

## SYNERGY AND TRADITION: THE UNITY OF RESEARCH, SERVICE, AND TEACHING IN LEGAL EDUCATION

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The law school exists on the borders of education and labor, profession and occupation, commerce and public service. It can take the best of each of these worlds and bring it to the others: the creativity of disinterested inquiry to the high-stakes pressure of raging disputes; the discipline of practice to flights of theory. But the liminality of the law school also creates vulnerabilities, particularly in an era of technocratic management practice and techno-utopian promises for online education.<sup>2</sup>

Technocratic managers aim to extract the full value of whatever benefits law schools create. On this view, universities should aim to capture more of the earnings premium attributable to J.D. degrees. Since the median economic value of a law degree has been estimated at about \$650,000, there is still pressure from central university administrations on law schools to raise tuition in order to better reflect the value they create.<sup>3</sup> There is also subtler pressure to monetize other functions of the law school, such as its clinics or research.<sup>4</sup> Several clinics have moved beyond their traditional focus on the marginalized, to play a role in promoting

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1. Professor of Law at the University of Maryland Francis King Carey School of Law. This essay benefited greatly from discussions with Professor Michael Simkovic, recent law graduates and academics at the Education Finance Research Group meeting at the State University of New York at Buffalo, and my colleagues during a summer workshop at the University of Maryland. I particularly thank Robert Condlin, Richard Boldt, and Don Gifford for their insights.

2. These tensions also face the university as a whole. See CHRISTOPHER NEWFIELD, *UNMAKING THE PUBLIC UNIVERSITY: THE FORTY YEAR ASSAULT ON THE MIDDLE CLASS* (2008).

3. Michael Simkovic and Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 284 (2014) (estimating value of the degree, controlling for numerous variables, such as selection effects). Note that while university administrators might use these findings to justify increases in tuition, the findings also recommend reduced interest rates for loans to law students, since they are better credit risks than most other borrowers. Natalie Kitroeff, *Is the Government Charging Some People Too Much for Student Loans?*, BLOOMBERG (June 18, 2015), <http://www.bloomberg.com/news/articles/2015-06-18/should-the-government-charge-certain-people-less-for-student-loans>- (“it would make more sense to give lower interest rates to people who major in lucrative fields, or those who go to graduate school for certain professional degrees”).

4. See Patricia Pierce & Kathleen Ridolfi, *The Santa Clara Experiment: A New Fee Generating Model for Clinical Legal Education*, 3 CLINICAL L. REV. 439, 466 (1997).

entrepreneurship or other aspects of for-profit business.<sup>5</sup> Just as a corporation may drop unprofitable product lines, a university might change or refocus the mission of its components to maximize opportunities for future revenue growth.

The techno-utopianism of online education pulls in the opposite direction: rather than emphasizing the value of teaching, techno-utopians claim it is as easily automatable as assembly lines or car washes. Some commentators would essentially end the university as we know it, replacing it with a network of massive open online courses (MOOCs) or hybridized offerings of distance and in-person instruction.<sup>6</sup> Such online courses would computerize both instruction and assessment of students, and are marketed as being far cheaper and more convenient than in-person instruction. Cut-rate online instruction in law renders both the traditional research and service missions of the law school nugatory: faculty are judged only on their ability to teach the skills or dispositions necessary to generate an earnings premium upon graduation.

There are numerous problems with such a narrow approach to legal education. Research informs teaching, and vice versa: to eliminate either activity in the name of improving the other is an initiative based more on ideology than evidence.<sup>7</sup> Evidence is emerging that the stripped-down model of online education is not working.<sup>8</sup> California, at the vanguard of the deregulation of legal education, has seen a number of fly-by-night schools pop up. According to one journalistic inquiry, nine out of ten of the

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5. See Pierce & Ridolfi, *supra* note 4.

6. See Clayton M. Christensen et al., *Disruption in Education*, in *THE INTERNET AND THE UNIVERSITY: FORUM 2001 20* (Devlin & Meyerson eds., 2002); CLAYTON CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997). For critiques of disruption theory in education, see Audrey Watters & Sara Goldrick-Rab, *Techno Fantasies*, *INSIDE HIGHER EDUC.* (Mar. 26, 2015), <https://www.insidehighered.com/views/2015/03/26/essay-challenging-kevin-careys-new-book-higher-education> (reviewing KEVIN CAREY, *THE END OF COLLEGE* (2015)); Frank Pasquale, *The University of Nowhere*, *L.A. REV. BOOKS*, Nov. 12, 2015 (reviewing KEVIN CAREY, *THE END OF COLLEGE* (2015)). *But see* Stephen Colbran & Anthony Gilding, *MOOCs and the Rise of Online Legal Education*, 63 *J. LEGAL EDUC.* 405, 405 (2014) ("While it is not suggested that legal education in general will be provided through open online courses with participants numbering in the hundreds of thousands, these courses provide an opportunity to explore how universities, law schools and academic staff may change the way they teach.").

7. John Quiggin, *Grattan Institute Advocates Cutting University Research Funding* (Nov. 2, 2015), <http://johnquiggin.com/2015/11/02/grattan-institute-advocates-cutting-university-research-funding/> ("[S]tudents are beating down the doors of the research-intensive universities. Teaching-only schools are the second choice for nearly everyone.").

8. See Jason Song et al., *Nearly 9 in 10 Students Drop Out of Unaccredited Law Schools in California*, *L.A. TIMES* (July 25, 2015), <http://www.latimes.com/local/education/la-me-law-schools-20150726-story.html#page=1>; Brian Burnsed, *Online Law Schools Have Yet to Pass the Bar*, *U.S. NEWS & WORLD REP.* (Mar. 23, 2011, 9:00 AM), <http://www.usnews.com/education/online-education/articles/2011/03/23/online-law-schools-have-yet-to-pass-the-bar>.

students enrolling in these schools never graduate.<sup>9</sup> But this result should not be surprising. The “MOOC Revolution” has stalled, as even its foremost proponents question online courses’ relevance to those who do not already have degrees.<sup>10</sup>

Both technocratic management practice and techno-utopianism menace law schools’ traditional missions of balancing theory and practice, advocacy and scholarly reflection, study of and service to communities. These movements also destabilize law schools by taking radically opposed positions on their funding level and sources: technocrats want to squeeze ever more revenue from law schools; techno-utopians promise instruction as cheap as YouTube channels. And yet the two sides have struck alliances of convenience on a number of issues, generally pushing the law school away from its role as part of the university and toward a newer, corporate identity as handmaiden to the bar and lawyers’ most powerful and wealthy clients.

The power of these twin movements lies in their ability to combine populist hostility to intellectual life with elite demands for austerity. Both advance policies to undermine traditional norms of shared governance (among faculty and administrators) and synergies of practice informed by theory, and theory informed by practice. Technocratic managers’ view of law schools as potential cash cows, and techno-utopians’ dismissal of them as residual, are contradictory in the long run. But in the short run, they can be combined to buffet deans and faculty with double binds (such as, “run like a for-profit business” *and* “serve those in the community who can never pay you”). Political theorist William Connolly has described how these tensions, far from undermining ideologies, conduce to their benefit. A “resonance machine” can amplify a shared policy goal (“close or shrink nearly all law schools”) even when it arises out of radically different values, ideals, and even factual analyses.<sup>11</sup>

Even more troublingly, these macro-level, contradictory pressures on law schools are recapitulated in more directed critiques of scholarship and teaching. Legal scholarship is either too esoteric (inappropriately aping humanities scholars’ monographs or scientists’ findings), or too practical (a pale imitation of practitioners’ briefs). Classroom teaching is either too rote and traditional, or ersatz apprenticeship. In voluminous critiques of law

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9. *Id.*

10. Stefan Popenici, *Deceptive Promises: The Meaning of MOOCs-Hype for Higher Education*, in *MACRO-LEVEL LEARNING THROUGH MASSIVE OPEN ONLINE COURSES (MOOCs): STRATEGIES AND PREDICTIONS FOR THE FUTURE* 158 (Elspeth McKay and John Lenarcic eds., 2015).

11. William E. Connolly, *The Evangelical-Capitalist Resonance Machine*, 33 *POL. THEORY* 869, 871 (2005); *see also* Clifford Geertz, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT* 47 (David Apter ed., 1964); *see also* MICHAEL FREEDEN, *IDEOLOGY: A VERY SHORT INTRODUCTION* (2003).

schools, practitioners and theorists battle one another, betraying little awareness of trends toward the corporatization of the university that, left unchecked, will render both irrelevant. Rather than fighting one another, they should unite to defend and promote the law school's traditional integration of scholarship, teaching, and service.

This essay develops such a defense, responding to varied critiques of law schools. It is not meant to resist all calls for reform, innovation, or reduced funding of law schools. I have taught innovative courses; I've done my share of critiquing some baleful trends in legal scholarship; I have proposed cost-saving measures and worked for a fairer system of educational finance. But "reform" focused primarily on cost-cutting, and driven by a temporary alliance of convenience among forces with deeply contradictory views on the nature and purpose of higher education and law, is dangerous.<sup>12</sup> Neoliberal cost-cutting in health care has already generated consequences unintended and regretted by some of its initial backers.<sup>13</sup> Similar agendas in legal education are likely to generate similar regrets.

This essay defends the traditional model of legal education, premised on an integration of research, service, and teaching. Law schools have long been part of universities and will always face some tensions between their scholarly and practical missions. Nevertheless, as Part I shows, dual identities can generate creativity and innovation when talented staff and students are given autonomy to cultivate interests free of immediate pressure for profits. Part II defends the independence of scholars and clinicians against elite complaints about their alleged failure to meet the staffing needs, or respect the political interests, of major law firms serving large corporate clients. Part III develops a case for caution regarding various quantitative indicators proposed as tools to measure and manage educational productivity. The essay concludes with reflections on real problems facing the legal profession. Law schools can continue to address them, if they are valued by the profession as partners in developing normative and long-term perspectives on law and protecting the interests of the vulnerable.

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12. Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFFALO L. REV. 659, 743 (2014) ("we cannot decide on how to deliver the most costeffective legal education unless we first decide what an appropriate legal education entails.").

13. See Frank Pasquale, *The Hidden Costs of Health Care Cost-Cutting: Toward a Postneoliberal Health-Reform Agenda*, 77 LAW & CONTEMP. PROBS. 171 (2014).

I. BALANCING MISSION AND MARGIN: THE LAW SCHOOL  
IN THE UNIVERSITY

The vast majority of American law schools are parts of nonprofit universities. Embedded in a larger institution, law schools have faced recurring disputes about the amount of “overhead” and similar support they should pay to the central administration.<sup>14</sup> Back in 2005, many critics claimed that law schools functioned as a cash cow for universities, raising tuitions on their own students in order to cross-subsidize other programs or administrators.<sup>15</sup> By 2015, the charge was, more commonly, reversed: many claimed that law schools functioned as parasites, draining funds from other programs.<sup>16</sup> For the harshest critics, the lesson was clear: universities should stop subsidizing their law schools, and shut them down instead.

To this day, the “cash cow” meme persists, even though the “parasite” characterization is more popular. The endurance of these contradictory accusations testifies to a lack of awareness about something fundamental to nonprofit governance: the balance between mission and margin.<sup>17</sup> Without a mission, there is no reason for a nonprofit to exist; but without some margin of revenue above expenses, a nonprofit risks insolvency. If, for example, a hospital heavily discounted care, it would better meet part of its mission (expanding access to care), but it wouldn’t have the margin necessary to buy new equipment, improve quality, and, in the slightly longer term, even keep operating.

Balancing mission and margin is critical. Perhaps a college could increase the starting salaries of graduates by sacking four history professors, replacing them with two engineering professors, and focusing its marketing on potential enrollees already gifted in mathematical and scientific skills. But the mission of the institution is not limited to maximization of graduates’ starting salaries. There is, instead, a balance: between maintaining a tradition of humanistic education and research, and

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14. See Philip J. Closius, *The Incredible Shrinking Law School*, 31 U. TOL. L. REV. 581, 584 (2000).

15. Nathan Koppel, *One Law School Dean’s Noisy Withdrawal*, WALL ST. J. (July 29, 2011) (“Closius said that the [University of] Baltimore law school cannot adequately serve its students if it has to provide so much money to the university. This is a gripe shared by many other deans at law schools . . .”).

16. See David Barnhizer, *Looking at the Law School ‘Crisis’ from the Perspective of the University*, LAWNEXT (Nov. 6, 2014), <http://lawnext.org/looking-at-the-law-school-crisis-from-the-perspective-of-the-university/>. Professor Barnhizer has long criticized law schools. See generally David Barnhizer, *Of Rat Time and Terminators*, 45 J. LEGAL ED. 49, 51 (1995) (observing “savagery and cannibalism” among over-populated rat nests and asserting that behavior offers some kind of lesson for “lawyer-terminators . . . pursuing their own self-interest at their clients’ expense”).

17. Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin, and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL’Y, L. & ETHICS 1, 5 (2005).

responding to modern economic demands. That is not to say that educational institutions ought to persist wholly undisciplined by market forces; a school with terrible employment outcomes should lose students and eventually face economic crisis. Rather, the point of a nonprofit sector is to preserve parts of the economy capable of maintaining a longer-term view than for-profit firms, which are subject to well-documented biases toward short termism.<sup>18</sup>

Of course, there are some for-profit institutions of higher education, and there is constant pressure in some ideological precincts for nonprofits to act more like businesses.<sup>19</sup> But even in many businesses, there are rationales for high-performing divisions (say, Microsoft's MSWord software) to support those losing money (like Bing).<sup>20</sup> The company may believe the division that is now losing money may become profitable again. Or it may be developing expertise that helps other divisions in ways that are hard for outsiders to understand. Even the most stalwart maximizers of shareholder value would be loath to lambaste CEOs for every failure to cut out less profitable parts of a firm.<sup>21</sup> Universities should have an even longer time horizon. A university focused only on the short-term may have cut its Russian courses in the 1990s, given the dissolution of the Soviet Union and ensuing economic distress. Few at the time could have anticipated developments that have restored Russia to the center of contemporary geopolitical disputes. This reasoning applies *a fortiori* to departments studying China, which appeared economically marginal only a few decades before its rise to be one of the top three economies in the world.

Broadening the scope further, developmental industrial policy has clearly helped the "Asian Tigers" join the ranks of the highest-income

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18. Lynne Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 264, 269 (2011). There are ways of structuring for-profit firms to insulate them from short-termism, but the bulk of commercial activity in the United States is driven by financial imperatives to show immediate results.

19. Given widespread abuses in the for-profit sector, the Obama Administration was correct to enact new restrictions on such schools' access to federal financing. Sarah Ann Schade, *Reining In The Predatory Nature Of For-Profit Colleges*, 56 ARIZ. L. REV. 317, 321 (2014) (describing reasons for the gainful employment rule); STAFF OF S. COMM. ON HEALTH, EDUCATION, LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 37 (Comm. Print 2012).

20. Henry Blodget, *Can We Please Stop Pretending That Microsoft's Bing Is Doing Well?*, BUS. INSIDER (Apr. 30, 2011, 12:29 AM), <http://www.businessinsider.com.au/microsoft-bing-losing-billions-2011-4>.

21. Indeed, even the short-termist logic of shareholder value maximization has been severely criticized. See Steven Pearlstein, *How the Cult of Shareholder Value Wrecked American Business*, WASH. POST (Sept. 9, 2013), <http://www.washingtonpost.com/news/wonkblog/wp/2013/09/09/how-the-cult-of-shareholder-value-wrecked-american-business/>; see also LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012).

countries in the world.<sup>22</sup> South Korea invested for decades in money-losing manufacturers only to see them lead their economy more recently.<sup>23</sup> The logic of short-term profit maximization may work for some for-profit institutions in developed economies. But it is not a logic that applies at all times to all places.

Principles of maximization demand a maximand—i.e., something measurable to be maximized. Countries may be measured by GDP; companies, by returns to shareholders; and in each case, short-term losses may be the key to longer-term gains. If a university that is run as a corporation decides to keep some “loss-leading” divisions operational in hope of future gains, there will be some future accounting that will enable a judgment on the success of the strategy. But once the multiple goals of the nonprofit world are in play, maximization of some measured quantity must give way to the joint optimization of multiple goals. Universities have at least three *educational* functions: to prepare students for democratic citizenship and leadership, to train them for jobs, and to prepare them to compete for relative advantage.<sup>24</sup> They also have multiple scholarly and community service missions.

Viewed from a purely market perspective, that may strike some as an inefficiency: why not spin out every part of the law school, to assess its market value individually? On this vision, law school clinics should seek either paying clients, or get grant funding. Legal researchers should do the same. But these multiple missions exhibit significant synergies. Unlike many think tank researchers (whose chase after research grants has severely undermined their credibility), university professors who do not seek such grants can more often offer unbiased opinions on critical legal issues.<sup>25</sup> Faculty researchers have the time and independence to

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22. See generally HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2008); MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* (2014); GEOFF MULGAN, *THE ART OF PUBLIC STRATEGY: MOBILIZING POWER AND KNOWLEDGE FOR THE COMMON GOOD* (2009); Robert C. Hockett & Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 WASH. L. REV. (forthcoming 2015).

23. See *id.*

24. David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RES. J. 39, 46 (1997).

25. See Tevi Troy, *Devaluing the Think Tank*, NATIONAL AFFAIRS (Winter 2012), available at <http://www.nationalaffairs.com/publications/detail/devaluing-the-think-tank> (“donors interested in influencing key debates want their contributions to lead to results, and are unlikely to be satisfied with merely helping to create an environment in which scholars kick around ideas regardless of their political impact.”); Loic Wacquant, *The Self-Inflicted Irrelevance of American Academics*, 82(4) ACADEME 18 (Jul.-Aug. 1996) (“Who needs independent thinkers when the hundred-some think tanks that prosper in Washington produce on demand or, better yet, on command, those impeccable scholarly compilations (for want of being scientific), thick technical documents (preferably quantitative), and other dry “evaluation reports” expressly designed to buttress the accepted wisdom of the moment and to give a veneer of rationality to measures adopted on completely different grounds?”).

contextualize “black letter” law with history, social science, and deep doctrinal research. Clinical faculty can take on unpopular causes. Unburdened by the pressure to directly monetize their cases in billable hours, they can perform the type of training that modern clients have increasingly told law firms they are unwilling to pay for. Clinicians can inform researchers about cutting edge problems arising in practice; researchers can advise clinicians on novel legal theories and emerging social science. Both clinicians and researchers can advise government agencies and nonprofits, again *gratis*, helping to level a playing field always tending toward unfairness thanks to extreme wealth inequality and the commodification of expertise.

Some business theorists may insist that a logic of specialization and division of labor should instead govern the law school. But how atomistic, in both time and space, can such a perspective become? The logic of unbundling may dictate first that every school be a “self-sufficient” entity (spun out from a university), then every professor, then every course, then every class in every course, then every minute in the class, *ad infinitum*.<sup>26</sup> While billed as part of a business trend of spin-offs, a teaching-only model of law school undermines rationales for institutional identity in the first place—and ignores counter-trends within business itself toward conglomeratization.<sup>27</sup> Networks of scholars, to the extent they exist at all, could just as easily be ad hoc and ever-changing. Faculty would also face the temptation to become hired guns, or to focus research in areas that can quickly be monetized into full-time jobs, lest volatile demand render their teaching positions untenable.

Disintermediation of research universities would have predictable, baleful consequences for all aspects of their mission. Replacing faculty and staff with an anonymous reserve army of educational labor engaged in a reverse auction of wages to teach or perform ad hoc classes is not a recipe for stability, insight, independence of mind, or community service. Rather,

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26. One university has already released estimates of the “profitability” of each professor. See Stephanie Simon & Stephanie Banchemo, *Putting a Price on Professors*, WALL ST. J. (Oct. 22, 2010), <http://www.wsj.com/articles/SB10001424052748703735804575536322093520994>. It is hard to think of a more self-defeating move, from an institutional perspective: rational, “profitable” professors may strike out to form a rival institution that can cut them a better deal. This type of activity was common in health care during the boom in specialty hospitals. See, e.g., Frank Pasquale, *Ending the Specialty Hospital Wars*, in THE FRAGMENTATION OF U.S. HEALTH CARE: CAUSES AND SOLUTIONS (Einer Elhauge ed., 2010). Moreover, the “low-value” professors may actually be contributing more to the university in hard-to-measure ways. Crude quantifications inevitably miss such “soft” characteristics as rapport, empathy, being available beyond office hours, writing good recommendations, and the many other tasks good professors perform.

27. Derek Newton, *Higher Education is Not a Mixtape*, THE ATLANTIC (Jan. 27, 2015), <http://www.theatlantic.com/education/archive/2015/01/higher-education-is-not-a-mixtape/384845/>.

that vision of precarization ensures almost no mentoring relationships, community service, time for research, or pro bono work.

Before imposing such short-termist, atomistic discipline on educational institutions, we would do well to wonder: is this logic imposed on CEOs? On politicians? On banks, or top brass in the Pentagon? The paucity of “accountability reform” with teeth in such fields is one deep clue that pressure for radical change in legal education is less a campaign of efficiency than it is an effort by those outside the profession to impose discipline and control upon it. Traditional law schools may be facing some budget cuts and a gradual reduction in revenues, but most are not in crisis.<sup>28</sup> Rather, they are a sustainable commons of intellectual and practical expertise, balancing needed autonomy with responsibility to the communities in which they are embedded.

## II. BALANCING AUTONOMY AND RESPONSIBILITY: INDEPENDENCE OF MIND IN SCHOLARSHIP AND SERVICE

The synergies between research and service at law schools also give rise to points of vulnerability. To some critics, law professors are selfish; they don't give enough of their own time to help their community (in the case of those non-clinical professors who do little measured or publicized community service). But in the case of clinics, other critics say that law schools are biased, overwhelmingly taking the side of the poor, criminals, and the environment.<sup>29</sup> For these critics, law professors' comparative neglect of the rich, victims of crime, and polluting businesses shows just how egregiously biased they are.<sup>30</sup>

This pincer attack on the professoriate must be addressed on multiple levels. Not every professor can perform every function of the law school at the same level. There is specialization among individual personnel so that

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28. Susan Carle, *What It Means to be a Lawyer in These Uncertain Times: Some Thoughts on Ethical Participation in the Legal Education Industry*, 47 AKRON L. REV. 223 (2014).

29. Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 MISS. L.J. 507, 529 (2007); Cameron Stracher, *Taste: Meet the Clients*, WALL ST. J., Jan. 26, 2007, at W11; Heather MacDonald, *Clinical, Cynical*, WALL ST. J., Jan. 11, 2006, at A11 (“Law school clinics weren't always incubators of left-wing advocacy.”); Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. (forthcoming, 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2686369](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686369) (“Opponents such as Eric Posner use the left-leaning projects of human rights clinics to argue against the existence of those clinics. Drew and Morriss indicate a preference for individual service provision over larger advocacy projects in clinics.”).

30. See WALTER OLSON, *SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA* (2011) (bias claims); Adam S. Chilton & Eric Posner, *An Empirical Study of Political Bias in Legal Scholarship* (Coase-Sandor Inst. for Law & Econ. Working Paper No. 696, 2014), available at [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2376&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2376&context=law_and_economics); see also BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* (2015).

the institution as a whole can better serve the community. Moreover, critics often understate, or completely dismiss, the value of legal scholarship (to be addressed shortly below), and the advising done by law professors for legislators, regulators, former students, journalists, and others. Judges, administrative agencies, and journalists consult legal scholarship and legal scholars in order to make sense of complex issues. A balanced look at the costs and benefits of professional education must at least try to offer such an assessment of the value of such services. They would almost certainly be cut back dramatically if cut-rate models of law-school-as-trade-school prevail.

The service done by clinical professors is also rarely, if ever, properly acknowledged in critiques of the value of the legal academy. Leading reports on legal education call for *more*, not less, experiential learning in order to prepare students.<sup>31</sup> My law school, at the University of Maryland, for example, provides 140,000 hours of free legal services, primarily for the indigent, each year.<sup>32</sup> But some of the work of our clinics—and that of several other law schools—has provoked the second critique: that community service projects chosen by law professors are biased in an ideological way.<sup>33</sup>

The problem with this critique, though, is that it ignores the predictable ways in which needs for free legal advice and representation are likely to be concentrated among populations or interests that are poor or unpopular or diffuse. To give one of many possible examples: polluters can often pay for top-priced legal talent; victims of pollution (particularly from nonpoint sources), by and large, cannot.<sup>34</sup> Pollution's harms may be enormous overall, but very slow to accumulate individually, causing collective action problems.<sup>35</sup> One of the key reasons law is organized as a *profession*, a third logic in some ways independent from the usual demands of market and state, is because legislators had the foresight to know that unpopular causes

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31. ABA, REPORT OF THE TASK FORCE ON THE FUTURE OF LEGAL EDUCATION (2014).

32. *Clinical Law Program*, U. OF MD. FRANCIS KING CAREY SCH. OF L. (Sept. 17, 2015, 5:18 PM), <http://www.law.umaryland.edu/programs/clinic/>.

33. See, e.g., Annie Linskey & Timothy B. Wheeler, *Lawmakers Decry UM Law Clinic's Farmer Lawsuit*, BALT. SUN, Mar. 27, 2010, at 1A; Gov. Mike Foster, Letter to the Editor, *Governor Weighs in on Law Clinic Rules*, NEW ORLEANS TIMES PICAYUNE, June 28, 1998, at B10 ("My problem with the Tulane Environmental Law Clinic is that its actions in the Shintech case seem to be driven by the radical political agenda of its professors.").

34. Shawn Collins, *Contamination Victims Deserve a Lawyer, Too*, POLLUTION LAW WATCH (Sept. 11, 2013), <http://www.pollutionlawwatch.com/2013/09/contamination-victims-deserve-a-lawyer-too/>.

35. See Jacklyn Cock, *The Vocation of Sociology—Exposing Slow Violence*, SOCIAL SCIENCE SPACE (Feb. 20, 2013), <http://www.socialsciencespace.com/2013/02/the-vocation-of-sociology---exposing-slow-violence/>.

and persons needed some systematic, institutional sources of support and defense against predictable tyranny by the majority.<sup>36</sup>

Such long-term thinking also helps unravel another paradox all-too-frequently foisted upon researchers. Some critiques of legal scholarship themselves exemplify the groundless generalization and distortion that academics exist to dispel.<sup>37</sup> Journalists like the *New York Times*'s Adam Liptak have lamented the state of legal scholarship, without acknowledging their paper's (or their sources') regular reliance on it.<sup>38</sup> He is preoccupied with Supreme Court citations as a measure of success, and secondarily with other judicial citations. He gives short shrift to the agencies many scholars are indeed influencing. This is not a minor oversight: bureaucracies shape vast swathes of American life daily, with billions of dollars in measurable influence.<sup>39</sup> Health law scholars like Tim Jost have great (and positive) impact as they serve advisory bodies considering complex issues in

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36. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 308-10 (Arthur Goldhammer trans., 2004) (1835); ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* (2001).

37. Michael Dorf, *Judge Harry Edwards Is Still Unimpressed With Legal Scholarship*, DORF ON LAW (Dec. 15, 2014), <http://www.dorfonlaw.org/2014/12/judge-harry-edwards-is-still.html> ("the complaints of Judge Edwards, Justice Breyer, Chief Justice Roberts, and the other critics of legal scholarship rest on nothing more than an occasional perusal of the covers of law reviews.").

38. See Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), <http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html>; see also Paul Caron, *More on the New York Times' Perspective on Law Reviews*, TAXPROF BLOG (Oct. 22, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/10/more-on--1.html](http://taxprof.typepad.com/taxprof_blog/2013/10/more-on--1.html). Judge Dennis G. Jacobs, quoted by Liptak as forcefully dismissing the relevance and use of law reviews, has in fact "cited law reviews dozens of times in his years on the bench." Jack Chin, *Getting Law Review Fans out of the Closet: Liptak on Jacobs and Waxman*, PRAWFSBLAWG (Oct. 21, 2013), <http://prawfsblawg.blogs.com/prawfsblawg/2013/10/getting-law-review-fans-out-of-the-closet-liptak-on-jacobs-and-waxman.html>.

39. As Robert Condlin has documented:

[There are] numerous contributions [of] legal scholarship to the development of law over the years. See, e.g., . . . ROBERT H. BORK, *THE ANTITRUST PARADOX* (2d ed. 1993) (antitrust); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (property); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law, Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (environmental protection); . . . Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007), available at <http://www.democracyjournal.org/5/6528.php> (consumer financial protection); GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (product safety) . . . See THE CANON OF AMERICAN LEGAL THOUGHT (David Kennedy & William Fisher III eds., 2006) (describing twenty law review articles that have had a profound effect on the shape of American law and legal institutions); Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1 (2011) (describing the influence of legal business law scholarship on the decisions of the Delaware Supreme Court).

Robert J. Condlin, "Practice Ready Graduates": *A Millennialist Fantasy*, 31 TOURO L. REV. 75, 84 n.28 (2014). See also Brian Leiter, *Legal Scholarship That Has Affected the Law*, BRIAN LEITER'S LAW SCHOOL REPORTS (Sept. 21, 2015), <http://leiterlawschool.typepad.com/leiter/2015/09/legal-scholarship-that-has-affected-the-law.html>.

insurance law.<sup>40</sup> Thomas Greaney recently testified before Congress on hospital mergers.<sup>41</sup> The decades of expertise and unbiased, objective views these scholars bring to policymakers are invaluable to informed policy debates.

Another example may be found in Saule T. Omarova's article, *The Merchants of Wall Street*, which helped spark the Federal Reserve to re-examine its regulation of bank holding companies.<sup>42</sup> Public interest groups have given her a great deal of credit for illuminating shadowy financial practices, which make little if any contribution to productivity and impose great costs on the real economy.<sup>43</sup> If an article catalyzes regulatory change that saves the economy billions of dollars, does the failure of courts to cite it diminish its value? Indeed, would it not be *more valuable* to convince an agency or corporation to shift course, rather than sparking litigation or legislative efforts to force it to do so? Consider the scholarship of Danielle Keats Citron and Mary Ann Franks on revenge pornography: they have spurred large internet firms like Google and Microsoft to change their policies on the topic, even before serious litigation or consumer boycotts against them could commence.<sup>44</sup>

We might also want to compare the allegedly rotten state of legal scholarship to that in other areas. Is pharmaceutical research much better?<sup>45</sup> Psychology?<sup>46</sup> What about economics?<sup>47</sup> Finance?<sup>48</sup> Medical inquiry?<sup>49</sup>

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40. See, e.g., Press Release, National Association of Insurance Commissioners, NAIC Names 2014 Consumer Liaison Representatives (Dec. 13, 2013), available at [http://www.naic.org/Releases/2013\\_docs/naic\\_names\\_2014\\_consumer\\_liaison\\_representatives.htm](http://www.naic.org/Releases/2013_docs/naic_names_2014_consumer_liaison_representatives.htm).

41. Robert Pear, *House Hearing on Insurers' Mergers Exposes Health Care Industry Divide*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/11/us/house-hearing-on-insurers-mergers-exposes-health-care-industry-divide.html>.

42. David Kocieniewski, *A Shuffle of Aluminum, but to Banks, Pure Gold*, N.Y. TIMES (July 20, 2013), [http://www.nytimes.com/2013/07/21/business/a-shuffle-of-aluminum-but-to-banks-pure-gold.html?\\_r=1](http://www.nytimes.com/2013/07/21/business/a-shuffle-of-aluminum-but-to-banks-pure-gold.html?_r=1).

43. See, e.g., Bartlett Naylor, *Big Banks: Big Appetites: The Consequences When Banks Swallow Commodities*, PUBLIC CITIZEN 7 (Apr. 4, 2014), available at <http://www.citizen.org/documents/banking-commodities-consequences-repport.pdf>.

44. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014); Amit Singhal, "Revenge Porn" & Search, GOOGLE PUBLIC POLICY BLOG (June 19, 2015), <http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html>.

45. BEN GOLDACRE, *BAD PHARMA: HOW DRUG COMPANIES MISLEAD DOCTORS AND HARM PATIENTS* (2012).

46. *Trouble at the Lab*, ECONOMIST (Oct. 19, 2013), <http://www.economist.com/news/briefing/21588057-scientists-think-science-self-correcting-alarming-degree-it-not-trouble>; B.A. Nosek et al., *Estimating the reproducibility of psychological science*, 349 SCIENCE 6251 (Aug. 28, 2015).

47. Jared Bernstein, *Is Economics a Science?*, HUFFINGTON POST BLOG (Aug. 26, 2013, 9:02 AM), [http://www.huffingtonpost.com/jared-bernstein/is-economics-a-science\\_b\\_3816471.html](http://www.huffingtonpost.com/jared-bernstein/is-economics-a-science_b_3816471.html); Andrew C. Chang and Phillip Li, *Is Economics Research Replicable? Sixty Published Papers from Thirteen Journals Say "Usually Not"*, Finance and Economics Discussion Series 2015-083. Washington: Board of Governors of the Federal Reserve System, <http://dx.doi.org/10.17016/FEDS.2015.083> (2015).

Econometrics?<sup>50</sup> The larger lesson is clear: if one's only point of reference is legal scholarship itself, it is easy to commit the Nirvana Fallacy, presuming the existence of some paradisiacally pure realm of inquiry. Kuhn's history of science gives evidence of recurrent crises of confidence in even the "hardest" fields.<sup>51</sup> Indeed, to the extent legal scholars openly debate questions of methodology and purpose, they exemplify a disciplinary milieu particularly capable of recognizing and correcting errors.

Citation patterns may help us discern truly important work. But *lack* of citation isn't nearly as damning as many make it out to be. There are documented problems with "citation cartels" and insular groups of scholars who cite each other and shut out those who fail to conform to their narrow methodology.<sup>52</sup> Citation can be driven by many motives other than the excellence of work. The Supreme Court has drifted to the right on many issues over the past three decades.<sup>53</sup> Does that somehow diminish the quality of scholarship that fails to support its policy positions? Politics and social science are distinct vocations, and while the utility of an article in a given case may suggest its importance, validity, or rigor, the reverse is not the case.

Moreover, many of those who work in transactional or administrative fields don't aspire to be cited by courts. Many legal academics have had very important roles at the Federal Trade Commission, Federal Communications Commission, Food and Drug Administration, and other agencies. Articles that are rarely if ever quoted by courts or widely cited by other scholars may be very important to agencies—indeed, work of very narrow relevance, understandable to only a small handful of other academics, may unravel complex legal issues that regulators are too busy to address by themselves. This work is highly influential, precisely because of its narrow, technical focus. I know that my work on the law of health information technology will never be cited as often as my work on the law

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48. Richard Robb, *An Epistemology of the Financial Crisis*, 25 CRITICAL REV. 131 (2013); Luigi Zingales, *Does Finance Benefit Society*, Presidential Address, American Finance Association, January, 2015, at <http://faculty.chicagobooth.edu/luigi.zingales/papers/research/Finance.pdf>.

49. PHILIP MIROWSKI, *SCIENCE-MART: PRIVATIZING AMERICAN SCIENCE* (2011).

50. *Leamer on the State of Econometrics*, ECON TALK HOSTED BY RUSS ROBERTS (Library of Economics and Liberty, May 10, 2010), [http://www.econtalk.org/archives/2010/05/leamer\\_on\\_the\\_s.html](http://www.econtalk.org/archives/2010/05/leamer_on_the_s.html).

51. THOMAS S. KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

52. Phil Davis, *The Emergence of a Citation Cartel*, THE SCHOLARLY KITCHEN (Apr. 10, 2012), <http://scholarlykitchen.sspnet.org/2012/04/10/emergence-of-a-citation-cartel/>.

53. Justin Ewers, *Ranking the Politics of Supreme Court Justices: Four of the Five Most Conservative Justices Since 1937 Are on the Bench Today*, U.S. NEWS & WORLD REP., May 12, 2008, available at <http://www.usnews.com/news/national/articles/2008/05/12/ranking-the-politics-of-supreme-court-justices>.

of search engines, but I would question any simple judgment that the former is less important than the latter. Critics of the legal profession may lament regulatory complexity—but barring some revolutionary evisceration of millions of pages of rules and adjudications, disinterested legal expertise will continue to be vital to their fair administration.

Legal scholarship drawing from philosophy, literature, or history also brings venerable humanistic insight to students, practitioners, and courts. These fields also frequently utilize the work of legal scholars. The humanities can reward practitioners with insights unforeseeable at the time research is undertaken. The work of legal historians can, indirectly, influence matters ranging from gun control to ERISA, but they often have no idea when they start researching what their inquiries will lead to.<sup>54</sup> To simply write them off if they don't happen to appear in a court decision (or get cited by some critical mass of other authors) is deeply anti-intellectual, and reminiscent of Sarah Palin's crude dismissal of "fruit fly research" and other basic science.<sup>55</sup> Palinesque contempt for anything without immediate application has already deeply deformed research in other fields.<sup>56</sup> It would be a shame to see it warp legal scholarship as well.

### III. BALANCING MARKET DEMANDS AND PROFESSIONAL INTEGRITY: LAWYERS BEYOND LAW FIRMS

The professional training mission of law schools has also attracted the attention of critics, and contradictory demands. For some, the key measure of law school outcomes is the percentage of students with JD-required jobs within nine months of graduation.<sup>57</sup> Others argue that traditional law jobs are fading, and professionals of the future will need to combine skills to meet ever-changing demands of clients and employers. These are conflicting demands for accountability; law schools that concentrate on the JD-required segment of the market are rendering themselves (and their students) vulnerable to future labor market disruptions, while those that anticipate such interprofessional evolution in legal practice may fall behind in the current race to generate JD-required placements.

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54. John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003).

55. Ben Armbruster, *Memo to Palin: Fruit Fly Research Has Led to Advances in Understanding Autism*, THINK PROGRESS (Oct. 24, 2008, 11:43 AM), <http://thinkprogress.org/politics/2008/10/24/31264/palin-fruit-flies/>.

56. See PHILIP MIROWSKI, *SCIENCE MART: PRIVATIZING AMERICAN SCIENCE* (2011); see also WENDY WAGNER AND TOM MCGARITY, *BENT SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* (2012); *Sounding the Alarm for Basic Science Research Funding*, ON POINT WITH TOM ASHBROOK (Oct. 15, 2003), <http://onpoint.wbur.org/2013/10/15/nobel-prize-research-funding>.

57. *The Competition is for Full-Time, Professional Law-Related Jobs, Part II*, LEGAL WHITEBOARD (June 30, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/06/>.

Law schools have long reported employment outcomes about their students. Some have been caught exaggerating their figures and have been disciplined for that cheating.<sup>58</sup> An infraction common before 2010 was reporting median salary figures (from respondents who did not adequately represent their class) as the main or only representation of employment outcomes.<sup>59</sup> Spurred by calls for transparency, law schools' reporting has noticeably tightened up since 2010. The ABA now posts disclosures of *all* graduates' employment outcomes nine months after graduation.<sup>60</sup> Granular reporting has enabled some websites to offer comparisons of job outcomes for subcategories of employment: "JD-required," "JD-advantaged," and other categories are available.<sup>61</sup> But for many law school critics, JD-advantaged jobs are seen as far less valuable than the other categories.<sup>62</sup>

Such valuation may be contestable. For example, Deborah Jones Merritt argues that since 46.8% of 2011 law school graduates with JD Advantage jobs reported that they were seeking other work, there is evidence that such jobs are undesirable.<sup>63</sup> However, responsible career experts advise that young workers should often be looking for another,

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58. Carl Bialik, *Law-School Jobs Data Under Review*, WALL ST. J. (Mar. 16, 2012), <http://blogs.wsj.com/numbers/law-school-jobs-data-under-review-1126/>. *But see* Michael Simkovic, *What "Employment" and "Unemployment" Mean*, LEITER LAW SCHOOL REPORTS (Apr. 1, 2015), <http://leiterlawschool.typepad.com/leiter/2015/04/what-employment-and-unemployment-mean-michael-simkovic.html%20> ("Some law school critics have claimed that anyone who fails to respond to a survey about their employment status should be assumed to be unemployed. The Census and BLS disagree, and instead weight the data to account for non-respondents.")

59. *See* Michael Simkovic, *Standardized Measurement and its Discontents*, BRIAN LEITER'S LAW SCH. REPS. (Apr. 21, 2015), <http://leiterlawschool.typepad.com/leiter/2015/04/standardized-measurement-and-its-discontents.html>; Michael Simkovic, *What "Employment" and "Unemployment" Mean*, BRIAN LEITER'S LAW SCH. REPS. (Apr. 1, 2015), <http://leiterlawschool.typepad.com/leiter/2015/04/what-employment-and-unemployment-mean-michael-simkovic.html>; Brian D. Galle, *A (Very) Brief Note on Law Employment Statistics*, PRAWFSBLAWG (Apr. 22, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/04/a-very-brief-note-on-law-employment-statistics.html> (commenting on Simkovic).

60. ABA Section of Legal Education and Admissions to the Bar, Protocol for Reviewing Law Graduate Employment Data, and Statement of Procedures for Collecting, Maintaining, and Reporting Law Graduate Employment Data—Final 3 (June 9, 2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2014\\_june\\_protocol\\_and\\_statement\\_employment\\_data\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_june_protocol_and_statement_employment_data_final.authcheckdam.pdf).

61. *See, e.g., Detailed Analysis of JD Advantage Jobs*, NALP (May 2013), [http://www.nalp.org/jd\\_advantage\\_jobs\\_detail\\_may2013](http://www.nalp.org/jd_advantage_jobs_detail_may2013); Sam Flanigan and Robert Morse, *Methodology: 2016 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 9, 2015), available at <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

62. Jill Backer, *J.D. Advantage Versus J.D. Required: The Old Rules No Longer Apply*, N.Y.L.J. (Apr. 20, 2015), <http://www.newyorklawjournal.com/id=1202723607549/JD-Advantage-Versus-JD-Required-The-Old-Rules-No-Longer-Apply?slreturn=20150920155405>.

63. Deborah J. Merritt, *Straight Talk About JD Advantage Jobs*, LAW SCHOOL CAFE (Apr. 28, 2013), <http://www.lawschoolcafe.org/thread/straight-talk-about-jd-advantage-jobs/>.

better position.<sup>64</sup> Someone who followed their advice, but was satisfied in his job, would clearly count as part of the 46.8% of those with JD Advantage jobs who reported that they were seeking other work. Moreover, 2011 was a particularly bad year for placements—one of the largest classes in decades, graduating into a fragile economy.<sup>65</sup> As Michael Simkovic and Frank McIntyre have argued, law school critics are prone to seize on cyclical phenomenon (such as recession-inflected job satisfaction or job placement data) as evidence of fundamental structural changes that, while often predicted in the past, did not materialize.<sup>66</sup> First the copy machine was supposed to destroy large sectors of legal employment; then computerized research; then e-discovery.<sup>67</sup> Instead, computerization has oft-proven to be *more* complementary to employment than substitutive for it among high-skilled professionals.<sup>68</sup>

Many J.D.-advantaged jobs are in settings that involve regulation, lobbying, legislation (on the local, state, and national level), government affairs, community affairs, helping professions (such as care coordination), and compliance.<sup>69</sup> To discount their standing may inadvertently reinforce the prestige of those who do corporate defense work. Is the value of the work of a state legislator (non-JD-required job) who is, say, trying to force the disclosure of cigarette ingredients, that much lower than the corporate attorney (JD-required job) suing under the Fifth and Fourteenth Amendments to prevent a “taking” of his clients’ trade secrets? Is a palliative care coordinator (not JD-required) that much worse a job than a medical malpractice attorney?

Myriad other questions confront those who would make JD-required status the *sine qua non* of student placement success. Some positions may need to be designated as “non-JD-required” for statutory or political

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64. This advice is roundly disseminated by LinkedIn founder Reid Hoffman in his recent, influential work, *The Alliance*.

65. Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL STREET J. (Jun. 25, 2012), <http://www.wsj.com/articles/SB10001424052702304458604577486623469958142>.

66. Simkovic & McIntyre, *supra* note 3, at 252-57.

67. *Id.*

68. See Frank Pasquale and Glyn Cashwell, *Four Futures of Legal Automation*, 63 UCLA L. REV. DISC. 28 (2015); Paul Caron, *<4% Chance That Lawyer, Professor Jobs Will Be Replaced By Technology*, TAXPROFBLOG (May 22, 2015), [http://taxprof.typepad.com/taxprof\\_blog/2015/05/4-chance-that-lawyer-professor-.html](http://taxprof.typepad.com/taxprof_blog/2015/05/4-chance-that-lawyer-professor-.html); Carl Benedikt Frey & Michael A. Osborne, Oxford Martin Sch., *The Future of Employment: How Susceptible are Jobs to Computerisation?* 41 (Sept. 17, 2013), available at [http://www.oxfordmartin.ox.ac.uk/downloads/academic/The\\_Future\\_of\\_Employment.pdf](http://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf). Frey is an expert in economics and business and Osborne is an expert in robotics. They believe that “for the work of lawyers to be fully automated, engineering bottlenecks to creative and social intelligence will need to be overcome.” *Id.*

69. *Detailed Analysis of JD Advantage Jobs*, *supra* note 62; see also Backer, *supra* note 63.

reasons, even if legal understanding is critical to the job being done right.<sup>70</sup> There is also considerable variation of quality among both the JD-advantaged and JD-required jobs. How do we convey quality of job? Timing issues also confound ostensibly data-driven work here, since the jobs counted are at a snapshot in time—9 to 10 months after graduation<sup>71</sup>—when a graduate will likely be earning less than they will at any time over the next three or four decades of work. If a student takes one to four years to raise a child after law school, is that an indication of the school's failure—or a perfectly respectable lifestyle choice? Should schools screen very carefully to be sure that, whoever they admit, that person will practice law within nine months after graduating? If so, the JD-required job measure is a clear incentive to admit scions of various legal aristocracies, nearly-guaranteed some type of legal job by connected relatives. The question of familial connections in employment placement is a topic rarely, if ever, confronted by would-be private regulators of law school disclosures. Yet if they were serious about addressing the true “value-added” by a school, it would of course need to be addressed.

This is a surprisingly common problem among education reformers. They will evoke pay-for-performance or other outcome measures in health care reform, and encourage educational institutions to follow its lead.<sup>72</sup> But health care policymakers have only adopted such reforms in fits and starts after *decades* of wrangling about risk-adjustment—i.e., how to measure the actual contribution of an insurer or provider to someone's health, *adjusted* by the person's health conditions when they were treated. It is obviously more difficult to treat an 85-year-old heart attack patient with 10 comorbidities than it is to treat a 40-year-old one with none, and risk-adjustment tools take that difference into account in assessing virtual networks like Accountable Care Organizations.<sup>73</sup> But law school reformers have, by and large, failed to grapple with this issue when commending various performance measures for law schools. Without taking the flaws,

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70. See OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES (2009), available at <http://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf>; see also Adam Levitin, *Robosigning 2.0: Mortgage Foreclosure File Reviewers*, CREDIT SLIPS (Oct. 8, 2011), <http://www.creditslips.org/creditslips/2011/10/robosigning2.html> (lamenting the futility of foreclosure review by non-attorneys).

71. Bialik, *supra* note 59.

72. JAMIE MERISOTIS, AMERICA NEEDS TALENT 74 (2015) (discussing “objective indicators” of health from blood tests, and suggesting that educational institutions find analogues for measuring talent, but failing to adequately acknowledge the development of risk adjustment in the health care context to make such outcome measurement fair.)

73. Frank Pasquale, *Accountable Care Organizations in the Affordable Care Act*, 42 SETON HALL L. REV. 1371, 1379 (2012) (“CMS will reward the provision of quality care by giving providers participating in the ACO a share of the savings if *risk-adjusted*, per-beneficiary spending levels came in below a benchmark set by the agency at the outset.”) (emphasis added).

inadequacies, and gaps in data seriously, they are inviting gaming and risk selection among the entities they claim to aspire to improve.<sup>74</sup>

Nor do law school critics tend to openly consider the conflicts of interest that reporting requirements can generate. A professor, for instance, may face recurrent dilemmas: counsel a student to take a low-level JD-required job (to guarantee a boost to her school's ranking), or to take a more lucrative or interesting JD-advantage job? Or to take a year or two years to find exactly the right job, when the professor has been told by the student that the student is likely to be supported by other family members over that time period?

More data may improve measurement—or may further complicate decisionmaking. One potential “clarification” of employment outcomes is on the horizon: starting salaries. These statistics are vital to business school rankings now and are likely to play a larger role for law schools.<sup>75</sup> But they, too, can be misleading. As Michael Simkovic and Frank McIntyre have shown, salaries for lawyers in their first decade out of law school tend to rise rapidly.<sup>76</sup> A more representative set of figures would include the starting 5-year and 10-year salaries—as well as Simkovic & McIntyre's calculation of the career-long value of the degree. But journalists cautious about information overload (or simply too overburdened to compile a more nuanced and complete picture) are far more likely to focus on the simple starting salary statistics.

Such reductive figures also mislead in another way: focusing attention on only one component of the *social value* of attorneys. For example, a public interest attorney fighting lead paint poisoning (and paid \$35,000 a year) by suing scofflaw slumlords is probably far more valuable to society than the associate paid \$180,000 per year to come up with legal arguments to deflect their liability.<sup>77</sup> Given the gravity and magnitude of

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74. For another example of coarse ranking information misleading consumers, see Timothy P. Glynn & Sarah A. Waldeck, *Penalizing Diversity: How School Rankings Mislead the Market*, 42 J. L. & EDUC. 417, 419 (2013) (“There is a growing body of literature on the market distortions caused by faulty rating and ranking system methodologies. Indeed, high-profile controversies include the ratings agencies' failure to identify the financial risks that contributed to the economic downturn, the deleterious effects and perverse incentives of law school rankings, and concerns regarding manipulation of the algorithms that determine Internet search results. In all of these instances, misinformation has encouraged the relevant actors to make a series of suboptimal choices, which have caused varying degrees of harm.”).

75. Lindsay Gellman, *Do Business-School Rankings Matter?*, WALL ST. J. (Mar. 4, 2015), <http://www.wsj.com/articles/do-business-school-rankings-matter-1425517222?alg=y>.

76. Simkovic & McIntyre, *supra* note 3, at 261; Michael Simkovic & Frank McIntyre, *Economic Value of a Law Degree: PowerPoint Presentation* 8, 33 (May 18, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2270175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270175).

77. NEW ECONOMICS FOUNDATION, A BIT RICH: CALCULATING THE REAL VALUE TO SOCIETY OF DIFFERENT PROFESSIONS (2009), [http://b.3cdn.net/nefoundation/8c16eabdbadf83ca79\\_ojm6b0fzh.pdf](http://b.3cdn.net/nefoundation/8c16eabdbadf83ca79_ojm6b0fzh.pdf) (contrasting the social and market value of various occupations). For information on the extraordinary

environmental racism, hybrid, inter-professional positions may be necessary to advance social justice for afflicted communities. But in order to make them available to the widest possible range of applicants, hiring agencies may deem them non-JD-required. Ironically, some of the harshest critics of law schools' records in placing students in JD-required jobs have also attacked occupational licensure requirements. They cannot have it both ways: if requiring a JD for a job is an affront to free-market ideals, it cannot simultaneously serve as the be-all and end-all for measuring law schools' educational performance.

Among social media savvy commentators on the legal profession, there is a constant drumbeat of alarmed, amused, or exhortatory posts on the supposed insularity of lawyers from business practice, economic reality, statistical knowledge, new technology, and computational advances in e-discovery. Some sincerely believe that law schools are still preparing lawyers to practice as they did in the 1870s (certainly a surprise to students learning about the 2013 Omnibus HIPAA rulemaking in my Health Information, Privacy, and Innovation class). All these sources foresee a future where large portions of what attorneys now do is swept away from them and instead completed by nimble teams of "legal process automators" and "project managers."<sup>78</sup> To compete in that new reality, attorneys are supposed to learn and practice a broad spectrum of skills. But many of the very jobs best positioned to enable them to do that—where the JD is framed as one part of a repertoire of team-based, inter-professional expertise—are dismissed as trivial or worse by new law school rankings based only on JD-required jobs. They do not count *at all* toward a law school's relative standing in at least one ranking.<sup>79</sup> Thus for *Above the Law* they count even less than "number of SCOTUS clerks per year," a well-nigh freakish placement outcome for over 90% of schools, given the Court's well-documented proclivity for hiring the vast majority of their clerks from twenty or so schools.<sup>80</sup> Like Adam Liptak's fixation on

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externalities of lead paint, *see* GERALD MARKOWITZ AND DAVID ROSNER, *LEAD WARS: THE POLITICS OF SCIENCE AND THE FATE OF AMERICA'S CHILDREN* (2013).

78. *See* Daniel Martin Katz, *Quantitative Legal Prediction – Or – How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 *EMORY L.J.* 909 (2013); Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 *IOWA L. REV.* 1649 (2011).

79. *Top 50 Law Schools 2015:Methodology*, ABOVE THE LAW, <http://abovethelaw.com/careers/2015-law-school-rankings/#methodology> (last visited June 3, 2015) (ranking law schools based 30% on "full-time, long-term jobs requiring bar passage"; 30% on top-250 law firm jobs and federal law clerk jobs; 7.5% on SCOTUS clerkships; 7.5% on federal judgeships; 15% on cost; 5% on "alumni rating"; and 5% on "debt per job").

80. Oliver Roeder, *The Most Conservative and Most Liberal Elite Law Schools*, FIVETHIRTYEIGHT (Dec. 5, 2014), <http://fivethirtyeight.com/features/the-most-conservative-and-most-liberal-elite-law-schools/>; *see also* Dahlia Lithwick, *Yale, Harvard, Yale, Harvard, Yale, Harvard, Harvard, Harvard*,

Supreme Court citations of legal scholarship, ATL's strange decision to weight SCOTUS clerkships more than JD-advantaged jobs reflects an unfortunate disregard among legal elites for administrative, compliance, human resources, and government relations work.

2015]

Synergy and Tradition

45

IV. AFFIRMING THE SYNERGY OF SCHOLARSHIP,  
TEACHING, AND SERVICE

Current debates over higher education are dominated by a neoliberal logic of extraction that ignores or subverts the vital role educators have to play in serving our society. They prominently feature venture capitalists, private equity firms, and think tanks trying to “disrupt” traditional research universities with ill-tested technological solutionism (but well-proven profit maximization strategies).<sup>81</sup> This hostile policy environment seriously endangers the teaching, service, and research mission of law schools.

This essay has tried to highlight the most troubling, potentially contradictory, critiques of law schools. For easy reference, the following chart summarizes them:

POTENTIALLY CONTRADICTIONARY CRITIQUES OF LAW SCHOOLS

<i>Parasite/ Cash Cow</i>	Law schools are a cash cow: they soak their students to support the rest of the university.	Law schools are parasites: universities should stop subsidizing them and shut them down.
<i>Selfish/ Political Faculty</i>	Law professors are selfish; they don't give enough of their own time to help their community (in the case of those non-clinical professors who do little measured or publicized community service).	Law professors who provide community service are constantly taking sides, overwhelmingly for the poor, criminals, and for environmental protection. Their comparative neglect of the rich, victims of crime, and polluting businesses shows just how biased they are.

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81. Watters & Goldrick-Rab, *supra* note 6. For a definition of “solutionism,” see EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM (2013).

<i>Biased/ Useless Research</i>	Professors who don't practice don't know what real lawyering is.	Professors who do practice are inaccessible to students because they're too busy.
	Professors who bring their research into the classroom are imposing their views on students.	Professors who don't bring their research into the classroom prove how worthless and impractical that research is.
<i>Changing Job Market Dilemmas</i>	The key measure of law school outcomes is the percentage of students with JD-required jobs within 9 months of graduation.	Traditional law jobs are fading; professionals of the future will need to combine skills in non-JD-required work to meet ever-changing demands of clients and employers.
<i>Curricular &amp; Staff Reform vs. Cost Cutting</i>	Students need to be practice-ready, so law schools must expand their offerings of small courses that focus on practical skills.	Students need cheaper legal educations, so law schools must cut back on offering small expensive courses.
	Law schools need to offer more student services, especially in career placement.	Law schools need to cut student services to reduce costs.

To be sure, there are many ways the median U.S. law school can improve. But it can only do so in a durable and sustainable manner within present institutional frameworks. Disruption is far from a panacea; rather, it is far more likely to precipitate a race to the bottom already documented in many online contexts.<sup>82</sup> To the extent unacceptable employment levels

82. For a list of online law school failures, see Frank Pasquale, *Bootleggers and Baptists in the Student Loan Debate*, BALKINIZATION (Oct. 25, 2015), <http://balkin.blogspot.com/2015/10/bootleggers-and-baptists-in-student.html> ("At one for profit, online California law school, only one in five students graduates."). For a more positive view of online education as a potential complement to extant legal education, see Philip G. Schrag, *MOOCs and Legal Education: Valuable Innovation or Looming Disaster*, 59 VILL. L. REV. 83 (2014) ("MOOCs can interact with and support, rather than destroy . . . a system of legal education that the nation's universities have taken a century to develop."). For more on

afflict law school graduates, there are a variety of policy and practical responses available. Income-based loan repayment programs have grown in popularity, and should be strengthened.<sup>83</sup> More topical courses and practical training opportunities may be offered (and have been growing in popularity for at least a decade). Employers must also shoulder some responsibility here.<sup>84</sup> Systems of screening and matching applicants to work have become unduly bureaucratized and rigid. A competition for income among top managers (and law firm partners) has cut back on positions available, shifting excess work to remaining employees. A paradox of excess and deprivation reigns: as some young attorneys clock sixty- to eighty-hour weeks, others have no work at all. The maldistribution of work saves on benefits and office costs, but it is not physically sustainable for the overworked, or economically sustainable for the underemployed.

Relentless efforts to deprofessionalize (and thus reduce the compensation) of young attorneys reflect a neoliberal ideological program of increasing returns to capital. In the paradoxical labor economics of neoliberalism, a worker's lost wages are the economy's gain. Too many commentators are trying to excuse low wages as the just deserts of low productivity, when in fact they merely reflect asymmetries of power. To be more precise: unpaid internships and low-paid low-seniority attorneys are a windfall for the shareholders and top managers at the corporations that hire law firms. Judge Jose Cabranes was quite explicit about praising such "efficiencies" when he pushed a two-year degree in 2012.<sup>85</sup> The third year would be an apprenticeship in his model, and "firms could hire apprentices at lower salaries than first-year associates, train them in practice, and bill them out at rates clients would be willing to pay."<sup>86</sup> One wonders if the Judge's next proposal will be to repeal remaining Fair Labor Standards Act strictures on unpaid internships.<sup>87</sup> There would certainly be many more

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the tensions between commercial and eleemosynary aims of extant MOOCs, see James Grimmelmann, *The Merchants of MOOCs*, 44 SETON HALL L. REV. 1035 (2014) ("American higher education doesn't just educate a great many students . . . ; it also generates a great deal of research and provides a stabilizing and humane institution in society, one dedicated to the long-term flourishing of humanity. It does so by linking these three missions--teaching, scholarship, and service--and vesting them in the same faculty. They are linked for a reason, and we should not lightly sever those bonds.").

83. Frank Pasquale, *Democratizing Higher Education*, LOY. CONSUMER L. REV. (forthcoming, 2016) (making the case for extending income-based repayment, reducing loan interest rates, and accelerating loan forgiveness, given that loans have replaced what has traditionally been public provision for much higher education).

84. PETER CAPPELLI, WHY GOOD PEOPLE CAN'T GET JOBS 23-26 (2012).

85. Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 605 (2012) (quoting Cabranes).

86. *Id.*

87. Christopher Zara, *All Work, No Pay: Seeking Justice for Unpaid Interns, One Lawsuit at a Time*, INT'L BUS. TIMES (Feb. 1, 2013), <http://www.ibtimes.com/all-work-no-pay-seeking-justice-unpaid-interns-one-lawsuit-time-1052242>.

clients willing to pay nothing.<sup>88</sup> That simple deregulatory step could solve under-employment in a snap.<sup>89</sup>

On the other hand, we should not be too quick to label technocratic managers' or techno-utopians' current scramble to change law schools as either "deregulation" or "reform." It is simply one more change in institutional form that will help a narrow set of constituencies and disadvantage others. Just as the Frist family and Rick Scott found ways to make fortunes from the changing economics of health care, for-profit firms are angling to take advantage of law school "disruption."<sup>90</sup> And whenever they fail to improve outcomes for graduates, they will defend themselves by counseling a doubling down on deprofessionalization.

Bar associations and policymakers should resist that path. Institutions of higher education have broad and diverse goals that are inextricably intertwined. Cheap, technologically driven, quick fixes for solving the access problem in higher education are not the answer. Neither a rapid rise in online courses, nor loosened accreditation standards, nor the reconfiguration of universities as mere certifiers validating the acquisition of skills and learning elsewhere, have much promise as strategies to increase workforce preparedness. They also menace the many other missions of law schools.

Stripped down options should not be permitted to prompt a predictable race to the bottom in educational quality or narrowing of mission to maximization of graduates' starting salaries. As Australia learned when it made vocational education "contestable" (i.e., gave support to students in a variety of untested or barely validated options), there are numerous entities capable of cutting corners, or even offering an entirely valueless "education" to students.<sup>91</sup> Diploma mills, unchecked, can be enormously tempting profit centers for owners and credential granters for unscrupulous students. The recent findings of the Senate Health, Education, Labor, and

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88. David Lat, *Government Should Allow Most Unpaid Internships*, N.Y. TIMES (July 18, 2013, 11:41 AM), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/government-should-allow-most-unpaid-internships>. Lat argues that "unpaid internships . . . are so popular right now because many employers, large and small, simply don't have the ability to create new, full-time, paid positions." *Id.* But one critical reason the employers can't "create new, full-time, paid positions" is because, if they do so, they will be undercut by competitors who use unpaid interns.

89. Steve Lohr, *Customer Service? Ask a Volunteer*, N.Y. TIMES (Apr. 25, 2009), <http://www.nytimes.com/2009/04/26/business/26unbox.html>.

90. Tristram Korten, *Rick Scott Profits off the Uninsured*, SALON (Sept. 30, 2009), [http://www.salon.com/2009/09/30/rick\\_scott\\_one/](http://www.salon.com/2009/09/30/rick_scott_one/).

91. John Ross, *Senate demands contestability review*, THE AUSTRALIAN (Feb. 12, 2015, 2:48 PM), <http://www.theaustralian.com.au/higher-education/senate-demands-contestability-review/story-e6frgcjx-1227217379191> ("private education companies had made hundreds of millions of dollars in profits from public subsidies at the same time public funding for technical and further education was being slashed.").

Pensions Committee on for-profit higher education in general should offer ample cautionary tales regarding sudden “disruption” in legal education.<sup>92</sup>

There is synergy among scholarship, teaching, and service; law schools are more than the sum of their parts.<sup>93</sup> Those that fragment and pursue a logic of specialization do so at their peril. As John Kay has argued, institutions that exist solely for narrow or profit-seeking goals often perform more poorly than those with more diverse or substantive goals.<sup>94</sup> Kay focused on businesses, such as successful pharmaceutical firms with a culture of medical research, which monetarily outperformed other, more financialized firms in their sector.<sup>95</sup> But his point applies *a fortiori* in the context of nonprofits in education. Far from obsolete, the traditional integration of scholarship, teaching, and service in law schools exemplifies a wise diversity of mutually supportive aims and missions.

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92. U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (2012). This four volume report documented numerous deceptive and fraudulent practices at schools ostensibly designed to be purely student and career focused.

93. Michael J. Madison, *The Lawyer as Legal Scholar*, 65 U. PITT. L. REV. 63 (2003); Michael J. Madison, *Visions of the Future of (Legal) Education*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2412238](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412238) (2014) (“A law school should be guided by a sense of what the products of law school should be. Scholarship is one essential product. . . . Law was one of the handful of disciplines that has been taught continuously in universities since those institutions were invented more than 800 years ago. I see no good reason to abandon that tradition and lots of good reasons, including reasons that relate to the broad and effective education of new members of the profession, to continue it.”).

94. JOHN KAY, *OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY* 24-29 (2011).

95. *Id.*