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## ON LEGAL EDUCATION AND REFORM: ONE VIEW FORMED FROM DIVERSE PERSPECTIVES

ROBERT J. RHEE\*

### I. INTRODUCTION

This Symposium is part of a broader, national dialogue on the reform of legal education.<sup>1</sup> In many ways, American legal education is fine.<sup>2</sup> But it is not perfect. I identify two interconnected problems. First, legal education and practice are more disconnected than they should be,<sup>3</sup> a reality distinguishing law schools from other professional schools. Second, law school imposes large direct and opportunity costs on its students. Additionally, a deficiency in academic training and postgraduation financing of additional training impose a

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1. See, e.g., WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); Symposium, *The Evolution of J.D. Programs—Is Non-Traditional Becoming More Traditional?*, 38 SW. L. REV. 533 (2009) (collecting essays from a conference on legal education reform); Webcast: Future Ed Conference: New Business Models for U.S. and Global Legal Education, held by New York Law School and Harvard Law School (Apr. 9–10, 2010), [http://www.nyls.edu/centers/harlan\\_scholar\\_centers/institute\\_for\\_information\\_law\\_and\\_policy/events/future\\_ed](http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/future_ed) (follow “For Video of the Conference” hyperlink) (providing videotape of the conference).

2. Other legal educators share this belief. See, e.g., William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 453 (2011) (“[L]aw schools have been very successful institutions for many decades, and any reform of legal education should begin with preserving what has worked so well.”); Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 741 (1996) (arguing that the “highly abstract legal theories” taught in law school “do, and to a greater extent can, prove very helpful to legal practitioners in their daily work”).

3. See Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 501 (2011) (noting that many law firms regard recent graduates as “raw material” rather than trained professionals); Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 355 (2011) (stating that many clients do not perceive recent graduates as “work-ready lawyers”); *Trouble with the Law*, ECONOMIST, Nov. 11, 2010, [http://www.economist.com/node/17461573?story\\_id=17461573](http://www.economist.com/node/17461573?story_id=17461573) (noting the comments of Evan Chesler, of Cravath, Swaine & Moore LLP, who “decries ‘the difference between what law schools teach and what lawyers do’”).

growing financial strain on law students.<sup>4</sup> I examine these two interconnected problems in the context of the strong market incentive to reduce costs and the effects on the legal profession and legal education. This Essay adds a small pebble to the weight of a growing belief that the problem is serious.

This Essay is written in four parts. Part II sets out my perspective on law school and the legal profession, which is based on my prior educational and professional experiences. Part III discusses the challenges facing legal education after the financial crisis, which may have hastened a long-term trend toward the unbundling of legal services and a shift from long-term relationships between law firms and clients toward a short-term spot market for legal talent and engagement. Part IV identifies the major flaw of legal education as the failure to produce more market-ready lawyers with skills and knowledge to add value more quickly in a complex and challenging practice environment. Part V discusses some ideas for reform, ranging from the feasible, to the plausible, to the speculative. These ideas include curricular reform, pedagogical diversity, a focus on core skill sets, and perhaps a more dramatic revision of the third year of law school. I caution that some of my viewpoints are speculative insofar as they are based on a projection of what the future may hold.

## II. A DIVERSELY FORMED PERSPECTIVE

My perspective on legal education is based on my educational and professional experiences.<sup>5</sup> My legal experience has run the gamut—from clerking on the federal circuit, to representing the U.S. government as the first-chair trial attorney in a \$2.5 million HIV/AIDS medical malpractice case in federal court, and to representing a walk-in client on a \$1,868 insurance-collection claim in municipal court. For a time, I left the legal profession to study finance at business school and subsequently worked as an investment banker, doing pri-

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4. See Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 98–101 (1997) (discussing direct and opportunity costs incurred by law students and noting that such costs are funded by student loans).

5. My interest in the topic of legal education is not new. See generally, e.g., Robert J. Rhee, *Follow the M.B.A. Model*, NAT'L L.J., May 28, 2007, at 22 [hereinafter Rhee, *M.B.A.*] (suggesting that law school pedagogy has much to learn from business schools); Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363 (2009) [hereinafter Rhee, *Madoff*] (exploring how legal education can better prepare business lawyers for an increasingly complex market); Robert J. Rhee, *The Socratic Method and the Mathematical Heuristic of George Pólya*, 81 ST. JOHN'S L. REV. 881 (2007) [hereinafter Rhee, *Socratic Method*] (criticizing traditional legal pedagogy, such as the Socratic method).

marily mergers and acquisitions and corporate finance advisory work. In this role, I was a business client, hiring and working with many transactional lawyers from large law firms. I have seen legal education from the perspective of a law student, a business student, a litigator, an investment banker, a business client, and now a law professor. These experiences inform my teaching and scholarly agenda, as well as my thoughts on the flaws of legal education.

My perspective on legal education is rooted in the concept of law school as professional school rather than graduate school. Its most important mission is to train future lawyers to work in an increasingly complex world.<sup>6</sup> In its teaching mission, law schools should be rooted in the practice of law. To clarify a potentially contentious point, I do not suggest that the research mission should be “practical” in the sense that legal scholarship should cater to the practicing bar or the bench. To the contrary, law schools should embrace scholarship that may be highly theoretical, abstract, or without immediate application to a case or specific legal problem,<sup>7</sup> though good scholarship ultimately should be relevant to the empirical world.<sup>8</sup> By and large, only academics have the time, luxury, and resources to pursue important

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6. See William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 216 (1996) (noting that “the practice of law is becoming increasingly complex and specialized”).

7. I am aware of the complaint that legal scholarship is disconnected from law practice. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 41 (1992) (arguing that law schools should not “stray from their principle mission of professional scholarship and training,” because so doing will engender a larger divide between legal education and the legal profession “and society will be the worse for it”); David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 768 (2005) (“Too much of legal scholarship is becoming ‘law professor scholarship,’ a discourse among theorists with little practical application.”). Yet there is another perspective—namely that a greater understanding of the law need not always produce scholarly works that are cited by judges and lawyers. See, e.g., Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 306–07 (2000) (suggesting that academic scholarship may influence judges indirectly by “granting or denying legitimacy” to judicial decisions or to new ideas); Ronald J. Krotoszynski, Jr., *Commentary, Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321, 327 (1998) (“The cause and effect relationship of a legal scholar’s labors is not an exercise in Euclidean geometry or pool hall skill. When a legal academic plants the seed of an idea, . . . there is no way of knowing what effect it may ultimately have . . . . This basic indeterminacy is both the promise and curse of being a legal academic.”); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1325–26 (2002) (arguing that research may be “welfare maximizing” even though it “would have absolutely no relevance to how we live today”). Scholarly worth need not be measured by immediate utility to practice.

8. See, e.g., Posner, *supra* note 7, at 1326 (concluding that the quality of legal scholarship is measured by “the test of relevance, of practical impact”).

questions that would otherwise go unexplored because they do not advance client interests or provide assistance to the bench. It is worth adding that the professional school concept does not seem to pose obstacles to the faculty members of medical and business schools from winning Nobel Prizes and other important scholarly achievements.

Legal education has long been criticized for being disconnected from the needs of the legal market.<sup>9</sup> This criticism is a generalization, and it needs to be explored. The extent of the problem is a function of the sophistication of the law practice. Law practice is stratified.<sup>10</sup> Professor Gillian Hadfield has argued that the legal profession performs two functions—one democratic/political and the other economic.<sup>11</sup> I suggest another form of stratification: a spectrum that measures functionality and sophistication. The top end of this spectrum includes the work of large law firms for mostly corporate and institutional clientele. This practice employs a minority of the total law school graduates, and it pays the highest starting salaries.<sup>12</sup> These positions, along with federal clerkships, are considered the plum prize of the law school tournament, and the demand by law school graduates probably far exceeds the supply of positions.

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9. See SULLIVAN ET AL., *supra* note 1, at 12–13 (noting the importance of “bridg[ing] the gap between analytical and practical knowledge” in legal education); see also ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4 (1992) [hereinafter MACCRATE REPORT], available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (explaining that “law schools cannot reasonably be expected” to “convert[ ] . . . students into full-fledged lawyers licensed to handle legal matters”). Academics and judges have also noted this disconnect. See, e.g., Edwards, *supra* note 7, at 57–66 (criticizing legal pedagogy that emphasizes theoretical education at the expense of doctrinal instruction); Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 676–78 (2005) (arguing that the law school curriculum has become “soft,” despite law firms’ need for graduates with “hard” skills).

10. Geoffrey C. Hazard, Jr., *Commentary: Policy Implications*, 10 J.L. & HEALTH 79, 83 (1995–1996).

11. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1702 (2008). The democratic/political function includes “protecting the architecture of democratic institutions, protecting individual rights, implementing the balance of power that promotes the normative goals of self-governance such as human dignity, autonomy, fairness, and well-being.” *Id.* The economic function entails promoting “efficient market transactions,” for example, through the establishment of property rights and the facilitation of “contractual and organizational economic relationships.” *Id.*

12. See, e.g., Cunningham, *supra* note 3, at 499 (noting that junior associates at large law firms are generally top law students from elite schools with starting salaries “over \$150,000 per year”).

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Large, sophisticated law practices are disproportionately burdened by a deficient legal education system.<sup>13</sup> By making the three-year graduate program mandatory, legal education provides students, if they seek it, a potential path toward a higher level of practice that focuses on more complex problems. In this sense, the American three-year graduate school model is the gold standard.<sup>14</sup> Law schools are academically rigorous, and students think about legal problems in a standardized way<sup>15</sup> that has withstood the test of time and shifting academic fads.<sup>16</sup> There is indeed much to applaud in American legal education. For most law practice, three years of graduate education is sufficient, flaws notwithstanding.<sup>17</sup> Deficiencies in educational training are inevitable because the classroom cannot wholly substitute for an immersion experience of independent practice, whether the schooling is in law, medicine, or business.<sup>18</sup> Many of these deficiencies are remedied in small or midsize law practice through postgradu-

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13. Cf. Dilloff, *supra* note 3, at 359 (“No longer is it sufficient for law schools to impart basic substantive law, train students to think like lawyers, and prepare them to pass the bar examination.”).

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14. While American legal education is conducting a self-assessment, certain parts of the world are following the American graduate school model. For example, Korea has begun transitioning from an undergraduate program to a three-year graduate school model. Tom Ginsburg, *Transforming Legal Education in Japan and Korea*, 22 PENN. ST. INT’L L. REV. 433, 434 (2004). I taught at Korea University College of Law in the summer of 2010. Based on my discussions with faculty members from the law schools of Korea University and Yonsei University, it seems that Korea is making this transition because it wants to produce more and better lawyers. See also *id.* at 434 (noting that the issue in Northeast Asian countries has been how to train *more* lawyers). In the past, legal education in these countries focused on bar examination scores. Proponents of the graduate school model hope that a move toward liberalizing the bar passage rate in conjunction with a graduate model will produce lawyers better trained and more sophisticated than those who merely passed the bar exam with high scores. Cf. *id.* at 438 (noting that one goal of this process is to ensure that Korean lawyers are equipped to serve clients across Asia).

15. See, e.g., James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 81 (1996) (noting that traditional legal education teaches students “a single, unquestionably critical, lawyerly skill and activity through the model of the lawyer’s retrospective thinking experience”).

16. See Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 611 (2010) (noting that the legal education model “has proved remarkably resilient”).

17. See Trail & Underwood, *supra* note 6, at 226–27 (“What law schools can realistically aspire to accomplish in three years is to produce students who know basic legal doctrine, possess certain core lawyering skills, and have experience using this knowledge and skill to perform a reasonable range of lawyering tasks.”).

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18. In the medical profession, medical students have clinic-based third and fourth years of school, and new doctors undergo residency training. The business profession achieves experiential training in the opposite manner. Admission to most top business schools requires substantial work experience, and upon graduation, the professionals are inserted back into the market.

ation mentoring, experience, perseverance, and due care.<sup>19</sup> Indeed, personal mentoring and training at smaller organizations may be more readily available than in larger organizations, where such mentoring may be hit or miss depending on senior lawyer initiative and organizational design.<sup>20</sup>

Generally, large law firms serve the most sophisticated clients—mostly corporations and other complex entities with the most difficult legal problems. Since law schools must train the Wall Street and K Street lawyers, as well as the Main Street lawyers, law schools with aspirations of national reputation and impact must have curricula capable of training the top end of law practice. In turn, such a program would have downstream benefits for students who go on to other kinds of law practice. Tuition increases that outpace inflation and the cost of goods are ultimately supported by students' expectation that future income will service their debt load.<sup>21</sup> The economic engine of legal education is powered by the salary bases of large firms, which are largely financed by corporate and institutional clientele.<sup>22</sup> It is now commonly known that the starting salaries of graduating students are bimodal.<sup>23</sup> In 2009, the national median and mean of postgraduate salaries were \$72,000 and \$93,454 respectively, but very few students actually earned salaries near the median or mean.<sup>24</sup> Instead, salaries clustered around two modes: one around \$160,000 and the other

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19. See Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 *FORDHAM L. REV.* 847, 878 (2001) (explaining that lawyers in small law firms receive more training than commonly thought). *But see* MACCRATE REPORT, *supra* note 9, at 47 (stating that lawyers entering small practice are forced to “rely on their legal education for learning practice competencies” because they lack the “mentor[s], collegial support [and] on-the-job training” typically associated with large firm practice).

20. See, e.g., Joyce S. Sterling & Nancy Reichman, *So, You Want to be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 *FORDHAM L. REV.* 2289, 2294 (2010) (stating that some partners in large firms “have become reluctant to devote their limited time to socialization and training”).

21. Cf. Elie Mystal, *The Next Bubble: Law School Tuition*, ABOVE THE LAW (Apr. 27, 2010, 1:34 PM), <http://abovethelaw.com/2010/04/the-next-bubble-law-school-tuition> (challenging the traditional assumption, made by Professor Christine Hurt and others, that a legal education is a “good investment”).

22. See Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 *J. LEGAL EDUC.* 623, 628 (2010) (stating that large, private firm salaries may make larger “debt loads more tolerable”).

23. See, e.g., *Salary Distribution Curve*, NALP, <http://www.nalp.org/salarydistrib> (last visited Dec. 29, 2010) (displaying graphs that show the bimodal distribution of reported full-time legal salaries).

24. Press Release, Nat'l Ass'n for Law Placement, Inc., *Market for Law Graduates Changes with Recession: Class of 2009 Faced New Challenges* (July 22, 2010), *available at* [http://www.nalp.org/uploads/Class\\_of\\_09\\_Jobs\\_and\\_JDs\\_Report\\_Press\\_Release.pdf](http://www.nalp.org/uploads/Class_of_09_Jobs_and_JDs_Report_Press_Release.pdf).

around \$40,000–\$65,000.<sup>25</sup> Law school tuitions are not sustainable without the prospect of the higher salary mode.<sup>26</sup>

My perspective is not that, as client matters go, the legal problems of corporate and institutional clients are inherently more important than the problems of the average person in need of a good lawyer—they are not. We cannot make value judgments about the intrinsic worth of the various interests protected by lawyers. The point here concerns student needs and expectations. We must acknowledge that an important reason why students assume the enormous direct and opportunity costs of law school is the prospect of a career with an anticipated economic return;<sup>27</sup> being a lawyer is a career that supports one’s living, family, and lifestyle. Law schools with national aspirations must satisfy the educational, professional, and economic needs and expectations of all students. This requires opening more opportunities for students who will be doing the most sophisticated legal work under the demanding conditions for which graduates are paid the highest wages or are otherwise compensated.

### III. RECESSION-INDUCED CHANGES IN THE LEGAL MARKET

Since I entered law school over two decades ago, not much has changed in legal education.<sup>28</sup> The first-year curriculum is largely the same, as is the basic teaching pedagogy—some form of Socratic dialogue in conjunction with the traditional law school casebook method.<sup>29</sup> Some things have changed, of course. Clinical education

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25. *See id.* For a graph showing this distribution, see *Salary Distribution Curve*, *supra* note 23.

26. *See* John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 360 (2007) (citing a survey that indicated the amount of debt incurred by law students prevents many students from pursuing employment in the public sector).

27. *See* Wegner, *supra* note 22, at 628 (acknowledging that some students enter law school “hoping for an economic return on their educational investment”). In light of high tuition rates, rising student debt, and difficult economic times, some have begun to question the adequacy of the economic return on a law school education. *See* David Segal, *Is Law School a Losing Game*, N.Y. TIMES, Jan. 8, 2011.

28. One major change is that law schools have made significant strides toward achieving more diverse and international student bodies. *See* Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, a Deeper Commitment*, 52 J. LEGAL EDUC. 491, 491 (2002) (noting that law schools “have become increasingly committed to enrolling a student body [that] represent[s] a diversity of backgrounds and perspectives”). This trend reflects important economic changes, beyond the obvious advancement of progressive values and our society’s changing demographics. In an era of globalization and rising new economies across the world, clients are increasingly more diverse and international. The legal profession should reflect this economic and social diversity.

29. *See* Moliterno, *supra* note 15, at 74–75 (stating that typical legal education in the 1980s “us[ed] appellate cases as the basis for a Socratic dialogue”).

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and experiential learning have become more prominent.<sup>30</sup> Law schools also offer many more concentrations in specialized areas of law, funneling students through centers, institutes, and certificate programs. Specialization provides curricular form to the largely amorphous and student-driven upper-level curriculum.<sup>31</sup> Other than these developments, legal education has remained largely the same: law school is still traditionally three years; the education is still founded on the common law and on a litigation perspective; appellate cases, statutes, and regulations dominate the materials studied and drive the pedagogy.

The static nature of legal education contrasts with the dynamic landscape of the legal profession.<sup>32</sup> Over the past several decades, the legal profession has undergone a structural change.<sup>33</sup> Law firms have grown in both national and international scope.<sup>34</sup> Salaries and leverage (the ratio of associates to partner) have increased along with economic pressures and competition.<sup>35</sup> The law firm itself is no longer a strong web of long-term professional relationships among attorneys, firms, and clients.<sup>36</sup> The market for legal services is moving from one of long-term relationships toward one of more temporary contractual arrangements akin to a spot market for legal talent.<sup>37</sup>

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30. See Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 144 (2001) (noting that “the MacCrate Report gave a substantial boost to clinical pedagogy and to clinics”).

31. See Jeffrey E. Lewis, “Advanced” *Legal Education in the Twenty-First Century: A Prediction of Change*, 31 U. TOL. L. REV. 655, 657 (2000) (noting the increasing number of certificate programs in American law schools and explaining that such programs typically “consume approximately one-half of the ‘true electives’ that are otherwise available” to upper-level students).

32. See, e.g., Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1875–76 (2008) (correlating law firm changes with the increased size and changed context of many firms and noting recent, dramatic changes in large law firm practice).

33. Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

34. See, e.g., Neil Irwin, *Piper Rudnick to Merge with Big British Firm*, WASH. POST, Dec. 6, 2004, at E01 (describing a merger that created “one of the largest combinations ever of law firms from different countries”).

35. Galanter & Palay, *supra* note 33, at 752–53; Rex S. Heinke, *Putting Associate Salaries into Perspective*, L.A. COUNTY BAR ASS’N, <http://www.lacba.org/showpage.cfm?pageid=1288> (last visited Dec. 29, 2010) (explaining that large law firms must continually raise associate salaries to remain competitive in the legal market). R

36. See, e.g., Dilloff, *supra* note 3, at 349 (arguing that the increased lateral mobility of lawyers, which characterizes the contemporary legal profession, “has made large law firms less stable and partners less trusting of each other”). R

37. See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 29–33 (2008) (describing the increasing commoditization of most legal services).

In the past several years, the legal profession has also changed in response to the recent financial crisis.<sup>38</sup> The crisis was the most serious since the Great Depression<sup>39</sup> and has had a profound impact on both domestic society and the global economy.<sup>40</sup> In its nadir, the total market capitalization of companies listed on the NYSE and NASDAQ lost approximately half of their value, relative to their value in October of 2007.<sup>41</sup> As a service industry, the legal profession trails the broader economy.<sup>42</sup> By now, we are familiar with the discouraging stories of partner and associate layoffs, salary reductions, and deferred start dates.<sup>43</sup> The effects of these problems flow down to law schools and legal education.<sup>44</sup>

We do not know whether these effects are temporary or permanent. One thought is that once the economy recovers, so too will the

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It is beyond the scope of this Essay to inquire further into the reasons why law firms exist and the strength of the contractual relationships among their factors of production.

38. See Michelle M. Harner, *The Value of "Thinking Like a Lawyer,"* 70 MD. L. REV. 390, 394–400 (2011) (describing the impact of the economic recession on the legal profession); Thies, *supra* note 16, at 599–608 (outlining how the economic recession may impact the legal services market).

39. Josh Bivens, *Worst Economic Crisis Since the Great Depression? By a Long Shot*, ECON. POL'Y INST. (Jan. 27, 2010), [http://www.epi.org/economic\\_snapshots/entry/snapshot\\_20100127](http://www.epi.org/economic_snapshots/entry/snapshot_20100127).

40. See MARTIN NEIL BAILEY & DOUGLAS J. ELLIOTT, BROOKINGS INST., THE U.S. FINANCIAL AND ECONOMIC CRISIS: WHERE DOES IT STAND AND WHERE DO WE GO FROM HERE? 16 (2009), available at [http://www.brookings.edu/~media/Files/rc/papers/2009/0615\\_economic\\_crisis\\_baily\\_elliott/0615\\_economic\\_crisis\\_baily\\_elliott.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/0615_economic_crisis_baily_elliott/0615_economic_crisis_baily_elliott.pdf) (noting that “[t]he economic and financial crisis that originated here has spread around the world”); Sara Murray, *Slump Over, Pain Persists*, WALL ST. J., Sept. 21, 2010, at A1 (describing the domestic effects of the economic recession).

41. See Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661, 667 n.28 (2010) (describing the halving of the Standard & Poor's 500 index closing numbers between October 2007 and March 2009).

42. See Bruce MacEwen, *Perspective on the Unlikely and the Impossible*, COMPENSATION & BENEFITS FOR L. OFF., Feb. 2009, at 7 (suggesting that the legal industry, “a lagging industry,” is likely to pull out of the recession later than the rest of the economy).

43. See, e.g., Gina Passarella, *Drinker Biddle to Enlist Class in Basic Training: Firm Avoids Deferral for Incoming Associates*, LEGAL INTELLIGENCER, May 12, 2009, at 1 (highlighting “Drinker Biddle & Reath's decision to reduce first-year associate starting salaries for the first six months of the year . . . in favor of creating a training program”); Amanda Royal, *Law Firm Salary Cuts Keep on Coming*, LAW.COM, May 4, 2009, <http://www.law.com/jsp/article.jsp?id=1202430403772> (noting the trend of lowering associate salaries).

44. For instance, here at University of Maryland School of Law, the effects have been felt by students and faculty alike. Students, like their peers across the country, are finding the job market tight, and for the past three years, faculty and staff salaries have been reduced by mandatory furloughs. See Dana Mattioli & Sara Murray, *Employers Hit Salaried Staff with Furloughs*, WALL ST. J., Feb. 24, 2009, at D1 (describing University of Maryland's “scaled approach” to furloughs).

demand for legal services.<sup>45</sup> I am not as sanguine. Some of the changes in the legal profession will prove more durable, suggesting the financial crisis may have accelerated a long-term trend toward greater rationalization of legal services.<sup>46</sup> I base this claim on the premise that once the market finds a source of efficiency, the new state will become the norm.<sup>47</sup>

What will be the source of this new efficiency? The billable hour model has long been viewed with some suspicion.<sup>48</sup> Defenders may argue that it incentivizes proper representation.<sup>49</sup> The billable hour is also the most important measure of productivity in a firm, and it is not uncommon for attorneys to wear their billable hours as badges of accomplishment.<sup>50</sup> The potential for agency cost is obvious.<sup>51</sup> The billable hour model supports a leveraged law firm structure, such as the pyramid structure that has a wide base of associates producing a large volume of billable hours, thus increasing partner profitability.<sup>52</sup> From the client's perspective, there is plenty of room to complain, particularly in tough economic times.<sup>53</sup> The billable hour model incentivizes

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45. See Thies, *supra* note 16, at 603 (“It is possible that, like all good businesses, law firms are simply adapting to a weak spot in the market and preparing to return to business as usual as soon as the economy improves.”).

46. See Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. TIMES, Aug. 4, 2010, at B1 (noting the increasing trend toward outsourcing and unbundling legal work such as document review and due diligence).

47. Cf. Evan N. Turgeon, *Boom and Bust for Whom?: The Economic Philosophy Behind the 2008 Financial Crisis*, 4 VA. L. & BUS. REV. 139, 142 (2009) (referencing Adam Smith's theory that a free market “produc[es] an efficient distribution of goods” and “guides the economy to a stable equilibrium”).

48. See, e.g., Douglas McCollam, *The Billable Hour: Are Its Days Numbered?*, AM. LAW., Nov. 28, 2005, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1132653918886> (describing the billable hour as “the cockroach of the legal world”).

49. Cf. *Blum v. Stenson*, 465 U.S. 886, 898–900 & n.16 (1984) (noting that billable hours and rates in fee awards in federal civil rights cases are based on the complexity of the case and the attorney effort required for proper representation).

50. See Dilloff, *supra* note 3, at 354 (noting that until recently associate success was measured by the number of hours billed).

51. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 769 (“Hourly billing . . . can exacerbate lawyer-client agency costs because it tempts law firms to spend unnecessary time and client money.”); see also McCollam, *supra* note 48 (“The basic flaw of the billable hour, say its detractors, is that it puts the financial incentives for lawyers in the wrong place.”).

52. See McCollam, *supra* note 48.

53. See, e.g., Susan Saab Fortney, *I Don't Have Time to be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305, 308 (2003) (stating that “the frustration over hourly billing has mushroomed to the point where attorney and client complaints have reached a fevered pitch”); Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. TIMES, Jan. 29, 2009, at A1 (noting that long-standing client complaints about the billable hour have increased due to the “rough economic climate”).

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inefficiency, and some training of junior attorneys is surely funded on the client's dime.<sup>54</sup>

The recent stress on the legal profession has added to the pressure on the billable hour model,<sup>55</sup> raising the question of whether the leveraged law firm structure will decline in the future. I do not know what the legal market will look like in the next five years, let alone a longer period. Lacking foresight, I simply note that there will be increasing pressure for efficiency in the delivery of legal services.

This point was made clearer to me in a conference presentation by Chester Paul Beach,<sup>56</sup> Associate General Counsel of United Technologies Corporation ("UTC"), a public company with a market capitalization of approximately \$70 billion.<sup>57</sup> The company has approximately 240 in-house lawyers.<sup>58</sup> According to Beach, the company spends about \$125 million for external legal services<sup>59</sup> and has reduced external legal costs from about thirty-three basis points (0.33%) of revenue to twenty-two basis points (0.22%) over a ten-year period (1999–2008) with no loss in quality of representation.<sup>60</sup>

A seemingly mild-mannered lawyer, Beach made provocative assertions during his presentation that caught the ear of the attendees<sup>61</sup>:

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54. Cf. James Backman, *Externships and New Lawyer Mentoring: The Practicing Lawyer's Role in Educating New Lawyers*, 24 *BYU J. PUB. L.* 65, 112 (2009) (noting that "clients increasingly refuse to cover billable hours for young lawyers while they are . . . [completing] their training program").

55. Dilloff, *supra* note 3, at 354.

56. The conference was co-hosted by New York Law School and Harvard Law School in April 2010. Subsequently, I had an e-mail dialogue with Mr. Beach, who clarified the comments he made at the conference and augmented his thoughts. E-mail from Chester Paul Beach, Assoc. Gen. Counsel, United Techs. Corp., to Robert J. Rhee, Professor of Law, Univ. of Md. Sch. of Law (Aug. 13, 2010) [hereinafter Beach E-mail] (on file with author).

57. *United Technologies (UTX)*, YAHOO! FIN., <http://finance.yahoo.com/q?s=UTX> (last visited Dec. 29, 2010).

58. Webcast: Future Ed Conference: New Business Models for U.S. and Global Legal Education, Panel 1, held by New York Law School and Harvard Law School, at 00:37:20–00:37:25 (Apr. 9, 2010), [http://www.nyls.edu/centers/harlan\\_scholar\\_centers/institute\\_for\\_information\\_law\\_and\\_policy/events/future\\_ed](http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/future_ed) (follow "For Video of the Conference" hyperlink; then select "Future Ed Conference—Panel 1" hyperlink) [hereinafter Future Ed Conference, Panel 1] (remarks of Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.).

59. *Id.* at 00:36:16–00:36:20.

60. *See id.* at 00:39:55–00:40:15; *see also* Beach E-mail, *supra* note 56. A basis point is one-hundredth of one percent (.01%): "Basis points are used in computing investment yields . . . and in apportioning costs and calculating interest rates in real-estate transactions." BLACK'S LAW DICTIONARY 145–46 (7th ed. 1999).

61. Beach's presentation was covered by the media. *See, e.g.,* Elie Mystal, *Corporate General Counsel Puts Fear of God into Legal Educators (and You Should Be Worried Too)*, ABOVE THE LAW (Apr. 9, 2010, 6:08 PM), <http://abovethelaw.com/2010/04/corporate-general-counsel-puts-fear-of-god-into-legal-educators-and-you-should-be-worried-too>.

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- The company is “passionate about killing the hourly rate,” and the company is “trying to actively destroy the current model.”<sup>62</sup>
- The company does not want to pay inflated associate billable hours. It does not allow first- and second-year associates to work on projects without “special permission” because they “are worthless.”<sup>63</sup>
- The company is “not a client . . . I’m a customer 90% of the time.”<sup>64</sup>
- “I’m a customer 90% of the time, and as much as it might pain all of us to think about it, I am basically buying a commodity.” Accordingly, the company is seeking ways to unbundle legal services.<sup>65</sup>
- The company seeks “cost-efficiency and results. . . . We expect year-over-year price reduction.”<sup>66</sup>
- Management principles dictate that in-house counsel “reduce the cost of legal services to our enterprise as a function of revenue.”<sup>67</sup>

These comments are striking because they go to the heart of the current business model of large law firms and to the sustainability of a highly leveraged organizational structure.<sup>68</sup> They are not the out-of-turn rant of an overzealous employee.<sup>69</sup>

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62. Future Ed Conference, Panel 1, *supra* note 58, at 00:40:18–00:40:51 (remarks of Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.).

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63. *Id.* at 00:42:18–00:42:35, 00:49:29–00:49:40. Beach subsequently clarified that, rather than “worthless,” these associates are “worth (far) less.” Beach E-mail, *supra* note 56.

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64. *Id.* at 00:35:57–00:36:25. The full transcript, as Beach recited to me in an e-mail is as follows:

First a terminological point, I am not a client. A client is someone who has a relationship to a learned and esteemed professional advisor and a counsel. Don’t think of me as a client, because I am only a client about 10% of the time in the \$125M a year we spend on legal services around the world. I’m a customer 90% of the time and as much as it might pain all of us to think about it I am basically buying a commodity. I can buy it from an awful lot of people. There’s a surplus of suppliers for 90% of what I buy in the market in this country and in the other countries where we do business and I am really interested in cost, efficiency and results.

Beach E-mail, *supra* note 56.

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65. Future Ed Conference, Panel 1, *supra* note 58, at 00:36:25–00:36:30, 00:42:32–00:43:36 (remarks of Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.).

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66. *Id.* at 00:36:40–00:36:45, 00:39:52–00:39:55.

67. *Id.* at 00:38:54–00:39:14.

68. *See* Thies, *supra* note 16, at 600 (suggesting that the ability of a leveraged structure to maximize profits per partner is a function of the billable hour).

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69. *See also* Dilloff, *supra* note 3, at 353 (noting that in addition to United Technologies, other large corporations, such as Pfizer and Tyco, have entered into alternative fee arrangements with law firms).

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The financial implications of Beach's assertions tell an interesting story. In 2009, UTC recognized revenue of \$52.9 billion and earned \$3.8 billion in net income attributable to common shareholders.<sup>70</sup> Its market capitalization was approximately \$70 billion as of November 19, 2010, which entails a trailing price-to-earnings (P/E) ratio of 18x.<sup>71</sup> An eleven basis-point reduction in external legal cost based on 2009 revenue<sup>72</sup> would result in \$58 million in pretax cost saving, or about \$42 million in after-tax contribution to profit.<sup>73</sup> At a multiple of 18x earning, this translates into an increase of about \$750 million to the company's stock value.<sup>74</sup> These numbers represent the type of value-maximizing decisions and outcomes that catch the attention of chief executives, corporate boards, and shareholders.

These numbers suggest another implication. Beach stated that the reduction in price of legal services also coincided with equal or better quality.<sup>75</sup> But suppose the company experiences worse outcomes. United Technologies Corporation can stand to suffer from inferior legal services as long as the lost value does not exceed the cost savings.<sup>76</sup> The more salient point is that legal risk management should be subject to a cost-benefit analysis. The "gold-standard" representation—the commitment of vast or expensive resources to every level of a legal problem or task—is not necessarily the best type of legal service from the perspective of value-creation.<sup>77</sup>

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70. UNITED TECHS. CORP., 2009 UNITED TECHNOLOGIES CORPORATION ANNUAL STATEMENT: FIVE-YEAR SUMMARY 38 (2009), *available at* [http://utc.com/UTCReports/Company%20Reports/Annual%20Reports/2009/pdfs/UT\\_2009\\_UT-Financials.pdf](http://utc.com/UTCReports/Company%20Reports/Annual%20Reports/2009/pdfs/UT_2009_UT-Financials.pdf).

71. *See* United Technologies, YAHOO! FIN., <http://finance.yahoo.com/q?s=utx> (last visited Dec. 29, 2010). The price-to-earnings ratio is "[t]he ratio between a stock's current share price and the corporation's earnings per share for the last year." BLACK'S LAW DICTIONARY, *supra* note 60, at 1080.

72. *See supra* text accompanying note 60.

73. This assumes that UTC's effective tax rate on pretax profit is approximately twenty-eight percent.

74. Another way to think about this is that approximately 1.4% of the market value of UTC (or \$750 million of \$52.9 billion) is attributable to the efficiency gain from reduced legal costs achieved over a ten year period.

75. *See* Beach E-mail, *supra* note 56; *supra* text accompanying note 60.

76. Beach made clear that this proposition is true as an academic point, but "we absolutely don't think about legal risk management in this way." Beach E-mail, *supra* note 56.

77. On this point, Beach adds:

The more important point is that our cost and productivity initiatives proceed from the premise that legal services as we have purchased them from traditional large, vertically-integrated firms have been provided in such an inefficient and wasteful manner (including without limitation, your 'gold standard' approach) that vast improvement are possible WITHOUT any measurable increase in risk.

Beach E-mail, *supra* note 56.

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We can extrapolate a bit further. Fortune 500 companies most recently generated a combined \$9.76 trillion in revenue.<sup>78</sup> With even a five basis-point reduction from revenue in legal cost, a company would earn an additional \$3.2 billion in profit.<sup>79</sup> Assume a multiple of 25x earnings.<sup>80</sup> This implies an additional \$80 billion in equity value to the S&P 500, or about the market capitalization of McDonald's;<sup>81</sup> at ten basis points, the level claimed by UTC, the addition to equity value is \$160 billion, or about the market value of Johnson & Johnson.<sup>82</sup>

One may quibble on the margins of these back-of-the-envelope calculations. Whatever the more precise figures and projections are, the larger point is inescapable: Seemingly minute increases in cost efficiencies create substantial value for firms. It would be a mistake to take Beach's provocative statements—"killing the hourly rate" and "destroy[ing] the current model"—as the hyperbole of an overenthusiastic in-house counsel. They plainly communicate the strong market incentive for rationalization and measurement of legal services in corporate America.<sup>83</sup>

Thomas Sager, General Counsel of DuPont, expressed a similar sentiment in a keynote presentation at a recent conference on alternative litigation financing.<sup>84</sup> He explained that DuPont's in-house legal department is not simply a cost center for the company but supports revenue generation by more effectively prosecuting intellectual property claims. His message was that the company's in-house legal department should be considered an integrated business unit with independent responsibilities for profit and cost. He emphasized the

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78. See *Fortune 500*, CNNMONEY.COM (May, 3 2010), [http://money.cnn.com/magazines/fortune/fortune500/2010/full\\_list/index.html](http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/index.html) (author's calculation) (providing revenue data per company).

79. This assumes net of taxes based on a 34% rate.

80. Since 1990, the average monthly price earnings ("P/E") ratio for the S&P 500 has been 25.9x. See *S&P 500 P/E/ Ratio*, MULTPL, <http://www.mtpl.com/table?f=m> (last visited Dec. 30, 2010) (providing historic data). The P/E for March 1, 2010 was 21.00x. *Id.*

81. See *McDonald's Corp. (MDC)*, YAHOO! FIN., <http://finance.yahoo.com/q?d=t&s=MCD> (last visited Nov. 19, 2010). On November 19, 2010, the market capitalization of McDonald's was \$84 billion.

82. See *Johnson & Johnson (NYSE:JNJ)*, FORBES.COM, <http://finapps.forbes.com/finapps/jsp/finance/compinfo/CIAtAGlance.jsp?tkr=JNJ> (last visited Nov. 9, 2010). On November 19, 2010, the market capitalization of Johnson & Johnson was \$175 billion.

83. *But see* William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 451 n.1 (2011) (arguing that "[c]lients dealing with very large sums of money are not going to concern themselves with this sort of 'loose change'").

84. The two day conference, sponsored by the RAND Institute for Civil Justice, was titled "Alternative Litigation Finance in the U.S.: Where Are We and Where Are We Headed with Practice and Policy?". See *Events*, RAND CORP., <http://www.rand.org/events/2010/05/20> (last visited Dec. 30, 2010). Sager presented the keynote talk on May 21, 2010, the second day of the conference. *Id.*

broad message that in-house counsel should be focused on the company's bottom line.

Sager's message was consistent with Beach's in this respect: Both senior in-house lawyers spoke to the inefficiency in the legal profession. By implication, this criticism touches law schools. As their comments imply, in-house counsel are not just the chief internal legal advisers to the CEO and the board of directors but are also purchasing agents for legal services that facilitate the company's business.<sup>85</sup> As Professor John Coffee observed, in-house general counsel has become "as much a general manager of legal services as an actual counselor to management."<sup>86</sup> Commentators have noted such changes in the market forces steering the legal profession, suggesting that the practice of law on behalf of corporate clients has shifted from a profession to a business.<sup>87</sup> The rise of in-house counsel has led to greater price transparency and opportunities to rationalize legal services, resulting in greater economic pressure on external attorneys.<sup>88</sup>

In a different time, when the relationships among clients, firms, and attorneys were stickier, clients could rationally subsidize the training of junior attorneys because they could expect to capture much of the benefits in subsequent years as the attorneys climbed upward on the law firm ladder.<sup>89</sup> In the different context of corporate philanthropy, this is the type of long-term strategic vision that drives corporations to contribute to social institutions and initiatives.<sup>90</sup> The application of such vision to the client-law firm relationship depends

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85. See Lisa H. Nicholson, *Making In-Roads to Corporate General Counsel Positions: It's Only a Matter of Time?*, 65 MD. L. REV. 625, 633 (2006) (noting that general counsel "perform multiple other roles apart from legal counselor, including serving as business advisers, compliance officers, problem solvers, and cost-center managers").

86. JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 224 (2006).

87. See, e.g., TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* 136 (2006) (arguing that the legal profession has "become less professional and more like [a] business[ ]"); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 291 (1990) (acknowledging a deterioration in "[t]he ideal of law as a public profession").

88. See COFFEE, *supra* note 86, at 224 (describing a shift in the balance of power between in-house and external counsel); see also Galanter & Henderson, *supra* note 32, at 1897 ("With the increased sophistication and bureaucratization of corporate legal departments, general counsel became less reliant on law firm referral networks to find capable lawyers in other cities.").

89. Cf. Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299, 303 (2002-2003) (observing that "lawyer mobility serves as a disincentive for investment by firms in the training and development of their lawyers").

90. See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 582-83 (N.J. 1953) (describing a corporation's interest in contributing to philanthropic causes). See generally Michael E.



on two facts: (1) whether clients see their relationship with outside counsel as a commercial relationship based on the best combination of price and quality; and (2) whether the relationship between firms and attorneys is substantially based on economic returns for both. In this respect, the market segment of large law firms may be moving from stable relationships based on long-term relational commitment to a short-term spot market for legal talent and engagements.<sup>91</sup> As the capital markets teach us, a move from long-term to short-term contracts often results in volatility in price and volume.<sup>92</sup> For a client who depends on short-term contracts for legal services, a long-term investment in training external lawyers does not make much sense, as there is no substantial recoupment of the investment.<sup>93</sup>

I do not know whether the billable hour model has been mortally wounded by the recent financial crisis, but it is reasonable to believe that the model of the billable hour with high leverage may no longer be a viable model for some firms if commoditization, unbundling of some aspects of legal services, improvements in outcome measurement, and other efficiency-driven processes continue to advance.<sup>94</sup> If clients continue to pay billable hours for engagement staffing at inflated rates, then either they believe that the model works for the matter at hand, or they have not yet figured out a better alternative. What strategies will corporate clients pursue to ration legal services? What cost efficiencies are achievable? What is the optimum balance of quality and cost? The answers are anyone's guess, but I suspect that corporations will continue to experiment because legal service can have a significant financial impact on the bottom line.<sup>95</sup> A key problem is measurement: how should a client measure the sliding scale between

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Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78.

91. See *supra* note 37 and accompanying text.

92. See, e.g., Thomas Lee Hazen, *Rumor Control and Disclosure of Merger Negotiations or Other Control-Related Transactions: Full Disclosure or "No Comment"—The Only Safe Harbors*, 46 MD. L. REV. 954, 956 (1987) (noting that an emphasis on short-term investments results in "volatile markets that are significantly affected by rumors").

93. Professor Hadfield questions whether the homogenous nature of curriculum and pedagogy best serves a segmented legal market:

Law students graduate law school ill-prepared to participate directly in solving the complex legal problems faced by business clients, and so law firms are organized on a tight hierarchy that keeps most beginning lawyers away from client interaction and strategic decision making until well into their careers.

Hadfield, *supra* note 11, at 1722–23. The additional wrinkle here is that corporate clients may no longer readily pay for the base of this pyramidal hierarchy. See Dilloff, *supra* note 3, at 355 (“[L]earning at the clients’ expense is history.”).

94. See *supra* note 37; *supra* notes 55–67 and accompanying text.

95. See *supra* text accompanying notes 70–73.

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outcome and price or analyze the marginal costs and benefits of legal risk management?<sup>96</sup> In this respect, clients and lawyers may have different perspectives on legal risk. Whereas clients may prefer some risk, lawyers presume that it is best to eliminate all identifiable legal risk.<sup>97</sup> This disjunction is probably common, and it is ripe with the possibility of miscommunication and misunderstanding.<sup>98</sup> (I say this with my past experience as a business client in mind.) As assessment techniques mature, we should expect to see continuing price pressures on the legal industry.

The implication of the above digression is that corporate clients may continue to fund the training of lawyers in firms closely connected to their business, but as law firms compete for short-term relationships and discrete engagements, this may no longer hold true as a general proposition.<sup>99</sup> There is not enough of a return on the client's investment, and funding training in the context of short-term relationships enhances the free rider problem.<sup>100</sup> In those situations, the client wants an immediate return.<sup>101</sup> If so, as I have previously suggested, "training and education are not free. They must be funded in some way."<sup>102</sup> If clients are not willing to subsidize training, someone must bear the cost: associates in the form of lower salaries, partners in the form of lower profits, law firms in the form of increased business risk, or law schools.<sup>103</sup>

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96. Beach notes that the measure of outcomes and quality is a "daunting challenge." Beach E-mail, *supra* note 56.

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97. See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 377-78 (1997) (suggesting that lawyers "knowingly overstate . . . legal risk" when advising their clients to ensure the importance of their services and to avoid the personal and economic consequences of giving advice that costs the client money).

98. *Id.* at 376 (exploring the possibility that lawyers overstate risk to their clients, which causes "economic actors [to] act upon" information that "may well be different from the law as objectively understood," and, in turn, undermines "the efficiency of the 'received' law").

99. See *supra* text accompanying note 93.

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100. See Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41, 55 (2010) ("In economists' terms, a 'free-rider problem' arises when people refrain from engaging in some socially beneficial pursuit because those people anticipate that others will be able to derive a benefit without putting forth any of their own effort or investment.").

101. *Cf.* Dilloff, *supra* note 3, at 345-46 (observing that law firms expect newly hired attorneys "to begin working in a productive and client-worthy capacity as soon as possible").

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102. Rhee, *Madoff*, *supra* note 5, at 390.

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103. See *id.* ("Either employers absorb the cost of legal training—obviously undesirable from the law firm's perspective—or law schools graduate students with more directly applicable skill sets.").

## IV. THE PROBLEMS WITH LEGAL EDUCATION

Newly minted lawyers are not market-ready.<sup>104</sup> Because they must undergo a substantial training period, salaries at the top end of the entry-level market must be seen as subsidized wages. What are the problems with legal education that create a greater need for post-graduation training? My answer focuses on curricular issues.

First, I think the first two years of law school are mostly fine.<sup>105</sup> It takes time and effort to learn our legal system—one in which there is significant interaction between case law, statutes, and regulations—and the complex branches of government that create and administer these laws. The first two years of law school teach the difficult skill of “thinking like a lawyer” within basic, doctrinally important areas of law such as contracts, property, torts, constitutional law, and civil procedure.<sup>106</sup>

There is room, however, for improvement in curriculum. As Professor Lisa Fairfax noted in her symposium presentation, the core curriculum—if not most of law school—is litigation focused<sup>107</sup>: students read cases and write briefs, a practice nicely complemented by the Socratic method of teaching case law.<sup>108</sup> Yet, litigation is not the only aspect of law practice. As Professor Hadfield suggested in her symposium presentation, contract law could be taught from a transactional perspective.<sup>109</sup> Since most tort cases settle and courts actively resolve only a minute fraction of matters,<sup>110</sup> even tort law could be taught

104. See Sonsteng et al., *supra* note 26, at 318 (listing necessary “skill areas” in which law schools do not provide sufficient training).

105. See Reynolds, *supra* note 83, at 454–57 (defending the first-year law school curriculum); see also Sonsteng et al., *supra* note 26, at 332 (“The results of the [1979 ABA-commissioned] Cramton Report concluded that, at best, legal education was providing students a two-year program with a fairly useless third year.” (footnote omitted)).

106. For a succinct summary of the concept of “thinking like a lawyer,” see Harner, *supra* note 38, at 390–94.

107. Lydia Nussbaum, Executive Summary, *The Profession and the Academy: Addressing Major Changes in Law Practice* (May 27, 2010) (unpublished symposium summary) (on file with the Maryland Law Review).

108. Cf. Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education’s Signature Pedagogy*, 84 IND. L.J. 589, 601 (2009) (“The Socratic method, in which the professor asks students questions about the cases they have read and put forth hypotheticals about potential future application of already-established rules, is similar to oral argument in many ways.”).

109. For a description of Professor Hadfield’s transactional contracts course, see Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484 (2011).

110. Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295, 1335 & n.103 (2010) (stating that “[a]n extremely large percentage of tort cases already settle under current law” and noting that only three percent of all tort cases “reach a jury verdict” while the rest are dismissed or settled (citing JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 40 (2d ed. 2008))).

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through a transactional filter at times. I do not suggest that a litigation focus is bad. The study of cases sharpens legal analytical skills, which are the prerequisite for transactional work.<sup>111</sup> But, the singular focus on litigation is misleading to the neophyte and can lead to deficiencies in perspective and skills.

By focusing on litigation, law schools deemphasize the transactional nature of law practice and fail to expose students to this important aspect of a lawyer's work. This is quite evident from the first-year required curriculum. All law schools require students to learn the Rules of Civil Procedure, and yet most do not require course work or training in alternative dispute resolution.<sup>112</sup> Most first-year legal writing courses focus on writing an appellate brief.<sup>113</sup> This is a good exercise because brief writing is a demanding, precise art. Once a student acquires this skill, we assume she can apply it to other tasks. Even if this assumption is true, the skill does not transfer to *all* other important legal writing contexts. Drafting contracts, opinion letters, legal memoranda, settlement agreements, and corporate transactional documents are different from writing appellate briefs in important ways, such as length, tone, style, and purpose. Where boilerplate terms are important, even the principles of good writing are subordinated to a higher transactional purpose.<sup>114</sup>

Another significant deficiency in legal education is its singular focus on legal analysis almost to the exclusion of other skill sets and knowledge bases.<sup>115</sup> As Professor Michael Kelly has argued, law stu-

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111. Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 351 (2010) ("The main argument in favor of the case method of instruction has been its ability to teach the skill of thinking like a lawyer—the skill of critical thinking and analysis that forms the basis of legal problem solving.").

112. For an argument that schools should teach alternative dispute resolution, see John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010). The authors contend: "To be effective, attorneys must be more than legal analysts and litigation advocates, considering that less than five percent of filed cases go to trial in many jurisdictions, and that many tasks which lawyers work on do not even result in the filing of litigation." *Id.* at 251–52 (footnote omitted).

113. See Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 GONZ. L. REV. 57, 62–63 (2002–2003) (explaining that the "traditional first-year legal analysis, writing, and research course" concludes with an appellate-level assignment.).

114. See *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039, 1048 (2d Cir. 1982) (commenting on the importance of boilerplate contractual terms in economic transactions).

115. See, e.g., Charlotte S. Alexander, *Learning to be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. REV. 465, 465 (2011) (noting one report's findings that

dents should learn to appreciate organizational dynamics.<sup>116</sup> Law practice is not a monastic pursuit, though law study often is, and the organization of law firms and corporations can be quite complex.<sup>117</sup> In addition, most lawyers routinely work in temporary organizations with multiple factors of productions—for example, litigation and transactional teams composed of different professionals from various firms who continuously form and disband as needed. Managing such organizations and relationships can be challenging, and a lawyer's long-term career may depend on this skill as she transitions from a skilled legal functionary to a manager of relationships and endeavors.

The deficiency is more apparent when we consider the student who has little professional experience upon entering law school. In law school, there is little institutional emphasis on collaborative learning, leadership, or formal training in organizational behavior.<sup>118</sup> It may be that law professors lack the skill set to deliver such courses without external assistance. But formal course work may not be needed. Law schools can expose students to these issues through enrichment programs and pedagogy. By comparison, many business schools institutionalize collaborative learning and team-based projects into their curricula.<sup>119</sup>

Teamwork and collaboration also seem to come naturally for business school graduates. This was made clear to me as a former business school student and as a professor. I recently taught a course on corporate social responsibility at University of Maryland Robert H. Smith School of Business. As a part of the course, I randomly assigned students into teams of four, and fifty percent of each student's final grade was based on her team's grades. All students accepted this arrangement, and several indicated that another professor had done the same. I contrast this to my experiences with past torts classes. In

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law schools "focus[ ] exclusively on doctrine and analytical skills and for neglect[ ] the formation of professional identity").

116. Michael Kelly, *A Gaping Hole in American Legal Education*, 70 MD. L. REV. 440, 447–50 (2011).

117. *See id.* at 444 (explaining the importance of attending to "the ways *organizations* of lawyers have become more sophisticated, aggressive, and effective").

118. *See* Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation": *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957, 965 (1999) (explaining that "legal education, as an institution, is not receptive to the use of collaborative or cooperative learning teaching pedagogies"); *see also* Rhee, *M.B.A.*, *supra* note 5, at 22 ("Law schools can do a better job of incorporating group work, case-study analysis and experiential-learning methods into the structural fabric of the curriculum.").

119. *See* Elizabeth A. Reilly, *Deposing the "Tyranny of Extroverts": Collaborative Learning in the Traditional Classroom Format*, 50 J. LEGAL EDUC. 593, 604 (2000) (observing that collaborative learning is common in business schools).

the past, I gave midterm exams in which law students were randomly assigned to a team whose work product determined the students' grades. The exams were typically worth twenty to twenty-five percent of their grade for the course, and students were told in advance that the grade distribution would be within a narrow range so that the course grade would still largely depend on individual effort in the final exam. Nevertheless, student evaluations show that a significant portion of the class did not like this arrangement—even though the experience was good for them.<sup>120</sup> There is more to this anecdote than simply an issue of maturity or pedagogical differences. Legal education prizes the thought in a lawyer's legal analysis, which is seen as individually produced. But legal analysis alone does not solve problems.<sup>121</sup>

In her symposium presentation, Professor Hadfield described an experiment in which she conducted “an extracurricular case study session” for law and business school students—law students in the role of lawyers, and business students in the role of clients.<sup>122</sup> She explained that “law students found it very difficult to deliver the kind of creative thinking the client was looking for and . . . the business students were unable to extract that sort of thinking from their lawyers.”<sup>123</sup> Lawyers solve clients' problems, and a necessary part of this process is positive interaction and communication with the client. My take from Professor Hadfield's anecdote is that legal analysis is not a one-way flow from the lawyer-adviser to the client-decisionmaker; instead, it is a two-way flow between lawyer and client toward a decision that solves the client's problem. Understanding this process is vital to the lawyer's function, and one wonders whether a curriculum based on the individual pursuit of legal analysis—typically not contextualized as a part of a broader picture—provides the necessary exposure to organizational behavior, leadership, and business communication. A focus on teaching legal analysis should not be seen as conflicting with teaching other valuable professional skills. Yet, the typical law school curriculum

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120. There are several reasons for the difference in attitudes. Business school students are older and usually have prior professional experience. Teamwork is also the norm for business schools, but it is unusual in the first-year law curriculum. Moreover, in my experience, law students are risk averse and are uncomfortable with new things, particularly when first-year grades are so important to the trajectory of their academic careers. Their discomfort is understandable.

121. See Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807, 810 (2007) (“The central goal of legal education . . . should be to teach students how to *resolve* legal problems.” (emphasis added)).

122. Hadfield, *supra* note 109, at 484.

123. *Id.* at 486–87.

largely ignores some of the “soft” skills necessary for the professional workplace and instead almost exclusively focuses on the mantra of “thinking like a lawyer.”<sup>124</sup>

While the first two years of law school are mostly fine, the same cannot be said for the third year. The third year adds a substantial financial cost, which, at the high end, can approach \$50,000.<sup>125</sup> It also adds a significant opportunity cost, if one believes law students are capable of passing the bar examination after two years and of practicing law at a certain minimum level of sophistication.<sup>126</sup> The cost could potentially reach \$100,000, including the foregone tuition, reduced educational debt service, and lost earnings. I do not mean to open up a debate on whether law school programs should be two or three years. Accelerated or decelerated (evening) programs notwithstanding, law schools have traditionally been three years. I doubt that this will change anytime in the near future.<sup>127</sup>

Unquestionably, the third-year curriculum is problematic. Keeping in mind that law school curricula and law students are unique, I make some general observations. For many students, the third year is a period of job searching and academic disengagement.<sup>128</sup> By this time, there is only marginal improvement in legal analytic skills,<sup>129</sup> and many students take courses on the basis of intellectual interest, schedule, and bar examination requirements. Both curricular flexibility and extensive course offerings have positive attributes, but there are downsides as well. Often, a student’s chosen course combination does not produce the most coherent program, thus failing to maximize the value of a third year of education.

Mitu Gulati, Richard Sander, and Robert Sockloskie suggest the limitations of the upper-level curriculum in their empirical assessment of third-year students’ interests:

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124. See Dilloff, *supra* note 3, at 355; Harner, *supra* note 38, at 390–94.

125. See *Best Law Schools: What Are the Priciest Private Law Schools?*, U.S. NEWS & WORLD REPORT, [http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/private\\_cost](http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/private_cost) (last visited Dec. 30, 2010) (listing yearly tuition rates at private law schools).

126. Cf. Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 235–36, 262 (2001) (describing recent proposals to eliminate the third year and speculating that “a majority of law students would support abolishing the third year”).

127. See *id.* at 262 (“Eliminating the third year outright would reduce law school revenues by one-third and, presumably, would reduce faculty sizes by nearly that amount.”).

128. See *id.* at 244–47 (presenting data suggesting third-year disengagement).

129. Cf. Paul Barron, *Can Anything Be Done to Make the Upper-Level Law School Courses More Interesting?*, 70 TUL. L. REV. 1881, 1881 & n.3 (1996) (suggesting that “interest level and participation” decreases in the third year).

[M]any of the satisfied students in the law school mainstream appear to be willing and eager to do more in their second and third years (especially the third), if provided with the opportunity to pursue real interests and develop new, client-oriented skills. A significant number of students want more (and better) clinical offerings and business skills training. They also appear eager to help others and are seeking opportunities to do pro bono work. This suggests to us that the upper years of law school could be reformed to be more than the back end of a credentialing process.<sup>130</sup>

Experiential learning, skills development, and a greater focus on curricular choice make sense in any educational setting.<sup>131</sup>

Law schools can take a greater role in steering students toward better curricular choices. For example, consider the field of business law with a focus on corporate transactions. In this area, a law student should complete some substantial package of courses from the following menu: business associations, corporate finance, contract drafting, securities regulation, mergers and acquisitions, bankruptcy, advanced tax, and business planning. Training in essential business concepts, such as accounting and finance, should also be required.<sup>132</sup> Corporate transactional lawyers are not simply custodians of standard-form documents or cut-and-paste functionaries. They must be technically proficient at maximizing transactional value.<sup>133</sup>

The third-year curriculum might achieve this by introducing interdisciplinary learning through joint programs with other professional and academic institutions. Our world is becoming increasingly complex, and legal work must address this complexity.<sup>134</sup> Lawyers should be sensitive to the application of other disciplines to legal

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130. Gulati et al., *supra* note 126, at 259.

131. See, e.g., Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 354 (1994) (emphasizing the importance of practice-based settings and suggesting that “law students can learn about the situated roles, judgments, and actions of lawyers, judges, jurors, and witnesses *only* if they *experience* these human actors and human events from the inside of legal culture rather than at its fringes”).

132. See Rhee, *Madoff*, *supra* note 5, at 381 (advocating interdisciplinary education for business lawyers); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 352 (2005) (arguing that in the future business lawyers will require more “technical proficiency in finance and economics”).

133. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1984) (arguing that business lawyers are “transaction cost engineers” who maximize the value of transactions). See generally Rhee, *Madoff*, *supra* note 5 (arguing that a deficiency in legal education contributed to the failure of lawyer-regulators in the Madoff scandal).

134. See *supra* note 6 and accompanying text.

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problem solving.<sup>135</sup> Crossdisciplinary expertise can be acquired not only through training and experience but also through a formal educational environment.<sup>136</sup> This observation is consistent with the movement toward interdisciplinary scholarship in the legal academy. But given that it takes considerable time and effort to learn legal analysis, the only time to introduce interdisciplinary learning in any substantial way is the third year of law school.

Finally, another wrinkle common to contemporary, sophisticated legal practice is the importance of international work. Globalization and internationalization of business are reality. Global business and regulation depend on a diverse group of people, cultures, nationalities, and languages.<sup>137</sup> This potential complexity suggests the need to teach international aspects of legal practice to students, exposing them to the reality of the practice.<sup>138</sup>

## V. SOME PROPOSALS FOR CURRICULAR REFORM

My main criticism of legal education is that it can be more effective in training market-ready lawyers, and law schools should do more to prepare students fully for practice. If our model for legal education remains unchanged, a two year program might be a better option for many students given the enormous cost of the third year and the increasing problem of student debt burden.

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135. See Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 324, 340 (1999) (observing that “[I]ack of exposure to other disciplines during the [legal] training process gives the implicit message that these disciplines are unimportant to the solving of legal problems”).

136. See *id.* at 354–56 (describing a model interdisciplinary training program involving “a two semester course for law students and graduate students in social work and psychology,” taught by professors “from all three disciplines,” and supplemented by visits from experts in “medicine and law enforcement”). Many schools offer joint degree programs. For example, Northwestern University and University of Pennsylvania offer accelerated joint J.D./M.B.A. programs. See KELLOGG SCH. MGMT. JD-MBA PROGRAM, <http://www.kellogg.northwestern.edu/jdmba/> (last visited Dec. 30, 2010); PENN LAW: GOAT, <https://goat.law.upenn.edu/ACADEMICS/JOINTDEGREEPROGRAMS/WebPages/JDMBA.aspx> (last visited Dec. 30, 2010). Such programs are more cost effective in terms of tuition and opportunity cost.

137. See, e.g., Donald B. King, *Globalization Thinking for Modern Legal Education*, in LEGAL EDUCATION FOR THE 21ST CENTURY 393, 399 (Donald B. King ed., 1999) (noting that international parties who engage in trade with China must look not only to China’s “civil law of contracts” but also to its “foreign trade law on contracts”).

138. See, e.g., *id.* at 393, 412 (proposing a new model for legal education that requires “the incorporation of the approaches of different legal systems, and the incorporation of globalized human values,” and arguing that this “globalization thinking” renders lawyers’ thinking more flexible and provides them with the broad perspective necessary to meet their professional obligation to improve the law).

Some have argued that modern legal education requires a stronger connection between theory and practice.<sup>139</sup> As implemented in many schools, the division between theory and practice roughly coincides with the division between doctrinal faculty members in one group and clinical and legal writing faculty members in another group. The traditional law school curriculum emphasizes analytical, theoretical thinking in accordance with the mantra of “thinking like a lawyer.” The chief pedagogical tools—the Socratic method or a mix of lecture and discussion—aim to hone this skill.<sup>140</sup> This model is revered in legal education, and it is the method by which most law professors have been trained.<sup>141</sup>

On the practical side of the theory-practice gap, law schools also provide experiential learning options. In recent years, clinical education has gained strength and prominence in the legal academy.<sup>142</sup> Moreover, several law schools, such as Northeastern University School of Law and Drexel University Earle Mack School of Law, have begun to offer externship opportunities as a serious part of their curricula.<sup>143</sup> Although these law schools continue to train students to think like a lawyer, their practice-based programs provide the opportunity to *do* like a lawyer.

This division along pedagogical functionality—between theory and practice—is an oversimplification. Consider first the theory component. Three years of teaching the same analytical method in the context of different substantive bodies of law is repetitive. The third

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139. See Christine M. Szaj, *Building Bridges and Connecting Dots: Easing the Transition from Law School to Law Practice*, in LEGAL EDUCATION FOR THE 21ST CENTURY, *supra* note 137, at 119, 120, 125 (noting that “law schools [have] attempt[ed] to minimize the gap between theory and practice” and concluding that “it cannot be argued persuasively that one is more important than the other”).

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140. See Rhee, *Socratic Method*, *supra* note 5, at 882 (describing the Socratic method as “a concrete analytic tool”).

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141. See Burnele V. Powell, *A Defense of the Socratic Method: An Interview with Martin B. Louis (1934–94)*, 73 N.C. L. REV. 957, 962 (1995) (quoting Professor Martin B. Louis as stating that the Socratic Method is “a superior learning method for most students”).

142. See, e.g., *Clinical and Pro Bono Programs*, HARV. L. SCH., <http://www.law.harvard.edu/academics/clinical/> (last visited Dec. 31, 2010) (describing Harvard’s clinical legal education program).

143. See *Bluhm Legal Clinic*, NW. L., <http://www.law.northwestern.edu/legalclinic/externships/> (last visited Dec. 31, 2010) (describing externship opportunities); *Experience the Difference: Hands-On Education*, EARLE MACK SCH. OF LAW DREXEL U., [http://www.earlemack.law.drexel.edu/admissions/difference/experiential\\_learning/](http://www.earlemack.law.drexel.edu/admissions/difference/experiential_learning/) (last visited Dec. 31, 2010) (listing “practical learning” opportunities). Washington & Lee University School of Law recently revamped its third-year curriculum to incorporate a substantial experiential learning component. See *Washington & Lee’s New Third Year Reform*, WASH. & LEE U. SCH. OF LAW, <http://law.wlu.edu/thirdyear/> (last visited Dec. 31, 2010).

year represents the point of diminishing returns.<sup>144</sup> The framework for conducting discrete legal analysis is based on the doctrinal skill of reading cases, statutes, and regulations. This skill is mostly acquired after two years of law school.<sup>145</sup> This fact is even more critical now because the cost of legal education has ballooned, making the opportunity cost more significant.<sup>146</sup>

Now consider the practice component. Clinical education is a good way for students to experience the practice of law under careful and expert faculty supervision.<sup>147</sup> But there are limitations to practice-based teaching. Clinical education most naturally is given in the context of litigation. It is limited by budgetary and other resource constraints, suggesting that it is ultimately financed by student tuition.<sup>148</sup> An important economic consideration is the need for a low student to faculty ratio in clinical teaching, given that faculty salary is the largest expense in a law school's operating budget.<sup>149</sup> Moreover, while clinics enable students to practice law, they are not a substitute for *immersion* in the practice of law, which is the steepest part of the learning curve for new lawyers.<sup>150</sup> There simply is no substitute for the experience gained from an intense, less controlled environment in which the professional, sometimes without tight supervision or handholding, must solve problems as they arise with smarts, sweat, and independent judgment. Clinics provide only the training wheels for this eventuality.

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144. See *supra* notes 128–31 and accompanying text.

145. Some have suggested that two years of law school as a formal classroom experience may be sufficient. See, e.g., Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance*, 6 U. ST. THOMAS L.J. 302, 331 (2009) (noting that some have suggested a two year program (citing RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 281 (1999))).

146. See *supra* text accompanying notes 126–27.

147. See Gulati et al., *supra* note 126, at 262–63 (arguing that “clinical education may indeed have the potential to fill much of the third-year void”).

148. See Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 286 (1990) (stating that “live-client, in-house clinics probably are still more expensive than most other teaching methodologies” despite rising costs in alternative teaching methods).

149. See James H. Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 34 (2010) (“One of the problems in delivering these in-house clinics is the high cost for the law schools because of the necessarily low student/faculty ratios involved.”).

150. See Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991) (noting that recent law school graduates “complain about . . . their lack of preparation for what the practice of law truly entails” and suggesting that “the gap between the students’ antiquated, idealized view of the law and the actual legal world they enter causes unexpected dissatisfaction”).

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The problem with legal education arises from contradictions. There is too much theory; there is too little theory. There is not enough practice; practice is not enough. These contradictions are made more pronounced by a unitary vision of the legal profession and education.

Traditional legal analysis founded on doctrine and litigation-focused policy arguments, while being the foundational skill of an American lawyer, may be insufficient for training the twenty-first century lawyer whose practice environment is far more complex than it has ever been.<sup>151</sup> Sophisticated clients require core competencies that are not adequately taught in law schools. Some law schools have recognized this problem. For instance, former Dean David Van Zandt of Northwestern University Law School consulted with law firms, government agencies, nonprofit organizations, and private companies and identified the competencies that his law school seeks to teach its law students: teamwork, communication, basic quantitative analysis, basic strategic thinking, project management skills, and globalization.<sup>152</sup> This program of skills development borrows heavily from business schools, and it identifies some essential deficiencies in legal education.

What can law schools do to close the training gap and produce more market-ready lawyers? At least in the short term, they can address some needs without doing violence to the overall educational architecture.

First, they can create more opportunities for interdisciplinary and concentrated study programs.<sup>153</sup> The selection of specialty fields might include business, healthcare, tax, environmental, and intellectual property law. These fields benefit from a structured curriculum. Interdisciplinary learning could be introduced, and it seems that course offerings and textbooks on teaching interdisciplinary tools are increasing.<sup>154</sup> A focus on quantitative concepts would provide a valua-

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151. See, e.g., Weinstein, *supra* note 135, at 319–20 (discussing the importance of interdisciplinary legal education in an increasingly complex world).

152. David E. Van Zandt, *The Evolution of J.D. Programs—Is Non-Traditional Becoming More Traditional?: Keynote Address Transcript*, 38 SW. L. REV. 607, 613–15 (2009).

153. See Gulati et al., *supra* note 126, at 264–66 (suggesting that law schools introduce course subjects from other programs and offer concentrated study programs).

154. See, e.g., HOWELL E. JACKSON ET AL., *ANALYTICAL METHODS FOR LAWYERS V* (2003) (“Lawyers . . . must work in settings where effective argumentation and the giving of sound legal advice often depend on mastery of language and techniques derived from disciplines such as economics, accounting, finance, and statistics, staples of the modern business school curriculum, but notably absent . . . from law school classrooms.”); ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW XIX–XX* (2010) (describing a course taught by the authors on empirical research techniques).

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ble perspective. Moreover, even outside of joint degree programs, formal relationships with other graduate schools makes sense in some areas, such as business (corporate law), medicine (health law), and engineering (intellectual property law). Increased access to courses in other schools and disciplines would facilitate interdisciplinary studies.

Second, law schools can expose students to the international aspects of law and the reality of a globalized economy. Such international exposure might be achieved through some combination of formal coursework or other structured programs.<sup>155</sup> A diverse student body can itself provide significant exposure as well.

Third, law schools can introduce teamwork and leadership components into their curricula without losing sight of the all-important goal of teaching legal analysis. There is no reason why law students cannot learn legal analysis in the context of group work or in a simulation of the more complex production of professional work.<sup>156</sup> Legal analysis and collaborative learning are not mutually exclusive.

Finally, law schools can introduce different pedagogies. After the first year, there is no reason why doctrinal courses should be taught primarily through the traditional Socratic dialogue or lecture. For example, students can benefit from the case method, which is different from case analysis.<sup>157</sup> Judges, as well as casebook authors, sanitize the facts of judicial opinions. A simplifying ex post bias is inherent in such analysis, but the real world is invariably messy from the ex ante view. In contrast, business school-style case studies provide a rich milieu of complex factual problems without the sort of prepackaged solutions inherent in the analysis section of appellate opinions. Similarly, transactional law can be taught through role playing and

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155. See King, *supra* note 137, at 414–15 (suggesting ways to incorporate “globalization thinking” into the legal curriculum).

156. See, e.g., Gulati et al., *supra* note 126, at 265 n.48 (noting that Vanderbilt Law School “has set up a series of law-and-business classes that are jointly run by law and business school faculty and use many aspects of the business school teaching model”).

157. A major impediment for doing this is a lack of teaching materials. Through the Harvard Business School, business schools have a large repository of case materials. See *Cases*, HARV. BUS. PUBLISHING, <http://hbsp.harvard.edu/product/cases> (last visited Dec. 31, 2010) (selling various case studies). Law schools have historically relied on casebooks of edited appellate opinions, so there is a dearth of case studies available to legal educators. Nevertheless, Stanford Law School has made an effort to write and collect them. See *Stanford Law School Case Studies Collection*, SLS HOME: PUBS & BLOGS, <http://www.law.stanford.edu/publications/casestudies/> (last visited Dec. 31, 2010) (providing an overview of its “Case Studies Collection”). Emulating the business school case study, I have written case studies as a part of my scholarly efforts. See Rhee, *supra* note 41, at 664–96 (presenting a case study of the 2008–2009 merger of Bank of America and Merrill Lynch and an analysis of the fiduciary duty issues).

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mock documents rather than through case law analysis.<sup>158</sup> The Rules of Civil Procedure can be taught through a case simulation. Negotiations and alternative dispute resolution can be taught through a combination of simulations and reflective learning—and indeed, many courses in negotiations are already taught in this manner.

All of the previous suggestions are feasible. I now turn to legal education reform that is plausible but less conventional. Recall the assertion that the distance between academics and practice is more pronounced in law than it is in business and medicine. Medical school curricula have both a clinical component and a residency requirement, and the traditional business education is sandwiched between substantial professional experiences.<sup>159</sup> Law schools seem more disconnected from the market. There should be ways to bridge this gap.

Law schools and firms can pursue joint strategies toward training. For instance, consider law firms' summer associate programs, which serve as devices for identifying the best law school candidates for permanent associate positions. There are significant costs associated with running these programs, such as paying the salaries of first-year associates on a pro rata basis for second-year law students and devoting attorneys' time to supervise and advise students. Suppose that, in addition to these programs, law firms and law schools were to coordinate substantial, experiential learning summer programs for school credit that mimicked associate level work. Such a program would be similar to an externship, but the coordination between organizations would be greater. Law schools would screen applications based on the law firm's requirements, and sponsoring firms would commit to working with school faculty on a structured practicum. There would be educational benefits, of course, but there would also be a real connection to employment opportunities for students and potential research opportunities for faculty members with more practice-driven scholarly agendas. This is just one of many possible ways to better connect law practice, legal education, and scholarship.

We can envision even more speculative proposals for legal education reform. One possibility is an alternative third-year curriculum in which, for instance, students work as lawyer-trainees under the supervision of a sponsor-employer in an apprenticeship similar to the Brit-

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158. See, e.g., *supra* text accompanying note 109.

159. See *supra* note 18.

ish model.<sup>160</sup> They would be paid a trainee wage—a real salary, but one reflecting a training period.<sup>161</sup> At the same time, students would attend law school and take courses better suited for their chosen practices, much in the same way that evening students work during the day and study at night.<sup>162</sup> A hybrid program combining the British model with an accelerated evening and weekend program would allow students to accomplish multiple goals: students can immerse themselves in legal practice; with a structured third-year curriculum, they gain necessary and foundational knowledge as their careers progress; and, they reap the benefits of a salary, which enables them to pay tuition immediately rather than simply paying tuition and biding time until their professional certification is completed with a passing grade on the bar exam. Legal employers, too, might be interested in such a program: It furthers their employees' education, it extends the period for evaluating potential hires, and it allows employers to train job candidates at cost-effective rates that are easier to justify to clients.

## VI. CONCLUSION

The recent market downturn has had a significant impact on the legal profession. I do not know whether these changes are temporary or permanent, though I suspect that some will endure. The legal market will be subject to pricing pressures if there are significant advances in the methods for evaluating legal services. Clients' increased drive to rationalize legal services may result in less funding for training.

Law schools have long been criticized for being disconnected from the legal market. The current model of American legal education may be effective in teaching law students the skills and knowledge necessary for the average practice, but it is costly and inefficient. Cer-

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160. See Andrew Boon & Julian Webb, *Legal Education and Training in England and Wales: Back to the Future?*, 58 J. LEGAL EDUC. 79, 82 (2008) (explaining that English lawyers-in-training must undergo a supervised practice apprenticeship).

161. See *id.* at 112 (noting that large firms in England now “pay their trainees' training expenses as well as significant salaries”).

162. While this would be a demanding schedule, it is feasible. The University of Maryland Robert H. Smith School of Business has an accelerated M.B.A. program in which professionals take concentrated courses during the evenings and weekends, completing a full M.B.A. program in two years. See *Program Comparison Matrix: Which Smith M.B.A. Program is Right For You?*, U. MD. ROBERT H. SMITH SCH. BUSINESS, <http://www.rhsmith.umd.edu/mba/programs/chart.aspx> (last visited Dec. 31, 2010). I taught the program's corporate social responsibility course, and my students told me that the program is hard but manageable. Of course, this analogy between the situations of business and law students has limits, since most business students already have prior professional experience. In the proposal here, a mix of daytime work and nighttime study may actually have a net educational benefit for law students due to the mix of practice and school.

tainly, the disconnect between law schools and the legal market affects the quality of education for students who will practice in sophisticated legal environments. For those students, deeper training in substantive fields of law and other disciplines is required. Students can also benefit from an immersion experience in the practice of law, and this suggests that cooperation between law schools and the legal market could prove to be mutually beneficial.