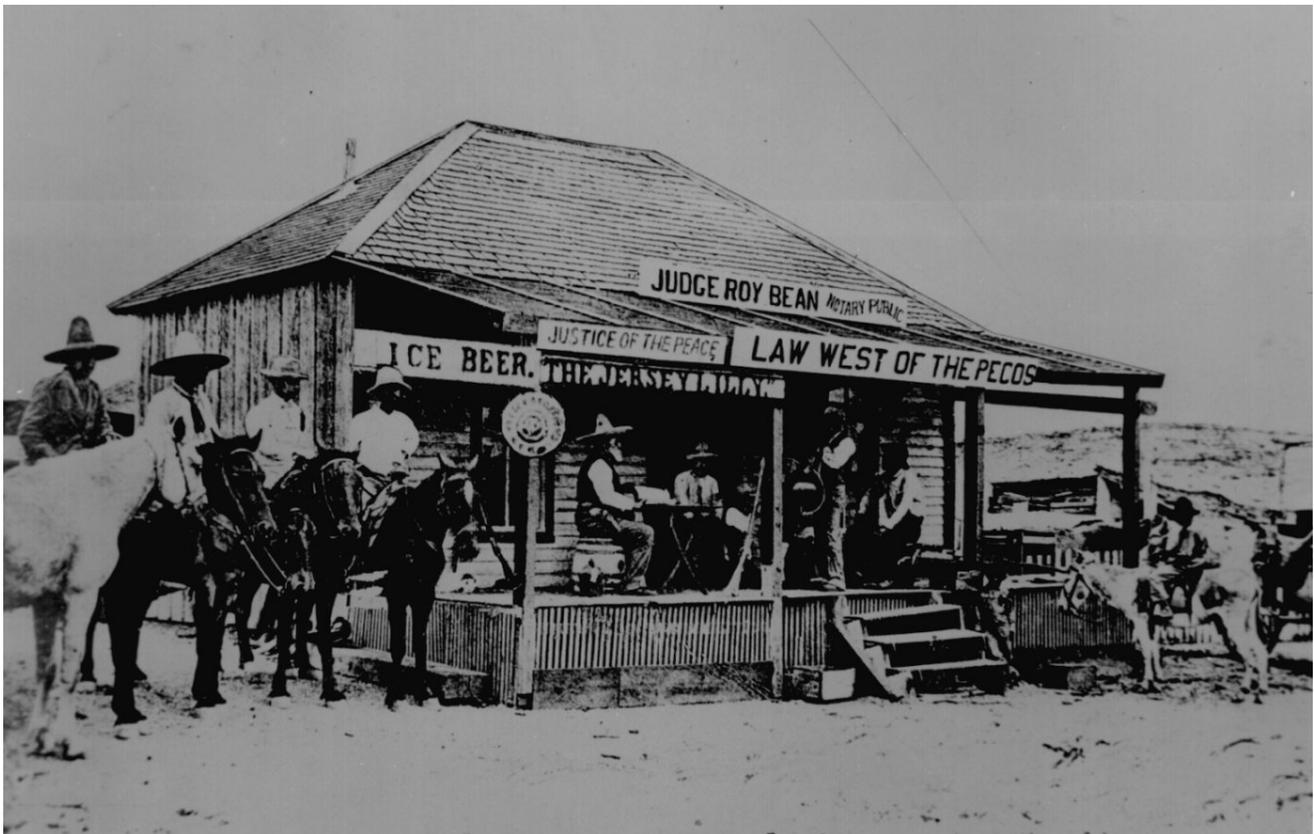


RADICAL TEACHER

A SOCIALIST, FEMINIST, AND ANTI-RACIST JOURNAL ON THE THEORY AND PRACTICE OF TEACHING

A Personal Reflection on Law Teaching, or How I Became an Establishment Insider on the Outside

By Michael A. Olivas



"JUDGE ROY BEAN, THE 'LAW WEST OF THE PECOS' HOLDING COURT AT THE OLD TOWN OF LANGTRY, TEXAS IN 1900, TRYING A HORSE THIEF. THIS BUILDING WAS COURTHOUSE AND SALOON." COURTESY OF LIBRARY OF CONGRESS

I assume that not all readers are *au courant* with the so-called crisis in legal education. Therefore, it may be useful to offer a brief description of the current problems of the legal profession and the consequent debate occurring among legal educators, bar officials, judges, and lawyers. Propelled by the recent attention to the decline in law school applications, the unseemly deception practiced by some legal educators to jigger important numbers, and the retrenchment in the legal services market, that debate has manifested itself in a proliferation of books, articles in journals and the higher education and legal trade press, and the blogosphere's dissemination of scholarship as well as the contrarian viewpoints from snarky disappointed law graduates. Because of the disproportionate role played by lawyers in U.S. society, there has been some concern about whether or not the current difficulties will end in a better situation or a return to a troubled Eden.

My own take on these various issues is that, though many see a crisis in legal education and are proposing draconian remedies, such an assessment is hyperbolic because (a) the problems are not new, even if they are more evident; (b) a number of the problems are not specific to law, but have characterized other professions and fields of study that compete for entrants; (c) law schools have made serious efforts to adjust, including some overdue downsizing; (d) students face increased difficulties in paying for their legal education, but Congress has acted to ameliorate some of the debt issues, in ways that have not yet fully played out, and, in any event, a number of schools provide part-time study; e) to the extent that there is a crisis, it is global and is most evident in the constriction of the traditional lawyer job market; and hence, f) it cannot be addressed solely by reforming U.S. legal education or even U.S. higher education overall. Even though it is not sexy or quotable to caution about overreaction, some of the suggestions for reform would likely harm more than help—especially the increased use of contingent faculty and the deregulation of the accreditation process. Virtually all the proposals have the same mantra—that the regulatory and accreditation process have led to cookie-cutter law schools and a failure to experiment. On the contrary, I see a great variety of experimentation, and a greater need for regulation and quality control.

I confess, it is an oddly-establishment position in which I have found myself lately, odd inasmuch as I have always viewed myself as an outsider to the legal education enterprise. I had always assumed that I would be remembered, if at all, for my work on the Dirty Dozen List, a shaming mechanism that I organized from approximately 1987, just five years after I entered law teaching, until about a dozen years later, when I declared victory and went home. I had identified nearly 40 law schools with no Latinos on their full-time faculty and successfully pressured the listed schools into hiring nearly 50 Latino and Latina law faculty. After investing a great deal of time and effort, I decided then that I would not continue to be the seed bank or racial cop, and ended the project.^[1] Today, there are over 240 Latino law faculty in the many ranks of law schools, and five of us have been selected to serve as presidents of the Association of American Law Schools (AALS) in the last ten years, including two in a row and

three of the last five. These may seem small victories, but they are huge symbolic and substantive achievements, akin to Justice Sonia Sotomayor having been seated on the U.S. Supreme Court.

A dozen years later, after a surprising turn as President of the AALS (the third of the five), I find myself in the odd position of being considered such an insider that critics of the enterprise have excoriated me as a knee-jerk defender of the faith and the status quo. One sad blogger denounced me as "A Profile in Academic Myopia,"^[2] while a recent legal scholar who wrote a critical book on legal education ridiculed public testimony I delivered for the AALS before accrediting authorities, defending tenure systems and full-time faculty governance. He sneered: "Olivas's suggestion that we perform the important task of modeling 'selflessness' for law students is specious at a time when legal educators are paid handsomely for what we do."^[3] While this *Radical Teacher* forum is not a venue for airing grievances (I was also accused of having a "ratty assed beard" to which, I suppose, I must plead guilty), it must be noted that critics from the right and the academic left have zeroed in on a handful of issues that have to do with pedagogy and the curricular delivery of legal education, which I acknowledge here so that outsiders will be aware that there are deep dissatisfactions in the legal academy, a number of which are generic and unlikely to be resolved in part because they are, well, unresolvable or due to economic restructuring beyond the control of law faculties.

I begin with the premise that many of the problems being encountered by legal education are cyclical, and that they have affected all of higher education, are contextual, vary across institutions and sectors, and are unlikely to resolve themselves apart from a general academic recovery.

But these are not new. They have surfaced in different guises throughout the history of legal education, and even within my thirty-plus years as a law teacher. In some respects, the recent dissatisfaction reminds me very much of other academic fields where there were once glory days, and where a major restructuring was undertaken, such as in the academic fields of English (which I left after my Master's degree, when I saw the likely employment possibilities), and the other Humanities, all with longstanding declines still in evidence. I insist that my arriving at these conclusions is not a sign of liberal indolence or faculty featherbedding (Tamanaha), of my being unsympathetic to students (*Third Tier Reality*), or of my being a liar (an American Bar Association (ABA) official said so in public).^[4]

I begin with the premise that many of the problems being encountered by legal education are cyclical, and that they have affected all of higher education, are contextual, vary across institutions and sectors, and are unlikely to

resolve themselves apart from a general academic recovery. All law teachers should be concerned with the fast-churning events and troubled by a number of the markers and revelations, and many are. A leading Cassandra is Professor Brian Z. Tamanaha, whose apocalyptic 2012 book *Failing Law Schools* is a shrill call to arms, a substantial work of powerful charges and dire solutions, well-written and arriving at a crucial time in legal education, in the United States and worldwide. I give his views great deference because his book has captured the *zeitgeist*, because it is widely influential, and because his views contrast sharply with mine on how we might remedy the situation.

The Many Moving Parts in the Political Economy of Legal Education

Here, then, I list some of my assumptions about legal education, many of which I readily note are congruent with those of Professor Tamanaha. A number of states, faced with ruinous economic conditions, are reducing their subsidy to public collegiate institutions.^[5] This development and the rising cost of private education have meant that it is harder for students to finance education in any field of study without substantial borrowing.^[6] Many students already arrive at law schools with substantial obligations and compromised credit worthiness.^[7] Some states have privatized their public law schools, rapidly increasing the tuition prices.^[8] Private law school tuition costs have continued to outstrip the consumer price index.^[9] Thus, law student debt loads have also increased substantially. Professor Tamanaha is at his best in chronicling these developments, carefully laying out the way that debt issues arose, and giving examples of the extraordinary costs being incurred by the increased costs of legal educations, ones that have affected both ends of the spectrum, from the fabulously successful Yale Law School charging \$50,750 in 2010 to the lowest-tier John Marshall in Atlanta, whose students “graduated with an average law school debt of \$123,025, among the highest in the country. Many of its graduates did not get jobs as lawyers. Whether accredited or unaccredited, the school remains at the bottom of the Atlanta-area law school hierarchy and its students will have limited opportunities for employment.”^[10]

He attributes this dire situation to the required ABA accreditation process, where, he avers, opaque and collusive governance oversight enables legal educators to coerce all law schools into meeting higher (and more expensive) standards: “Now, however, students must pay a premium that attaches to accreditation, not just because it costs more to run an accredited law school but also because the market-based tuition price of an accredited law school is at least \$10,000 higher than an unaccredited school.”^[11] Even though he thoroughly notes and critiques these differences in law schools, he nonetheless argues that ABA accreditation is a cookie-cutter process that flattens out difference. He also holds that its high costs are borne largely by students and that proposals to loosen some of the important ABA standards “would allow . . . greater flexibility and variation among law schools.”^[12] His logic fails in these mutually-exclusive assertions about the diversity of the two hundred or so (ABA-accredited or

provisionally-accredited) law schools in the United States and the accreditation provisions that have enabled so many styles and approaches to bloom.

Every law school has its own admissions trajectory and narrative, and the national aggregate data are very volatile and episodic. Schools did fine and no one couched the scoring in apocalyptic terms back in 1987–88 or 1994–2001, when there were fewer LSAT takers than there were in 2011–12 (130,000).^[13] Many of these issues are interconnected, including the strength of the post-baccalaureate job market, perceptions about overall degree value and professional opportunities, international test-taking and immigration trends, and other features over which the legal education complex has little or no control. In volatile times, some schools lean into the wind and increase their size and even their number of locations, as did Cooley School of Law, while others downsize their student bodies, faculty, and staff.^[14] Cruel fates await schools that guess wrong, in either direction, but I read these institutional responses as major differentiating features, not as evidence of convergence and uniformity.



IN 1879, BELVA LOCKWOOD BECAME THE FIRST WOMAN ADMITTED TO THE U.S. SUPREME COURT BAR. THE SAME COURT, HOWEVER, REFUSED TO ISSUE A WRIT OF MANDAMUS ORDERING THE COMMONWEALTH OF VIRGINIA TO ADMIT HER TO THE BAR, THEREBY SETTING THE LEGAL PRECEDENT ALLOWING STATES TO LIMIT THEIR DEFINITION OF “PERSON” TO MALES ONLY. COURTESY OF LIBRARY OF CONGRESS.

And, most importantly, these developments are always relative—compared to what? In a difficult post-baccalaureate job market, law schools historically have been reasonable and accessible alternatives to medical school, MBA programs, and other graduate or professional career paths for college graduates. Post-baccalaureate professional students in the United States and the world form the talent pool, and most can choose among professions. Law schools will always fare well in this competition, especially when U.S. graduate students are

declining as a part of that whole, when it costs more to become a physician and establish a medical practice, and when corporations are subsidizing fewer MBA enrollees among their employees.^[15]

The worldwide economic restructuring across professional sectors has also affected these fields, as well as other possible choices such as pharmacy, allied health professions, dentistry, and public administration.^[16] As a result, trends for medical school test-takers and applicants also vary, as do those in MBA programs and graduate programs generally. A September 2012 *Wall Street Journal* article about MBA applications could have as easily been about law schools, when it summarized the precipitous decline in MBA test-taking and MBA applications nationwide: "Demand for an M.B.A. has cooled in recent years. But this year, it's downright frigid in some corners of the market."^[17] No matter how the cycle turns, there will always be competition for and among potential law students, and this will occur whether or not law school tuitions increase. And there are only so many choices from which pre-professional students can select. Not everyone will be Bill Gates or Steve Jobs, dropping out of elite colleges to found corporate enterprises and change the world. Law schools will survive and a number will even flourish, and if some do not-- well, Darwinian forces are nothing new.^[18]

In perhaps the most ominous sign of change, the law firm and legal employment markets are being affected and restructured in ways that have led and will likely continue to lead to lower legal employment opportunities; structural changes and irreversible firm arithmetic are likely to result in lower salaries and more contingent lawyer workforces.

There is a dismal story about the debt loads being forced onto some law students to pay for the upscale law schools, chasing prestige and enrollments, and Professor Tamanaha makes indirect references to the cost of living and forgone wages that round out the cost of legal education; he and many others have considered this trend.^[19] But he is silent on how many law students live beyond their means while in law school, failing to economize as they might. Any frank appraisal of professional school costs would have to include accurate and useful information on this matter. Noting it as a problem more under the control of students than are tuition increases is not being insensitive or blaming the victims, just being perceptive. As for tuition costs, students have more information about their choices than in the past, but there are still substantial information asymmetries that can lead to imperfect self-assessments, leaving students with a poor sense of which law school may be better for their own portfolio of accomplishments and achievements.

The ABA Council on Legal Education and Admissions to the Bar serves as the quality control mechanism for the financial aid eligibility that underpins federal government loan programs. The accreditation process of the ABA deserves better than critics allow, not in all its particulars, but as an overall safeguard of institutional quality as is required by the federal government for financial aid eligibility purposes. That the process requires all two hundred law schools to be the same or to operate similarly is contradicted by their patent variability and diversity.

Up until approximately 2008-2009, many law students were in a position to finance the cost of their college and professional education with subsidized loans, which they repaid from employment in a well-compensated profession, where career earnings improved over the trajectory of lawyers' careers. All the components of this equation are shifting, and the equation itself is unlikely to continue as a working model for many of our students.^[20] Without the complex regime of relatively inexpensive and subsidized student loans, many students could not assume the growing risks of undertaking law study, at least not in the traditional three-year format of full-time enrollment. Not all enrolled students or their families will be able to avail themselves of stricter lending requirements. At the least, the costs of borrowing are likely to increase, postponing repayment of debts while also substantially increasing that burden. At the urging of legal educators, Congress adopted both an income-based contingent repayment plan and a public interest loan forgiveness program, but law students have not used them as widely as they should (and likely will). Undertaking long term debt is problematic in many dimensions, and the plans will require legislative revision, especially for the possible long-term tax consequences, but they provide a pathway to legal education that should be a serious consideration for many law students.^[21] In the summer of 2013, both Houses of Congress agreed, as they rarely have as of late, to provide student loans with more predictable interest rates, tied to national productivity standards; the loans had risen to much higher rates for a short period, before all parties recognized the ripple effect that would occur if borrowing money were unattractive.^[22]

In perhaps the most ominous sign of change, the law firm and legal employment markets are being affected and restructured in ways that have led and will likely continue to lead to lower legal employment opportunities; structural changes and irreversible firm arithmetic are likely to result in lower salaries and more contingent lawyer workforces. As one sign, major U. S. law firms are "outsourcing" legal work to staff attorney law firms in lower-cost cities; some outsourcing of routine legal work to foreign countries has been evident for years.^[23] While relatively few international lawyers seek or gain employment in the United States, several observable trends will likely result in a more globalized legal job market; these include bar admissions pressures, international General Agreement on Trade in Services (GATS) negotiations, and other flattening trends in international legal education. In some instances, these will lead to decreased opportunities for U.S. lawyers, at least those who speak only English.^[24] All these developments, virtually none of which are in the control of the legal education enterprise, have detrimentally affected

the employment prospects of new lawyers, and for that matter more senior attorneys, as law firms reorganize along traditional corporate lines and cut their workforces. [25]

These are daunting developments, knocking out or reducing the possibility of law school, especially for students from poor families, for first-generation college graduates, for immigrant families, and for minority communities. [26] Because these communities are growing and will provide the applicants for future law classrooms, these developments are ominous and unforgiving. I do believe that recent critiques have proven to be a needed wake-up call.

Unfortunately, Tamanaha's argument is largely an attack upon the full-time faculty model of legal education, which he identifies as a combination of self-serving governance, faculty self-indulgence, and law school greed, all of which combine to rob students of genuine choices and to require these duped students to subsidize the expensive lifestyle preferences of law professors:

Law schools are financially trapped by what they have become: top-heavy institutions with scholars teaching few classes (writing a lot) and clinicians teaching few students. The perpetual "more" of recent decades—creating more time for writing, hiring more scholars and more skills-training teachers, and spreading more money around—severely constrains law schools going forward. [27]

As I wrote in a column to AALS member readers, the indispensable features of legal education in the United States are like our democratic processes: worse than anything except the alternatives. Can it really be a good idea to discourage or limit faculty scholarship? Increasing the number and percentage of contingent and transitory faculty will diminish the overall quality of the enterprise, and should be resisted vigorously, rather than regressing to the churning mean of a part-time faculty, serving as independent contractors. [28] As in any large debate over fundamental principles, those wishing to change a longstanding, well-articulated, successful, and robust status quo have the burden of persuasion. This said, a downsizing of legal enrollments and a slowdown in accrediting new law schools will most likely prevail, even with wrenching consequences for a number of law graduates and their schools. Some schools, especially lower quality and marginal proprietary institutions, may close, a rueful but not necessarily bad result. To effectuate these difficult decisions, more regulation should be exacted of the producer schools, including more difficult school entry standards and criteria, not the self-governing, deregulated, and *laissez faire* universe Tamanaha prefers, especially if it remains largely subsidized by taxpayers.

Conclusions, for now

Length limitations preclude my giving deserved attention to proposals for curricular reform, which reflect deep-seated differences in worldview. It is safe to say that the major fulcrums on which legal education balances

today are 1) a proportion between the longstanding tradition of doctrinal case law study and the more recent insistence upon practical training and developing practice skills, and 2) finding the best and most efficacious means of providing such professional instruction. Even small-town lawyers with traditional bread and butter general practices are in need of specialized training, international knowledge, and transactional skills. While the need for general legal services has never been greater, virtually all areas of law now require the comprehensive and specialized knowledge previously reserved for detailed transactions or complex litigation. As one example, it is inconceivable that a family law or criminal lawyer in Santa Fe, New Mexico or Newark, New Jersey could genuinely and competently represent clients without knowledge of basic comparative law or immigration law. Negotiating what used to be a good result for one's DUI client could be disastrous in today's practice if she were a non-immigrant or undocumented resident.

No law school would willingly enter a caste system and offer the legal equivalent of cosmetology. Nevertheless, the halo effects of institutional hierarchies already convey substantial privilege, and I fear that offering alternative vehicles for variegated legal instruction will exacerbate this differentiation.

The increasing specialization and complexity of legal practice has led many observers to suggest that law school itself should become more specialized, offer J.D. "majors," or provide various certification programs that would carve out specialties. [29] But I do not accept the premise that increasing specialization, particularly the rise of J.D. "majors" and specialty certification programs, is a good or necessary development, for several reasons that I have spelled out in detail elsewhere. [30]

No law school would willingly enter a caste system and offer the legal equivalent of cosmetology. Nevertheless, the halo effects of institutional hierarchies already convey substantial privilege, and I fear that offering alternative vehicles for variegated legal instruction will exacerbate this differentiation. There is, at the undergraduate level, a chasm between collegiate institutions and proprietary schools, one that could become prevalent in legal education between elite, comprehensive law studies and more occupational, short-term lawyer trade schools. Shaping law schools around occupational niches, or creating shorter-term programs, would lead to a weakened version of law school and an undesirable, paraprofessional alternative. In at least one state, Washington, this sorting out of professional licensing has led to paralegals and legal assistants being certified to undertake litigation-related activities that lawyers, especially apprentice lawyers in training, used to do. Proponents of such radical changes should bear a very large burden of persuasion. To the extent that law schools are heading down this ill-advised path towards specialization, I urge that they reverse the

trend. We cannot simply hope that the problems will resolve themselves or that the cracks evident in the infrastructure will heal.

This is not a feeble and reflexive defense of the status quo, and I share the concerns for our students and graduates, having spent all my professional life trying to serve them. It is no accident that a disproportionate number of lawyers serve in business and corporate enterprises, as well as in positions of governmental leadership and civic participation, giving generously of time and talent. Critics are properly concerned when some schools produce few graduates who go on to become or practice as traditional lawyers (some as low as 26 percent),^[31] but I do not despair when I see these figures, provided they reflect a genuine choice of the graduates, not a choice forced on them by failure to navigate the bar processes, whether the examination portion or the moral character and fitness components of becoming lawyers.

There can be no doubt that some shrinking of individual schools and the overall enterprise is in order, and more attention to stricter—not looser—entrance requirements for starting new schools, including much more detailed needs analysis for regional schools and expansionist ambitions, especially for those existing schools that wish to cross state borders for satellite and branch campuses. The seven-year re-accreditation requirement, with many schools on chronic report-backs for failures to meet criteria, should be tightened, not subjected to less regulation. Schools that repeatedly fall short of program criteria should be placed on probation, and chronic-failure schools should be subject to more—and more meaningful—scrutiny. Such a gentlemen's agreement leads to virtually no school having its taxi medallion taken away; the laxity at the front end leads to almost no schools being de-certified. At the level of individual schools, more vigorous attention to the placement functions needs to be paid at most schools, not just for recent graduates but for alumni who find themselves in need of career services assistance when their own practices are harmed by the contraction of the legal employment system. Whether or not law schools accede to consumer regulation, developments in this area will affect legal education the way that they have in undergraduate education generally.^[32] And faculty productivity could be increased, in ways that better allocate research and teaching assignments, including class size and workload policies, tools that have long been in the arsenal of administrators who usually make such assignments. It is the rise in administrative and support personnel that is a more readily apparent problem, not the behavior of faculty. This is not an embrace of business as usual, but all of these small considerations will require the full attention and governance of a full-time and engaged faculty. No permanent or systemic change will occur within a part-time or contingent faculty, churning through as they seek better opportunities.

I bear in mind that I am making this case to people who read *Radical Teacher* and who may harbor doubts about the efficacy of internal problem-solving remedies. But that is not my premise. I do not think that the restructuring of legal education will go away and that the

legal markets will reappear, in time to save us. But I also do not think that Armageddon will arrive, and so I urge caution, especially in the downsizing and internal reallocations of institutional personnel that are occurring. It is not radical or convincing or sexy to suggest that cautious reorganization and some size reduction are doable for most schools, but these routes are likely our best paths out of the slow slide that began when we still felt that our world would always be as good or better. And I foresee no value in loosening accreditation requirements; indeed, I would make them more exacting and demanding, especially as they develop enrollment projections and service areas.

There can be no doubt that some shrinking of individual schools and the overall enterprise is in order, and more attention to stricter—not looser—entrance requirements for starting new schools, including much more detailed needs analysis for regional schools and expansionist ambitions, especially for those existing schools that wish to cross state borders for satellite and branch campuses.

This decision-making is how most law faculties determine their own fates, with none of the featherbedding or greedy considerations suggested by critics as the prerequisites. We need collegial governance not just in the best of times, when it is easy, but in the worst of times, if that is what these times are. Just as the *Yeshiva* case misapprehended how normative academic decision-making is actually undertaken, as if the faculty were the drivers of all the institutional decisions, so that they are really elided with management, and cannot collectively bargain in private colleges;^[33] so bloggers and critics have resorted to anecdotal stereotypes of faculty self-interest and selfishness that do not ring true, and do not square with my own experiences of service on the ABA Council, the AALS Executive Committee, the Association's Membership Review Committee, and eighteen site inspections.

I have cursed my share of darkness over the years, especially during my Dirty Dozen days, but I never really expected that such fist-shaking would convince others to my view. Naysayers and those who would fundamentally reconstitute legal education should have no such illusions, either. At the least, suggestions for improvement should demonstrably improve the situation before us, and do no overall harm. In my view, making law faculties more contingent and part-time, leaving them more subject to top-down decanal or institutional governance, and loosening further the minimal accreditation standards and federal government loan program requirements will do great harm to law schools and law school graduates. We should not belittle legal education's accomplishments, just as we should not overlook its weaknesses or inefficiencies or inequities. The bell will toll for all of us, even if we do not always hear its loud peals.

Notes

[1]. Ediberto Roman and Christopher B. Carbot, *Latinos and Latinas in the Legal Academy: Freeriders and Diversity in The Legal Academy: A New Dirty Dozen List?* 83 Ind. L.J. 1235 (2008).

[2]. <http://thirddtierreality.blogspot.com/2011/08/profiles-in-academic-myopia-michael.html> (visited August 6, 2013) (hereafter, *Third Tier Reality*)

[3]. Brian Z. Tamanaha, *Failing Law Schools* 19 (2012) (hereinafter, *Tamanaha*)

[4]. Mark Hansen, *Too Much Momentum? Despite Criticism, a Review of ABA Standards for Law Schools is Moving Forward*, A.B.A. J., May 2011, at 55.

[5]. There is an extensive literature on this distressing feature. Among the better resources is Donald E. Heller, *State Support for Higher Education: Past, Present, and Future*, in *Privatization and Public Universities* 11, 17–18 (Douglas M. Priest & Edward P. St. John eds., 2006) (noting decline of state support subsidies for colleges from approximately 50 percent of institutional totals in 1980 to 35 percent in 2000). See also Michael S. McPherson & Morton O. Schapiro, *U.S. Higher Education Finance*, in *Handbook of the Economics of Education* 1403, 1403–34 (Eric Alan Hanushek & Finis Welch eds., 2006).

[6]. See Lani Guinier, *Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 130 n.67 (2003) (discussing college student debt). The number of case studies has also increased, leading to very distressing reading of individual students and families. See, e.g., Ron Lieber, "For Student Borrowers, Relief Now May Mean a Big Tax Bill Later," *New York Times*, Dec. 15, 2012, at B1; Jason DeParle, "For Poor, Leap to College Often Ends in a Hard Fall," *New York Times*, Dec. 23, 2012, at A1; Caitlin Peterkin, "Rising Student-Loan Debt Spurs Calls for Frank Discussion, Not Panic Over Extreme Cases," *Chronicle of Higher Education*, Oct. 26, 2012, at A3.

[7]. The College Board tracks these trends over time, and the data reveal clearly that an increasing number of students borrow for their undergraduate education, and borrow more money, even adjusted for inflation. College Board, *Trends in Student Aid 2011* at 4, 19, Figure 10A and 10B, available at http://trends.collegeboard.org/sites/default/files/Student_Aid_2011.pdf. In addition, a growing legal and economic literature is available, analyzing these issues. See, e.g., Michael Simkovic, *Risk Based Student Loans*, 70 WASH. & LEE L. REV. 1 (2013).

[8]. As examples, see the websites at various high-ranking public law schools, such as those in the University of California system, where in 2012–13, the tuition and fees alone at UC Berkeley and UCLA were \$50,373.50 (<http://www.law.berkeley.edu/6943.htm>) and \$47,464 ([https://www.law.ucla.edu/current-students/tuition-and-](https://www.law.ucla.edu/current-students/tuition-and-fees/Pages/default.aspx)

[fees/Pages/default.aspx](https://www.law.ucla.edu/current-students/tuition-and-fees/Pages/default.aspx)) respectively, for residents. Out-of-state-students will pay additional non-resident charges. But as difficult as it is to accept this development, these schools are behaving rationally in a market where their state funds have declined, where the stock market is affecting their endowments, and where their applications and market niches remain competitive.

[9]. See Matt Leichter, *At Last, a Rational Explanation for Why Law School Tuition Keeps Rising*, AMLAWDAILY (Mar. 1, 2012), <http://amlawdaily.typepad.com/amlawdaily/2012/03/at-last-a-rational-explanation-for-why-law-school-tuition-keeps-rising.html>.

[10]. *Tamanaha*, supra note 1, at 19.

[11]. *Tamanaha*, supra note 1, at 19.

[12]. *Id.* at 31.

[13]. See FIG. 1, in MICHAEL A. OLIVAS, *ASK NOT FOR WHOM THE LAW SCHOOL BELL TOOLS: PROFESSOR TAMANAHA, FAILING LAW SCHOOLS, AND (MIS)DIAGNOSING THE PROBLEM*, 41 WASH. U. ST. L. J. L. & POL. 101, 108 (2013) (LSACS ADMINISTERED, LSACs administered, 1987–2012).

[14]. Thomas Cooley, headquartered in Lansing, Michigan, is among the few ABA-accredited law schools with approved law programs in non-contiguous states. See Elie Mystal, *Ranking the Worst ABA-Accredited Law Schools*, ABOVEHELAW (Oct. 31, 2012), <http://abovethelaw.com/2012/10/ranking-the-worst-aba-accredited-law-schools/#more-202939>.

[15]. For application and admissions trend data across several areas of study, see ASS'N OF AM. MED. COLLS., *MCAT SCORES AND GPAS FOR APPLICANTS AND MATRICULANTS TO U.S. MEDICAL SCHOOLS, 2000–2011* (2011), available at <https://www.aamc.org/download/161690/data/table17.pdf> (medical); GRADUATE MGMT. ADMISSIONS COUNCIL, *KEY TRENDS IN THE GMAT STUDENT PIPELINE, 2012*, available at <http://www.gmac.com/~media/Files/gmac/Research/miscellaneous/gmac-presentations-at-icam2012-public-final1.pdf> (MBA programs).

[16]. Heather Biele, *Majority of Veterinary Colleges See Rise in Graduate Numbers in 2012: Iowa State, Ohio State Continue to Top List by Class Size*, DVM NEWSMAGAZINE, July 1, 2012, at 35, available at <http://veterinarynews.dvm360.com/dvm/Veterinary+news/Majority-of-veterinary-colleges-see-rise-in-gradua/ArticleStandard/Article/detail/778718?contextCategoryId=44924> (veterinary medicine); Colleen Flaherty, "The J-School Bubble," *InsideHigherEd.com*, August 9, 2013, <http://www.insidehighered.com/news/2013/08/09/study-points-gaps-between-how-journalism-educators-and-journalists-view-j-schools#ixzz2bTELavez> (problems in journalism education); and graduate programs generally: COUNCIL OF GRADUATE SCH., *GRADUATE ENROLLMENT AND DEGREES 2000–2010*, at ch. 3 (Sept. 2011),

available at http://www.cgsnet.org/ckfinder/userfiles/files/R_ED2010.pdf; NAT'L SCI. BD., DIMINISHING FUNDING AND RISING EXPECTATIONS: TRENDS AND CHALLENGES FOR PUBLIC RESEARCH UNIVERSITIES (2012), available at <http://www.nsf.gov/nsb/publications/2012/nsb1245.pdf>.

[17]. Melissa Korn, "M.B.A.s Lose Their Luster at Some Schools," Wall Street Journal, Sept. 10, 2012, available at <http://blogs.wsj.com/atwork/2012/09/10/m-b-a-s-lose-their-luster-at-some-schools/>

[18]. If a law school were to close or suspend its operations, it will likely be a marginal freestanding for-profit (or low-prestige collegiate) institution in a geographical area with a full array of other competing collegiate institutions with law programs, or a California private school at a low-prestige institution, where the school loses ABA accreditation or provisional accreditation, and where bar authorities move to limit the ability of its students to sit for the state bar examination. Each year, dozens of undergraduate colleges close, merge, or reconstitute themselves. See, e.g., GARY RHOADES, CENTER FOR HIGHER EDUCATION POLICY REPORT NO. 1, CLOSING THE DOOR, INCREASING THE GAP: WHO'S NOT GOING TO (COMMUNITY) COLLEGE? (2012), available at http://futureofhighered.org/uploads/ClosingTheDoorFINAL_ALL32812.pdf.

[19]. TAMANAHA, FAILING LAW SCHOOLS 100 (2012).

[20]. E.g., Caitlin Peterkin, "Rising Student-Loan Debt Spurs Calls for Frank Discussion, Not Panic Over Extreme Cases," Chronicle of Higher Education, Oct. 26, 2012, at A3; Matt Leichter, At Last, a Rational Explanation for Why Law School Tuition Keeps Rising, AM LAW DAILY (Mar. 1, 2012), <http://amlawdaily.typepad.com/amlawdaily/2012/03/at-last-a-rational-explanation-for-why-law-school-tuition-keeps-rising.html>.

[21] See Brian Tamanaha, What's Wrong with Income Based Repayment in Legal Academia: A Response to Schrag, BALKINIZATION (Nov. 29, 2012), <http://balkin.blogspot.com/2012/11/whats-wrong-with-income-based-repayment.html>; Libby A. Nelson, An Underused Lifeline, INSIDE HIGHER ED (Oct. 23, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/10/23/despite-student-debt-concern-income-based-repayment-lags>. See also Jack Crittenden, A 45% Employment Rate? How Law School Employment Numbers are Inflated, NAT'L JURIST (June 15, 2011, 12:06PM), <http://www.nationaljurist.com/content/45-employment-rate-how-law-school-employment-numbers-are-inflated>. See also Philip G. Schrag, The Federal Income-Contingent Repayment Option for Law Student Loans, 29 HOFSTRA L. REV. 733 (2001); he published a fuller version as a book: REPAY AS YOU EARN: THE FLAWED GOVERNMENT PROGRAM TO HELP STUDENTS HAVE PUBLIC SERVICE CAREERS (2001). More recent authoritative research on the subject by Professor Schrag includes: Philip G. Schrag, Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations, 36 HOFSTRA L. REV. 27

(2007) and Philip G. Schrag & Charles W. Pruett, Coordinating Loan Repayment Assistance Programs with New Federal Legislation, 60 J. LEGAL EDUC. 583-612 (2011).

[22]. Christine Lindstrom, "The Good, the Bad, and the Ugly in the Student-Loan Deal," Chronicle of Higher Education, August 8, 2013, http://chronicle.com/article/The-Good-the-Badthe/141011/?cid=at&utm_source=at&utm_medium=en.

[23]. See Catherine Rampell, "At Well-Paying Law Firms, a Low-Paid Corner," New York Times, May 24, 2011, at A1 (domestic outsourcing); John Markoff, "Smarter Than You Think: Armies of Expensive Lawyers, Replaced by Cheaper Software," New York Times, Mar. 5, 2011, at A1 (restructuring of legal work through technology).

[24]. Penn State law professor Laurel S. Terry is among the leading scholars on this complex subject, and I am in her debt for spelling out the likely effect that GATS negotiations will have in more easily allowing foreign lawyers to practice in the United States. A sampler of her recent articles includes: The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers," 2008 J. PROF. LAW. 189; and From GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 AKRON L. REV. 875 (2010).

[25]. There is growing news coverage of the problems encountered by big law firm and more senior attorneys. See, e.g., Kent Zimmermann, Law Firm Leaders Feel Mayer Brown's Pain, MARTINDALE.COM BLOG (July 25, 2013), <http://blog.martindale.com/law-firm-leaders-feel-mayer-browns-pain>; Noam Scheiber, The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries#>. While the poor and middle class need more access to legal services, no successful market mechanisms have yet arisen to provide these services. See, e.g., William Henderson, Losing the Law Business, Cayman Financial Review 78 (2013); Tara Siegel Bernard, A Start-Up Aims to Bring Financial Planning to the Masses, NY Times, July 27, 2013, at B1.

[26]. Recent developments in immigration policy and state bar association practices have even led to law graduates in unauthorized status being recommended for full bar membership in Florida and California. See Michael A. Olivas, Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students, 21 WM. & MARY BILL RTS. J. 463, 535-38 (2012).

[27]. TAMANAHA, FAILING LAW SCHOOLS AT XXX (2012).

[28]. Michael A. Olivas, 2011 AALS Presidential Lecture, at http://www.aals.org/services_newsletter_presAug11.php.

[29]. The Clinical Legal Education Association, in a 2007 report, recognized that "there is a place in legal education for 'niche' law schools that seek to prepare students for very specific areas of practice, or even for specialty tracks in any law school's curriculum," although it

acknowledged that most law schools, especially state schools, had a mission to prepare students for "a wide variety of practice options." Roy Stuckey et al., *Best Practices for Legal Education* 41-42 (2007).

[30]. Michael A. Olivas, *Majors in Law: A Dissenting View*, 43 *Harvard Civil Rights- Civil Liberties Law Review* 625 (2008). I have appropriated language and ideas from this earlier work, with permission.

[31]. TAMANAHA, at 114-16.

[32]. As good examples of this rising concern, see, e.g., Hazel Glenn Beh, *Student Versus University: The University's Implied Obligation of Good Faith and Fair Dealing*, 59 *MD. L. REV.* 183 (2000); Angela C.

Lyons, *A Profile of Financially At-Risk College Students*, 38 *J. CONS. AFF.* 56 (2004).

[33]. *Nat'l Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 672 (1980) (holding faculty in mature universities are "managerial employees," hence ineligible for collective bargaining).



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