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WHAT AILS THE LAW SCHOOLS?

*Paul Horwitz**

SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA. By *Walter Olson*. New York and London: Encounter Books. 2011. Pp. 237. \$25.95.

FAILING LAW SCHOOLS. By *Brian Z. Tamanaha*. Chicago and London: The University of Chicago Press. 2012. Pp. xiii, 187. \$25.

INTRODUCTION

In January 2012, law professors from across the country arrived in Washington, D.C., for the annual conference of the Association of American Law Schools (“AALS”). It was an opportune moment. The legal economy was struggling. Graduates were begging for jobs and struggling with unprecedented levels of debt.¹ The smart talk from the experts was that the legal economy was undergoing a fundamental restructuring.²

For these and other reasons, law schools were under fire, from both inside and outside of the academy. Judges—including the keynote speaker at the AALS conference himself!—derided legal scholarship as useless.³ Law school deans called the economics of law school increasingly unsustainable.⁴

* Gordon Rosen Professor, University of Alabama School of Law. I am grateful to Paul Caron, John Devlin, Sean Donahue, Jim Fischer, Rick Garnett, Paul Gowder, Renee Newman Knake, Grace Lee, Jeffrey Lipshaw, John McGown, Deborah Jones Merritt, Jennifer Michaelis, Derek Muller, Joel Nichols, Tamara Piety, Nancy Rapoport, Paul Secunda, and Stephanie Tai for comments, and Aisha Mahmood for research assistance.

1. See, e.g., Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 WM. MITCHELL L. REV. 1185, 1186–87, 1200–01 (2012).

2. See, e.g., William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373 (2011).

3. See Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/>; Karen Sloan, *A Prescription for Law Schools: Go Back to the Basics, Return to 'Terra Firma'*, NAT'L L.J. (Jan. 6, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202537684344>. But see David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359 (2011) (finding a “marked increase” in the frequency of citation to legal scholarship in reported federal court of appeals opinions over the past six decades).

4. See Chen, *supra* note 1; Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465 (2004).

Legislators and litigators alike were looking into what law schools said and did.⁵ Professors registered their alarm in high and low places.⁶

What many call the “law school crisis,” and more than a few the “law school scam,” managed to pierce the carapace of the AALS. A workshop on “the future of the legal profession and legal education” contained a number of panels whose descriptions promised “frank and open exchanges” about “the many interrelated issues raised by change in both the legal profession and legal education,” and “how the current restructuring of law practice likely will affect the organization and economics of law schools.”⁷

Yet, if there was an overall message conveyed by the conference, it was, in the words of Kevin Bacon’s character in *Animal House*, “Remain calm! All is well!”⁸ It did not escape notice that the AALS rejected at least two proposals for so-called “hot topics” sessions devoted to financial aid and other issues surrounding law schools, concluding that “there was not a strong proposal for a session on the legal education crisis” while finding room for a panel on the U.S. Fish and Wildlife Service.⁹

Not coincidentally, public discussion of the law school “crisis” or “scam” reached its boiling point around the same time as the rise of the Occupy Wall Street movement and not long after the rise of its counterpart on the right, the Tea Party movement. All three phenomena sounded a distinct note of populism, and all were connected to the present economic doldrums. All three voiced complaints that predated the recession, and all three gener-

5. See, e.g., Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1, 3 (2012) (describing class action suits filed against multiple law schools); Press Release, Senator Barbara Boxer, Boxer Calls on American Bar Association to Ensure Accurate and Transparent Data Reporting by Law Schools (Mar. 31, 2011), available at <http://boxer.senate.gov/en/press/releases/033111b.cfm>; Letter from Senator Charles E. Grassley, Ranking Member, Senate Comm. on the Judiciary, to Stephen N. Zack, President, Am. Bar Ass’n (July 11, 2011), available at <http://grassley.senate.gov/about/upload/2011-07-11-Grassley-to-ABA.pdf>.

6. For the “high,” see generally Deborah Jones Merritt & Daniel C. Merritt, *Responsibility-Rights in the Legal Profession*, 43 ARIZ. ST. L.J. 1257 (2011), and Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?* (Vanderbilt Law & Econ. Research Paper, Working Paper No. 11-42, 2011). For the “low,” consult any number of legal blogs as well as the so-called “scamblogs” focused on failures and deceptions in legal education. For a general description of the latter, see Lucille A. Jewel, *I Can Has Lawyer? The Conflict Between the Participatory Culture of the Internet and the Legal Profession*, 33 HASTINGS COMM. & ENT. L.J. 341, 365–66 & n.140 (2011). The most prominent scamblog is *Inside the Law School Scam*, written by Professor Paul Campos. INSIDE L. SCH. SCAM, <http://insidethelawschoolscam.blogspot.com/> (last visited Aug. 28, 2012).

7. Final Program, Ass’n of Am. Law Schs., 2012 Annual Meeting in Washington, D.C. 6, 11, 16 (Jan. 4–8, 2012), available at <http://www.aals.org/am2012/2012program.pdf>.

8. NATIONAL LAMPOON’S ANIMAL HOUSE (Universal Pictures 1978). Shortly after saying this, Bacon’s character is trampled by a rioting crowd.

9. Libby A. Nelson, *Elephant in the Room*, INSIDE HIGHER ED (Jan. 5, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/01/05/law-schools-gather-dc-annual-conference> (describing comments of AALS Executive Director Susan Westerberg Prager). In the interests of disclosure, I should say that I was one of several professors who proposed a hot-topics panel on the legal education crisis. By way of follow-up, the AALS scheduled even fewer programs on issues relevant to the “law school crisis” in its 2013 annual conference.

ated calls for immediate action—usually more vague than specific. Finally, all of them spoke to a vision of a divided society, one nicely captured by the meme of the “1 percent” versus the “99 percent.”¹⁰ Some elite group—bankers, incumbent politicians, law schools—had managed to enrich itself at the expense of a suffering majority. A reckoning was due.

Popular dichotomies such as the “1 percent” versus the “99 percent,” however, are often unclear about what how to define the divide and who falls within which group. In the political realm, the question is whether the division is class-based—whether it involves a simple distinction between the wealthiest and everyone else—or culture-based, involving divisions between “Wall Street” and “Main Street,” the elite and the common man, the latte-sipper and the beer-drinker, and so on.

Something of this vagueness is also present in debates over what ails the law schools. Is the problem structural and economic—a problem of debt, tuition, and job scarcity, exacerbated by a lack of transparency on the law schools’ part? Or is the problem what law schools *do*, particularly their failure to produce students who are educated in the actual practice of law rather than in airless theorizing about “the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria?”¹¹

Many critiques of law schools focus on either economic or culture-war explanations. It is possible that how we identify the primary problem will shape the course of our reform efforts (if there are any). It certainly, in any event, will say a great deal about our preoccupations, and about what different audiences see (or fail to see) when they look at law schools.

This split between economic and cultural visions of the law school crisis is evident in the two books under review here. Brian Tamanaha’s *Failing Law Schools*¹² takes a largely economic approach to its examination of the law school crisis, focusing on the financial and economic causes of the crisis and advocating both financial reform and partial deregulation of the law school market. Walter Olson’s *Schools for Misrule: Legal Academia and an Overlawyered America*¹³ takes more of a culture-war approach, arguing that law schools are a breeding ground for “liberal-left wing” ideas; they “helped bring us the Sixties,” among other sins, and are still at it today (Olson, pp. 3, 7). Tamanaha seeks structural reform aimed at the economics of law school, while Olson wants law professors to set aside “the business of trying to govern the rest of us” and focus instead on “training students in the skills and knowledge they will need in legal practice” (Olson, p. 237).

10. For a nice example tailored to the law schools, see Elie Mystal, *The 99 Percent’s Take on Law School Employment Statistics*, ABOVE L. (Oct. 31, 2011, 2:51 PM), <http://abovethelaw.com/2011/10/the-99-percents-take-on-law-school-employment-statistics/>.

11. *Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship*, ACSBLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship> (quoting Chief Justice John Roberts).

12. Brian Tamanaha is the William Gardiner Hammond Professor of Law at the Washington University School of Law.

13. Walter Olson is a Senior Fellow at the Cato Institute.

As I make clear in this Review, I find Tamanaha's diagnosis convincing and Olson's much less so. My point is not to compare and contrast, however. Rather, I want to suggest that one of Tamanaha's main prescriptions—that there should be “greater flexibility and variation among law schools” (Tamanaha, p. 31)—is at least a partial answer to both critiques. Institutional pluralism of a variety of sorts is not a complete answer to either the economic or the culture-war diagnosis of what ails the law schools. Nor will it succeed without other structural changes in how law schools operate and are funded. But it's a damn good start.

I close with a discussion of what seems to me a remarkable gap in both books—and, indeed, in discussions of law school reform generally. That is the absence of the *client*. It is an unfortunate fact that we have in this country both an apparent oversupply of law school graduates, and an undersupply of lawyers willing and able to serve large numbers of people who need competent legal representation.¹⁴

The reasons for this mismatch vary. Many of them have to do with the kinds of structural problems that Tamanaha and other critics have raised: it's difficult to provide lower-priced legal services for low- or middle-income clients when you are carrying six figures of student debt. It is striking, nevertheless, that so few of these discussions focus directly on clients. Even Tamanaha, who acknowledges the problem (Tamanaha, p. 170), focuses primarily on the plight of lawyers and law students. Reform of the American system of legal education is certainly necessary. But reforming law schools without focusing on clients is bound to be incomplete, and could lead law school professors and administrators, who are fiduciaries of a sort, to neglect the essential objects of our fiduciary obligations: our clients and the broader public.¹⁵

It is also striking that many of the most vocal advocates for law school reform seem to *want* it that way. The most fervent pro-reform constituency

14. For arguments that the oversupply thesis is overstated, see, for example, Ronald D. Rotunda, *Teaching Professional Responsibility and Ethics*, 51 ST. LOUIS U. L.J. 1223, 1230–33 (2007), and Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1467–73 (2000) (reviewing ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998)). For the argument that our problem is more one of misdistribution than oversupply, see, for example, Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 990 (1998). For an intriguing critique of the misdistribution thesis and the idea that increased pro bono legal services are the proper avenue for addressing any misdistribution, see Silver & Cross, *supra*, at 1477–93.

15. See, e.g., Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 647 (2008) (“[L]egal educators must consider not only their students' needs, but also the well-being of their future clients and employers, who will pay the price for inadequacies in their training.”); Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 97–106 (2008) (arguing that law schools should be treated as fiduciaries for a variety of stakeholders, primarily students but also the public); Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1592 (2011) (arguing that law schools must “own[]” their educational “outcomes,” as this will “enhance[] the ability of each law graduate to serve employers and clients”).

is made up of neither professors nor clients: it consists of current students and recent graduates. Their main concern, understandably, is not with the culture-war issues of what is taught and how. It is with *economic* interests—specifically, their own. It is on tuition, debt, and jobs. Law professors who focus on other issues are accused of diverting attention from the central economic issues. These constituents raise valid concerns, and law schools have both an economic incentive and a moral obligation to address them. But they are not our only constituency. In good *and* bad economic times, we have an obligation to consider the needs of clients, not just students.

The current law school crisis is salutary. As crises do, it provides an opportunity and incentive to engage in real reform. But it also poses a risk. The crisis may encourage us to focus on only one part of the problem. Conversely, if and when the crisis passes and students begin finding decent-paying jobs again, the incentive for law schools to think about what they should be doing, why, and for whom, is likely to dissipate. The current crisis may have sensitized more law school professors and administrators to focus on structural issues which have, until now, been paid too little attention. The question is whether we can use this crisis to remind ourselves that our duty to be mindful of our obligations must persist through booms as well as busts.

I. WHAT'S WRONG

Fred Rodell famously observed that just two things were wrong with law reviews: their style and their content.¹⁶ In short, everything. A modern-day Rodell might say that just two things are wrong with American legal education right now: how law schools treat the law, and how they treat education. In short, everything. Of these failings, and despite many law professors' emphasis on scholarship,¹⁷ the second is vastly more important and I turn to it first.

A. Economics

There is no perfect place to begin. As Tamanaha writes on the first page of his book, “[L]aw schools are failing abjectly in multiple ways” (Tamanaha, p. ix). The problems are multiple and interconnected. But we could offer the following list.

Accreditation. The American Bar Association (“ABA”)’s accreditation process for law schools forces law schools to conform to a unified, questionable, and expensive model. For a variety of reasons, not least the law schools’ thirst for legitimacy within the precincts of the university (Tamanaha, p. 23), law schools must all meet the same basic description: “a

16. See Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

17. See, e.g., Anita Bernstein, Comment to *Tamanaha's Proposals on Reforming Legal Education Financing and Regulation*, BRIAN LEITER'S L. SCH. REP. (June 1, 2012, 2:32 PM), <http://leiterlawschool.typepad.com/leiter/2012/06/tamanahas-proposals-on-reforming-legal-education-financing-and-regulation.html>.

three-year course of study taught by full-time academics” (Tamanaha, p. 26). They must all provide a basic package of resources, some of which are both costly and of dubious utility: for example, the insistence that law schools maintain a substantial library, despite the shift to electronic research.

High on the list of accreditation requirements that raise law school costs and make adaptation difficult is the ABA’s requirement that “the main law faculty . . . consist of tenured positions” (Tamanaha, p. 29). This raises several practical issues. Most faculties consist of tenure-track academics whose main focus is scholarly production, not practical lawyering. Law schools wishing to provide a substantial practical education generally rely on adjuncts, clinicians, and legal writing faculty. But the ABA’s emphasis on tenure-track faculty constrains law schools in their reliance on adjunct faculty. It also buttresses the claims of clinicians and legal writing faculty that they should enjoy equal tenure-track status with their full-time scholarly colleagues.

Of course, there are benefits to tenure. But “[t]enure is costly and inflexible for schools—a lifetime marriage with a professor with almost no possibility of a divorce” (Tamanaha, p. 29). Schools are triply constrained by being forced to invest in scholarly faculty members who cannot easily be made to leave. They cannot easily experiment with the hiring of nonscholarly but practically oriented faculty nor can they shift direction (except through more hiring) when curricular needs change. They can do little when faculty members win tenure and stop writing. And long-term investments in faculty members (including extensive benefit packages), as well as ABA library requirements and other mandated investments, leave little money left over for other expenditures.

Rankings. In the law school market, the coin of the realm is the *U.S. News and World Report* rankings. Tamanaha writes that “*US News* ranking competition has wrought profound detrimental changes” in law schools (Tamanaha, p. 85). I am somewhat more sanguine about this. Law firms, too, lamented the crassness of publications like *The American Lawyer* when they began peeking behind the profession’s veil.¹⁸ But law schools, like law firms, are a market, and increasing the information and metrics available to law school consumers is a positive good.¹⁹

Nevertheless, it is obvious that the *U.S. News* rankings have had negative as well as positive effects. The metrics it uses are notoriously imperfect.²⁰ Their largely static, uniform quality has led to “a homogenizing influence on the student body, on the faculty, and across law schools, dampening in-

18. See, e.g., Dennis Curtis, *Can Law Schools and Big Law Firms Be Friends?*, 74 S. CAL. L. REV. 65, 70 (2000).

19. See, e.g., Mitchell Berger, *Why the U.S. News and World Report Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487 (2001); Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998).

20. See generally Symposium, *The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006).

novation and diversity” (Tamanaha, p. 85). The quest to move ahead in the rankings and thus draw more applicants with better credentials (which, in turn, helps a school’s ranking), has led law schools to focus on doing what the rankings measure rather than adapting to local needs. As Tamanaha writes, “We became what the ranking[s] counted” (Tamanaha, p. 85).

The *U.S. News* rankings would be problematic enough if the numbers were accurate. But they are not. American law schools resemble the institutions on the television show *The Wire*: they are constantly “juking the stats.” Some statistics are weak: employment statistics are based on small samples of graduates, and often don’t distinguish between employment in the legal field and employment as a soda jerk (Tamanaha, pp. 71–72). Some are manipulated: many law schools followed the lead of Northwestern Law School and hired unemployed recent graduates for positions within the law school, often for just long enough to inflate the *U.S. News* statistics for employment in the legal field nine months after graduation (Tamanaha, p. 73). Some are phony: both Villanova and Illinois, for example, have admitted in recent years to submitting inflated LSAT or GPA scores to *U.S. News* (Tamanaha, pp. 74, 76).

The focus on rankings has also increased costs, and thus tuition, and encouraged schools to misdirect their resources. Schools lavish scholarship money on applicants with high scores to induce them to enroll. As a result, they spend less on need-based scholarships (Tamanaha, pp. 97–99). Merit-based scholarships themselves are weighted heavily toward building the first-year class statistics, and vanish if students fail to make the grade. Since academic reputation is a major part of the *U.S. News* calculus, schools have driven up the market for lateral hires of professors with distinguished publication records, regardless of students’ actual educational needs. Until *U.S. News* revamped its metrics to include the median LSAT scores of part-time students in schools’ rankings, some law schools steered lower-scoring students into part-time evening programs. Once the metric changed, part-time programs, which offer a gateway to legal practice for students with heavy work and family commitments, dropped in size (Tamanaha, pp. 86–88). A General Accounting Office report concluded that “competition among law schools over the ranking is a major contributor to the increase in tuition.”²¹

Professors. The rankings race, combined with cultural factors within law schools themselves, has made law teaching an absurdly ideal job, often to the detriment of students and the local legal community. Accreditation standards and the rankings’ emphasis on academic reputation have led to increased salaries and decreased teaching loads. The norm at many schools, driven by competition at the entry-level and lateral-hiring stages, has settled on a three-course teaching load. A 2006 study found that the annual teaching load at the top ten law schools averaged 7.94 credit hours.²² Teaching

21. Tamanaha, p. 78; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009).

22. See Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 546 (2007).

loads are higher at lower-ranked law schools, but in the push to rise in the rankings, those schools have begun competing here as well. “[I]ndications are,” Tamanaha writes, “that the ratcheting down of teaching in favor of scholarship has not yet reached a bottom.”²³

Of course, the same effects pervade universities as a whole. As Tamanaha notes, however, “the universe of postsecondary education is more differentiated than [that of] law schools, with vocational colleges, community colleges, liberal arts colleges, and research universities” (Tamanaha, p. 45). Postsecondary education offers more than one staffing model. The ABA’s uniform accreditation requirements mean that American legal education does not. “In effect, all accredited law schools are set up like research universities” (Tamanaha, p. 45). Law professors sometimes argue that their salaries are lower than those of their former students. As Tamanaha shows, however, most full professors’ salaries are competitive with salaries in the profession as a whole—without even considering professors’ enviable quality of life (Tamanaha, p. 51).

Tuition and debt. It will surprise no one that law school tuition has increased dramatically, although some professors, comfortably insulated from the nitty-gritty workings of even their own institutions, may be vague on the details; I know my own institution has kept its tuition fairly low but I cannot, as I sit here, tell you the actual sticker price.²⁴ Tuition increases began long before the recession of the 1990s and have “far outstripped the rate of inflation” (Tamanaha, p. 108). For example, tuition at Yale Law School was \$12,450 in 1987; in 2010, it was \$50,750 (Tamanaha, p. 109). Public law schools started with lower fees but their rate of increase has exceeded that of the private law schools.

Students cover these astronomical tuitions through debt, and student indebtedness has skyrocketed as tuitions have risen. Law graduates in the mid-1980s had an average combined undergraduate and law school debt of \$15,676; in 2010, the average debt for law school alone was \$68,827 for public law school graduates and \$106,249 for private law school graduates (Tamanaha, p. 109). Those are averages, of course. A list of the law schools with the highest average debt in 2010 showed no fewer than eighteen schools with average debt over \$125,000 (Tamanaha, p. 110).

Jobs. On that list, the top ten schools, with average debt ranging from \$128,495 to \$145,621, are California Western, Thomas Jefferson, Southwestern, American, Catholic, Golden Gate, Northwestern, Loyola Marymount, Charleston, and Pacific (McGeorge) (Tamanaha, p. 110). I taught at Southwestern between 2004 and 2006. Some of its graduates have phenomenal success stories, and its faculty members—my friends—are

23. Tamanaha, p. 43. *But see* Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at SR10, <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> (noting that Hastings Law School, as part of a recent reduction in class size, has increased professors’ teaching loads by 20 percent).

24. The most recent information provided by my law school places in-state tuition at \$18,030 and out-of-state tuition at \$30,950. *Tuition & Financial Aid*, U. ALA. SCH. L., <http://www.law.ua.edu/admissions/tuition-financial-aid/> (last visited Aug. 16, 2012).

first-rate. It has long served as a gateway to professional life for individuals who were the first in their family to receive a college degree, let alone a law degree. That said, with the exception of Northwestern, I would not advise my own children to take on such high debt at these schools for such uncertain prospects.

The reason is that as tuition and debt have climbed, jobs have vanished. Many graduates of these and other schools do not obtain jobs as lawyers at all. For most, a job at a large corporate firm at the high end of the salary distribution for lawyers is unobtainable. That leaves most graduates earning salaries at the first spike in the bimodal distribution of salaries for law school graduates, with nearly half earning between \$40,000 and \$65,000 in 2010 (Tamanaha, pp. 112–13).

These graduates may qualify for the federal Income Based Repayment (“IBR”) program, which allows participants to pay off their loans in lower amounts over a longer time, with the remainder being forgiven after twenty-five years. The IBR program is intended to serve those for whom “standard repayment would be a great hardship” (Tamanaha, p. 121; emphasis omitted, internal quotation marks omitted). Tamanaha observes: “An educational sector, or an individual school, that systematically produces a high IBR rate among graduates is signaling that the debt level is too high relative to the earning opportunities provided” (Tamanaha, p. 121). IBR can be a “lifeline” for some graduates (Tamanaha, p. 121), but it is also a warning. Of the schools with the highest average law-student debt, five of them, according to Tamanaha’s analysis, are also among the schools with “the lowest percentage of graduates landing ‘JD required’ jobs” (Tamanaha, pp. 154–55). What price unemployment?

Given the recent economy, it’s not surprising that legal jobs are scarce. But it’s less clear that all the blame can be laid at the feet of the recession, or that things will change much when the economy improves. One study suggests that “the legal sector has been in decline since the mid-2000s” (Tamanaha, p. 168). Several writers have suggested that the American legal profession, as a result of client pressure and technological and other changes, is undergoing a fundamental downsizing and restructuring (Tamanaha, pp. 168–69). Both academics and hiring partners have predicted that “law firms will not return to the recruiting and hiring patterns that preceded the recession” (Tamanaha, pp. 169–70; internal quotation marks omitted). The changes may prove less dramatic than that:²⁵ although law firms, like any other businesses, respond to market forces, we should not underestimate their talent for making unwise management decisions. But there is no guarantee that today’s large firms will be tomorrow’s large firms, or that they will exist at all. Just ask Dewey & LeBoeuf.

25. See, e.g., Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 101–02 (arguing that “the large American law firm is not dying” but predicting that it will be subject to “evolutionary” rather than “revolutionary” changes “in the way that complex and sophisticated legal services are produced and delivered”).

B. Culture

In addition to *how* law schools are doing, another perennial concern involves *what* they are doing. It's worthwhile to begin with an extended quotation from Michael Olivas, the president of the AALS in 2011, speaking in opposition to the ABA's proposal to loosen the requirement that faculties consist mostly of tenure-track professors:

The high quality and distinctiveness of American legal education are based largely on the work of career, full-time faculty who engage fully in the law school's teaching, scholarship, and service missions. Full-time faculty should be experts in their fields and continue to engage in scholarship that makes them even more accomplished. Given that law is fundamentally a public profession, law school faculty should perform *public service* that both models for students the *selflessness* encouraged for all lawyers, and helps fulfill the role of law schools in contributing to the improvement of law, lawyers, the legal system, and the system of justice. The scholarship and *public service* of career, full-time faculty do not merely supplement their teaching role. Both scholarship and *public service* underlie teaching and give it an authority that . . . teachers who merely pass on received understanding or transmit skills cannot. (Tamanaha, p. 30; citation omitted)

Nice words. But how true are they? Not very, Tamanaha argues. I agree. For one thing, it is doubtful that full-time, tenure-track law professors offer any more by way of "public service" than adjunct instructors engaged in full-time practice. For another, "[m]ost law professors spend limited time with students, so we do little modeling of any kind outside of the classroom" (Tamanaha, p. 31).

More broadly, Olivas's statement raises some nagging questions: "Accomplished" at *what*? "Authority" on *what*? Clinical instructors, who joined Olivas in opposing the ABA's proposal, raised the same question, citing "the overwhelming capture of law school governance by faculty members whose scholarly work and teaching do not reflect a practice orientation and many of whom lack experience" as lawyers (Tamanaha, p. 32; internal quotation marks omitted). If law professors are not modeling public service or practice skills, what *are* they doing?

The answer—sort of—is scholarship. We have already seen that "individual professors and law schools [have traded] teaching time for more scholarship" (Tamanaha, p. 43). Tamanaha warns that in the modern legal academy, anyone who emphasizes practical training and questions the value of scholarship "risks being branded an anti-intellectual" (Tamanaha, p. 55). That warning is too strong: one has to be noticed to be branded, and many law professors are disengaged from these debates altogether. But it is certainly true that for a variety of reasons, including the hunt for prestige, hiring criteria, and the *U.S. News* effect, law schools are heavily and increasingly focused on scholarship over teaching *or* service.

In keeping with the economics-versus-culture distinction, Tamanaha is mostly concerned with the cost of scholarship and its effect on law schools' sustainability. Legal scholarship can be expensive to produce, and as schol-

arship moves away from pure doctrinal analysis and toward things like empirical work, those costs will rise (Tamanaha, pp. 56–57).

It is difficult to measure scholarship's benefits. But two things are clearly true. First, most scholarship withers on the vine; most articles are rarely if ever cited at all (Tamanaha, p. 57; citation omitted). Second, despite the reduction in teaching loads, the "burden" of producing scholarship is unevenly distributed. The qualitative and quantitative requirements for tenure at law schools are low, and after tenure many professors publish only rarely, not always well, and sometimes not at all.

In fairness, this is a natural risk of law schools' hiring and tenure models, which involve an early investment in unproven assets; this is one reason lateral hiring has taken off and entry-level hiring has focused increasingly on "fellows," who at least have a partial track record as scholars. It's also true that teachers who are unproductive or unimpressive as scholars can contribute mightily in other ways. But there are no guarantees on that side either, and the ones who do nothing but teach—and only three courses, at that—are paid almost as well as their productive colleagues. (The latter can move, however, while the former are likely to remain fixed in place like barnacles.)

Tamanaha's interest is not in getting rid of scholarship, but in asking "whether it is appropriate that law students are forced to pay for the production of scholarship at current levels and to the same extent at law schools across the board" (Tamanaha, p. 61). Walter Olson's complaint is more substantive, albeit more questionable. Olson agrees with those who have called much legal scholarship "daffy, eccentric, or bonkers" (Olson, pp. 3–4). Where he differs is in his belief that people outside the scholarly community actually pay attention to it. "Bad ideas in the law schools have a way of not remaining abstract. They tend to mature, if that is the right word, into bad real-life proposals" (Olson, p. 4). Law schools "shape what the general community thinks about law, which in turn shapes the law itself" (Olson, p. 2). Thus, legal scholarship "has revolutionized (or created from scratch) whole fields of law, from product liability to sexual harassment to class action law" (Olson, p. 2). Judges—their own statements to the contrary²⁶—"draft their opinions with one eye on the law commentators, most of whom are either in the legal academy or one jump away from it" (Olson, p. 2).

For Olson, the influence of legal scholarship—specifically, left-leaning legal scholarship—in the United States has been widespread and catastrophic. All the usual suspects are interrogated; indeed, his book reads as if its working title was "The History of Legal Scholarship From 1965 to 1995." Olson criticizes the influence of William Prosser (d. 1972) on torts, Harry Kalven (d. 1974) on class actions, and Charles Reich (ret.) and others on standing and property. He blames the Ford Foundation and similar groups for the rise of activist law school clinics in the 1970s—that is, thirty to forty years ago. He criticizes the influence of the legal academy on the

26. See *supra* note 3.

slavery reparations litigation, which died aborning.²⁷ Decades after its drop in popularity, he criticizes the structural litigation model championed by academics after *Brown v. Board of Education*. And so on. Missing from his list, peculiarly, are originalism and law and economics—the two legal academic fields with the greatest real-world impact in the past forty years.

Olson scores some points, although few original ones. Harold Koh's remark in a speech to incoming students at Yale during his deanship—"Ladies and Gentlemen of the Yale Law School of 2008, Citizens of the republic of conscience, Welcome to the Yale Law School!"—is an entertaining target (Olson, p. 14; internal quotation marks omitted). Complaints about the liberal leanings of professors are old hat, but true just the same, and Olson nicely points out, borrowing an insight from someone else—and a law professor at that!—that it may have less to do with willful discrimination than with the tyranny of "shared assumptions, connections, and comfort levels" (Olson, p. 26). His material on the connections between law schools and the well-heeled foundations that saw themselves as engaged in left-leaning social engineering is nicely presented.

Perhaps his most original point is an aside that complements Tamaha's book: accreditation requirements and the competition for prestige have made law professors highly mobile and law schools highly homogenized, "with surprisingly little in the way of regional flavor" (Olson, p. 46). This is an important observation. On the whole, however, *Schools for Misrule* is basically a competent, intermittently entertaining clip job—a collection and consolidation of what has already been said elsewhere.²⁸

For all that, the book has some value. It is a concise compilation of everything that irks many people about the legal academy—its political biases, its "bad ideas," its taste for social engineering, its neglect of sound practical training, and its cozy assumptions about the rightness of the views of "members of the elite, thinking class and like-minded folk" (Olson, p. 232; internal quotation marks omitted). His view is captured in a trope he uses early in the book, one that is just as likely to appear in the speeches of the Tea Party and, slightly modified perhaps, Occupy Wall Street: that the law schools have suffered an "estrangement from Main Street opinion" (Olson, p. 23). He omits the obvious: that sort of elitism characterizes prominent legal academic conservatives as well, and that his own populist branding formula was concocted closer to K Street than Main Street. If that makes his claims somewhat precious, it doesn't mean they are unfounded. Nor does it change the fact that he captures a widespread perception.

Law professors should be flattered, concerned, and a little bewildered by that perception. Flattered, insofar as Olson mostly depicts the legal profession as powerful and influential, not unread and ineffectual. Concerned,

27. See *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006). In the interests of disclosure, I worked on this litigation on the defense side while in private practice.

28. The praise heaped on the book by its back-cover blurb writers has to be read to be disbelieved.

insofar as the perception captures something about how law schools are viewed by the public. Finally, law professors should be bewildered by Olson's insistence that the legal academy's ideas are both silly *and* profoundly influential. What is the mechanism by which some ideas propounded in law review articles gain influence while others don't? Olson appears to lay all the blame at the feet of the schools themselves. That's silly. Ideas—even bad ones—respond to “[t]he felt necessities of the time.”²⁹ As the slavery reparations example shows, some ideas perish immediately upon exposure to the outside world; most law review articles don't get even that far. Whether products liability law, structural litigation, and other scholarly proposals manage to find a foothold in the world is not just a matter of professors' influence over their graduates. They succeed because they fill a need; they adapt, or die, when that need disappears or is understood differently.

Although Olson's book pales next to Tamanaha's and differs in its focus on culture rather than economics, it is worth observing some points of intersection. Both books argue that law schools are pushed toward uniformity by a myriad of internal and external pressures. Both suggest that law schools have become estranged from “the sorts of everyday law . . . that many or most students are likely to wind up practicing” (Olson, p. 23). And both point out the potential fragility of this model. A national corps of law professors and schools, lacking much in the way of “regional flavor,” is unlikely either to serve students adequately or find political support when the chips are down. A “republic of conscience” with no fixed address may find that it has few fast friends.

II. WHAT IS TO BE DONE

The consensus at this point is that there is a problem with American legal education. The question is what to do about it. The answers to this question, like the proposals of those drawn to the Tea Party and Occupy Wall Street movements, often cluster around either fatalism or utopianism. For the fatalists, nothing can be done: the system is too entrenched, the students too powerless, the deans and law professors too evil. For the utopians, the answer is simple: all we need to do is close half the law schools, deregulate the legal profession, force professors to give up half their salaries and stop doing abstract scholarship, institute a global political and economic revolution, and check off other items on the list of Things That Are Unlikely to Happen Any Time Soon.³⁰

The news is not all hopeless. On what I have called the cultural end, a good deal of interstitial change has been occurring with relatively little notice. Some reform proposals are unlikely to affect any but the elite schools,

29. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass'n 2009) (1881).

30. Visitors to the comments section of the *Inside the Law School Scam* blog will recognize most of these proposals.

and would probably be a bad idea elsewhere.³¹ Others are more practical and portable. Take Duke Law School's Wintersession program.³² It carves a week out of the academic calendar for hands-on courses taught by practicing lawyers that focus on particular skill sets, such as drafting contracts, conducting discovery, and filing for bankruptcy. Or take Gillian Hadfield's efforts to bring the business school case-study method and business students themselves into the law school classroom, to lessen "the growing mismatch between what the world needs from law and what we, as lawyers, actually provide."³³ Consider also recent proposals for clinical settings that more closely emulate the law firm environment.³⁴ Or take something as simple as my own school's introduction of a course in law office practice, which focuses on both the common transactions that small-office lawyers (a likely career path for many Alabama graduates) are likely to conduct, and on "the business of law practice," such as "fee setting and malpractice prevention."³⁵ Those who think nothing is happening are not looking.

But these and other reforms come up against major economic realities and structural barriers. For current students and recent graduates, the most important barrier is the lack of jobs. Training a law student to be a competent lawyer in a small practice rather than the next assistant professor at Yale is an improvement, but unless those jobs exist it's like teaching a person to fish and setting her loose with a fishing pole in the middle of the Sahara.³⁶

31. Berkeley Dean Christopher Edley's proposal to turn "great" law schools into training grounds for global citizens and "cross-disciplinary societal problem solvers," which may be haunting Olson's dreams at this moment, is one example. See Christopher Edley, Jr., *Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School*, 100 CALIF. L. REV. 313, 313 (2012).

32. See *Wintersession*, DUKE L., <http://www.law.duke.edu/wintersession> (last visited Aug. 17, 2012). Somewhat similar, if more general in nature, is Northwestern's "Lawyer as Problem Solver" program for first-year and LL.M. students. See *Lawyer as Problem Solver*, NORTHWESTERN L., <http://law.northwestern.edu/problemsolver> (last visited Oct. 21, 2012).

33. Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 487–88 (2011).

34. See Bradley T. Borden & Robert J. Rhee, *The Law School Firm*, 63 S.C. L. REV. 1 (2011). In the summer of 2012, Arizona State University's law school announced plans to create a medical residency-style nonprofit law firm supervised by experienced lawyers and staffed by up to thirty recent graduates. Martha Neil, *Law Dean at Arizona State Unveils Plan to Create Law Grad 'Residency' Program at Nonprofit Law Firm*, ABA J. (June 5, 2012, 12:52 PM), http://www.abajournal.com/news/article/Law_Dean_at_Arizona_State_Unveils_Plan_to_Create_Law_Grad_Residency_. It should be noted that the plan would presumably beef up postgraduation employment statistics in the *U.S. News* rankings, thus serving both God and Mammon.

35. See *Law Office Practice—Law 688*, U. ALA. SCH. L., <http://www.law.ua.edu/courseguide/courses/view/116> (last visited Aug. 20, 2012); see also Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being a Lawyer*, 71 ALB. L. REV. 201 (2008).

36. See Paul Campos, *The Message*, INSIDE L. SCH. SCAM (Feb. 17, 2012, 6:07 AM), <http://insidethelawchoolscam.blogspot.com/2012/02/message.html> ("There are a great number of things wrong with legal academia, but in the end the problem is this: There aren't enough jobs.").

Nor is that the only structural problem. As long as loans are freely available and there is continued demand from applicants, tuitions will increase and debt will rise. As long as law schools practice something less than full disclosure, many prospective students will make bad decisions, even as others get the message from other sources and make more informed ones. As long as law schools compete for *U.S. News* status, they will focus on those metrics and not others. And as long as the ABA encourages uniformity through its accreditation requirements, schools will head in the same questionable direction. Not all of these things are intrinsically wrong: despite *U.S. News's* flaws, the information and competition it provides are better than none at all. Taken together, however, they make it more likely that law school reform will occur only around the edges.

On these larger questions, Olson's book is no help. He limits himself to Polonius-like generalities. Law schools should focus more on practical training, ethical conduct, and respect for "the dignity of the kind of everyday legal work that the world will always need" (Olson, p. 237).

Tamanaha offers much more here, which is unsurprising given his focus on economics rather than culture. Both the soundness and the practicality of his recommendations are open to debate, but they're a start. He recommends that states eliminate the requirement of an ABA-accredited law degree to sit for the bar, arguing that the increased competition will drive down tuition at lower-ranked law schools (Tamanaha, pp. 176–77). That hasn't happened in California, which does allow unaccredited schools. He urges changes to the eligibility of schools for federal student loans, including more stringent requirements on schools to demonstrate that their students are finding gainful employment, a possible cap on the loan amount available to each school, and opening up the private loan market while making those loans both non-mandatory for lenders and dischargeable in bankruptcy (Tamanaha, pp. 177–81).

His most intriguing suggestion is that we pare down ABA accreditation requirements that force law schools into a single educational model. That includes slashing the required number of hours of instruction to allow law schools to pursue two-year programs; eliminating requirements that force schools to rely mostly on tenure-track, research-oriented faculty; and doing away with rules that "require law schools to maintain unnecessarily expensive library collections and a large support staff" (Tamanaha, p. 173). His goal is not the fall of the research-oriented law school, but the rise of law schools with competing models, so that students can "pick the legal education program they want at a price they can afford" (Tamanaha, p. 174). Some will still choose Yale, while others will choose a cheaper and more practically oriented model. But students interested in the latter will not be forced to pay for the former.

Some objections to this proposal strike me as weak. The objection that "[t]he quantity and quality of published legal scholarship would fall,"³⁷ for

37. See Anita Bernstein, Comment to *Tamanaha's Proposals on Reforming Legal Education Financing and Regulation*, BRIAN LEITER'S L. SCH. REP. (June 1, 2012, 11:08 AM),

example, may be correct. But it is hard to argue that we are producing an efficient amount of legal scholarship right now, measured against its costs and student or professional needs. The worry that “if law professors can be fired at will, they’ll publish only what pleases their bosses”³⁸ must be balanced against the likelihood of contractual protections for academic freedom, particularly if law schools still want to compete for scholarly faculty. Moreover, under the present regime plenty of professors write to “please their bosses” prior to tenure and simply stop writing afterwards, while those who are interested in lateral movement still have incentives to kowtow to their prospective colleagues and their politics.

The fine phrases of Olivas’s objection to an increased reliance on adjunct or non-tenure-track faculty also founder. It is questionable that tenure-track faculty currently model selflessness and public service in an impressive way, or that they do a better job of it than adjuncts. And then there is the plain fact that law schools have *already* quietly moved to create a massive cadre of adjunct faculty—and that those adjuncts are sometimes among the best and most popular teachers at the schools. Similarly, concerns that facilitating experimentation and competition among law schools will create a “two-tier system” of elite and “second-rate” law schools³⁹ not only beg the question of why a less academically driven legal education would be a “second-rate” one; they also neglect the reality that we *already* have a two-tier system, albeit one whose pretenses of uniformity drive up costs across the board.

The biggest question about Tamanaha’s proposals is not whether they are dangerous, but whether they will succeed at curing the particular ills they are aimed at. Without other structural changes, such as reforms aimed at student loans, the answer is uncertain. Still, the reduction in required classroom hours alone would surely encourage the rise of fully adequate two-year programs, at a one-third reduction in tuition; and formal recognition of the vital role adjunct teachers play would help reduce the cost of supporting deadwood faculty who no longer publish *or* engage in service, while allowing schools to adapt and compete more readily.

The bottom line, it seems to me, is that law school reform will not be entirely effective without several interlocking changes:

Information transparency. Law schools must provide more and better information to prospective and current students. Law schools cannot, and perhaps should not, prevent applicants from making unwise choices; but they needn’t egg them on.

<http://leiterlawschool.typepad.com/leiter/2012/06/tamanahas-proposals-on-reforming-legal-education-financing-and-regulation.html>.

38. Bernstein, *supra* note 17.

39. Michael Livingston, Comment to *Tamanaha’s Proposals on Reforming Legal Education Financing and Regulation*, BRIAN LEITER’S L. SCH. REP. (June 1, 2012, 10:16 AM), <http://leiterlawschool.typepad.com/leiter/2012/06/tamanahas-proposals-on-reforming-legal-education-financing-and-regulation.html>.

Locally oriented curricula. Law schools must engage in more far-reaching and locally responsive curricular reform. One of the gravest consequences of the homogenization of the law school faculty, with its heavy concentration of Yale and Harvard graduates seeking to recreate their own law school experience in the hinterlands,⁴⁰ is the growing ignorance of faculties about the nature and needs of their own regional legal market. More faculty curricula are aimed at the 1 percent of the class that may end up in large-firm practice than at the 99 percent who, if they find jobs at all, will fill very different local niches. This is not just about creating an equally homogeneous model of “practice-ready” legal education. It is about figuring out what a school’s *own* graduates and legal community want and need. The world may still want some schools that focus on “global citizenship,” Kantian philosophy, and large-firm corporate practice. It surely does not need 200 schools aimed at the same goals.

Improved communication. Law schools cannot meet their local legal economy’s needs unless they know what that local legal economy is. Law schools need to do a better job of soliciting perspectives from a variety of constituencies, including established members of the bar in large and small practice, current students, and recent graduates, rather than simply cherry-picking from the most successful among them. Almost as important as listening to these varied constituencies is being *seen* to listen to them. Trust needs to be cultivated, not assumed. Those law schools that engage in reform ought to make sure their constituents know it, and seek ongoing feedback about how those reform efforts are doing.⁴¹

Institutional diversity. Law schools ought to seek out more institutional diversity and changes in ABA accreditation that will allow that diversity to emerge. The greatest threat to the prospect of law school diversity, I suspect, is probably not the ABA, but *U.S. News*. As long as schools are measured by the same top-down metrics, they are less likely to take steps that are responsive to local needs but hurt them in the national ratings. Nevertheless, law schools ought to recognize that talk of a national market, either in terms of legal jobs or in terms of law schools themselves, is exaggerated. Few schools serve a national job market, and most schools draw heavily on regional applicants. There is movement, sometimes dramatic and exaggerated, up and down the *U.S. News* ladder every year, and it does have effects on applicants and schools; but most schools remain within a particular range and hit a ceiling at

40. This phenomenon is reminiscent of Tom Wolfe’s account of Yale architecture students in the 1950s, who all found themselves designing “the same . . . box . . . of glass and steel and concrete, with tiny beige bricks substituted occasionally. This became known as The Yale Box. Ironic drawings of The Yale Box began appearing on bulletin boards,” depicting them popping up in the oddest and most inapposite places. Tom Wolfe, *FROM BAUHAUS TO OUR HOUSE* 47 (1981). More or less literally, too many law schools and their curricula tragically resemble The Yale Box.

41. Cf. William H. Simon, *Where Is the “Quality Movement” in Law Practice?*, 2012 *Wis. L. REV.* 387, 397–99 (arguing that the legal profession generally has lagged behind business firms and professions in making use of ongoing improvement mechanisms, including peer review).

some point. They certainly cannot break through that ceiling and ascend indefinitely simply by trying to make themselves more like Yale every year.

Financial reform. Law schools need to find better and fairer revenue models. Change in the structure of student loans is needed because the schools themselves are unlikely to act without pressure to do so. To some degree, of course, this will happen with or without loan reform: "Economic rationality eventually has its way even when multiple sources of market distortion collude to prop up a system beyond its expiration date" (Tamanaha, p. 181). But there is little doubt that the easy availability of loans and their lack of connection to student outcomes have delayed this reckoning. "The fate of law schools" should be more closely "aligned with the fate of their graduates" (Tamanaha, p. 178).

Mindful governance. Most important, if more abstract, is an overarching point: law schools must become more *mindful*. Like all academic departments, law schools talk a good game about academic freedom. But a core element of academic freedom is faculty governance, and here law schools' walk is much less impressive than their talk. Like most institutions, law schools suffer from inertia. In faculty governance, the default option is always to do nothing new,⁴² and that tendency is pronounced among lawyers, who are extraordinarily hidebound. Faculty members have little involvement in a variety of increasingly bureaucratized functions like career services, loans, and budgeting; they have relatively little knowledge about what most of their students do after graduation; and they have little personal incentive to devote time to structural reform. So we drift on.

A more mindful and hands-on approach is needed. It matters less what individual law schools think their mission is than that they translate that sense of mission into action. They are welcome to think of law schools as a market; but they should then ask what kind of market it is, who it ought to serve and how, and what the market imperfections are. Conversely, they are free to argue that there are aspects of professional education and academic work that cannot be quantified or commoditized. As Olivas's words suggest, this is a popular view among legal academics. But this view carries its own obligations. There is little point in romantic talk about the glories of scholarship or the value of public service at a school that takes too many students, at too high a cost, in a region where there are too few jobs; where many faculty members engage in little scholarship *or* public service; and whose pedagogical model has been frozen in amber for decades. If legal education's masters believe it serves a higher purpose, they ought to act like it.

A sense of mindfulness is especially important precisely *because* of the current perception that law schools are in a moment of crisis. Crises provide opportunities for change, to be sure, but they present two problems. The first is that any changes may be impulsive and badly thought out. The second is

42. See generally F.M. CORNFORD, MICROCOSMOGRAPHIA ACADEMICA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN (5th ed. 1953) (cataloging the folkways of academic inaction).

that as crises pass, the impetus for change dies down. Although there is reason to think that the legal profession is undergoing significant structural changes, the legal market has been through other recessions without dramatic transformation. Anyone who, for their sins, reads enough comments on “scamblogs” will come to recognize that for all the talk about the fundamental evils of legal education, many commentators are (understandably) interested in jobs and jobs alone. If and when the jobs return, most students will care little about how law schools function. There will be nothing to counteract the usual institutional inertia. Law schools need to grab the reins of institutional reform and give more thought to what they hope to achieve—not because they are in a crisis, but because one day they may no longer be. One voyage of the *Titanic* is bad enough; setting out deliberately on the same course, again and again, is inexcusable.

III. WHOM DO WE SERVE: THE CLIENT AND LAW SCHOOL REFORM

Asking schools to be mindful raises an important and surprisingly neglected question: mindful of *whom*? In other words, who should law schools serve?

We can assume the answer is not “the professors,” although the reality sometimes seems to suggest otherwise. But the answer of the most avid writers and readers of the scamblogs—the students—is not good enough either. Students are certainly the most vocal constituency, and their tales of joblessness have captured the attention of a growing number of legal academics. As long as law schools are the accredited gatekeepers of the legal profession, however, they are obligated to serve a larger constituency than that. They should serve the profession as a whole, and that includes the primary object of the profession’s fiduciary duties: its clients.

Clients have been remarkably absent from contemporary discussions about what ails the law schools. To be sure, that’s not universally true; concern for clients has certainly been a part of the literature addressing curricular reform, and of the literature on the changing nature of the legal economy itself.⁴³ But the client is practically nonexistent in much of the current discussion focusing on the “law school crisis.”

It’s unsurprising that the client receives little attention in Olson’s book: he is fighting a cultural battle that purports to be about ideas and their consequences, and in which actual people play a supporting role at best. It is more surprising, and regrettable, that the client plays so marginal a role in Tamanaha’s book. His concern is almost entirely with students and lawyers. His preface makes no mention of clients. But it does warn that the high cost

43. For discussions of the failure of the American legal profession to serve the legal needs of low-income and middle-class individuals, see, for example, AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>; LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA (2009), available at <http://www.lsc.gov/JusticeGap.pdf>; and Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010).

of entry into the profession means that “[i]ncreasing numbers of middle class and poor [students] will be dissuaded from pursuing a legal career” (Tamanaha, p. xiii). He returns to this theme in his epilogue, lamenting that “[i]t is increasingly more difficult for people from all spectra of society to become lawyers—and especially hard for people from modest economic backgrounds to get in to and afford an elite law school” (Tamanaha, p. 186). As far as I can tell, clients do not enter the picture at all until page 25.

That’s not to say Tamanaha doesn’t care about clients. Proposed reforms such as the shortening of the required length of law school are aimed in part at “mak[ing] more lawyers available to fill unmet legal needs at a more affordable price” (Tamanaha, p. 174). And he notes that “[p]erversely, the United States has an oversupply of law graduates at the same time that a significant proportion of the populace—the poor and lower middle class—go without legal assistance” (Tamanaha, p. 170). Clients and their needs obviously matter to him. But they appear in the book mostly as an afterthought.

This is meant less as a criticism of Tamanaha than as a general observation about the state of the current discussion about law schools. The tendency is even more evident in a reading of the scamblogs. In a post on *Inside the Law School Scam*, law professor Deborah Jones Merritt offered various sensible proposals about how legal education might be made “more responsive to clients.”⁴⁴ The response was largely negative. One commenter wrote, “I fear that focusing attention on models of legal education merely deflects attention to a relatively minor problem and obfuscates the human tragedy that flows from producing more than twice as many lawyers as are needed.”⁴⁵ Responding to a proposal to have students shadow practice lawyers, one practitioner wrote, “Even if I had the time (which I don’t) to explain everything I’m doing to some youngster, I really would [not] be enthusiastic about training more competitors in an already over-crowded profession.”⁴⁶ In other words, to hell with curricular reform. Focus on reducing competition and increasing jobs, not on what clients want and need.

This is an excellent example of why greater mindfulness is needed on the part of the professoriate, and of how the air of crisis in American legal education can distort as well as motivate. Law schools serve (or disserve) students, to be sure, but they serve (or disserve) clients too. Law schools’ immediate responsibility may be to their students. As long as they continue to be accredited gatekeepers, however, they serve the profession as well. Many of the reforms that Tamanaha and others propose ought to help stu-

44. Deborah Jones Merritt, *Client Centered Law Schools*, INSIDE L. SCH. SCAM (May 24, 2012, 6:29 AM), <http://insidethelawschoolscam.blogspot.com/2012/05/client-centered-law-schools.html>.

45. Anonymous, Comment to *Client Centered Law Schools*, INSIDE L. SCH. SCAM (May 24, 2012, 7:55 AM), <http://insidethelawschoolscam.blogspot.com/2012/05/client-centered-law-schools.html>.

46. tdennis239, Comment to *Client Centered Law Schools*, INSIDE L. SCH. SCAM (May 24, 2012, 8:19 AM), <http://insidethelawschoolscam.blogspot.com/2012/05/client-centered-law-schools.html>.

dents, lawyers, *and* clients: reducing tuition and debt, for example, makes it possible for more lawyers to charge lower fees and serve underrepresented portions of the population.⁴⁷ But, with all due respect, clients ought to be our ultimate concern. That's unlikely to be the case unless their needs and interests are openly and actively considered when we look at reforming legal education.⁴⁸ Whether legal scholarship increases or decreases, whether recent graduates find jobs or debt relief, and whether "people from modest economic backgrounds [can] get in to and afford an elite law school" are all valid but subsidiary concerns (Tamanaha, p. 186). Law students are not the 99 percent. Clients are.

CONCLUSION

The news from law schools these days is grim, but not unreservedly so. There is some good news. First, even an insulated market cannot survive intact forever. Predictions that large numbers of law schools will fold in the near future seem questionable. But there is some suggestion that more law schools are reducing enrollment, at least temporarily,⁴⁹ and that others are doing a better job of disclosing more information.⁵⁰ Second, the state of law schools has at least become a subject of widespread attention and conversation, thanks in large measure to thoughtful commentators like Tamanaha. It is hard to tell just how far that conversation has penetrated; there are thousands of law professors in this country, and only a few of them show up for the handful of bull sessions the AALS allows, or read the blogs. But awareness of the issue has grown. Third, despite the relative lack of interest on the part of scambloggers, a number of law schools have engaged in reforms aimed at making law schools better serve the needs of clients. I suspect that we have already created a lost generation of recent law school graduates for whom little can be done except to express sympathy. But there is still time to steer a better course for the next generation.

47. This result seems to me far preferable to retaining something like the existing system while increasing lawyers' pro bono obligations. Surely, low-income clients with legal needs would be better off with lawyers who specialize in the particular services they require, rather than volunteer lawyers with no special experience or expertise in those areas.

48. Including curricular reform. Recent graduates are right from their perspective to argue that the real problem they face right now has to do with the lack of jobs, not the lack of training. From a client-centered perspective, however, law schools ought to care about both.

49. See, e.g., Vivia Chen, *GW and Hastings Cut Enrollment While Bottom-Ranked Cooley Adds Another Campus*, CAREERIST (May 17, 2012, 1:19 PM), <http://thecareerist.typepad.com/thecareerist/2012/05/law-school-news-may2012.html>. Chen notes cuts in student enrollment at two high-ranked law schools, and the addition of a new campus at another, low-ranked school. *Id.* From a rankings- and revenue-oriented perspective, of course, this split decision makes perfect sense: a sufficiently low-ranked school will want to maximize revenue up to the point at which accreditation is endangered, while a high-ranked law school in close competition with other similarly ranked law schools will not want to endanger its ranking by enrolling students with low LSATs and GPAs.

50. See, e.g., *Employers for Classes of 2009–2011*, U. MICH. L. SCH., <http://www.law.umich.edu/careers/classstats/Pages/employerstats.aspx> (last visited Aug. 20, 2012) (listing detailed post-graduation employment statistics for the most recent graduating classes).

I am reminded, though, of Saul Alinsky's statement to his staff during a momentary bout of popularity: "Don't worry, boys, we'll weather this storm of approval and come out as hated as ever."⁵¹ It is still an open question whether law schools can reform at all, let alone how. But it is an equally open question whether any reforms will go further than to quell student complaints and mollify federal lenders and regulators.

Both the legal academy and the legal profession in the United States are cyclical businesses,⁵² and they have a remarkable talent for not learning from the past. During the legal recession of the early 1990s, commentators were talking about "a palpable anxiety and dismay within the legal profession" and noting "structural changes that are transforming big firms and their world in fundamental ways."⁵³ Seven years later, in the midst of the tech boom and a fat economy, little anxiety or dismay was apparent. I received a raise as a summer associate before the summer even began, and another raise—this one retroactive—before the summer ended.⁵⁴ In 2012, proposals like Tamanaha's to eliminate a single, expensive, standardized model of legal education are met with fears of a "two-tier system" consisting of "elite schools" and those offering "a second-rate education."⁵⁵ In the early 1920s, the same concerns were raised by the elites of the legal academy and the bar, with the result that law schools were forced into the same unified three-year model that they labor under today (Tamanaha, pp. 23–26).

Twenty years from now, one hopes that Tamanaha's book will be filed in law libraries under "legal history," not "current events." But I'm not sure I'd take that bet.

51. HUNTER S. THOMPSON, *THE GREAT SHARK HUNT* 215 (1979).

52. See, e.g., Ellen Joan Pollock, *Big Law Firms Learn that They, Too, Are a Cyclical Business*, WALL ST. J., Aug. 15, 1991, at A1, cited in Vincent Robert Johnson, *On Shared Human Capital, Promotion Tournaments, and Exponential Law Firm Growth*, 70 TEX. L. REV. 537, 560 n.138 (1991) (book review).

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

54. Cf. William Wordsworth, *William Wordsworth—The Major Works: Including The Prelude 550* (Stephen Gill ed., 2008) ("Bliss was it in that dawn to be alive,/But to be young was very heaven!").

55. Livingston, *supra* note 39 (internal quotation marks omitted).