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Ask Not For Whom the Law School Bell Tolls:
Professor Tamanaha, *Failing Law Schools*, and
(Mis)Diagnosing the Problem

Michael A. Olivas*

It is a truth universally acknowledged that law faculty are in want of purpose. It takes a lot to get us riled, and even more to call us to the barricades. But the current state of financing legal education is just such a burning theater, and we all should be troubled by the fast-churning events. Because most of us went to law school during the Golden Age, which I situate as having ended in approximately 2005–06, at the top of the application apex and the height of the modern-day job markets for law graduates, most of us are blissfully unaware of recent developments that literally threaten the enterprise. I write to discuss these many moving parts and to call us to action as a community, for threats to the universe of legal education will affect us all to our collective detriment and to that of our students. The real Cassandra, however, is Professor Brian Z. Tamanaha, whose apocalyptic book *Failing Law Schools*¹ 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 believe he holds powerful diagnostic skills and has

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This Article grew out of a shorter AALS presidential column. I acknowledge my substantial debt to Dean Richard Matasar for his scholarship and service in this important area and to Dean Kent D. Syverud for his service and for his invitation to present this paper at his law school. I also thank Lauren E. Schroeder, Katy Stein, and Professors Linda Jellum, Peter Winograd, and Phil Schrag for their useful suggestions on various editions, and note the work of my two official food-tasters (Dean Larry Dessem and Professor Robert Gorman) for their efforts in reviewing all my AALS columns. Of course, we all disagree on many of these issues, but their views have substantially affected my attention to the subject. All views expressed in this Article are my own, and should not be considered AALS policy.

1. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

a storyteller's narrative, but I believe his solutions are substantially wide of the mark, and would violate the code that remedial actions should, at the least, do no harm. If he were simply overstating issues or being a *provocateur* for the sheer sake of being one, as other critics have done,² I would simply let him stew in his own juices. But his devastating critique has a number of accurate observations, ones I share, so laying out his arguments and his critical architecture is necessary to see how the analytic second step—his remedies—can be so wrong. Indeed, rather than merely noting his architectural framework, I will note the arithmetic of his remedies, and attempt to show why he should receive only partial credit for his math homework.

THE MANY MOVING PARTS IN THE POLITICAL ECONOMY OF LEGAL EDUCATION

First, I set out the many moving parts, and briefly describe their interrelationships. I will then contrast Professor Tamanaha's assessment with my own and that of Dean Richard Matasar, another critic of legal education, who is addressed in the book, but in glancing fashion (and in a somewhat snarky manner, as with noting the dean's large salary for the record). Indeed, I note from the outset that *Failing Law Schools* cites a substantial number of studies in his extensive footnotes, but he never offers a critical or synthetic review of the research literatures, including a number of which might have made more explicit his argumentation or buttressed his points, even better than did his own arithmetic. He also uses a number of straw man arguments, and does not discern carefully his critics from his supporters. Therefore, his book has a breathless, repetitive, and broad-brush quality to it, rendering it much less effective than it might have been.

2. A number of critical bloggers fit this bill, but I give a shout-out here to Professor Paul Campos, who has turned snarkiness into anonymous work ("ScamProf"), later acknowledged as his own, in his blog *INSIDE THE LAW SCHOOL SCAM* and in a self-published e-book, *DON'T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR'S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK* (2012). I note that I am eternally grateful for his work on reducing prejudice against overweight persons, *THE OBESITY MYTH* (2004), even if it appeared too late to help me.

Here, then, I list many of my own assumptions about legal education, many of which I readily note are congruent with the trenchant observations of Professor Tamanaha. Neither of us are the first cowboys at this particular rodeo, so there is a surprisingly large body of research in legal education, most, but not all of it by legal scholars. And there is a remarkable convergence on what the major issues and problems are. A number of states, faced with ruinous economic conditions, are reducing their subsidy to public collegiate institutions.³ This development and the rising cost of private education have meant that it is harder to finance education without resorting to substantial student debt burdens.⁴ Many students already arrive at law schools with substantial obligations and compromised credit worthiness.⁵ Some states have privatized their public law schools, rapidly increasing the tuition prices.⁶ Private law school

3. 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).

4. 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*, *N.Y. TIMES*, Dec. 15, 2012, at B1; Jason DeParle, *For Poor, Leap to College Often Ends in a Hard Fall*, *N.Y. TIMES*, Dec. 23, 2012, at A1; Caitlin Peterkin, *Rising Student-Loan Debt Spurs Calls for Frank Discussion, Not Panic Over Extreme Cases*, *CHRON. HIGHER EDUC.*, Oct. 26, 2012, at A3.

5. 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).

6. 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-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. Legal scholar Bryant Garth applies

tuition costs have continued to outstrip the consumer price index.⁷ Both these features have meant that 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, which he characterizes as one whose students “graduated with an average law school debt of \$123,025, among the highest in the country. Many graduates did not get jobs as

this lesson, drawing upon the work of economist Caroline Hoxby, who has analyzed the undergraduate markets and competition for undergraduate students. CAROLINE M. HOXBY, NBER WORKING PAPER NO. 6323, HOW THE CHANGING MARKET STRUCTURE OF U.S. HIGHER EDUCATION EXPLAINS COLLEGE TUITION 5–7 (1997). Citing Hoxby, Garth notes: “Educational hierarchy is real in Hoxby’s analysis. Schools that are relatively unselective cannot invest as much, leading to more differentiation in the market. But the main point is that the large increases in tuition among less selective and more selective universities are in Hoxby’s analysis rational responses to increased competition.” Bryant Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, STAN. L. & POL’Y REV. (forthcoming 2013), 33–34, available at <http://ssrn.com/abstract=2166441>. He paraphrases Hoxby:

From this perspective, the increase in law school tuition comes from a more competitive market. As with respect to undergraduates, potential students now have much more information about the relative quality and prestige of different law schools. The brightest students are less likely to attend the local alternative or state school in lieu of a more elite school than in the past, and the availability of inexpensive travel facilitates attendance away from home.

Hoxby argues that the strategy of cutting tuition does not work as a means of attracting high quality students; instead, it leads to a self-fulfilling decline in student quality. Law schools according to this logic raise tuition to offer inducements to students such as clinics, writing programs, academic support, journals, and enhanced career services. She does not dwell on this point, but the students also may be shopping for notable professors in programs that interest them. Students considering law schools that appear comparable in some respects shop, according to this argument, according to what they believe will help them get more out of their investment in law school. Schools that are relatively unselective cannot invest as much, leading to more differentiation in the market, but they compete as long as the[y] can and as effectively as they can, including with tuition *increases* if they can be sustained.

Id. at 34 (emphasis in original; citations omitted).

7. Garth, *supra* note 6. See also Matt Leichter, *At Last, a Rational Explanation for Why Law School Tuition Keeps Rising*, AMLAWDAILY (Mar. 1, 2012, 7:01 PM), <http://amlawdaily.typepad.com/amlawdaily/2012/03/at-last-a-rational-explanation-for-why-law-school-tuition-keeps-rising.html>.

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.”⁸

And he lays this dire assessment at the feet of the requisite ABA accreditation process, whose opaque and collusive governance 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.”⁹ He also plays off other schools against each other, as in the case of UCLA and Loyola Marymount in Los Angeles, where he contrasts the variegated opportunity structures at these competing institutions.¹⁰ Even while thoroughly noting and critiquing these contrasting differences in law schools, at the same time, he develops a major premise that the accreditation process flattens them and requires a cookie-cutter accreditation regime, one that is too costly and borne largely by students: proposals to loosen some of the important ABA standards “would allow...greater flexibility and variation among law schools.”¹¹ If there is a single point at which his logic fails, one need look no further than these mutually-exclusive assertions about the variability of the two hundred or so U.S. (ABA-accredited or provisionally-accredited) law schools and the accreditation provisions that have enabled so many styles and approaches to flower and bloom, looking nothing at all alike.¹² These

8. TAMANAHA, *supra* note 1, at 19.

9. *Id.* at 19.

10. *Id.* at 101.

11. *Id.* at 31.

12. When he does cite relevant literature, he does so selectively and incompletely, as when he notes a single sentence from a recent Government Accountability Office report, “Higher Education: Issues Related to Law School Cost and Access,” that he correctly reports attributes rising costs to “competition over the ranking” TAMANAHA, *supra* note 1, at 78. However, he omits the larger and more extensive findings, directly on point, that attribute accreditation requirements a “minor role” in the costs. “According to law school officials, the move to a more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings appear to be the main factors driving the cost of law school, while ABA accreditation requirements appear to play a minor role. Additionally, officials at public law schools reported that recent decreases in state funding are a contributor to rising tuition at public schools. Most law school officials do not cite ABA accreditation standards as

developments have also led to internal reorganizations and the creation of revenue streams to law schools, such as increased CLE and short-term curricular offerings, executive-style programs especially at the graduate level, additional and more-specialized LLM programs (including on-line and asynchronous course offerings), and many other revenue-generating and auxiliary enterprises, all of which have further diversified the universe of law schools. These many different response choices (some are market-driven, others are devices “for harvesting additional bodies”) and other features have also led to regular fluctuations in enrollment patterns, expanding and contracting accordion-like, as conditions permit.¹³

Professor Tamanaha does provide a useful service in his substantive analysis of enrollment and application data, perhaps the most detailed and balanced exposition of any single issue in this complex book. But it is what he chooses not to discuss that is equally telling, particularly the need for law students to live more frugal lives while in law school, so that they do not live like law students when they are lawyers, bar passage rates, and in my view, the most salient counter to his narrative—compared to what?

Asking this last question situates the data in historical and comparative fashion, including earlier similar times in the ebbs and flows of legal education.¹⁴ In a difficult post-baccalaureate job

having an impact on minority access at their schools.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009), available at <http://www.gao.gov/new.items/d1020.pdf>. He also refers to the GAO as the Government Accounting Office.

13. TAMANAHA, *supra* note 1, at 64.

14. See Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333 (1999). For a more recent study, see David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249 (2010). See generally 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>; Stacey Patton, *Applications to U.S. Graduate Schools Increase, but New Enrollments Drop*, CHRON. HIGHER EDUC. (Sept. 28, 2012), <http://chronicle.com/article/Applications-to-US-Graduate/134746/>; Tamar Lewin, *College Loans Weigh Heavier On Graduates*, N.Y. TIMES, Apr. 12, 2011, at A1 (two-thirds of all bachelor’s degree recipients graduated with debt in 2008; in 1993, it was fewer than 50 percent. In 2010, college graduates who took out loans averaged \$24,000 in debt.). But see Ann Carns, *College Students Don’t See Debt as Burden*, N.Y. TIMES BUCKS BLOG (June 15, 2011, 12:28 PM), <http://bucks.blogs.nytimes.com/2011/06/15/college-students-surprising-attitude-toward-debt/?nl=your-money&emc=your-moneyema5> (suggesting the opposite, that students were not burdened with debt).

market, law schools historically have been reasonable and accessible options to medical school, MBA programs, and other graduate or professional alternatives for college graduates. While there are more law students enrolled at present than in history, the demographics of law study are shifting as well, and not all populations will be equally able to undertake law study. While I think we should watch these figures carefully, I do not agree that we should believe or act as if the sky is falling.

There is a growing consensus that the legal education system is overbuilt and overleveraged, by any reasonable estimates, but there is less consensus on what the solutions are. *See, e.g.*, William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: Federal Loans Inflate College Budgets, But How Long Will That Last if Law Grads Can't Pay Their Bills?*, A.B.A. J., Jan. 2012, at 30; ERIN DILLON, EDUCATION SECTOR, AFFORDABLE AT LAST: A NEW STUDENT LOAN SYSTEM (Oct. 28, 2011), available at http://www.educationsector.org/sites/default/files/publications/AffordableAtLast_RELEASE.pdf.

FIGURE 1: LSATS ADMINISTERED, 1987–2012

LSAC Volume Summary
Volumes are rounded to the nearest hundred.

	Fall 2003	Fall 2004	Fall 2005	Fall 2006	Fall 2007	Fall 2008	Fall 2009	Fall 2010	Fall 2011	Fall 2012
ABA Applicants										
Preliminary End-of-Year	98,300	98,700	93,500	87,300	82,800	82,000	85,600	87,500	78,800	68,000
% change from prior year	10.6%	0.4%	-5.2%	-6.7%	-5.1%	-1.0%	4.4%	2.3%	-10.0%	-13.7%
Final End-of-Year	99,500	100,600	95,800	88,700	84,000	83,400	86,600	87,900	78,500	
% change from prior year	9.5%	1.1%	-4.8%	-7.4%	-5.2%	-0.8%	3.8%	1.5%	-10.7%	
Admitted Applicants										
End-of-Year	56,800	55,900	56,100	56,000	55,500	55,500	58,400	60,400	55,800	
% change from prior year	0.6%	-1.6%	0.3%	-0.2%	-0.9%	0.0%	5.1%	3.5%	-7.7%	
LSAC Matrics										
End-of-Year	46,200	45,400	45,800	46,100	46,700	46,500	48,900	49,700	45,600	
% change from prior year	0.4%	-1.7%	0.9%	0.7%	1.4%	-0.5%	5.3%	1.6%	-8.3%	
ABA First Year Enrollment										
End-of-Application-Year	48,900	48,200	48,100	48,900	49,100	49,400	51,600	52,500	48,700	
% change from prior year	0.9%	-1.3%	-0.2%	1.7%	0.3%	0.7%	4.5%	1.6%	-7.2%	
ABA Applications										
Preliminary End-of-Year	522,800	552,400	543,000	527,900	514,800	530,600	564,000	602,300	536,500	469,600
% change from prior year	17.4%	5.7%	-1.7%	-2.8%	-2.5%	3.1%	6.5%	6.8%	-10.9%	-12.5%
LSATs Administered										
End-of-Year	147,600	145,300	137,400	140,000	142,300	151,400	171,500	155,100	130,000	
% change from prior year	-0.3%	-1.6%	-5.4%	1.9%	1.6%	6.4%	13.3%	-9.6%	-16.2%	
Credentialed Assembly Service (CAS) Registrations*										
End-of-Year	90,100	84,800	80,900	78,300	78,200	80,600	87,900	70,000	62,000	
% change from prior year	-4.3%	-5.8%	-4.6%	-3.2%	-0.2%	3.1%	9.1%	-20.4%	-11.5%	

* CAS (formerly LSDAS) changed to a 5-year subscription beginning with 2002–2003.

Every institution has its own admissions trajectory and narrative, and there have been years where schools defied gravity, and there will be years where they return to earth. In addition, these national aggregate data are very volatile and cyclic. 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). There are many interlocking features to these issues, 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 industrial complex has little or no control. In volatile times, some schools lean into the wind and increase their size, as did Cooley, while others downsize, as did a number of institutions.¹⁵ Cruel fates await schools that guess wrong, in either direction, but I read these institutional responses as major differentiating features, not the evidence of convergence that Professor Tamanaha observes. And the test itself is re-normed periodically to account for the psychometrics of the testing population, so that a given score one year may be slightly different than the same raw score and percentile in a different year.¹⁶

And, most importantly, these developments are always relative—compared to what? Post-baccalaureate professional students in the United States and the world form the talent pool, and while they are not interchangeable with each other, they are the likely overall admissions pool. This pool is growing and 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 is more expensive to become a medical doctor and establish a medical practice, and when

15. 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, 12:03 PM), <http://abovethelaw.com/2012/10/ranking-the-worst-aba-accredited-law-schools/#more-202939>.

16. Linda F. Wightman, *Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229 (2003). In this study, psychometrician Wightman reviewed a number of testing methodology and efficacy issues, particularly differentiated racial results of LSAT test taking. In a different vein, Wim J. van der Linden has studied technical and administrative issues in differential testing times. LAW SCHOOL ADMISSION COUNCIL, RESEARCH REPORT 08-01, CONCEPTUAL ISSUES IN RESPONSE-TIME MODELING (2008), available at <http://www.lsac.org/lscresources/research/tr/pdf/tr-08-01.pdf>.

corporations are subsidizing fewer MBA enrollees among their employees. The worldwide economic restructuring across professional sectors has affected these fields and others such as pharmacy/allied health professions/dentistry/public administration and the other possible alternatives for college graduates. 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 choose. Law schools will survive and even flourish, and if some do not, in a Darwinian environment, these forces will still apply.¹⁸

17. See generally Melissa Korn, *M.B.A.s Lose Their Luster at Some Schools*, WALL ST. J., Sept. 10, 2012, available at <http://blogs.wsj.com/atwork/2012/09/10/m-b-a-s-lose-their-luster-at-some-schools/>. 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); 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); 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>.

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?

In addition, Professor Tamanaha paints a dismal picture about the debt loads being forced onto law students to pay for the upscale law schools, chasing prestige and enrollments, and he makes indirect references to the cost of living and forgone wages issues that round out the cost of legal education, such as noting that the cost of law school attendance in New Haven, Connecticut was \$19,700 in 2010. Of course, 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, by failing to economize and to live more modestly and frugally than is often the case. Any frank appraisal of professional school costs would have to include accurate and useful information on this feature.

And he is noticeably silent on how bar passage rates align students along a continuum, and the natural experiment that occurs in California each year, an odd omission, inasmuch as a number of his more telling anecdotes and case studies originate in California. There, 76 percent of the graduates of the California ABA-accredited schools in 2011 who took the State bar passed the July exam, while only 35 percent of the non-ABA approved school graduates (that is, the state-accredited schools) passed the same bar examination. Graduates from both types of law schools can sit for the bar and practice in California after passing the examination, but the differentiated results and pattern have repeated themselves over many years of the parallel tracks, indicating how the unaccredited institutions have regressed to a much lower mean, traditionally at half the success rate.²⁰ Despite his earnest solicitousness for the students, this glaring disparity reveals what the national universe would look like, absent the ABA and its essential accreditation role in assuring a level of quality and efficacy in accredited schools. If anyone is getting short shrift in legal education or being victimized by their law schools, it is the graduates of these state-accredited schools, whose debt loads may be somewhat lower due to the cheaper model he urges, but whose legal educations

(2012), available at http://futureofhighered.org/uploads/ClosingTheDoorFINAL_ALL32812.pdf.

19. There is a free and useful interactive computer program, the Law School Cost Calculator, available at http://www.admissionsdean.com/paying_for_law_school/law-school-cost-calculator. Warning: Users should be prepared for the sticker shock phenomenon.

20. See *infra* Figure 2: California Bar Passage Rates.

are demonstrably of lower quality and whose job prospects are severely compromised, as is their likelihood that they will ever become lawyers. He is dismissive of discussions about these consequences, even as he urges such schools be allowed to operate: “Talk of a race to the bottom is scare mongering.”²¹ Students have more and more transparent information about their choices, but there are substantial information asymmetries, ones that can lead to imperfect self-assessments. As with choices of annuities, 401(k) plans, and prepaid tuition plans, there are so many choices that applicants are in a position to have too much data, and a poor sense of what law school is the best for them, even which sector is better in California.²²

FIGURE 2: CALIFORNIA BAR PASSAGE RATES, ABA-ACCREDITED AND STATE APPROVED LAW SCHOOLS²³

GENERAL BAR EXAMINATION STATISTICS (FEBRUARY 2012)

Law School Type	First-Timers			Repeaters			All Takers		
	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
CA ABA Approved	478	297	62.1	1245	621	49.9	1723	918	53.3
Out-of-State ABA	284	135	47.5	530	206	38.9	814	341	41.9
CA Accredited	105	35	33.3	433	106	24.5	538	141	26.2
CA Unaccredited	91	30	33.0	272	38	14.0	363	68	18.7
Law Office/Judges' Chambers	1	1	100.0	1	0	0.0	2	1	50.0
Foreign Educated/JD Equivalent + One Year US Education	42	7	16.7	44	7	15.9	86	14	16.3
US Attorneys Taking the General Bar Exam	333	230	69.1	155	58	37.4	488	288	59.0
Foreign Attorneys Taking the General Bar Exam	101	26	25.7	177	45	25.4	278	71	25.5
4-Year Qualification	10	3	30.0	27	2	7.4	37	5	13.5
Schools No Longer in Operation	1	0	0.0	52	2	3.8	53	2	3.8
Total	1446	764	52.8	2936	1085	37.0	4382	1849	42.2

21. TAMANAHA, *supra* note 1, at 31.

22. As one example of a call to simplify, see Libby Nelson, *White House Urges States to Make College-Savings Plans More Usable*, CHRON. HIGHER EDUC. (Sept. 9, 2009), <http://chronicle.com/article/White-House-Urges-States-to/48345>.

23. *California Bar Examination Statistics*, STATE BAR OF CAL. (Feb. 2012), <http://admissions.calbar.ca.gov/Portals/4/documents/Statistics/FEBRUARY2012STATS.pdf> (last visited Feb. 16, 2013).

Moreover, federal law requires all its accrediting agencies, such as the ABA, to articulate clear standards and reasonable criteria, and to revise them regularly in the certification process. Therefore, 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. Up until approximately 2010, 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-paid profession, where career earnings improved over the trajectory of lawyers' careers. All the parts of this equation are shifting, and the equation itself is unlikely to continue as a working model for many of our students, as he accurately documents.²⁴ 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 fulltime enrollment.²⁵ 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 the debt repayment but also substantially increasing that burden. At the successful urging of legal educators, Congress adopted both an income-based repayment plan and a public interest loan forgiveness program, but law students have not used them as widely as they should be used. Here, Professor Philip Schrag has usefully rebutted Professor Tamanaha's analysis of the various plans; they need revision, especially for the possible long-term tax consequences, but they provide a pathway to legal education that

24. For recent stories about undergraduate employment markets, see Catherine Rampell, *Many With New College Degree Find the Job Market Humbling*, N.Y. TIMES, May 19, 2011, at A1. Legal employment figures are regularly reported by NALP: Press Release, The Association of Legal Career Professionals (NALP), *Class of 2010 Graduates Faced Worst Job Market Since Mid-1990s: Longstanding Employment Patterns Interrupted* (June 1, 2011), available at <http://www.nalp.org/uploads/PressReleases/11SelectedFindings.pdf>. Federal data suggest that the growth in the legal job market will increase by 10 percent in the next decade, lower than the overall job market, which it predicts will be 14 percent. U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: LAWYERS (2011), available at <http://www.bls.gov/ooh/legal/lawyers.htm> ("Job Outlook, 2010–20: The projected rate of change in employment for the 10-year timeframe between 2010 and 2020.").

25. Frank Donoghue, *The Gainful-Employment Rule—New Developments and Implications*, CHRON. OF HIGHER EDUC. (June 20, 2011), <http://chronicle.com/blogs/innovations/the-gainful-employment-rule-new-developments-and-implications/29690>.

should be a serious consideration for many law students.²⁶ Limitations on bankruptcy for student loans likely mean that there will be pressure upon state bar authorities to use financial health and credit records in the moral character and fitness determination process.²⁷ Some institutions, especially newly established and a number of other struggling law schools, may not be able to meet the increased regulatory requirements for administering loan programs, such as the proposed “gainful employment” and 90/10 criteria. While these are very technical matters, they mean that schools with

26. 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. Pruet, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583–612 (2011). There is a growing literature in this area, and it will likely shed more light when some of the definitional and data issues are resolved. See, e.g., ASSOC. AM. U., *LOOKING MORE CLOSELY AT STUDENT DEBT* (Aug. 9, 2012), available at <http://www.aau.edu/search/default.aspx?searchtext=Looking%20More%20Closely%20at%20Student%20Debt>. Simply increasing technical assistance and transparency, while necessary, does not automatically lead to better understanding or use of financial aid, especially loans. See, e.g., HEALEY C. WHITSETT & RORY O'SULLIVAN, NERA ECONOMIC CONSULTING, *LOST WITHOUT A MAP: A SURVEY ABOUT STUDENTS' EXPERIENCES NAVIGATING THE FINANCIAL AID PROCESS* (2012), available at http://www.nera.com/nera-files/PUB_Student_Loan_Borrowers_1012.pdf. In addition, Administration underwriting standards will likely cause many parents to be uncreditworthy or ineligible for loans that they would take out for their children. See Libby A. Nelson, *Cracking Down on PLUS Loans*, INSIDE HIGHER ED (Oct. 12, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/10/12/standards-tightening-federal-plus-loans#ixzz296VwhEbi>.

27. As two of literally hundreds of bar admissions cases that turn on financial responsibility, including bankruptcy issues, see *Application of G. W.*, 161 N.H. 401, 13 A.3d 194 (2011) (financial irresponsibility, fraud, and deceit in bar application); *In re Griffin*, 943 N.E.2d 1008 (Ohio 2011) (concerning bankruptcy). For a thorough review of the bankruptcy hardship provisions affecting students, see Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005).

undercapitalized operating expenses (that is, they rely almost exclusively upon tuition) and poor placement and/or bar passage records for graduates will find it more difficult to operate and be authorized to administer federal loans.²⁸ Under current structures, no law school in the United States could operate without access to federal borrowing and lending activities for its students.

In perhaps the most ominous sign of change, the law firm and legal employment markets are being restructured in a fashion that has led and will likely continue to lead to lower legal employment opportunities; structural changes 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 such as Wheeling, West Virginia and Dayton, Ohio; some outsourcing of routine legal work to foreign cities, especially in India, has been evident for years.²⁹ 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.³⁰

28. See generally Matt Leichter, *Who Knew Law Students Were Scamming the Government All Along?*, AMLAWDAILY (Oct. 25, 2012), <http://www.americanlawyer.com/PubArticleALD.jsp?id=1202576338628> (reviewing NEW AMERICA FOUNDATION (NAF), SAFETY NET OR WINDFALL? EXAMINING THE CHANGES TO INCOME-BASED REPAYMENT FOR FEDERAL STUDENT LOANS (2012), available at http://edmoney.newamerica.net/publications/policy/safety_net_or_windfall). See generally Alina Mogilyanskaya, *3 For-Profit Institutions Lose Student-Aid Eligibility After Failing 90/10 Test Twice*, CHRON. HIGHER EDUC. (Sept. 27, 2012), http://chronicle.com/article/3-Institutions-Lose/134696/?cid=at&utm_source=at&utm_medium=en. And there is a small boomlet for using alternative measures for measuring efficacy, which raise many troubling issues, particularly the voodoo economics and poor data availability. See, e.g., Dan Berrett, *All About the Money; What if Lawmakers and Students Used Starting Salaries to Evaluate Colleges and Their Programs?*, CHRON. HIGHER EDUC. (Sept. 18, 2012), <http://chronicle.com/article/All-About-the-Money/134422/>.

29. See Catherine Rampell, *At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES, May 24, 2011, at A1 (domestic outsourcing); John Markoff, *Smarter Than You Think: Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1 (restructuring of legal work through technology).

30. 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

Congressional and Obama Administration efforts to tighten up the gainful employment/ability-to-benefit equation have largely been a function of undergraduate proprietary schools, but the increased scrutiny to employment issues, including institutional honesty and transparency, will extend to legal education overall, which could restrict some schools from participation in the federal scheme. Law schools have not been fully scrutinized on these issues until several highly publicized incidents of institutional dishonesty and deceit surfaced, causing accreditation and legal education authorities to tighten up their procedures and to adopt more legalized governance procedures and reporting requirements.³¹ Professor Tamanaha spells out the falsified reporting scandals in some detail, and notes that what is often even worse is what passes for legal or normative within the vague rules, such as the many incidents of schools gaming reporting systems, sometimes to get over on authorities and to toe the line of what is proper and honest practice in legal education—or outright manipulation of programs, such as the shoddy practices of using transfer students to avoid LSAT score issues and the even more

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; *The European Commission Project Regarding Competition in Professional Services*, 28 NW. J. INT'L L. & BUS. 1 (2009); *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875 (2010); *An Introduction to the Financial Action Task Force and the FATF's 2008 Lawyer Guidance*, 2010 J. PROF. L. 3; and *Transnational Legal Practice: 2009 Year-in-Review*, 44 INT'L L. 563 (2010).

31. In the competitive world of comparative admissions statistics, both colleges and professional schools have been caught at and have conceded serious evidence of fraud and misreporting data. One reporter, after reviewing a number of recent cases, wryly noted, "In the Wild West of college admissions, there is no Data Sheriff." Eric Hoover, *Inflated SAT Scores Reveal 'Elasticity of Admissions Data,'* CHRON. HIGHER EDUC. (Feb. 1, 2012, 12:01 AM), <http://chronicle.com/blogs/headcount/inflated-sat-scores-reveal-elasticity-of-admissions-data/2957>. See, e.g., Martha Neil, *ABA Raps Villanova re Inaccurate Admission Data, Says Law School Must Post Censure Online*, A.B.A. J. (Aug. 15, 2011, 2:23 PM), http://www.abajournal.com/news/article/abas_legal_ed_section_sanctions_villanova; Mark Hansen, *U of Illinois Law School Is Publicly Censured by the ABA, Fined for Misreporting Admissions Data*, A.B.A. J. (July 24, 2012, 2:20 PM), http://www.abajournal.com/news/article/u_of_illinois_law_school_is_publicly_censured_for_misreporting_admissions_d/; John A. Byrne, *Who Cooked The Books At Tulane?*, POETSANDQUANTS (Jan. 17, 2013), <http://poetsandquants.com/2013/01/17/who-cooked-the-books-at-tulanes-b-school/>. See generally William Seth Howard, *The Student Loan Bubble and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485 (2011) (conservative critique of law school financing policies); Gene R. Nichol, *Wages, Work, Privilege, and Legal Education*, 5 HARV. L. & POL'Y REV. 401 (2011) (liberal critique of these issues).

questionable—although allowed at the time—practice of hiring recent law alums so as to make them appear to be genuinely employed, for placement purposes.³²

These are daunting developments in the world of legal education, and many of the evils in his list have occurred, 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.³³ Because these communities are growing and will provide the applicants for future law classrooms, these developments are ominous and unforgiving, depending upon how one views the changes. While many people see some of these, and some see many of these, I believe that Professor Tamanaha's book is a needed wakeup call. However, had his

32. Paul Campos, as one such critic, has accused law schools of misrepresenting graduation placement figures. Paul Campos, *Served: How Law Schools Completely Misrepresent their Job Numbers*, NEW REPUBLIC (Apr. 25, 2011), <http://www.tnr.com/article/87251/law-school-employment-harvard-yale-georgetown>. See also Eric Kelderman, *American Bar Association Takes Heat From Advisory Panel on Accreditation*, CHRON. HIGHER EDUC. (June 9, 2011), <http://chronicle.com/article/American-Bar-Association-Takes/127869/?key=SWGIIgU5ZXVKZnlqZj0UYD0AbH1tNxb2YnhNPnotblxREw%3D%3D> (ABA not in compliance with seventeen regulations, but accrediting status renewed). In 2012, the ABA Section of Legal Education and Admissions to the Bar censured both the University of Illinois and Villanova law schools for submitting falsified data, and also fined Illinois a quarter million dollars. See Karen Sloan, *Illinois Law Fined \$250,000 for Falsifying Applicants' Test Scores*, NAT'L L.J. (July 24, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564243650&Illinois_Law_fined_250000_for_falsifying_applicants_test_scores. These transgressions have been widely reported by the trade press. See Karen Sloan, *ABA Backs Off Making Law Schools Report Graduates' Salaries*, NAT'L L.J. (Mar. 19, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&ABA_backs_off_making_law_schools_report_graduates_salaries_ (new ABA accreditation standard on improving data reports); see also Debra Cassens Weiss, *No Fudging: Revised Standard Bars Law Schools from Publishing Misleading Consumer Info*, A.B.A. J. (Aug. 6, 2012), http://www.abajournal.com/news/article/no_fudging_revised_standard_bars_law_schools_from_publishing_misleadin/. For a decade-long bookends survey of ways in which many law schools fudge their data, see Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 J. LEGAL EDUC. 173, 190 (2001); see also Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEBR. L. REV. (forthcoming 2013). Professor Trachtenberg's careful and comprehensive review is a devastating indictment of law school misrepresentations, one that recommends professional responsibility and ethics disciplinary investigations for legal educators who engage in such behavior.

33. 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).

analyses been more comprehensive and his proposed remedies been more nuanced and less self-abnegating, the project would have been a useful irritant and a beacon, shining uncomfortable and disinfecting light on an important sector of postsecondary education. It might have even set out real reforms that could have been adopted and could have led to real change, rather than the cursing the darkness and blaming faculty evident in *Failing Law Schools*.

PROFESSOR TAMANAHA'S FINDINGS AND OBSERVATIONS

His architecture is largely an attack upon the fulltime faculty model of legal education, which he identifies as a combination of self-serving governance, faculty concupiscence, and law school greed, all of which combine to rob students of genuine choices and to require these duped students into subsidizing 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

. . . . Harvard set a new definition of what it meant to be an elite school: “elite” law schools (and those striving for this status) expand their faculty as a conspicuous display of intellectual wealth. Elites stockpile scholarly talent. While Harvard has the financial heft to pull it off, most law schools do not. The need for revenue kicked in.³⁴

He writes to put the entire polity and legal education community on notice that we face significant challenges in all these areas, and not all law schools will be able to survive the end game of some of these events. One need only look at the housing bubble and credit market collapse to see how quickly and precipitously such problems can

34. TAMANAHA, *supra* note 1, at 67–68.

occur. Professor Tamanaha sees such a “fundamental change” not as a tragedy but as a necessary clarion call and market correction:

To affect the overall dynamic of rising tuition and debt requires a more fundamental change. Previously, the federal government guaranteed student loans made by private lenders, but it now loans money directly to students. When lending the money, the government makes no evaluation of whether the borrower is *likely to repay the loan*. A student who borrows to attend Thomas Jefferson or Cooley gets the same treatment as a student who borrows to attend Harvard Law School, notwithstanding the fact that a far greater proportion of the former will not repay the loan. A private lender would soon go out of business if it operated this way, but in the student loan context this policy is justified as “providing access.”³⁵

Such a formulation not only would violate federal law, which does not allow differentiations based upon efficacy, or at least his version of efficacy, but this scenario completely misapprehends the way the financial aid and loan system actually works. The government had used a series of private lenders (such as The Access Group) to originate loans and to service them through the life of the transaction. By switching to direct lending, the government made a major policy shift to reduce the involvement of these vendors and loan servicers.³⁶ All student borrowers are required to “repay the loans” by one means or another, including income contingent means or public service, so the federal government’s institutional evaluation is neither required nor likely to improve the repayment. While some extreme hardship cases are exceptions, Congress has chosen not to allow most such loans to be discharged in bankruptcy. Oddly, Professor Tamanaha is critical of students’ inability to discharge these debts: “there must be no federal guarantee of private loans to attend law school, and any

35. *Id.* at 178 (emphasis added).

36. Michael Stratford, *As Loan Servicers Multiply, So Do Problems for Students, College Officials Say*, CHRON. HIGHER EDUC. (Sept. 23, 2012), http://chronicle.com/article/More-Loan-ServicersMore/134564/?cid=at&utm_source=at&utm_medium=en. These developments have forced The Access Group, the major law school loan service, founded by the LSAC, to reconstitute itself, probably as a foundation, while its loan assets are working their way through the system.

such private loans must be eligible for bankruptcy. This would put the risk on lenders, which would not loan money to students who are unlikely to repay (at least not without charging prohibitive interest rates).³⁷

Imagine what this world of legal education would look like, with probably no more than a dozen law schools, which he has already criticized as elite, in a position to serve as banks, with all the complex technical and legal regimes such lending authority would entail, and the required finances and capitalization.³⁸ If I were a trustee of that institution or its general counsel, I would run away screaming rather than institute such a naïve and simplistic plan, especially one where the loans to my graduates could be more easily discharged in bankruptcy. Indeed, when there were issues of repayment for the private loans (not all students are eligible for federally subsidized loans, a point he does not seem to recognize), lenders began to use FICO scores, co-signers, and other mechanisms to guarantee eligibility and to screen clients.³⁹ After all, most undergraduates and many law students are not credit-worthy in the traditional sense of having assets or collateral. Rather, most are all promise and possibility, underwater, with their earning potential not yet realized.

But worse than simply not understanding the complexities of the financial loan system he proposes eliminating, I believe, and regret, that Professor Tamanaha lays most of these problems at the feet of faculty and their deans who give in and capitulate to their demanding and slacker law teachers, and then cavalierly duck the bill and pass it to duped students who do not know better. His narrative is littered with poor Sarahs and other students who are forced to pick up the tabs for indulged faculty. (Occasionally he is critical of deans, mostly by side bar references to those with inflated decanal perquisites and salaries, some of which are over half a million dollars, but he mostly

37. TAMANAHA, *supra* note 1, at 180.

38. To get an understanding of how much regulation would be triggered by his suggestion, see generally DEANNE LOONIN, *STUDENT LOAN LAW* (3d ed., 2009 Supp.) and the National Consumer Law Center (NCLC) companion website, <http://www.consumerlaw.org/webaccess> (allowing subscriber access to site materials).

39. In some cases, this development has also detrimentally affected the financial credit situation for borrower parents. *See, e.g.*, Tamar Lewin, *Child's Education, but Parents' Crushing Loans*, N.Y. TIMES, Nov. 12, 2012, at A1.

demonizes faculty for lining their own pockets with student money.) He scolds, “if the escalation in the price of a legal education is to be contained, law professors must take less and do more. Faculties must shrink. Raises must be tempered, though in an uneven way: the senior generation of professors—twenty-plus years out of law school—must accept less to allow our younger colleagues to have more.”⁴⁰ In this sense, he also does not appear to understand the wage structure of public institutions or the nature of wage compression. In many institutions, junior faculty already make as much or more than do more senior colleagues who have stayed at the same institution for many years.⁴¹

I am also mystified by Professor Tamanaha’s curious eliding together of the ABA and the AALS, in several chapters other than Chapter Three. Except in this Chapter, where he accurately characterizes the differences between the two groups, he lumps them together throughout the rest of the book as gun shy (due to a major expensive antitrust lawsuit that has not been in effect for several years, and from which the AALS was removed as a defendant) and collusive in their insistence upon long-held standards and quality measures. As one of several confusing examples, he is critical that the ABA and AALS are joined at the hip:

In effect, all accredited law schools are set up like research universities. Pursuant to the unified academic model promoted by AALS and enforced by the ABA, what might have developed as the law school equivalent of community colleges has been squashed, banished to the unaccredited realm, reducing the availability of low cost options for people who wish to become lawyers.⁴²

40. TAMANAHA, *supra* note 1, at 187.

41. The best single resource for understanding salary issues, including compression, is found in the authoritative and accessible work of labor economist RONALD G. EHRENBURG, TUITION RISING: WHY COLLEGE COSTS SO MUCH 113–25 (2000). In this volume, he explains how salaries across seniority and fields of study can vary in institutions and in different regions. See also Ronald G. Ehrenberg, Hirschel Kasper & Daniel Rees, *Faculty Turnover at American Colleges and Universities*, 10 ECON. EDUC. RES. 99 (1991).

42. TAMANAHA, *supra* note 1, at 45.

He even misidentifies the AALS not as a voluntary membership organization but as an accreditor,⁴³ but his narrative does not fairly record the unusual and unprecedented enmity that existed for a period where a small group of conservative law deans had captured the ABA Council and standards review process—even stubbornly insisting that the longstanding standards did not require tenure or the equivalent.⁴⁴

The accreditation process of the ABA deserves better than he allows, not in all its particulars, but as an overall safeguard of institutional quality and as a requirement by the federal government for financial aid eligibility purposes. But to suggest, as he does throughout, that the two organizations are linked together to protect faculty is simply risible. First, there are relatively few faculty involved in the ABA Council governance process, relative to deans, and many of the faculty once served as deans. That the process requires all two hundred law schools to be the same or to operate similarly is belied by his own narrative throughout, a narrative that reveals tremendous variability and diversity; there are dozens of law schools that could not or would choose not to join AALS, a voluntary organization. What I see as necessary and “selfless duty” he mocks as featherbedding and selfishness. His false premises, careless and incorrect insider baseball, and inconsistent railings at the process undermine what could have been a useful and substantive critique, rather than the hollow ring of an advantaged law professor, one simply protesting too much.

DEAN MATASAR’S VERSION OF EVENTS

I do not suggest for a moment that all legal educators have ignored these markers or that no one has tried to point out the problems. One of the more thoughtful observers is former New York

43. *Id.* at 177.

44. In the exchange that occurred in March 2011 at an ABA Council public forum, an ABA subcommittee chair who had put forward the proposals in effect called me a liar when I was critical of the proposals. My letter to the Subcommittee is posted at the AALS website: <http://www.aals.org/advocacy/Olivas.pdf>. See also Mark Hansen, *ABA Committee Members Show No Inclination to Start Over on Accreditation Standards Review*, A.B.A. J. (Apr. 2, 2011), http://www.abajournal.com/news/article/aba_committee_members_show_no_inclination_to_start_over_on_accreditation_s/. Rather than succumb to my lesser angels, I am reserving to another schoolyard the proper rebuttal to his ad hominem take.

Law School Dean Richard Matasar, who has pointed out many of these issues, and has done so in both scholarly fashion and through his service on the Board of The Access Group. His article in the *Iowa Law Review*, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, was an even more succinct indictment of the status quo, and he identified many of the rabbit trails that were explored by Professor Tamanaha.⁴⁵ If Dean Matasar is right, and I suspect he is absolutely correct in his diagnosis of the problems, we all owe him a debt of gratitude—in this context, I mean debt in the literal sense. As I will note at the end, he and I strenuously disagree on what the conditions will require, so we do not read the problems as driving the same solutions, but I start with the premise that we all need to look at the developments, or they shall surely engulf us at high tide, and there will be no safe harbors. By the Matasar metrics, schools all across the spectrum will encounter serious problems, not just the more marginal schools that are part of our expansive universe.

After detailing a number of the same developments that were later highlighted in *Failing Law Schools*, Dean Matasar notes,

The simple answer is that the law degree will continue to be viable . . . for some. Law schools with ancient and powerful reputations will prosper over the short- to medium-term. The very few schools currently offering inexpensive degrees should survive, joined by newer, innovative, less costly programs that will emerge. For the remaining, expensive mid-tier schools, the degrees they offer will become less and less attractive, unless they seek to create value for their graduates commensurate with their costs.

He also notes, and this may be the most important admonition he raises, “And for a large group of wanna-be lawyers, the degree will make sense only if they properly evaluate its cost, their expected financial returns, and most importantly, the intrinsic value of

45. Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579 (2011). He has a long record of scholarship in this area, including Richard A. Matasar, *Does the Current Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, N.Y. ST. B.J., Oct. 2010, at 20.

becoming a lawyer.”⁴⁶ He also resorts to a clever (and devastating) characterization, one that will resonate for the politics of many legal educators: “If Robin Hood took from the rich and gave to the poor, law school often does the reverse. It gives scholarships to top students, who have employment opportunities at firms that pay top salaries, funded by full-paying, lower-ranked students, whose employment will often be at organizations paying more modest salaries.”⁴⁷ I stand shoulder to shoulder next to him in this critique, and have dedicated my professional life to inculcating this view and trying to persuade all who will listen that “merit” has many metrics, not just how well one did on a Saturday morning in a large group, with a no. 2 pencil. I even served as a trustee of the College Board, so that I could better understand the SAT and its disproportionate role in the admissions process. (That service also allowed me the perspective of being on the short end of 16–1 votes more than once.)

Even so, as I indicated, he and I fundamentally differ on our solutions or prescriptions for what we both agree is an ailing system. As my first form of disagreement, I do not think that the rise of more law schools has led or will ever lead to a better situation, even as it has made attendance more accessible and improved the job market for law professors and legal educators generally. I am particularly skeptical of the many proprietary law schools that have arisen, and I do not believe that every metropolitan statistical area or geographic nook and cranny necessitates a law school. At some point, the economics of establishing new law schools will shift, and the barriers to entry will increase, while existing schools, some of them improvidently established at high tide, will have to fold. Dean Matasar has successfully articulated a need to increase the number of contingent faculty as a cost-control measure. (His views have substantially affected deliberations on ABA security-of-position proposals, through the *legerdemain* of the American Law Deans Association.) In my belief system, this top-down managerial approach would compromise the entire system, rendering the cure worse than the ailment. Dean Matasar concludes that “law schools, law-school regulators, and the profession must be willing to

46. Matasar, *The Viability of the Law Degree*, *supra* note 45, at 1580.

47. *Id.* at 1581.

experiment and permit new models of legal education to arise that can produce sufficient value at a reasonable cost in order to assure the continued viability of the law degree.”⁴⁸ I am not as sanguine, and believe that a number of these developments would lower the quality of instruction to a deplorable level, particularly if some of the tenure-eliminating proposals making their way through the Council of the ABA Section on Legal Education and Admissions to the Bar process are adopted, and if more legal study is delivered by internet and distance education.⁴⁹ There is already considerable flexibility built into the accreditation process that has resulted in many differences among law programs and experimental law schools. In my calculus, losing some lower-quality or inefficient law schools may be an acceptable price to retain the core faculty and traditional governance structures. Dean Matasar (and Professor Tamanaha) would disagree with me:

Revising the current accreditation standards would almost certainly make it possible for new entrants to the legal education market—schools using higher levels of distance learning, with much smaller facilities; schools taught by part-time, contingent faculty, paid at lower salaries; schools seeking to produce lawyers more quickly than two years; schools permitting work for pay; schools permitting credit for work that is paid by others; and so on. Such schools almost certainly would be lower cost than existing schools and might exert substantial pressure on those schools to change.⁵⁰

As I wrote in a column to AALS member readers, these indispensable features of legal education in the United States are like our democratic processes: worse than anything except the alternatives.

48. *Id.*

49. A useful website makes available the public submissions and much of the public work product of the Standards Review Committee (SRC), charged with reviewing the various accreditation Standards and recommending any changes to the ABA Section on Legal Education and Admissions to the Bar: http://www.americanbar.org/groups/legal_education/committees/standards_review.html. I reviewed some of the problems that had arisen in this SRC process in my 2011 AALS Presidential Lecture, Academic Freedom and Academic Duty, in AALS NEWS, Mar. 2011, at 1, 2, 9, available at <http://www.aals.org/documents/newsletter/february2011.pdf> [hereinafter Olivas, 2011 AALS Presidential Lecture].

50. Matasar, *The Viability of the Law Degree*, *supra* note 45, at 1621.

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.⁵¹ 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, and as I have tried to demonstrate, these proposed remedies would harm the patient and have substantial collateral consequences. 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 a self-governing and *laissez faire* universe, especially if it remains largely subsidized by taxpayers.

CONCLUSION

That said, all of us similarly have a serious interest in cost containment and in making legal education accessible and affordable to our students. We cannot simply hope that the problems will resolve themselves. We have erected a substantial system of training lawyers, one that is a spectacular success by any measure, notwithstanding the cracks evident in the infrastructure. Faculty need to keep up with these developments, counter challenges to our existence, and work harder to explain why our system is worth saving at its core. We also need to do a better job of explaining the large role of lawyers in the world society, not only as technicians with attention to detail but as defenders of important core values and democratic principles. I do not view the migrating role of lawyers to civilian life across non-law fields as evidence of our declining competence, as some commentators have in analyzing legal employment figures, but rather as robust evidence of the growing value of being a lawyer and

51. Olivas, 2011 AALS Presidential Lecture, *supra* note 49, at 1.

applying our skills to the many societal problems in need of our multifaceted talents.⁵² 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 enterprises, as well as in positions of governmental leadership and civic participation, giving generously of time and talent. Professor Tamanaha is properly concerned when some schools produce few graduates who go on to become or practice as lawyers (some as low as 26 percent),⁵³ 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. Any law school that rests on its laurels without a searching examination of its business model and its self-governance obligations or one that whistles past the graveyard during this difficult current situation does not deserve the resources we all collectively provide legal education. 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

52. TAMANAHA, *supra* note 1, at 146–54. For early policies tying resources to placement, see Dan Berrett, *All About the Money; What if lawmakers and students used starting salaries to evaluate colleges and their programs?*, CHRON. HIGHER EDUC., Sept. 21, 2012, at A1; see also Paul Basken, *Cost Savings Appear Elusive in Push for Faculty Productivity*, CHRON. HIGHER EDUC. (Oct. 8, 2012), http://chronicle.com/article/Is-Pushing-Faculty/134892/?cid=at&utm_source=at&utm_medium=en (noting difficulty in productivity practices and studies). Early in my own career, I encountered a field being restructured, and left the field of English before finishing my PhD because of my own difficult and searching assessment about employment prospects in college teaching in the mid-1970s. Many fields have had such restructuring and have had devastating prospects for participants. For a review of the cyclic nature of English teaching, see Kaustuv Basu, *A Modest Bump*, INSIDE HIGHER ED (Sept. 25, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/09/25/mla-list-shows-modest-increase-job-openings>. I do believe this to be an under-theorized area of the legal enterprise, one where more faculty should be involved and where more scholarship is called for, especially in the context of the many developments outside the academy. But again, here, as in many of the issues raised in this debate, a more contingent faculty will pay less attention to these student needs, not more.

53. TAMANAHA, *supra* note 1, at 114–16.

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. A gentlemen's agreement leads to virtually no school having its taxi medallion taken away. 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.⁵⁴ And faculty productivity could be increased, in ways that better allocate research and teaching assignments, including class size, tools that have long been in the arsenal of administrators who usually make such assignments. It has been my experience through observation and through the accreditation process that many law schools do variegate their teaching loads, mixing them with research, administrative, and program development assignments. It is the rise in administrative and support personnel that is more readily apparent, not the domain 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 contingent faculty, churning through as they seek better opportunities. No proposal to abrogate tenure or make the legal academy more "flexible" and less permanent has satisfactorily accounted for the huge transaction costs that would certainly be implemented when U.S. law schools adopt the Latin American model or other approaches away from the current model. The move to clinical faculty continuing year contracts and the substantial number of other contingent instructors has already begun, and needs no overhaul of

54. 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).

the ABA Standards that would accelerate this trend. Indeed, I would reverse this trend if I were to effectuate many of the changes that critics are urging.

There is a fatalistic *fin-de-siècle* sense in Professor Tamanaha's dire work, one that is inconsistent with the actual world in which most law professors and law schools find themselves, and it is these inconsistencies and contradictions that fatally undermine his vision. Whether in the collective sense or the more focused, single-law school sense, faculty do not make all these decisions that he rues. When my own institution revised its workload policy to have fewer overall courses taught by individual faculty members, the decision was largely that of the University of Houston Law Center administration, in consultation with the Faculty Executive Committee and several substantial discussions at several faculty meetings, where it was obvious that there would be clear tradeoffs—less flexibility or coverage in the overall curriculum for our students, fewer small seminars and “favorite” courses, and less play in the joints for leaves and semesters off. We have some faculty—but not as many as we used to have—who teach in a part-time, adjunct, or contingent fashion. We have increased clinics and clinical faculty, and a major commitment to skills training, as evidenced by both curricular and non-curricular resources. This decision-making is how most law faculties determine their own fates, with none of the featherbedding or greedy considerations suggested by Professor Tamanaha as the prerequisites. (It is in contrast to the way he apparently implemented such a top-down plan on his own in his short interim term as acting dean.)⁵⁵ 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 they are really elided with management, and so cannot collectively bargain in

55. It also betrays ignorance for him to single out immigration or tax clinic practices as giving students “common tasks” to learn. I hereby invite Professor Tamanaha to visit our extraordinary University of Houston Law Center immigration law clinic, where highly specialized students handle dozens of high-wire cases each term, no two of which are alike or “common.” One of our important cases even went to the U.S. Supreme Court, overturning the Fifth Circuit in a unanimous decision. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (minor drug offenses are not automatic grounds for deportation of permanent resident).

collegial colleges,⁵⁶ so Professor Tamanaha resorts 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, but I never really expected that such fist-shaking would convince others. Professor Tamanaha should have no such illusions either.

Perhaps most importantly, we need to be supporters for legal education writ large, and also to be critics that hold it and ourselves to high standards. In many countries, law faculties are entirely part-time and contingent, and widespread student access is limited by a filter of counterproductive and inefficient attrition. In schools such as these across the world, thousands of law students enter the chute, sit in desultory fashion in large classes for years of instruction, and never graduate or move into the legal profession. This is not the path we have chosen, and it is our glory. At the least, suggestions for improvement should demonstrably improve the situation before us. In my view, making law faculties more contingent and part-time, leaving them more subject to top-down decanal 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.

56. 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).