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The Canary in the Coal Mine: What the University Can Learn from Legal Education

Richard A. Matasar
New York University

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The Canary in the Coal Mine: What the University Can Learn from Legal Education

Richard A. Matasar*

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* Vice President and Professor of Management, New York University.

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Fearful of being exposed to toxic fumes, the miners of old, having no fancy technology to measure coal mine air quality, would place canaries in cages in mine shafts and check on them periodically to see if they still were breathing. If the canaries were alive, the mine would remain open. If they died, the mine would close until the air was once again safe to breathe. Are law schools—with high cost, massive student debt burdens, worsening legal employment prospects, decreasing student demand, and angry students—the proverbial higher education canary? Or are law schools a one-off, eggshell-skull victim, whose plight can safely be ignored by the rest of the university? Can the university express *schadenfreude* as the powerful legal education juggernaut falters, while they breathe the fresh, clean air of other disciplines?

This Article explores whether universities can safely assume that law school exceptionalism accounts for the fate of legal education. It asks whether the post-apocalyptic fate of law schools should permit the university to breathe easily or take steps to remediate previously undetected foul air. It concludes that law schools are not exceptional; that they are at the front end of a dangerously toxic environment that the rest of the university will face; that law schools are well-equipped to clear the air; and that the university should continue to mirror emerging new models of legal education that make it safe to breathe again.

I. LAW WORLD REVISITED—FROM GI BILL, TO VIETNAM, TO BABY BOOM, TO ECONOMIC PROSPERITY, TO LEHMAN, TO THE “END OF DAYS”

Given the state of the current law school malaise, it is hard to remember that most of the last decade was a golden era in legal education. In that decade, schools had record quality student bodies, became highly selective in admissions, and offered high employment prospects to their students. But, in the last few

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years, all indicators have declined, schools have laid off faculty and staff, and pundits have predicted that many schools will become so unprofitable that they will have to close. What happened?

A. *Changing Demography—Is There Another Population to Serve?*

For the last seventy years, law schools have benefitted from our country's changing demographics. While World War II decimated enrollments at many schools, after the war, returning veterans, bolstered by the G.I. Bill, flocked to higher education. Law schools became important career destinations for many of those soldiers.¹ Korea and Vietnam provided a similar boost, with the latter gaining an extra jolt of energy from changing cultural norms.² First, as schools' enrollments were threatened by the loss of potential male students to the war effort, schools aggressively began to offer women slots in law school classes.³ Second, as the Civil Rights movement made greater inroads into the fabric of American society, schools diversified their admissions.⁴ And, with the return of the veterans, schools used the influx of new demand to grow in size and stature.⁵

These changes were fueled by a growing American economy, which went from local to national and from national to international. American innovation drove new industries, which required skilled knowledge-workers and college graduates.

This growth altered the legal economy as well—with private practice growing from small and solo firms, servicing small businesses and individuals, to multi-city, multi-national large law firms, serving large businesses.⁶ Federal and state governmental “law” jobs increased in a similar fashion.⁷ Salaries for lawyers rose substantially (and so did tuition, at an even faster rate!).⁸

Who knew that these would be the “good old days?”

Looking forward, things do not look so rosy. First, contraction in employment opportunities has meant that fewer students can graduate and find jobs with sufficient salaries to support their debt.⁹ Second, returning veterans are

1. NAT'L CTR. FOR EDUC. STATISTICS, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 65 (1993).

2. *See id.* at 66.

3. *See id.* at 65.

4. *See id.* at 66.

5. *See id.* at 65.

6. William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000-2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1397 (2009).

7. Stephen Bronars, *Legal Industry Trends: Lawyer Salaries and Job Growth*, LAW 360 (Oct. 22, 2012, 2:44 P.M.), <http://www.law360.com/articles/385376/legal-industry-trends-lawyer-salaries-and-job-growth> (on file with the *McGeorge Law Review*).

8. BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 107 (Univ. Chicago Press 2012).

9. William D. Henderson & Rachel M. Zahorsky, *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 23.

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not flocking to law schools; their benefits are no longer sufficiently robust to bear our price, and they have other less expensive alternatives.¹⁰ Third, with the erosion of home equity, there are fewer resources families can rely upon to pay for the education of their children.¹¹ Fourth, the population of the United States is skewing to poorer families, with higher birth rates, than wealthier families.¹² These suggest that the future holds the perfect demographic storm: more poor students, fewer family assets, and no new demographic population to stir demand.

B. When the Emperor Has No Clothes: Disciplinary Envy and Non-Law, Law

The growing demand for legal education also spurred the internal growth of the law school enterprise. Law schools adopted a simple formula to fulfill a never-ending, internal wish list of ways to “improve” legal education: more students at ever-higher tuition levels with a spice of increased private donations. Schools expanded by: constructing new buildings, growing their faculty, reducing teaching loads, increasing summer research grants, funding research leaves and sabbaticals, creating clinics, developing specialty programs, marketing programs far and wide, offering boutique courses, and saying “yes” whenever possible.

In leaner times, law school curricula were fairly uniform and bare bones with few electives. With increased student demand and unchecked tuition increases, however, faculty could offer smaller classes in more niche subject areas—all driven by faculty research agendas, no matter how esoteric. So long as students would come and pay, the expansion could continue.

However, this growth came at the edges of “core” legal subjects in traditional subject areas, which had come under increasing internal and external critiques. As formalism gave up room for legal realists, faculty members began to imagine that their discipline in the “science” of law was quite hollow and that deeper insights could be found only by reference to other, more rigorous disciplines like economics, philosophy, sociology, history, psychology, design, statistics—anything other than law. Such disciplinary envy led faculties to search for “law

10. See Michael Sewall, *Veterans Use Benefits of New GI Bill Largely at For-Profit and Community Colleges*, CHRON. OF HIGHER EDUC. (Jun. 13, 2010), <http://chronicle.com/article/Veterans-Use-Benefits-of-New/65914> (on file with the *McGeorge Law Review*) (discussing the use of the G.I. Bill by returning soldiers). Since 9/11 the United States has been involved in serious overseas military actions in both Iraq and Afghanistan. With an all-volunteer military force, many of the returning veterans have been younger and not yet completed their college education. Hence, the GI benefits are being used to enter junior college and college. *Id.* Enrollment in graduate school, including law school, must await completion of precursor programs. *See id.*

11. Bob Tedeschi, *College Tuition Not on the House*, N.Y. TIMES, Apr. 5, 2009, at RE 6, available at http://www.nytimes.com/2009/04/05/realestate/05mort.html?_r=0 (on file with the *McGeorge Law Review*).

12. Sharon Lerner, *Knocked Up and Knocked Down: Why America's Widening Fertility Class Divide Is a Problem*, SLATE (Sept. 26, 2011, 4:14 PM), http://www.slate.com/articles/double_x/doublex/2011/09/knocked_up_and_knocked_down.single.html (on file with the *McGeorge Law Review*).

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and” colleagues—those with law degrees and other specialties.¹³ With no “there, there” in the law, faculties began to shift to other subjects and expanded their capability of preparing students to think like lawyers, using tools from multiple disciplines—all funded by increased tuition price and enrollment growth.

The search for a multiplicity in educational offerings certainly enriched legal education—making law schools mini-universities of their own. However, the model was inefficient and left core legal education largely unchanged. Legal curricula developed substantial overlaps with other parts of the university and shifted from lawyer training to legal educational training. These shifts were primarily fueled by tuition payments supported by freely available credit repaid by an optimism that future job prospects would continue to expand at ever-increasing salary levels.

From the perspective of students, the expansion of the law school curriculum, the growth of law school faculty, the increased focus on research in “law and” fields, and the questioning of the legal method may have improved legal education, but only by significantly increasing its cost. When the job market began to dry up, however, the incommensurate benefit of these costs led many critics to question the value of legal education.¹⁴ Some have wondered whether the frills should be abandoned and schools should return legal education to its most traditional, basic form.¹⁵ The tension is becoming acute as schools have to retrench and find ways to educate their students with fewer resources.

C. Hocus Pocus and the Rankings Game

Since one of anything creates no synergy, most schools have created multiples of each initiative—a Noah’s Ark, in which everything comes in at least a pair. During the same period, a kinder, gentler past, in which most schools could claim distinction within their locations, gave way to a new metric that drove schools into desperate competition with each other. U.S. News and World Report (and other ordinal lists) led many schools to try to optimize their ranking—receiving rich rewards of higher prestige, better students, and more opportunities when successful in the game. They engaged in mutually-assured destruction

13. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34, 37–38 (1992–1993) (discussing the integration of other discipline into the science of Law).

14. See TAMANAHA, *supra* note 8, at x–xi (explaining how a recent law school graduate making an average salary with an average amount of debt cannot pay for basic living expenses after making a loan payment).

15. See Roger Dennis, *The No-Frills Law School*, THE FACULTY LOUNGE (Aug. 18, 2011, 12:26 PM), <http://www.thefacultylounge.org/2011/08/the-no-frills-law-school.html> (on file with the *McGeorge Law Review*) (contemplating what a no-frills law school model might look like). See also KEVIN HOUCHEIN, SPECIALIZATION IN LAW SCHOOL CURRICULA: A NATIONAL STUDY 6 (2003), available at <http://www.woodenpencil.com/research/JDspec041403.pdf> (on file with the *McGeorge Law Review*) (quoting a survey response stating why specializations are bad).

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strategies of reputation-seeking behavior in a search for reputational advantages in the rankings—expansion of faculty sizes to decrease student to teacher ratios, “merit” scholarship awards to entice “better” students to attend, self-funded scholarships through tuition discounting, reduced teaching loads to increase research productivity.¹⁶ To top it off, I won’t even mention puffing of student credentials, employment results, or even outright lying.

Apparently, law schools sought a Lake Wobegon world in which all the [faculty] are strong . . . [and] good looking and all the [reputations] are above average. Every law school sought to become the Ritz-Carlton, when being a Motel 6 might have sufficed, producing ever-escalating costs and decreasing benefits.

D. Consumerism, Social Networks, and Institutional Skepticism

For decades, most law schools flew under the radar of public scrutiny; they were of interest locally, if at all, and then only to their alumni and perhaps the local press. Today, nothing in legal education is invisible. Any “news” coverage can go national (or worse, viral) at any moment. With multiple blogging sites, the ubiquitous “Above the Law,” and consumer-scam conspiracy theorists seeking new targets, law school peccadillos are scrutinized in painstaking detail. Except for a handful of schools, whose turn has not yet come, there are two emerging story lines: (1) “look at this outrage—schools lie”¹⁷ and (2) “something is fishy here, but we haven’t caught them yet.”¹⁸

The toxicity of the dialogue has had the profound effect of undermining public trust in law schools. Such toxicity has moved the discussion from asking whether a legal education is effective in fulfilling its academic purposes (an intrinsic measure), to asking whether students receive adequate career outcomes (an extrinsic measure). Both measures are important and there should be some relationship between them. However, the former is primarily within the control of a school and the latter is deeply subject to external conditions. Nonetheless, this shift is undoubtedly permanent, as it must be, given the cost of a legal education, the need for most students to receive a return on their investment, and a general sense that “quality” in an education cannot be separated from the outcomes it produces.

16. See generally TAMANAHA, *supra* note 8.

17. See, e.g., Deborah Jones Merritt, *Deans Disbarred?*, INSIDE THE L. SCHOOL SCAM BLOG (Dec. 26, 2012, 10:52 PM), <http://insidethelawchoolscam.blogspot.com/2012/12/deans-disbarred.html> (on file with the *McGeorge Law Review*) (discussing the recent scandal of two law schools lying about their employment statistics).

18. See, e.g., Paul Campos, *Something Fishy*, INSIDE THE L. SCHOOL SCAM BLOG (Nov. 16, 2012, 10:44 AM), <http://insidethelawchoolscam.blogspot.com/2012/11/something-fishy.html> (on file with the *McGeorge Law Review*) (commenting on law school debt statistics that do not add up).

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This is in keeping with larger social trends. Consumer mistrust is on the rise, spurred by the divide between Wall Street and Main Street.¹⁹ The “1%-ers” are at odds with the other “99%.”²⁰ Mainstream media organizations are seen as untrustworthy.²¹ The government is at a standstill.²² It is no wonder that higher education has taken its lumps—deserved and undeserved. It just needs to get in line!

E. In the Coal Mine—Choking on the Fumes!

One could wonder why legal education seems to have been singled out among schools within the university for such close scrutiny. Here is a working hypothesis. Law is a highly visible discipline, enmeshed with nearly every aspect of daily life from family matters, to commerce, to sports, to entertainment, to criminal law, to government, to international affairs.²³ Law is text-based, and accessible. It can be described in simple language. Lawyers are both admired and despised. And, within the university, law schools are generally well-regarded, with successful graduates (even if they have arrogant faculty, administrators, and students). In short—legal education makes a good target.

Further, with law graduates facing a tough market, there are a lot of really smart people with time on their hands to complain/reveal secrets about their schools and their shortcomings. Law students and graduates are articulate. Some are argumentative. And, all have opinions that they are willing to share.

19. See *Study Shows Consumers Distrust Banks More Than Any Other Industry*, THE FINANCIAL BRAND (Mar. 20, 2012), <http://thefinancialbrand.com/22896/edelman-banking-financial-services-consumer-trust-study/> (on file with the *McGeorge Law Review*) (explaining the recent financial meltdown on Wall Street and consumer distrust).

20. See Simon Rogers, *Occupy Protestors Say it is 99% v 1%. Are They Right?*, GUARDIAN DATABLOG (Nov. 16, 2011, 9:32 AM), <http://www.theguardian.com/news/datablog> (on file with the *McGeorge Law Review*) (discussing the rift between the self-described 99% and the wealthiest Americans).

21. Lymari Morales, *U.S. Distrust in Media Hits New High*, GALLUP POLITICS (Sep. 21, 2012), <http://www.gallup.com/poll/157589/distrust-media-hits-new-high.aspx> (on file with the *McGeorge Law Review*).

22. See, e.g., Michael Hiltzik, *As Damaging Sequester Continues, Congress Goes On 5-Week Vacation*, LA TIMES (Aug. 9, 2013), <http://articles.latimes.com/2013/aug/09/business/la-fi-hiltzik-20130811> (on file with the *McGeorge Law Review*).

23. See, e.g., Devon Carbado, *Race Undercover: the Matter of Bias in the Zimmerman Trial*, HUFFINGTON POST (Aug. 7, 2013), <http://www.huffingtonpost.com/tag/trayvon-martin-george-zimmerman> (on file with the *McGeorge Law Review*) (criminal); *Tom Cruise-Katie Holmes Divorce One Year Later: Who Won?*, US WEEKLY (July 1, 2013), <http://www.usmagazine.com/celebrity-news/news/tom-cruise-katie-holmes-divorce-one-year-later-who-won-201317> (on file with the *McGeorge Law Review*) (family); Erik Bradley and Steve Berkowitz, *Six Active Players Join O'Bannon Lawsuit Against NCAA*, USA TODAY (July 18, 2013), <http://www.usatoday.com/story/sports/college/2013/07/18/ncaa-ed-obannon-lawsuit-active-players-arizona-clemson/2564375/> (on file with the *McGeorge Law Review*) (sports); Michael Hiltzik, *S&P Raises Desperate Defense Against Government Lawsuit*, LA TIMES (Sept. 6, 2013), <http://www.latimes.com/business/la-fi-hiltzik-20130908,0,2539608.column> (on file with the *McGeorge Law Review*) (government).

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Finally, although a major complaint is that law schools have been misleading applicants about the conditions they will face in the employment market,²⁴ within the academy, law schools are more transparent than other schools, which do not rigorously report their data.²⁵ Try to discover the post-graduate employment and salaries of Bachelors and Masters graduates in most academic disciplines. Sociology? Psychology? Philosophy? English? Journalism? Architecture? MBA's? Law schools are more transparent in comparison, despite the overhaul in data reporting.²⁶

It's no wonder that the law schools are the canaries.

II. THE QUESTIONS RAISED BY POST-APOCALYPTIC LAW SCHOOLS

Law schools are in the mine. The fumes are making them gag. How many will die? Of the survivors, what will they have done to move on, survive, or even prosper? What kind of schools will they be? Whom will they serve? By what means?

It is clear that many law schools are currently suffering deep financial strain. Too few students are enrolling to produce sufficient revenue to pay their current costs.²⁷ Something has to give. For some schools, belt-tightening should work. By shedding excess expenses and having staff and faculty attrition, they should be able once again to align their costs and their income. Others may have to reach more deeply, creating incentives to generate early exits for faculty and staff. These more robust cuts may produce sufficient reductions in costs to align their income as well.

Beyond these measures, however, some schools will simply not be able to bring costs down enough to break even. For them, there are only a few pathways: (1) find revenue from new sources to close the gap—fundraising, new academic programs, sales of services; (2) reorganize after declaring financial exigency; (3) become absorbed in another program through merger, sale, or acquisition; or (4) declare “victory,” teach out, and close.

I am not in the prognostication business, but it seems likely that some or all of these outcomes will occur. Whatever the immediate fate of each school, however, it is likely that each will continuously need to justify its expenses and

24. TAMANAHA, *supra* note 8, at 146.

25. See AM. BAR ASS'N SECTION OF LEGAL EDUC. ADMISSION TO THE BAR, 2012 LAW GRADUATE EMPLOYMENT DATA (2012).

26. See Christopher Polchin, *Raising the Bar on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201, 202, 206, 210 (2013) (discussing proposed changes in data reporting).

27. See, e.g., Martha Neil, *California Law School to Cut Enrollment by 40 Percent, Lays Off 9 Staff Members*, ABA J. (July 9, 2013), http://www.abajournal.com/news/article/mcgeorge_to_cut_law_school_enrollment_by_40_percent_lays_off_9_staff_member (on file with the *McGeorge Law Review*); Ashby Jones & Jennifer Smith, *In Rare Step, Law Schools Shrink Faculty*, WALL ST. J., Jul. 16, 2013, at B1.

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assure its stakeholders (universities, legislatures, boards, students, and graduates) that attending the school makes sense. In simple formulaic fashion: **V**(alue) is achieved when **O**(utcomes) > **P**(rice) and **I**(ncome) is = or > **C**(ost). (An education is **Valuable** and a school can survive only when its students' perceived **Outcomes** are greater than the **Price** they pay and the school's total **Income** from all sources is equal to or exceeds the **Cost** of producing the education). If the cost of producing perceived excellent student outcomes is greater than the price a school can effectively charge its students, the school must make up its income shortage by receiving subsidies from other sources—fundraising or public funding—or through other income generating activity—consulting, sales of services, educating other than law students, etc.

Some of these terms are loaded with multiple embedded questions. **Value**: When does value get measured—at graduation? Over the first few years after graduation? Over time? Is value only a cost/benefit financial matter? Does it include career satisfaction? Does it include value to society? **Outcomes**: Financial only? Quality of knowledge? Skills? Ability to help others? Measured when? Must the outcome be objectively measured by some metric—bar passage, salary, ability to pay debt immediately after graduation? Should it be measured by the assessments of employers? Of clients? Of self? What if outcomes are bimodal, depending on student performance? Are such differentials attributable to the school or the student? **Price**: Is this a uniform measure? Does it reflect choices made by students to eschew scholarships at one school and pay more at another? Does it matter if price is transparently tied to student performance?

I raise these questions not to answer them, but to highlight the types of discussions law schools are and will be having over the next several years if they are to survive and prosper. Such introspection is taking place across the legal academy in symposia such as this one, in faculty governance meetings, in oversight by Provost's offices, in fiduciary boardrooms, and in the press.²⁸ It seems that the legal education canary is being pulled out of the mine for inspection. The pressing question of this Article is: What is the rest of the university taking away from watching the law school spectacle?

To some, the plight of law students and law schools is merely legal education exceptionalism.²⁹ Just like law professors earn higher salaries than colleagues in other disciplines because they are part of a labor market outside of higher education, so too must law schools be different—subject to market forces that do not apply to other schools and disciplines. Law students are also seen as

28. See, e.g., *2013 Chapman Law Review Symposium*, CHAPMAN UNIVERSITY, <http://www.chapman.edu/law/publications/chapman-law-review/annual-symposium/2013-symposium.aspx> (last visited Sept. 13, 2013) (on file with the *McGeorge Law Review*); *Future Ed*, HARVARD LAW SCHOOL, http://www.law.harvard.edu/programs/plp/pages/future_ed_conference.php (last visited Sept. 13, 2013) (on file with the *McGeorge Law Review*).

29. See Paul L. Caron, *The Law School Crisis*, PEPP. L. MAG., <http://www.lawmagazine.pepperdine.edu/index.php/2012/09/the-law-school-crisis> (on file with the *McGeorge Law Review*).

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different, as careerist, seeing their education as a means to an end unlike other disciplines in which students study for learning's own sake.³⁰ Finally, to these analysts, higher education outside of the professional schools is its own reward and cannot be subjected to a crude formula asking for a return on the investment students make.³¹ According to this view, the potential death of law schools signals nothing to the miners above because law schools are particularly susceptible to market poisons.

I argue below that seeing law schools as exceptional is a mistake. In my view, they truly are providing an early warning system to the rest of the higher education ecosystem.

III. THE EMERGING LANDSCAPE IN HIGHER EDUCATION—WHAT WE SEE, READ, AND HEAR FROM OUR FRIENDS IN HIGH PLACES

I am a proud graduate of the University of the New York Times—my shorthand for those who are addicted to daily, popular mainstream news reporting. Not a day goes by without a story emerging on (take your pick): The Wall Street Journal,³² Time Magazine,³³ Sixty Minutes,³⁴ online aggregation sites (Google/Yahoo/MSN, or whatever flavor of the day)³⁵ about the higher education crisis. The beat is even louder in The Chronicle of Higher Education,³⁶ Inside

30. See ROBERTA SPALTER-ROTH & NICOLE VAN VOOREN, AM. SOC. ASS'N DEPT. OF RES. & DEV., IDEALISTS VS. CAREERISTS: GRADUATE SCHOOL CHOICES OF SOCIOLOGY MAJORS 1–3 (2009), available at <http://www.asanet.org/images/research/docs/pdf/Idealist%20vs%20Careerist.pdf> (on file with the *McGeorge Law Review*) (discussing reasons why students major in sociology). Other than those very few students who become faculty members in fields like sociology, philosophy, art history, literature, history, and the like, students of these disciplines expect that their studies will give them knowledge and skills that will serve them in unrelated careers. *Id.*

31. See ANDREW GILLEN, ET. AL., DEGREES OF VALUE: EVALUATING THE RETURN ON THE COLLEGE INVESTMENT, EDUC. SECTOR 1, 5 (2013), available at http://www.educationsector.org/sites/default/files/publications/Degrees%20of%20Value%20FINAL_0.pdf (on file with the *McGeorge Law Review*) (noting why some educators are uncomfortable measuring the economic value of an education).

32. See, e.g., David Wessel, *Four Ideas to Fix Higher Education*, WALL ST. J. (July 24, 2013, 4:50 PM), <http://online.wsj.com/article/SB10001424127887323971204578626123435046376.html> (on file with the *McGeorge Law Review*).

33. See, e.g., Governor Bill Haslam, *8 Ideas to Improve Higher Education*, TIME MAG. (Oct. 17, 2012), <http://ideas.time.com/2012/10/18/8-ideas-to-improve-higher-education/> (on file with the *McGeorge Law Review*).

34. See Jerry Bowyer, Op-Ed., *A College Bubble So Big Even the New York Times and 60 Minutes Can See It . . . Sort of*, FORBES (May 22, 2012, 3:56 PM), <http://www.forbes.com/sites/jerrybowyer/2012/05/22/a-college-bubble-so-big-even-the-new-york-times-and-60-minutes-can-see-it-sort-of/> (on file with the *McGeorge Law Review*) (reviewing a recent 60 Minutes piece on the education crisis).

35. See, e.g., Dani Skoog, *Ending the Student Debt Crisis: A Demand for Free Higher Education*, YAHOO! (July 7, 2013), <http://voices.yahoo.com/ending-student-debt-crisis-12218274.html> (on file with the *McGeorge Law Review*).

36. See, e.g., Joseph Marr Cronin & Howard E. Horton, *Will Higher Education be the Next Bubble to Burst?*, CHRON. OF HIGHER EDUC. (May 22, 2009), <http://chronicle.com/article/Will-Higher-Education-Be->

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Higher Education,³⁷ University Business,³⁸ or whatever trade mag we are reading these days.

The narratives and counter-narratives are becoming set pieces. Higher education is too expensive—usually followed by a horror story of high debt accumulated by a student and subsequent inability to repay the debt. Variations on the theme might include: (1) being enticed to make bad decisions by rapacious for-profit schools;³⁹ (2) making naive decisions to forsake going to the local inexpensive public school to attend the marginally more prestigious private school;⁴⁰ or (3) failing to navigate the complex regulations surrounding financial aid and missing an important deadline with dire consequences ensuing.⁴¹ Similar stories might include profiles of the local entrepreneur, who made a fortune by dropping out of school,⁴² or the higher salaries earned by tradespeople versus college graduates.⁴³ Others might focus on the waste of taxpayers' money funding silly research or goofy majors.⁴⁴ Yet others focus on wasteful university expenditures on climbing walls, salaries for abusive coaches, or concierge services.⁴⁵ In the counter-narrative, even with its flaws, going to college pays off in higher salaries, greater opportunities, intellectual growth, and contributions to

the/44400 (on file with the *McGeorge Law Review*) (discussing the increase in tuition versus the poor economy).

37. See, e.g., Libby A. Nelson, *Occupy Student Loans*, INSIDE HIGH. EDUC. (Nov. 15, 2011), <http://www.insidehighered.com/news/2011/11/15/occupy-protests-focusing-increasingly-student-debt> (on file with the *McGeorge Law Review*) (discussing student loan debt accumulation).

38. See, e.g., Matt Zalaznick, *College Enrollment Drops; Higher Ed Leaders Growing Concerned*, UNIV. BUS., <http://www.universitybusiness.com/article/college-enrollment-drops-higher-ed-leaders-growing-concerned> (last visited Sep. 7, 2013) (on file with the *McGeorge Law Review*) (discussing decreases in college enrollment).

39. See *False Promises*, N.Y. TIMES, July 31, 2012, at A20, available at http://www.nytimes.com/2012/07/31/opinion/false-promises-at-for-profit-colleges.html?_r=0 (on file with the *McGeorge Law Review*).

40. See Jason DeParle, *For Poor, Leap to College Often Ends in a Hard Fall*, N.Y. TIMES, Dec. 23, 2012, at A1, available at <http://www.nytimes.com/2012/12/23/education/poor-students-struggle-as-class-plays-a-greater-role-in-success.html?pagewanted=all> (on file with the *McGeorge Law Review*) (profiling some low-income children whose college choices ended poorly).

41. See *id.* (highlighting one young woman who enrolled at Emory, missed her financial aid deadline, and owed significant debt as a result).

42. See Catherine Rampell, *America's Biggest Entrepreneurs: High School Dropouts*, N.Y. TIMES (Sept. 13, 2013, 10:00 AM), <http://economix.blogs.nytimes.com/2013/04/19/americas-biggest-entrepreneurs-high-school-dropouts/> (on file with the *McGeorge Law Review*) (identifying successful college drop-outs).

43. See Thomas C. Frohlich, *The Seven Best Paying Jobs with Only High School Diploma*, 24/7 WALL ST. (Aug. 26, 2013, 6:36 AM), <http://247wallst.com/special-report/2013/08/26/the-best-paying-jobs-with-a-high-school-diploma/2/> (on file with the *McGeorge Law Review*) (highlighting high paying jobs that do not require a degree).

44. See, e.g., Michael Snyder, *30 Stupid Things the Government is Spending Money On*, THE AM. DREAM (Feb. 29, 2012), <http://endoftheamericandream.com/archives/30-stupid-things-the-governemnt-is-spending-money-on> (on file with the *McGeorge Law Review*) (listing several examples of wasted tax dollars in education including researching the effect of cocaine on quail's sexual behavior and studying how "Americans use the Internet to find love").

45. See, e.g., Nick Gillespie, *Forget Rutgers Coach Mike Rice: College Sports Abuses Virtually All Students*, REASON (Apr. 3, 2013), <http://reason.com/archives/2013/04/03/forget-rutgers-coach-mike-rice-college-s> (on file with the *McGeorge Law Review*) (breaking down college spending on sports programs).

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society.⁴⁶ Wonderful faculty researchers are highlighted.⁴⁷ Profiles focus on poor kids taking advantage of scholarships to achieve their dreams and on others whose single-minded pursuit of excellence has led them to accomplish extraordinary things with their education.⁴⁸ Whatever the slant—higher education is quickly rising to the top of our consciousness in popular culture.

Of late, these two narratives have merged in sophisticated stories that recognize the transformative nature of higher education coupled with the prediction that we are losing our way in American higher education.⁴⁹ In this telling, the cost of education has grown rapidly out of whack with inflation; state funding is now an ever-decreasing portion of income for public schools, and the United States has become a laggard behind many other countries in its students' achievements.⁵⁰ The visibility of these issues has certainly changed when multinational companies do public service advertising touting their initiatives to restore the United States to STEM (science, technology, engineering, and mathematics) superiority once again.⁵¹

The emerging claim is that higher education is reaching a tipping point—its absolute cost is too high (in relation to expected earnings by graduates); its relative cost (compared to dropping out, taking courses at the community college, or even to the good old days) is growing worse; and even more fundamentally, students who do attend schools are not really learning anything worthwhile. To law school aficionados, this should sound familiar—it was the storyline a few years ago before the collapse of the legal education market.

Unlike the law school story, however, the popular press is actually pointing to a way out for the university⁵²—call it MOOC mania. In this plotline, technology offers a way out of the cost and quality dilemma: first, by making

46. See Andrew J. Rotherham, *Actually, College is Very Much Worth It*, TIME MAG. (May 19, 2011), <http://content.time.com/time/nation/article/0,8599,2072432,00.html> (on file with the *McGeorge Law Review*) (discussing the benefits of a college education).

47. See, e.g., *Oklahoma State University Faculty Members Honored for Research Excellence*, OKLA. ST. UNIV. (Sept. 6, 2013), <https://news.okstate.edu/press-releases/2305-oklahoma-state-university-faculty-members-honored-for-research-excellence-> (on file with the *McGeorge Law Review*).

48. See, e.g., *Federal Program Helps Students Bound By Poverty Become College Bound*, SAVANNAH MORNING NEWS, <http://savannahnow.com/stories/060599/ACCupwardbound.html> (last visited Sept. 13, 2013) (on file with the *McGeorge Law Review*) (describing the stories of two boys probably destined to be factory workers who instead used their educations to become a lawyer and a city planning director).

49. See, e.g., *Not What It Used To Be*, THE ECONOMIST (Dec. 1, 2012), <http://www.economist.com/news/usa/21567373-american-universities-represent-declining-value-money-their-students-not-what-it> (on file with the *McGeorge Law Review*).

50. *Id.*

51. See Ken Cohen, *Phil Mickelson's Big Week Continues*, EXXONMOBIL PERSPECTIVES BLOG (Jul. 23, 2013), <http://www.exxonmobilperspectives.com/2013/07/23/phil-mickelsons-big-week-continues/#print> (on file with the *McGeorge Law Review*) (highlighting the work of ExxonMobil to improve education).

52. See Laura Pappano, *The Year of the MOOC*, N.Y. TIMES (Nov. 2, 2012), http://www.nytimes.com/2012/11/04/education/edlife/massive-open-online-courses-are-multiplying-at-a-rapid-pace.html?pagewanted=all&_r=0 (on file with the *McGeorge Law Review*) (highlighting educational benefits and challenges of MOOC, and how it can improve education).

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education less expensive (free?) and second, by making it better through more effective technology teaching-enhancement tools.⁵³ What is a MOOC? It is a Massive Open Online Course: produced by an outstanding faculty member teaching at a first-rate school, offered for free to those wanting knowledge and uninterested in a credential. Alternatively, a MOOC may be offered for a small fee to those wanting certification that they have completed the course and have a measurable amount of subject matter knowledge.⁵⁴

The claim is that these inexpensive (to the student) courses will soon receive academic credit at universities—either by being incorporated into their curricula and then supplemented by face-to-face teaching offered by inexpensive adjunct faculty or by direct approval of transfer credits to students taking the courses wholly online.⁵⁵ In either event, the course will be massively marketed at a low-price to students (and a recoupment of costs through a high number of students paying a low amount), thereby reducing the costliness of obtaining an education.

To improve quality, the MOOCs rely on Big Data.⁵⁶ They collect significant amounts of information about each learner in massively scaled teaching that observes in minute detail how students with different learning styles absorb content.⁵⁷ The MOOCs then construct multiple pathways through the material for each learner, customized to optimize each student's best way to learn. In its ideal, the course teaches itself what works for which students and then incorporates multiple ways for students to navigate the materials—all without live supervision.⁵⁸ Through the use of this adaptive learning software, the course offers each student an individually tailored learning path through the materials—thereby ensuring that all motivated students will achieve course competency.⁵⁹ On a massive scale, machines will do the type of customized teaching usually associated only with small classes and will do so without the need for a live faculty member.

One step removed from the MOOC as panacea is a slightly more cynical critique of the educational value of traditional schools. It derives three related “principles” from the promise of massively scaled, technology-driven courses:

53. *Id.*

54. *Id.*

55. *Id.*

56. Justin Pope, *Recession Pushes Major Education Innovation, and Investors are Watching*, HUFFINGTON POST (Sept. 3, 2013, 4:09PM), http://www.huffingtonpost.com/2013/08/05/recession-education-innovation_n_3707177.html (on file with the *McGeorge Law Review*).

57. *Id.*

58. See James G. Mazoue, *The MOOC Model: Challenging Traditional Education*, EDUCAUSEREVIEW ONLINE (Jan. 28, 2013), <http://www.educause.edu/ero/article/mooc-model-challenging-traditional-education> (on file with the *McGeorge Law Review*) (discussing methods of optimizing MOOC-based courses to increase student learning and performance).

59. See Cathy Sandeen, *From Hype To Nuanced Promise: American Higher Education and the MOOC 3.0 Era*, HUFFINGTON POST (July 18, 2013), http://www.huffingtonpost.com/cathy-sandeen/from-hype-to-nuanced-prom_b_3618496.html (on file with the *McGeorge Law Review*).

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(1) knowledge is (or should be) free; (2) whatever remaining services for which students pay are only tangentially related to learning and involve non-educational services; and (3) the residential university's primary remaining value is to provide credentialing and related networking.

I discuss these in turn.

A. Knowledge is Free

Massive open online courses demonstrate that there is a vast market for information, but a high level of sensitivity to price. Like other e-commerce sites, higher education is recognizing that “customers” are seeking access to information and will engage with material when it is freely available. Even before universities began to officially offer MOOCs the concept had been demonstrated by Khan academy video content, and even by I-Tunes University and other open educational initiatives.⁶⁰ Ultimately, these “freemium” sites are setting a market price for the information contained in courses—they should be free (or at least inexpensive).

Much like over-the-air broadcast radio, internet newsfeeds, file sharing in music, or other content-rich environments, higher education may learn that its mere “content” may be commoditized—especially in generic subject areas in any school's content that is unlikely to be so unique that it would warrant premium pricing. If the core educational content of a basic course is available for free, in a format that a student could study 24/7 wherever the student is located, and by whatever device the student has at hand, one might begin to wonder whether schools will continue to extract a high-price for generic face-to-face courses. The problem is only exacerbated when the material in the online, free course is as good or better than the in-person version of the course. Worse yet, is where the online teacher is more compelling than a local, live teacher and the learning outcomes are no worse online than in person—all claims made by the MOOCs.⁶¹

60. See KAHN ACADEMY, <http://www.khanacademy.org/about> (last visited Sept. 3, 2013) (on file with the *McGeorge Law Review*) (“[Kahn Academy] is “not-for-profit with the goal of changing education for the better by providing a free world-class education for anyone anywhere. All of the site's resources are available to anyone. It doesn't matter if you are a student, teacher, home-schooler, principal, adult returning to the classroom after 20 years, or a friendly alien just trying to get a leg up in earthly biology. Khan Academy's materials and resources are available to you completely free of charge.”); I-TUNES UNIVERSITY, <http://www.apple.com/apps/itunes-u/> (last visited Sept. 3, 2013) (on file with the *McGeorge Law Review*) (describing itself as “[t]he world's largest online catalog of free education content...”). See, e.g., OPEN YALE COURSES, <http://oyc.yale.edu/> (last visited Sept. 3, 2013) (on file with the *McGeorge Law Review*) (providing “free and open access to a selection of introductory courses taught by distinguished teachers and scholars at Yale University. . .”); MITx, <https://www.edx.org/school/mitx/allcourses> (last visited Sept. 3, 2013) (on file with the *McGeorge Law Review*) (offering courses in subject areas such as neuroscience, bioengineering, and financial technology).

61. See *What We Can Learn From the Udacity/San Jose MOOC Debacle*, THE HECHINGER REPORT, http://digital.hechingerreport.org/content/what-we-can-learn-from-the-udacitysan-jose-mooc-debacle_779/ (last visited Sept. 3, 2013) (on file with the *McGeorge Law Review*) (“In general, studies of online and blended

*McGeorge Law Review / Vol. 45**B. The Price of Going to a School is Unrelated to What is Learned*

This claim is a corollary to the idea that knowledge is ultimately “free.” The argument is that because students are willing to pay a high price for their education, even when they know that the knowledge is available for free (or for a much lower cost) elsewhere, the price of residential education must be related to other non-academic services. Among these could be that universities: (1) provide places for students to build lifelong professional networks; (2) provide a way for students to mature, experiment with risky life-style choices, learn to work on their own, and escape their parents; (3) create an environment for peers to learn from each other informally in dorm room bull sessions and all-night discussions fueled by stimulants; (4) provide placement services and career advising; and (5) provide opportunities for students to diversify their contacts, to learn about other cultures and people, and to confront difference.

Hence, the argument is that these byproducts of the residential university, while costly, are worth bearing—even if pure course-based educational content might be provided much more inexpensively. Proponents assert that expensive buildings, infrastructure, secure environments, admissions offices, alumni offices, development personnel, and placement services warrant a premium beyond educational content because they make it possible for students to gain important, non content-based educational value from their school.⁶² Of course one could argue that these services might be disaggregated and provided more cheaply and efficiently by specialists that the student could engage on an à la carte service model in which they could choose the services they desire, rather than in the price-fixed model of bundled tuition charges—but that is a fight for another day.

C. The Real Value is Credentialing

The final argument of the cynics is that even if course content were made free and students could unbundle services, universities still might charge a lot for their most important service: credentialing students.⁶³ In this view, universities perform critical signaling to the employment or graduate school market. First, universities do a quality assurance check on students before they admit them—prior school performance (GPA, class rank, etc.). Second, they rely on verified “intelligence” testing—SAT, ACT, MCAT, LSAT, GMAT, and GRE. Third,

learning have found completion and satisfaction rates similar to or slightly better than face-to-face courses alone.”).

62. See *Higher Education: Not What It Used To Be*, THE ECONOMIST, (Dec. 12, 2013), <http://www.economist.com/news/united-states/21567373-american-universities-represent-declining-value-money-their-students-not-what-it> (on file with the *McGeorge Law Review*) (“[S]tudents are paid a handsome premium for their degree and on the whole earn back their investment over a lifetime.”).

63. *What We Can Learn from Udacity*, *supra* note 61; Poper, *supra* note 61.

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universities measure relative academic performance of students within their institution—course grades, paper grades, GPA, class ranks, honorary societies, graduation honors, etc. Finally, depending on their prestige, the certification of graduation signifies that the student has joined a network of the “best of the best.”

Of course, like the other arguments above, credentialing might some day (perhaps sooner than we think) be measured independently from degrees and universities. Companies like Coursera and Udacity are already sorting performance in their open courses through crowd-grading where the homework, tests, or even postings of classmates are evaluated by peers whose assessments help push the best student contributions to the top of a very large heap of contributions made by a whole class.⁶⁴ These companies tout their top performers directly to employers for a small fee to the student and a larger fee to the employer. Some employers bypass even these evaluations and look directly to the underlying markers of students’ performances—lines of code they have written, papers they have produced, and projects and case studies to which they have contributed.⁶⁵ These suggest that even MOOC consortia might be made irrelevant.

I do not have to decide who is correct in this exchange about the value of traditional educational institutions. Whatever the case, it is apparent that real changes are bubbling—changes that threaten to deeply disrupt the dominance of high-priced, residential university education.

D. Disruption from the Bad, the Ugly, and the Huh. Is There a Good?

Like many other mature industries, higher education has stifled a loud yawn about the threat to its model posed by technology. Like other traditional firms viewing upstart enterprises that pick at the bottom of their markets, they can point to online educational providers as bottom feeders, low quality places, offering pale imitations of real education to weak students. They see these efforts as insufficiently rigorous in quality to warrant worrying that technology-driven education is competitive with “real” education. Defenders of the faith see some of the first-mover schools as desperately seeking a way to stay alive—last gasp measures of schools with modest or declining enrollments to remain afloat. They even suggest that the experiments of their most elite colleagues may be valiant, but ultimately irrelevant evangelical exercises that take first-world education and make it available to third-world students—educational colonialism or noblesse

64. Nicholas Carr, *The Crisis in Higher Education*, MIT TECH. REV. (Sep. 27, 2012), <http://www.technologyreview.com/featuredstory/429376/the-crisis-in-higher-education/> (on file with the *McGeorge Law Review*).

65. See Jason Fell, *How to Recruit a Great Programmer as Partner*, ENTREPRENEUR.COM, <http://www.entrepreneur.com/article/220416> (last visited Sept. 3, 2013) (on file with the *McGeorge Law Review*) (suggesting assessment of coder’s “technical chops” in a practical application before hiring).

oblige?⁶⁶ Whatever their views, most traditional schools see little threat of deep disruption to their hegemony by these upstart uses of technology-enhanced education. Are they right or is there a “good” alternative that might threaten the status quo?

1. *The “Bad” of Online Education*

For many years the largest providers of online education were for-profit enterprises like the University of Phoenix or Kaplan Higher Education.⁶⁷ They were seen as diploma mills, using high-pressure sales tactics to cram lots of students into classrooms in which most would fail.⁶⁸ The argument was that the schools were organized to produce highly leveraged revenue from poor students using government loans by providing low cost, massively scaled courses, that would rely on many students beginning and far fewer completing their education—mostly with borrowed funds.⁶⁹ There are certainly horror stories to be found in for-profit education, but one should not ignore that such stories can also be found among not-for-profits.⁷⁰ Moreover, there are also many success stories from the for-profit sector as well because they provide opportunities to students ignored by many other educational institutions.⁷¹

Traditional universities have also looked with disdain on not-for-profit initiatives like Western Governors University—a competency-based program,

66. See Chris Lehmann, *Educational Colonialism*, THE HUFFINGTON POST (Jul. 25, 2012), http://www.huffingtonpost.com/chris-lehmann/educational-colonialism_b_1704362.html (on file with the *McGeorge Law Review*) (“[W]hen you ensure your own child has an arts-enriched, small-class size, deeply humanistic education and you advocate that those families who have fewer economic resources than you have should sit straight in their chairs and do what they are told while doubling and tripling up on rote memorization and test prep, you are guilty of educational colonialism.”); A *MOOC Delusion: Why Visions to Educate the World Are Absurd*, THE CHRON. OF HIGHER EDUC., (July 15, 2013), <http://chronicle.com/blogs/worldwise/a-mooc-delusion-why-visions-to-educate-the-world-are-absurd/32599> (on file with the *McGeorge Law Review*).

67. *Shifting Ground: Technology Begins to Alter Centuries-Old Business Model for Universities*, MOODY’S INVESTOR SERVICE, 2 (Sept. 17, 2012), available at http://www.etsu.edu/125/taskforces/Programs_and_Opportunities/documents/MOOC.PDF (“Online education is hardly new, having fueled the explosive growth of for-profit education companies from 1995 to 2010. However, the growth of for-profit online education has stalled dramatically in the face of serious public scrutiny over student qualifications, job placement, and student loan defaults.”).

68. *For-Profit College Investigation*, HARKIN.SENATE.GOV, http://www.harkin.senate.gov/help/forprofit_colleges.cfm (last visited Sept. 4, 2013) (on file with the *McGeorge Law Review*) (“The investigation also documented that many companies recruiting tactics misled prospective students with regard to the *cost* of the program, the *graduation rates* of other students, the *job placement* of other students, and the *transferability of the credit*.”) (italics in original).

69. See generally *id.*

70. See David Segal, *Is Law School A Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all> (detailing story where law student accumulated \$250,000 in student loan debt and could only obtain temporary jobs upon graduation).

71. See Shadi Mirza, *5 Inspirational Alumni Success Stories*, UNIV. OF PHOENIX (Oct. 4, 2012), <http://www.phoenix.edu/forward/community/2012/10/5-inspirational-alumni-success-stories.html> (on file with the *McGeorge Law Review*) (boasting success stories from five University of Phoenix alumni).

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that awards credit to students for demonstrated knowledge in courses students take at their own pace.⁷² These courses run on massive scale and do not contemplate direct interactions between students and faculty. While inexpensive, they are criticized for their lack of interactivity, their implicit assumption that credit be given for mere factoid knowledge, rather than critical thinking, and for their teaching to the test attitude.⁷³

These “bad” initiatives are either rejected outright as illegitimate or labeled as pale versions of “real” university education. They can be and are ignored by many traditional schools, which righteously claim that whatever their worth, the initiatives are unworthy of emulation. To the extent that they are acknowledged, they occupy the role of the boogeyman—set up as the likely place that all other schools will end *if* they embrace technology. In the rare instance that they are viewed in a positive light—as places that use research to inform their teaching or to produce self-guided education and adaptive learning—their motives can be questioned even as their tactics are embraced.⁷⁴

2. The “Ugly” of Online Education

Online education is offered by a range of not-for-profit schools that cannot be labeled as exploitative profit mongers. These come in a variety of flavors—large state universities, often with multiple campuses, seeking efficiency in delivering course content and lower-tiered private schools, facing some financial jeopardy in their residential campuses, looking for alternative revenue sources. In both instances, more traditional or financially secure places find reasons to dismiss such online ventures as irrelevant to the core model of higher education.

It is no secret that for decades many states have slowly been curtailing their support of public universities. Hence, the percentage of total university support provided through state funding has become smaller and smaller over time. However, simultaneously, many of these states have required universities to service ever-growing numbers of students.⁷⁵ They have robust incentive programs

72. See *How We’re Different*, WESTERN GOVERNORS UNIV., http://www.wgu.edu/about_WGU/WGU_different (last visited Sept. 5, 2013) (on file with the *McGeorge Law Review*) (“Our online degrees are based on real-world competencies as opposed to seat time or credit hours. Our focus is on ensuring you possess the skills and knowledge you need to be successful, not whether you’ve attended class or not.”).

73. See Marc Parry et al., *The Gates Effect*, THE CHRON. OF HIGHER EDUC. (Jul. 14, 2013), <http://chronicle.com/article/The-Gates-Effect/140323/> (on file with the *McGeorge Law Review*) (discussing critics’ view of competency-based programs as offering “dubious long-term value to students...”).

74. *Id.*

75. Phil Oliff, et al., *Recent Deep State Higher Education Cuts May Harm Students and the Economy for Years to Come*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 19, 2013), <http://www.cbpp.org/cms/?fa=view&id=3927> (on file with the *McGeorge Law Review*) (“States are spending \$2,353 or 28 percent less per student on higher education, nationwide, in the current 2013 fiscal year than they did in 2008, when the recession hit [and] [l]imited revenues must support more students.”).

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for students to stay “in-state.”⁷⁶ They provide funds to high schools to become college preparatory and to send growing numbers of students to in-state institutions.⁷⁷ In addition to these issues, many states have also spread university education to multiple geographic locations—essentially branching their institutions and thereby forcing universities to find ways to service students in multiple locations.⁷⁸ In essence, state universities have had to serve greater numbers of students with lower levels of support—especially where they are also restricted from raising tuition.

Such universities have made use of online technology to connect students in many places and serve large numbers of students by having one primary faculty member who directs the course, using multiple less expensive adjuncts or graduate students to manage satellite operations.⁷⁹ Such schools have made extensive use of classroom capture technology to provide students with a way to “skip” class (and thereby reduce the need to build more classrooms) and attend lectures virtually and repeatedly online. And, such schools have made use of repurposing content in multiple locations at multiple times to avoid multiple sections of courses.⁸⁰

These uses of technology have also been embraced by a tier of schools seeking ways to circumvent the disadvantages of their isolated locations and the lack of demand for their in-person education.⁸¹ Both BYU Idaho and Southern New Hampshire University have grown their enrollments significantly by becoming online educational providers outside of their limited geographic areas.⁸² Using aggressive marketing and high quality online tools, they have become major competitors to the for-profits and have pioneered the use of technology in higher education.⁸³

76. See, e.g., *Georgia’s Hope Scholarship Program Overview*, GACOLLEGE411.ORG, https://www.gacollege411.org/Financial_Aid_Planning/HOPE_Program/Georgia_s_HOPE_Scholarship_Program_Overview.aspx (last visited Sept. 5, 2013) (on file with the *McGeorge Law Review*) (providing scholarship incentives for Georgia residents to attend college in Georgia).

77. *Id.*; See, e.g., *Early College High School*, TEXAS EDUC. AGENCY, <http://www.tea.state.tx.us/index3.aspx?id=4464#Funding%20Information> (last visited Sept. 5, 2013) (on file with the *McGeorge Law Review*) (describing process to become an “Early College High School” in Texas eligible for funding from a fund of over \$19 million).

78. See *Suny Campuses*, THE STATE UNIV. OF N.Y., https://www.suny.edu/student/campuses_complete_list.cfm (last visited Sept. 5, 2013) (on file with the *McGeorge Law Review*) (listing sixty-four campuses within the University); Policy-Credit Transfer, OHIO BD. OF REGENTS, <http://regents.ohio.gov/transfer/policy/index.php> last accessed Sep. 9, 2013) (on file with the *McGeorge Law Review*).

79. *Id.*

80. See *About Coursera*, COURSEERA, <https://www.coursera.org/about> (last accessed Sep. 9, 2013) (on file with the *McGeorge Law Review*).

81. See Marc Parry, *Online Venture Energizes Vulnerable College*, THE CHRON. OF HIGHER EDUC. (Aug. 28, 2011), <http://chronicle.com/article/How-Big-Can-E-Learning-Get-At/128809/> (on file with the *McGeorge Law Review*) (describing how the small private university became a “power house” in online colleges).

82. *Id.*

83. *Id.*

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As with the large public schools, these initiatives have largely been ignored by mainstream universities that currently feel no financial pressure, do not have to serve unchecked growth, and have no sense of geographic isolation. These “ugly” problems are seen as those of others, but essentially irrelevant.

3. The “Huh?” of Online Education

Since 2011, elite universities have been leading the charge to create MOOCs and have received an enormous amount of press in doing so.⁸⁴ Harvard and MIT lead in the development of the edX platform.⁸⁵ Faculty from Stanford leads in the development of Udacity (elite faculty-driven) and Coursera (elite institution-driven) efforts.⁸⁶ All three efforts look similar: massive courses consisting of online content, with extensive peer-driven commentary, and occasional multiple choice type testing. Students taking the courses generally receive no academic credit from the offering schools; at most, they can receive certificates of completion.⁸⁷ Pundits see the initiative as disruptive to the current face-to-face model, portending a democratization of higher education, a new inexpensive way to deliver elite education, a way to unbundle courses and allow students to mix and match their courses from a variety of sources, a way to eliminate state subsidies, a way to make education more efficient and better, and on and on.⁸⁸

The MOOC movement is currently being funded either with institutional support or venture funding.⁸⁹ Many have speculated about the mechanisms that will be used to provide long-term economic viability for these efforts. Some suggestions include: fee income for certificates of completion, fee income from

84. See, e.g., Sean McMinn, *MOOCs Being Embraced By Top U.S. Universities*, USA TODAY, Jul. 12, 2013, <http://www.usatoday.com/story/news/nation/2013/07/11/moocs-top-colleges-and-universities/2509883/> (on file with the *McGeorge Law Review*) (“[L]ess than two years after a trio of massive open online course (MOOC) provider startups—Coursera, edX and Udacity—began ballooning in popularity, every college atop *U.S. News and World Report’s* national university rankings is now embracing them.”).

85. Carr, *supra* note 64.

86. *Id.*

87. See, e.g., LI YUAN ET AL., MOOCs AND OPEN EDUCATION: IMPLICATIONS FOR HIGHER EDUCATION 7 (Mar. 2013), available at <http://www.smarthighered.com/wp-content/uploads/2013/03/MOOCs-and-Open-Education.pdf> (“MITx and Harvardx courses will not be offered for credit at either university but online learners who demonstrate mastery of subjects can pay a modest fee for a certificate of completion.”).

88. See Anant Agarwal, *Online Universities: It’s Time For Teachers To Join The Revolution*, THE OBSERVER (June 15, 2013, 17:39), <http://www.theguardian.com/education/2013/jun/15/university-education-online-mooc> (“M[OOC]s are democrati[z]ing education.”). But see Steve Kolowich, *The MOOC ‘Revolution’ May Not Be As Disruptive As Some Had Imagined*, THE CHRON. OF HIGHER EDUC. (Aug. 8, 2013), <http://chronicle.com/article/MOOCs-May-Not-Be-So-Disruptive/140965/> (on file with the *McGeorge Law Review*) (positing that MOOCs may not disrupt the traditional college model because students do not take advantage of accepting credit for MOOC courses when colleges offer the chance for credit); Carr, *supra* note 64.

89. See *What Campus Leaders Need To Know About MOOCs*, EDUCAUSE 2, available at <http://net.educause.edu/ir/library/pdf/PUB4005.pdf> (last visited Sept. 5, 2013) (on file with the *McGeorge Law Review*) (“Venture capital and philanthropy have funded platform providers such as Coursera and edX.”).

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employers or others seeking talent identified by performance in the courses, fee income from students to “place” them, fee income from mining data on student learning, fee income for use of the materials in for-credit courses offered by lower-tiered schools, or eventually, fee income from massively marketing new kinds of degrees, cobbled together and curated by the MOOC providers.⁹⁰

All of these speculations about the future suggest that the MOOC consortia are still a solution in search of a problem to solve. They leave many traditionalists asking whether they herald the future or are a mere curio, destined for exhibit as an interesting, but ultimately unsuccessful experiment. Whatever their future, however, these consortia efforts have raised the stakes and are forcing schools to mark their own educational technology territory in some fashion.

4. Is There a “Good” in Online Education?

What is missing from these efforts—whether from the for-profit sector, the multi-campus or non-elite private schools, or the MOOCs—is a major commitment by elite schools to enter for-credit online education. The elite schools do not offer online courses broadly to their students for credit, thereby opening the possibility of increased access and affordability AND a respected credential. The stakes are quite high: schools are hesitant to become an online provider—fearing comparison to the bottom feeders and brand dilution. Faculties worry that such a move will jeopardize job security or force them to teach more often and more students.⁹¹ Average faculty members fear that they will be forced to serve as assistants to their departmental stars. And, universities as a whole fear a shifting from school-based local control to central administrators seeking to make education “cheaper” at the expense of all that is good in university communities.⁹² These anxieties prevent creation of an acceptable way to leverage technology to assist in improving the value of already terrific schools (and maybe lowering barriers to entry, both physical and financial, at the same time).

I explore below the wisdom of traditional schools boldly moving to credited online programs, asking whether doing so might prevent the university from experiencing the gag reflex currently experienced in law schools.

E. I’m Mad as Hell and I’m Not Going to Take It Anymore—(and That’s from Our Friends)!

While the public, the blogosphere, and the press set forth a story about inefficiency and bloat in higher education and the possible salvation offered by

90. *Id.*

91. Carr, *supra* note 64.

92. *Id.*

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online programs, most schools steadfastly support the status quo (with a tweak here and there). However, even within our friendship circle, the drumbeat for change has been pounding.

First, within the academy there are loud voices clamoring for change—from disruption theorists, to “occupy higher education” radical thinkers, to deans of schools seeing eroding demand for their degrees, to faculty scholars of higher education—seeing that the value proposition has become unclear.⁹³

Second, both federal and state legislators have embraced improvement of higher education as an important social issue. Higher education has become one of the most critical battlefields of current public policy, including conflict over: whether to establish national examination common core standards in K–12 and beyond;⁹⁴ whether to mandate that colleges and universities increase the numbers of students they educate to serve social needs;⁹⁵ whether to promote policies to improve the performance of United States’ students in international rankings of student learning outcomes in core educational subjects;⁹⁶ whether to continue to fund for-profit student loans;⁹⁷ whether to require gainful employment for student borrowers commensurate to the debt they accumulate to become employable;⁹⁸ whether to tinker with lending programs to contain costs of schools or constrain borrowing;⁹⁹ and on and on. It is clear that universities will be under scrutiny by the government and the public and that they will be held accountable. Schools will no longer be invisible.

Finally, it seems likely that such scrutiny will move from peer regulators like our regional accreditors to outsiders like the federal government. In recent years,

93. See generally CLAYTON M. CHRISTENSEN & HENRY J. EYRING, *THE INNOVATIVE UNIVERSITY* (2011) (proposing innovative solutions to higher education problems); TAMANAHA, *supra* note 8 (detailing reform needed in law school education).

94. See *No Child Left Behind*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/nclb/landing.jhtml> (last visited Sept. 6, 2013) (on file with the *McGeorge Law Review*) (providing information on the No Child Left Behind Act on the Federal Government Education website); *Common Core Standards*, CAL. DEP’T OF EDUC., <http://www.cde.ca.gov/re/cc/> (last visited Sept. 6, 2013) (on file with the *McGeorge Law Review*) (describing common core standards California has adopted).

95. See NAT’L SCIENCE AND TECH. COUNCIL, *FEDERAL SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (STEM) EDUCATION 5-YEAR STRATEGIC PLAN 10*, (2013).

96. See *International Comparison of Education Outcomes*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=71> (last visited Sept. 6, 2013) (on file with the *McGeorge Law Review*) (ranking the United States with Canada, France, Germany, Italy, Japan, and United Kingdom on varying measures of income by educational attainment).

97. Tamar Lewin, *Facing Cuts in Federal Aid, For-Profit Colleges Are in a Fight*, N. Y. TIMES (June 5, 2010), http://www.nytimes.com/2010/06/06/education/06gain.html?_r=0. (on file with the *McGeorge Law Review*).

98. *Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers*, DEP’T OF EDUC. (Oct. 28, 2010), <http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax> (on file with the *McGeorge Law Review*).

99. See generally Allie Bidwell, *Proposed Student-Loan Reforms Set Activists and Lawmakers at Odds*, THE CHRON. OF HIGHER EDUC., (Apr. 12, 2013) <http://chronicle.com/blogs/bottomline/proposed-student-loan-reforms-set-activists-and-lawmakers-at-odds/> (on file with the *McGeorge Law Review*).

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the U.S. Department of Education has exerted greater influence on the direction of higher education. As the primary lender to higher education and the certifying body for accreditation organizations, the Department has gained enormous leverage to deploy against internal university choices. Given the risky financial exposure of the government to significant default risk in student loans, the Department has already enacted onerous regulations on for-profit schools like requiring them to fund significant portions of education with sources other than federal funds and to provide evidence of gainful employment of students seeking education for professional purposes.¹⁰⁰ These regulations have not been imposed on not-for-profit schools yet. But it is unlikely that the Department will continue to give such a free pass in the years ahead—especially if tuitions continue to escalate and employment prospects do not.

Given the financial exposure to the government as lender, one might speculate about how it will respond to the following non-exclusive list of concerns: (1) will the government continue to fund 100% of the cost of attendance for graduate students, regardless of their field of study—given income differentials that are associated with different fields?; (2) will the government continue to permit accreditors to approve schools whose graduates cannot gain employment sufficient to pay their debt?; (3) will schools be permitted to raise tuition indefinitely, with the government always supplying 100% of the cost of attendance, at whatever rates schools decide and without regard to student outcomes?; (4) will Income Based Repayment be available to all students, regardless of the likelihood that their choices of fields of study either will serve the needs of the country or have a reasonable chance to return on the investment?; (5) will all schools be treated alike, regardless of their cost of attendance or quality?; (6) will federal funds be available to schools that use tuition to fund other parts of the enterprise like research?; and (7) will schools' allocations of income be subject to review by the Department? Whatever the response to these concerns, it is most unlikely that the Department will do nothing.

These are the types of concerns being raised by those who support higher education.¹⁰¹ The critics are even more worried.¹⁰² If these critics come to power, who knows what the regulatory climate will become?

100. Libby A. Nelson, *Trying Again On 'Gainful'*, INSIDE HIGHER ED (Apr. 16, 2013), <http://www.insidehighered.com/news/2013/04/16/us-announces-rulemaking-gainful-employment-state-authorization-and-long-term-agenda> (on file with the *McGeorge Law Review*) (discussing the push on "gainful employment" legislation).

101. See Sam Dillon et al., *Education Chief Vies to Expand U.S. Role as Partner on Local Schools*, N.Y. TIMES (May 20, 2010), http://www.nytimes.com/2010/05/04/education/04educate.html?ref=arneduncan&_r=0 (on file with the *McGeorge Law Review*) (describing Secretary of Education Arne Duncan as "assertive" in achieving education agenda).

102. Henderson & Zahorsky, *supra* note 9 (criticizing federal government's role in student loan policies).

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IV. A LESS CYNICAL, BUT DEEPLY WORRIED VIEW

As detailed above, there are many attacks on higher education. They range from: (1) suggesting that knowledge is itself a commodity that can be forced down substantially in price; (2) that some of the most important value (and costs) in higher education are about things other than what is taught; (3) that if universities offer anything of substantial valuable, it is primarily in providing credentials; and (4) that technology is a panacea that will reduce waste, high cost and debt, and improve teaching and learning—all through radically disrupting the current higher education model.

I argue below that much of this criticism is either flat-out wrong or misguided. Nonetheless, I argue that it captures the essence of a problem: our current cost structure makes university-based education unaffordable for many; some schools will no longer be viable; prices will not rise forever; and debt cannot be unlimited, unrelated to income expectations, or forgiven by lenders at unsustainable levels. Finally, technology cannot be ignored as a tool to lower cost and improve outcomes—even if it does not solve every problem.

I end by suggesting ways that the university of the future can avoid stasis and respond to these strains by embracing changes that help it maintain or improve outcomes, without raising costs.

A. Knowledge IS Valuable—But At What Price?

The core higher education criticism embedded in MOOC advocacy focuses on the idea that once a faculty member's lecture is captured, it can then be provided at a much lower price to students—perhaps for free! To some, this suggests that providing “mere” knowledge is itself essentially not valuable. Simply put: this is nonsense.

The essence of all learning is solid, basic, and deep knowledge of literature, science, math, history, human behavior, language, writing, and other core disciplines. Foundational knowledge can then be grown substantially, combined, added to skills, and re-bundled in novel ways. New knowledge often grows incrementally from old knowledge. And, new generations of learners build on what their predecessors have shared with them.

There is ample evidence, both internal and external to the learner, that questing for and obtaining knowledge is important. People crave things to learn. They read. They go to theater and watch movies and television. They attend lectures. They buy self-help aids. They try new activities and then strive to master them. In short, we are born to be learners and are quite willing to pay for access to things that help us grow. Others validate the learner's quest. Individuals seek out friendships and relationships with other knowledgeable people. Employers hire those with domain expertises. Institutions seek those with

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credentials from trusted sources because the credentials signal that those having them also have related knowledge and skills.

No doubt: knowledge itself *is* valuable—but at what price?

Knowledge might be disaggregated into several components—information, application of information to novel problems, the ability to synthesize information from multiple subjects and create new things, and a facility to observe and classify information into categories to evaluate and use. Much of the criticism of higher education assumes that knowledge is primarily about learning things—essentially gaining nuggets of information.¹⁰³ Limited to this version of knowledge the criticism that such “education” is only modestly valuable or is too expensive or too inefficient strikes home. Once a great lecture is captured, the information snippets it sets out might be made freely available and, like other media that capture moments in time—film, music, art, books, etc., might be made available to mass audiences at a low price point. Or, to put it more directly: once we can capture a faculty member’s lecture, edit it, and make it beautiful, why should it be delivered live year after year. This is both inefficient and perhaps ineffective—especially since performers may not always be at their best!

Given this view, it is not surprising that many legitimately criticize the university for inflating costs through the inefficient continued use of the lecture as a primary teaching tool.¹⁰⁴ However, the criticism misses the mark where other types of knowledge become the dominant part of the classroom experience, where faculty members work closely with students to help them make non-intuitive connections—where knowledge becomes more than conveying information.

In the years ahead, costs for merely conveying information bits will certainly go down substantially—perhaps becoming free, as the MOOC consortia would have it. Universities will need to demonstrate that they are adding value through additional activities they build around core bits of information.

B. Education Is Expensive Because the Faculty Member Comes with It! But What About Value?

Transitioning from an education system that simply conveys information to one that challenges students to make connections between information sets, apply information to solve problems, and work to create new knowledge leads to high

103. David J. Helfand, *Watering the Roots of Knowledge Through Collaborative Learning*, THE CHRON. OF HIGHER EDUC. (July 8, 2013), <http://chronicle.com/article/Watering-the-Roots-of/140135/> (on file with the McGeorge Law Review).

104. See Jim Powell, *College Education Costs Are Likely To Drop At Least 50%, Without Government Intervention*, FORBES (Aug. 26, 2013, 8:00 AM), <http://www.forbes.com/sites/jimpowell/2013/08/26/college-education-costs-are-set-to-drop-at-least-50-without-government-intervention/> (on file with the *McGeorge Law Review*) (“Consider undergraduate lecture classes, the biggest moneymakers in the traditional college curriculum.”).

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costs. These functions require faculty guidance. Faculty members are highly paid,¹⁰⁵ and they do not scale.

The story is well-rehearsed: instructional cost is always going up; new faculty members, who bring new perspectives, must be hired; new fields come into existence and must be staffed; salaries go up to recruit and retain talent; teaching loads go down (to create time to research and refresh knowledge), thereby creating yet another need for more faculty to make up for lost teaching time. No doubt: when the faculty comes with it, courses are expensive. But, is the cost justified by the value the students receive?

Is all knowledge equally important? Do all fields require research faculty in order to create student knowledge? How much core knowledge is required to produce an educated person? Should knowledge be more closely aligned with competencies needed by society? Can society afford education that spends a tremendous amount of time on general knowledge when it has specific, more limited needs to be filled? Should all knowledge cost the same to obtain or should there be differential pricing depending on the use of that knowledge?

Such questions have bite to them. They threaten the perceived value of non-vocational subject domains. They lead critics to ask for metrics that prove the value of knowledge in fields in which there is no perceived occupational track into which students can apply that knowledge.¹⁰⁶ They lead to the hiring of non-research faculty, the defunding of departments, laying off staff, and calls for “practical” training.¹⁰⁷ And, without a response from higher education, they put at risk the value proposition of traditional university education—challenges that critics claim can be met through technology and cost reduction.¹⁰⁸

C. Education Is More Than a Credential; It Is a Way Of Life!

While accepting these critiques, some nonetheless defend the traditional, high cost residential education as sufficiently valuable because of its credentialing function.¹⁰⁹ In this view, education is primarily valuable because it

105. *Distribution of Annual Faculty Salaries, 2010-11*, THE CHRON. OF HIGHER EDUC., (Apr. 11, 2011), <http://chronicle.com/article/Faculty-Salaries-at-More-Than/127041/> (on file with the *McGeorge Law Review*).

106. Stephen Smith, *New Pressures on Liberal Education*, AM. RADIO WORKS, <http://americanradioworks.publicradio.org/features/tomorrows-college/english-major/pressures-liberal-education.html> (on file with the *McGeorge Law Review*).

107. Robin Wilson, *What Happens When Entire Departments Get the Ax*, THE CHRON. OF HIGHER EDUC. (June 18, 2009), <http://chronicle.com/article/When-an-Entire-Department-Gets/44519/> (noting some of the ways universities have responded to the rising costs of education) (on file with the *McGeorge Law Review*).

108. Thomas L. Friedman, Op-Ed., *The Professors' Big Stage*, N.Y. TIMES, Mar. 5, 2013, <http://www.nytimes.com/2013/03/06/opinion/friedman-the-professors-big-stage.html> (on file with the *McGeorge Law Review*).

109. *Cf.*, Doug Harward, *The Sustainability of MOOCs*, TRAINING INDUSTRY BLOG (Sep. 12, 2013) <http://www.trainingindustry.com/blog/blog-entries/the-sustainability-of-moocs.aspx>.

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signals the worth of the individual learner. In this telling, higher education admits to inefficient means of producing knowledge, but claims that the cost is justified by the excess social and financial rewards of gaining the credential.

I find this argument wrong on so many counts that it is worth pausing to parse them.

First, as credentials become easier to obtain, their value is debased. When a university education could be had only by the few (usually privileged individuals coming from a high socio-economic status), the credential signaled that the graduate was connected and elite. With the vast extension of higher education across multiple types of schools to widely diverse groups of students, a mere bachelors degree has come to have less cache. This leads to the claim that “today’s masters degree is equivalent to the old bachelors degree.”¹¹⁰ One might wonder whether this will soon lead to claims that only Ph.D.s or professional degrees matter—yet more credential inflation to maintain credentialing value.

Second, credentials are not all created equally. Does the awarding school have a strong reputation? Does it have grade inflation? What underlying demonstrable knowledge and skills does the credential contain? Are they the right knowledge and skills? Are they validated? By whom? For what purposes?

Third, will credentialing in universities matter if other reliable services enter into the credential business? Trade associations, consulting firms, professional organizations, and even individual faculty experts all have domain expertise that could lead them to “test” or “evaluate” the credentials of others. Computer coders are told that where they went to school or even if they went to school is not nearly as important as what they code, what they can create, and who uses their code.¹¹¹ The real credential seems to come from peer evaluations of competency, not from a piece of paper.

In short: if schools rely on their credentialing power as a measure of their worth, they may be challenged by others who do as well or better. If so, to retain its unique value (and pricing), higher education must demonstrate that its production of knowledge through teaching is intrinsically valuable—not because it can be credentialed, but because knowledge is itself valuable. That proof is often neither sought nor provided by higher education, although the “outcomes” movement may force schools in that direction.

(on file with the *McGeorge Law Review*) (noting that “[c]redentials are not provided to students who participate and complete MOOC programs.”). Motoko Rich, *The Newest College Credential*, N.Y. TIMES (Jan. 7, 2011), <http://www.nytimes.com/2011/01/09/education/edlife/09certificate-t.html> (on file with the *McGeorge Law Review*).

110. See Laura Pappano, *The Master's as the New Bachelor's*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/24/education/edlife/edl-24masters-t.html?pagewanted=all> (on file with the *McGeorge Law Review*) (asserting that the “credential inflation” has caused a dilution in the value of the bachelor’s degree).

111. Jordan Poulton, *Do You Need a Degree to be a Coder?*, TECH CITY NEWS (Aug. 9, 2013), <http://techcitynews.com/2013/08/09/do-you-need-a-degree-to-be-a-coder/> (on file with the *McGeorge Law Review*).

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Finally, I like to think that the value of education is so obvious that no one has chosen to offer a proof. Common sense provides some evidence of this. People seek knowledge through reading, leisure, and professional development time—often with no hope of a credential. They go to museums and libraries. They rent films. They buy books. They watch documentaries. They even attend MOOCs! This behavior tells us that education is itself part of our being—a way of life.

What remains, as I discuss below, is structuring higher education to recognize this without imposing undue expenses and inefficiency.

D. Technology Is a Means to an End, Not an End in Itself

Higher education critics make many of the points above and then offer up technology as a solution to the ills of residential, expensive universities. They argue: capture the best lecturer, have that person constantly refresh their presentation, use the material in all sections of the course, and excess faculty capacity and cost will disappear.¹¹² Teach to massive numbers of students, use machine grading to sort them, and use peer evaluation for qualitative assessments and entire programs can be cut.¹¹³ Use adaptive learning to eliminate tutors and mentors.¹¹⁴ Use big data to find the best learning formula for each learner.¹¹⁵ Technology solves the problem. Not completely.

1. Disaggregation and the “Aha” Moment

Technologists (and their supporters) have a point. Sometimes we can use a machine to lower cost and improve outcomes. The trick is discovering when using the tool makes sense, which tool is best for which purpose, and when something more personal is needed.

The “aha” moment occurs when we break down the teaching and learning process into digestible chunks; doing so helps us to know if and when to use a tool and when to maintain high touch, in-person, education. There are at least three interrelated teaching and learning functions that may be disaggregated effectively: conveying information, using information, and creating new information. Putting it another way, these represent three learning activities: seeing, doing, and teaching. Technology may be able to displace some of these functions and activities, but cannot replace them all.

112. John E. Chubb & Terry M. Moe, Op-Ed., *Chubb and Moe: Higher Education’s Online Revolution*, WALL ST. J. (May 30, 2012), <http://online.wsj.com/article/SB10001424052702304019404577416631206583286.html>; VEDDER ET AL., 25 WAYS TO REDUCE THE COST OF COLLEGE 131–33 (2010).

113. Chubb & Moe, *supra* note 110.

114. *Id.*

115. *Id.*

Seeing

It is likely that technology will make the live lecture obsolete when the goal is merely to convey knowledge nuggets. From the popularization of the flipped classroom by Kahn Academy acolytes to MOOC groupies to the now extensive use of classroom capture on most campuses, many have come to believe that live lecturing can be reduced substantially.¹¹⁶ For example, in large enrollment classes, taught in multiple sections by many faculty members, people rightly ask whether some students necessarily must be forced to sit through boring lectures delivered by modestly talented teachers when other students are taught by a superstar, brilliant lecturer in an adjacent classroom—especially in basic courses in which the content does not differ significantly from teacher to teacher. Others wonder why students should have access only to the views of their assigned lecturer, when technology might make multiple viewpoints available. Others wonder why any local faculty lectures are needed when content can be brought in from elsewhere and curated locally. Like the advent of the printed word that allowed experts from far away places to replace local story-tellers, one could imagine core content to standardize on a technology enhanced platform (with local color provided live). Technology will allow students to see things, without paying a high cost person to deliver the content live.¹¹⁷

Doing

While some concede that technology may have an important role to play in reducing multiple live lecture sections, they reject the idea that technology can effectively ask students to “do” something with the lecture content.¹¹⁸ They claim that live, in-person faculty supervision of tests, projects, group work, simulations, and other important assignments cannot be replaced by a machine.¹¹⁹ Some go so far as to say that once the classroom has flipped, in-person educational supervision is exclusively necessary for the remainder of what students must do.¹²⁰

116. Nathan Harden, *The End of the University as We Know It*, AM. INTEREST MAG., (Jan.– Feb. 2013), <http://www.the-american-interest.com/article.cfm?piece=1352> (on file with the *McGeorge Law Review*).

117. *Id.*

118. See Jonathan Marks, *Who's Afraid of the Big Bad Disruption?*, INSIDE HIGHER ED, Oct. 5, 2012, <http://www.insidehighered.com/views/2012/10/05/why-moocs-wont-replace-traditional-instruction-essay> (on file with the *McGeorge Law Review*) (highlighting several aspects of traditional instruction which cannot be replaced with online lectures) .

119. *Id.*

120. *Id.*

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Maybe

Law teachers strongly defend the proposition that the “do” portion of a legal education can never be provided through technology. They claim that the Socratic method cannot be replicated by machine.¹²¹ The claim is overbroad. First, a lot of the dialogue is asking questions, letting students flounder, and then providing answers—a sort of Socratic monologue dressed as Q and A. Second, much of the dialogue is not directed at producing insights or new knowledge, but rather is making sure that students have comprehended the reading. So, questions like: “state the facts,” “what’s the holding,” and “what did the Court reason” are really just checks on whether the work has been done. Finally, even more complex questions are mostly about seeing if students can connect one case to a prior case or line of cases and apply the holdings to new facts in hypothetical situations.

Gaming and simulation platforms now perform many of these functions. They can provide formats for students to walk through multiple questions, make right answers and move on, or make wrong answers and be directed back to possible paths. They can follow hypotheticals down multiple pathways, double back, deliver feedback, and even direct students to videos of lectures or text provisions that will help the students to find the right (or better) answer. They can adapt to choices students make and coach them. They can provide an interface for students to make competing arguments. And, through capturing live classroom dialogues, skillful film editors can simulate the dialogue in its full glory.

Such uses of technology weaken the argument that technology cannot create “do” education. However, technology still cannot provide the most important “doing” exercises we ask of our students. Clinical, real world projects require students to work on teams, on deadlines, with ever-changing information in real time. Nuances in expressions of clients, witnesses, lawyers, and even teachers require being able to evaluate human interactions. Similarly, students benefit from receiving immediate empathetic feedback from a disciplined teacher who is an expert in the assigned problem. Such doing activity is a critically important teaching function, hard to build by machine, and very difficult to scale. This may suggest that as technology becomes more deeply embedded, when teaching face-to-face, faculty members will need to move away from “showing” things to students and from drill work exercises into much more meaningful interactions and applications of knowledge. Unfortunately, prioritizing a more active set of

121. Cf. Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 273–83 (2007) (noting several ways the Socratic method can be used effectively inside the classroom); Daniel J. Dye, *Debunking the Socratic Method?: Not So Fast, My Friend!*, 3 PHOENIX L. REV. 351, 352–55 (2010) (arguing that the Socratic method is a highly effective teaching tool when used correctly).

teaching skills will be quite new to some faculty and will force others to give higher priority to these skills over lecturing and drilling.

Teaching

In medical education, it is said that novice doctors become skilled only after they have iteratively seen a process, done a process, and then finally taught the process to someone else.¹²² This coincides with the lived experience of many faculty members in how they mastered their subjects. As a beginning teacher, I remember thinking I knew my stuff. I soon came to realize how little of my subject I really understood deeply until I was forced to think it through in small bites and help others understand the steps to take. Being able to teach something to someone is the most difficult educational function to mechanize. Moving a student from novice to proficient requires constant nurturing, iterative chances to do things, and finally, a chance to share that knowledge with others through a teaching exercise. Technology may enable ways for students to convey their knowledge, but they need the coaching of their teachers to reach their potential.

Teachers are role models whose behavior can be emulated. They provide students with inspiration and constructive, cumulative feedback. Additionally, they guide students in their quest to learn enough to share what they have learned with others. If higher education aspires to turn every student into a teacher, it rarely succeeds in doing so. Many courses stop once students acquire a subject's core knowledge. Such courses, with modest goals, have little need for faculty inspiration. They just need an effective way to convey information and a good evaluation instrument by which students can demonstrate that they have acquired the information. More ambitious courses may ask students to demonstrate that they can apply knowledge to new situations, but even these might be mechanized through a machine-created and graded simulation. However, the most complex courses seek to move students from passivity to activity, from observers to teachers. Such courses force faculty members to do more than build smart technological delivery systems; they require faculty members to create projects on which students can work together. These courses necessitate collaborative efforts in which students publish their work and teach what they have learned to others. These need close faculty supervision. Faculty members must place students on teams, create supportive, collaborative, learning environments, and provide constant feedback and evaluations.

Turning students into teachers, mentoring them, and closely supervising projects requires faculty input that adds significant value to courses. As technology supplants the more prosaic aspects of teaching, it seems likely that

122. Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum*, 26 GEORGIA STATE U. L. REV. 361, 363 (2010).

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these functions will become the primary work of live faculty, the work that provides a justification for a relatively high price.

2. Learning Outcomes Are More Than Knowing Things

Technology provides an opportunity to produce better learning outcomes. It challenges schools to question the utility of high-priced, face-to-face interactions when the learning objectives sought might be done as well or better through technology. It forces faculty to add value in their interactions with students—not merely by providing them with information (which could be done once by video and refreshed when needed), nor even by drilling them to ensure that they have understood the material (which can be done in gaming or adaptive teaching tools). Rather, faculty members must turn students into active learners, capable of applying knowledge in new situations, and sharing that knowledge effectively with others.

Faculty members provide extraordinary value, commensurate with the need for face-to-face interactions, when they challenge students to gain knowledge in context, apply that knowledge in complex settings, and absorb that knowledge within the culture and ethics of their field of study.

Context is critically important. Machines can deliver information, but faculty members contextualize the information, help students understand why the information is important, when it is relevant, how it is used, and how it changes their perspective—all things that we lump together in the category of critical thinking. Faculty members can assure critical thinking when they challenge students to take what they have learned and apply it to novel contexts—what the U.S. civil war teaches about gay rights? What the holocaust teaches us about human nature? How a math formula explains a physical action in the world? These creative exercises force students to become uncomfortable, to struggle for connections, to make insights. They need a guide! Finally, context and application of knowledge, while valuable, need grounding in deeper values and ethics. How does such knowledge fit into our society? What are the universal issues embedded in knowledge? In distribution of resources? In the way people treat each other? In potential uses and misuses of the information? Such cultural and ethical issues need to become an important and explicit part of the faculty member's role—beyond what can be mechanized.

E. Getting from Here To There—Using the Right Tool for the Right Purpose and Recognizing That We Are All Using “Technology” to Enhance Our Teaching Already

I argue above that we can preserve the value of higher education when faculty members use their face-to-face time with students to provide inspirational mentoring and guidance, not mere information. Some doubt that faculty members

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will change—especially as they reject the value of technology-enhanced education.¹²³ I disagree. Faculty members do not have to be enticed into using technology to enhance their teaching; they have long done so. The trick is in seamlessly connecting their current uses with new versions of the same old thing!

Every faculty member uses distance learning today—if they assign a book, a website, an audio or video, or even outside research to be done by students. The assumption is that these technologies “teach” students background information before they ever set foot into the classroom. Once the oral tradition was supplemented by the book, pure face-to-face education became obsolete. Faculty members must now recognize that new technologies make this step easier. Face-to-face, in-person education can evolve even further.

Fancy new tools like “blogging” and “wikis” have been used for decades under different names like workshops in which students react to each other’s writing, or group projects in which a text is drafted by a team of learners. Student projects done in-person in a single space can now be done in a shared on-line workspace. Going to a conference can now be done remotely. Students can be counseled on Skype. Office hours can be held in a Google Hang Out. Review sessions can take place in a live chat. In short—what we do today and have long done can still be done—but perhaps more easily and with greater freedom in time and place. Such changes are not game changers, they are evolutionary improvements. We just need to embrace their possibilities.

V. A SPECULATION ON WHAT’S NEXT

Higher education has been rightly criticized for its high cost and ineffectiveness. While sometimes cynical, these views convey a sense that we are at risk if the value of education is perceptibly weakened. It is true that technology cannot fully replace everything done in residential education. Nonetheless, it is also true universities and faculty must find a way to more effectively use technology to respond to financial and quality challenges. However, doing so will raise pedagogical issues, will force programs from being input to outcome focused, will create internal conflict within the university, and will accelerate stratification in higher education.

A. *The Evolution of Teaching and Learning: from Web 1.0 to Web 3.0*

Since the advent of the printed word, higher education has utilized technology; it is doing so now at an accelerated pace.¹²⁴ The ever-expanding number of information technology tools has reached the tipping point: schools

123. Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. SCI. & TECH. L. 39, 40–41 (2008).

124. See *Shifting Ground*, *supra* note 67.

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must now think consciously about aligning the proper tool with specific educational goals.¹²⁵ While doing so, however, schools must recognize that their students are well ahead of them. They do not embrace information technology simply as tools. Rather, they use them ubiquitously in their daily lives as the primary way to gain information, stay in touch with friends and families, shop, and find entertainment. Students no longer easily accept the notion that their studies are severable from the conduct of their daily lives. It is simply too late to mandate that students submit papers in hard copy only, conduct research solely using books in the library, and meet in-person to discuss questions or collaborate with classmates.

Therefore, it is important to connect the classroom to students' expectation that they can "connect" with material through their usual tools. The ubiquity of these tools deeply implicates how students expect to learn and share knowledge and how they see, process, and interact with information.

The internet is now ever-present in our lives. Its development parallels the expectations that our students have. In its earliest uses (Web 1.0), the web was a medium of flat content: web masters prepared materials that could be viewed by users—sort of the equivalent of seeing a lecture.¹²⁶ Next, those preparing web materials began to invite users to interact with the material (Web 2.0), creating more social uses of content, enabling users to post comments, providing places for responses, contributing multiple takes on content—sort of like asking students to do something with material.¹²⁷ More recently, however, the web has become a primary means for unmediated relationships to be built through the opportunity to engage with others (Web 3.0)—the type of peer-to-peer teaching that might take place in an online teaching environment.¹²⁸

The movement from content, to user-generated content, to peer-generated content reflects very different expectations of the participants. Originally, the web was a top-down tool, controlled by the owners of the web sites, serving their purposes. Next, the social potential of the web was unlocked by creating ways for participants to add content to the web sites. Now, the web is significantly more collaborative. It contemplates that "experts" will participate alongside novices, that users will interact with each other to create novel things, and that everyone can make things to share with others. Netizens have moved from observers, to participants, to creators. They were once net-hermits; they soon formed net-relationships; they are now net-worked.

125. See Friedman, *supra* note 108.

126. Brian Getting, *Basic Definitions: Web 1.0, Web 2.0, Web 3.0*, PRACTICAL ECOMMERCE (April 18, 2007), <http://www.practicalecommerce.com/articles/464-articles464-Basic-Definitions-Web-1-0-Web-2-0-Web-3-0> (on file with the *McGeorge Law Review*).

127. *Id.*

128. *Id.*

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As online technologies become integrated with the classroom, we should anticipate that students will be dissatisfied if relegated to observer status. They will want and expect to be more than passive information vessels. Mere bilateral discussion with their teachers (like email) will not cut it. They will want a social experience in which they not only contribute content, but do so as their teacher's colleague and as part of a team of peers working in a collaborate network.

Relationship building has long been an implicit (sometime unintentional) value in higher education. In a Web 3.0 world, it may be the primary reason students will continue to come to campus. It must be integrated into the technologies that schools use in the educational process.

B. Owning Outcomes

Traditionally, higher education has been input centric. Quality has been measured by: the test scores of entering students, the numbers and percentage of faculty holding Ph.D.s, how many admitted students were in the top 10% of their high school classes, and so on.¹²⁹ In recent years, however, the Department of Education, regional accreditors, and even as conservative a body as the Council of the ABA Section on Legal Education and Admission to the bar have embraced a different philosophy: that educational outcomes are the most important metrics in assessing the quality of a school.¹³⁰ At its most basic form, this movement asks schools: to define what they seek to accomplish; set forth how they will reach their goals; assess whether they have succeeded; and establish what they must do to improve. The shorthand metric is: what's the value added?

Information technology provides an important way for universities to describe expected outcomes, measure performance in reaching those outcomes, and find ways to improve their performance. Traditionally, faculty members have balked at constantly evaluating student progress in reaching identifiable learning outcomes (formative assessment); instead they have relied on midterms and finals (with occasional papers and projects) to evaluate cumulative performance (summative assessment). The rise of information technology and the ability to collect vast amounts of information about how students learn (and which methods work best for any particular student) portends a revolution in measuring outcomes—both formative and summative.

129. Robert Morse & Sam Flanigan, *How U.S. News Calculated the 2014 Best Colleges Rankings*, U.S. NEWS & WORLD REPORT (Sept. 9, 2013), http://www.usnews.com/education/best-colleges/articles/2013/09/09/how-us-news-calculated-the-2014-best-colleges-rankings_print.html (on file with the *McGeorge Law Review*).

130. *Law School Strategic Planning and Outcomes-Based Assessment*, HANOVER RESEARCH, HIGHER ED. BLOG (July 16, 2013), <http://www.hanoverresearch.com/2013/07/law-school-strategic-planning-and-outcomes-based-assessment/> (on file with the *McGeorge Law Review*); Sarah Mui, *ABA Effort to Add Outcomes to Accreditation Standards Roils Law Deans*, A.B.A. J. (Feb. 22, 2010, 4:35 PM), http://www.abajournal.com/news/article/aba_effort_to_add_outcomes_to_accreditation_standards_roils_law_deans/ (on file with the *McGeorge Law Review*).

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First, such technologies can be used for adaptive learning purposes. Students can view materials multiple times, take online tests to measure their understanding of material, and be blocked from moving forward until each building block of information or knowledge is demonstrably shown.¹³¹ For those stuck, the technologies can be made to adapt—to see the weaknesses or gaps in a student’s grasp of material and then direct the student to an appropriate resource to relearn the missing material.¹³² Second, students, who may already be familiar with gaming approaches to learning—iterative replaying of complex chores until the correct pathway is learned—can be tasked to engage with materials in an academic game designed to push students to new levels of understanding and thereby progress at their own pace in achieving a course’s learning objectives.¹³³ Third, students can progress at their own pace and push to their own limits.

In addition to these formative assessment techniques, which can be implemented without direct faculty supervision, emerging online techniques provide other means of improving student learning outcomes. Peers can be asked to teach each other material by posting and discussing their various solutions to problems. These can be evaluated by the crowd, tasking peers to judge the quality of each student’s understanding of course concepts. Finally, the technology enables faculty to create granular levels of information that can each be absorbed, measured, and demonstrated by students. These in turn can be archived and made available to other students. The digital footprints can be matched against desired learning outcomes. Students can mix and match their learning objects from separate courses to demonstrate synthesized knowledge. Students can use their portfolios to demonstrate that they have actually gained competency in a field. It may be that assigning relative rank orders of students is no longer important. Instead, the goal might be more absolute: that every student demonstrate understanding and execution of all tasks—all done at whatever pace the student needs to gain the required knowledge and skills.

These approaches force schools to own their students’ learning outcomes.

C. It Won’t Be Pretty—Infighting for Blood and Other Pleasures!

Robust engagement with technology, while creating many new ways of teaching and assessment, will not be stress-free.¹³⁴ And, if schools choose to use these tools to deal with cost issues or the mix of faculty activities, such engagement will likely cause internal conflict.

For many years, faculty members have been balancing their obligations to produce scholarship, teach, perform public service, and serve their communities.

131. Cubb & Moe, *supra* note 112.

132. *Id.*

133. *Id.*

134. *Id.*

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As outlined above, some are pushing schools to rebalance in favor of teaching and advocating for technology to make it possible. They argue that the scaling potential of information technology will make faculty more productive by allowing them to teach more students. They argue that faculty members who flip their classrooms can now more effectively engage students in project learning, even though such activities will require more of the faculty member. They expect faculty members to eliminate stale notes and repetitively delivering the same content year after year. In the place of lectures, they would require faculty to focus rigorously and exclusively on learning outcomes.¹³⁵ And, if doing so is both more time-consuming and difficult than the current mix of teaching activities, that is the cost of progress. Further, if focusing on learning outcomes arrives at the expense of the faculty's preference to do scholarship, service, and community activities, priorities should shift nonetheless.

To some, the possibility that information technology can privilege student learning outcomes over all other faculty activities means that schools must do so.¹³⁶ In its most brutal form, such rebalancing may come against the wishes of the faculty (and perhaps even departments, schools, and central administrations). Rather, new and different priorities might be imposed by outsiders, who see high value in teaching, lower value in other activities, and are searching to improve the perception that education is valuable.

In other scenarios, universities may not need outsiders to prod them to change. Under financial pressure, universities themselves may restructure—retaining a handful of famous professors whose lectures will provide the core content that “lesser” colleagues will be forced to use in their now required close supervision of student learning outcomes. Some schools may invest in subsidizing star researchers by imposing more extensive teaching responsibilities on less well-known colleagues.

135. Charles Hill, *The Benefits of Flipping Your Classroom*, FACULTY FOCUS (Aug. 26, 2013), <http://www.facultyfocus.com/articles/instructional-design/the-benefits-of-flipping-your-classroom/> (on file with the *McGeorge Law Review*); see also Ellen M. Granberg, *How Technology Enhances Teaching and Learning*, THE TEACHING FORUM, <http://cft.vanderbilt.edu/library/articles-and-essays/the-teaching-forum/how-technology-enhances-teaching-and-learning/> (last visited Sept. 19, 2013) (on file with the *McGeorge Law Review*) (noting the impact technology has on the relationship between teachers and students and how technology can improve learning); Mary Bart, *How Technology Can Improve Learner-Centered Teaching*, FACULTY FOCUS (Dec. 5, 2011), <http://www.facultyfocus.com/articles/instructional-design/how-technology-can-improve-learner-centered-teaching/> (on file with the *McGeorge Law Review*) (“[I]ntegrating technology takes a fair amount of upfront time in terms of getting past the learning curve and choosing the correct technology to support each learning objective . . . [but] the payoff is a more engaged classroom and improved student learning.”).

136. Matthew Prineas & Marie Cini, *Assessing Learning in Online Education: The Role of Technology in Improving Student Outcomes*, NAT'L INST. FOR LEARNING OUTCOMES ASSESSMENT 12–13 (Oct. 2011), available at <http://www.learningoutcomeassessment.org/documents/OnlineEd.pdf> (on file with the *McGeorge Law Review*) (concluding faculty must integrate technology into the education process, abandoning the “one-size-fits-all approach,” to better serve students); see also *Faculty Embraces Plan to Expand Online Education*, YALE NEWS (Dec. 20, 2012), <http://news.yale.edu/2012/12/20/faculty-embraces-plan-expand-online-education> (on file with the *McGeorge Law Review*) (summarizing Yale's plan to expand online education).

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Not without a battle royale!

Fights will play out along important cleavages within the university: between have and have-not schools, between administrators and teachers, between presidents and provosts and deans, between central university officers and school officers, between trustees and their administrations, and between legislators, regulators, and governing boards. Interests among these groups are rarely perfectly aligned, and it seems unlikely that current distributions of power among the stakeholders will remain in place, especially as the scrutiny of higher education becomes more intense.

Traditionally, universities have espoused a preference for shared governance between administrators and faculty. The faculty determines curriculum, teaching loads, assignments, learning objectives, etc. Administrators find resources to make these choices possible. Discussions and negotiations resolve disputes in a sort of town hall writ large for the governance of the institution.¹³⁷

Strict adherence to this process is unlikely. In the years ahead, the financial stakes for students and families will become even more pronounced. Student debt will increase, regulatory mandates in learning outcomes will be prescribed, and regulators will demand demonstrable evidence that students are getting a return on their educational investment.¹³⁸ If shared governance breaks down, it will likely be replaced by more top down systems of governance, corporate governance models, or command and control systems.

Similar strains will be felt within the various schools of a university. Many universities operate in confederations, in which schools exercise tremendous autonomy from each other and from the central university. They have the

137. Robert Birnbaum, *The End of Shared Governance: Looking Ahead or Looking Back*, NEW DIRECTIONS FOR HIGHER EDUC., Fall 2004, at 5–6; see AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES 135, 136 (1966), available at <http://www.aaup.org/file/statement-on-government.pdf> (on file with the *McGeorge Law Review*) (“The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others. The relationship calls for adequate communication among these components, and full opportunity for appropriate joint planning and effort.”); see generally Gary A. Olson, *Exactly What is ‘Shared Governance’?*, CHRON. OF HIGHER EDUC. (June 23, 2009), <http://chronicle.com/article/Exactly-What-Is-Shared/47065/> (on file with the *McGeorge Law Review*) (“True shared governance attempts to balance maximum participation in decision making with clear accountability. . . . Genuine shared governance gives voice (but not necessarily ultimate authority) to concerns common to all constituencies as well as to issues unique to specific groups.”); *Shared Governance in Colleges and Universities: A Statement by the Higher Education Program and Policy Council*, AFT HIGHER EDUC. 4, <http://www.aft.org/pdfs/highered/sharedgovernance0806.pdf> (last visited Sept. 19, 2013) (on file with the *McGeorge Law Review*) (providing an overview of shared governance).

138. See Matthew Prineas & Marie Cini, *Assessing Learning in Online Education: The Role of Technology in Improving Student Outcomes*, NAT’L INST. FOR LEARNING OUTCOMES ASSESSMENT 1, 6 (Oct. 2011), available at <http://www.learningoutcomeassessment.org/documents/OnlineEd.pdf> (on file with the *McGeorge Law Review*) (“Pressures from the public and from the federal government to be more accountable for the outcomes of higher education no longer allow us to pay only lip service to student learning.”); Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1583–86 (2011) (analyzing trends in student debt burden).

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obligation to manage themselves, the right to keep the bounty they generate, and a tax obligation to contribute to the center. In recent years, such systems have become untenable, as successful units are sometimes asked to contribute to the commonweal in disproportionate shares in order to subsidize preferred units unable to fund themselves. Additionally, inexpensive units, with high profit margins, may be asked to subsidize programs with skinnier margins. Less prestigious units may be asked to contribute funds to more prestigious units. These pressures will increase the need for central management and may produce yet another internal battleground.

These are the easy fights because they are in-house. Tensions will rise substantially if outsiders—boards, the legislature, regulators—impose their will on schools. If these outsiders come to act on a core belief that education is too costly, they can decide to cut subsidies, prohibit certain uses of funds, demand more productivity, defund certain departments, impose different priorities, mandate particular (less expensive) teaching modes, and so on.

These scenarios will force a battle over the meaning of education. On one side will be those who see educational value primarily as a means to an end. These folks go to school to gain knowledge and skills in order to get jobs and improve social output. Others will argue that education is primarily a public good, worthy of a full governmental subsidy, in order to permit knowledge in all forms to be fostered without regard to immediate social utility or a student's return on investment. These worldviews do not reconcile easily. They herald a high stakes confrontation for the soul of education, with the winners in a position to dictate and impose their view of the good life on the losers.

I discuss what higher education can do to avoid (or postpone) this zero sum conflagration below.

D. Stratification, Cleavages, and Missions

Conflict is likely to be experienced quite differently by schools depending on their structure: public/private, high prestige/low prestige, not for profit/for profit, research/non-research, etc. Various cleavages may emerge on funding, globalization, and the role of producing and using content. These in turn may lead to haves, have-lesses, and have-nots.

Public institutions face significantly different pressures than private institutions as a result of the growing economic pressures they must face, the need to reach ever-growing numbers of students (at a lower price point), and state encouragement to deploy new technology. First, public schools are under constant regulatory pressure to drive their prices downward.¹³⁹ Similar pressure

139. See, e.g., Elizabeth Flock, *California School Protests: 5 Reasons Students Are Demonstrating*, WASH. POST (March 6, 2012, 10:15 AM), http://www.washingtonpost.com/blogs/blogpost/post/california-school-protests-5-reasons-students-are-demonstrating/2012/03/06/gIQACEqkuR_blog.html (on file with the

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on private schools is much more likely to come from market forces, which in turn are influenced by rankings and perceptions of relative prestige. Second, publicly-funded schools are held “accountable” by their funders—legislators or taxpayers; privates, if accountable to anyone, answer to their customers (students and parents), with Board oversight. Third, public funders often seek efficiency—large numbers of students educated at a low price point. Private funders often seek individual return on investment (ROI) for those paying tuition. Fourth, publics frequently are driven to adopt uniform curricula and assessments, governed by a single public body, delivered on a common technology platform, and managed by central staff. Privates often go their own way, seeking alliances or consortia memberships built to serve reputational goals; efficiency is often only a secondary concern. Fifth, outcome measures often are forced on public schools by outsiders. Privates use their autonomy to embrace or reject such measures as they choose.

Schools driven to lower their prices may be forced into servicing large numbers of students—scaling their enterprise to generate skinny margins and make up for it in volume. Higher prestige institutions may continue to raise prices and create even more luxurious services to warrant continued high prices. Lower prestige schools may be forced to work together, share faculty, and produce generic content inexpensively. High prestige schools may go it alone, rely on their brand names and stars to generate business, and continue to offer bespoke versions of subject matter that is relatively common. Brand-name schools will globalize, create physical locations in multiple locations, and rely on technology to tie their expanding locations together. Lesser schools may have to underprice markets to increase or maintain their market share and create virtual worldwide campuses to find students.

Brand-name schools will provide content that is likely to be licensed or purchased by lower prestige places. Some faculty members, whose personal reputations exceed those of their schools, may become independent contractors and sell their content widely to whatever schools are willing to buy that content.

McGeorge Law Review) (noting that tuition has “doubled over the past five years . . . for resident undergraduates at UC schools” as California struggles to find an answer for lowering tuition); Aaron Sankin, *California Middle Class Scholarship Would Slash UC and CSU Tuition by up to Forty Percent for Some Students*, HUFFINGTON POST (June 20, 2013, 5:11 PM), http://www.huffingtonpost.com/2013/06/20/california-middle-class-scholarship_n_3474124.html (on file with the *McGeorge Law Review*) (“[T]he California legislature approved a bill that would cut the fees charged to many middle class Golden State college students by up to 40 percent.”); Lizette Alvarez, *Florida May Reduce Tuition for Select Majors*, N.Y. TIMES (Dec. 9, 2012), <http://www.nytimes.com/2012/12/10/education/florida-may-reduce-tuition-for-select-majors.html?page-wanted=all> (on file with the *McGeorge Law Review*) (explaining Florida Governor Scott’s educational task force’s recent proposal that “university tuition rates be frozen for three years for majors in ‘strategic areas’” and the governor’s desire “to offer some of their four-year degrees for \$10,000,” which is a \$3,000 reduction in cost); Joshua Fechter, *Gov. Rick Perry Calls Upon Legislature to Freeze College Tuition*; DAILY TEXAN (Jan. 30, 2013, 4:05 PM), <http://www.dailytexanonline.com/news/2013/01/30/gov-rick-perry-calls-upon-legislature-to-freeze-college-tuition> (on file with the *McGeorge Law Review*) (noting the Governor of Texas sought to freeze tuition rates at colleges as part of a plan to lower the cost of attending college).

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Academic publishers may take their content and set up competing “courses” to those offered by the universities that employ their authors. Some schools may continue to focus on their inputs—assuming that whatever their educational services, they cannot damage high quality students.¹⁴⁰ Those lacking the prestige to draw-in highly desired students may orient themselves more to outputs to demonstrate their quality.

To summarize: every school must establish a place in an emerging competitive landscape marked by distinctive approaches to price, quality, reputation, and outputs. School policies likely will be much more transparent and subject to public scrutiny by consumers, regulators, and the public. Schools will be susceptible to disruption by new entrants into the market: publishers, content aggregators, distance learning providers, etc. These forces will divide schools into three archetypes that might succeed: those with such high prestige that they can continue to feature face-to-face, residential education, at a high price (even if their educational process and outcomes are not at the cutting edge); those who offer no frills, low-cost, generic education delivered in the most efficient and inexpensive way; and those who use whatever means they have to offer value-high quality at a lower price, with technology providing a means to achieve better outcomes and maintain a reasonable price. Schools not fitting into one of these models will be in deep trouble.

VI. LAW SCHOOL REVISITED: IS IT SAFE TO BREATHE AGAIN?

Law schools went into the coal mine first. Can they lead the way out as well?

They must . . . but to do so, they will have to get the balance right. For many years, every law school fashioned itself as a “national” school on the brink of being discovered as an undervalued asset, with quality equal to the highest ranked schools, a research faculty, a full curriculum, and an ability to specialize. In this fable, every school is above the median, each is unique, and all warrant the price that they charge.

Whether this was ever true, the market has already demonstrated that law schools can no longer engage in continued magical thinking. To survive and prosper, they must face reality: if they are not among either the handful of elite schools or the no-frills schools, they must become a value-driven school or become dead meat. To avoid reading their own obituaries, many schools must be willing to change, sometimes radically. I outline below some of the tough choices these schools will need to make during this process.

140. See *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, *supra* note 138, at 1589, 1592 (reviewing the traditional approach to measure the quality of legal education through a ranking of the schools’ inputs).

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A. Finding the Right Balance

Law schools look quite similar: three-year full-time programs; four-year part-time programs; little use of online courses; staffed predominantly by full-time, job-secure research faculty, engaged in face-to-face education, conducted in a physical facility with an extensive amount of seating. Much of this has been driven by choice (perhaps influenced by accreditation requirements) and the drive to raise prestige.

What was, is unlikely to be! I assume that virtually every aspect of the current system will be subjected to experimentation and change in the years ahead. Accreditation barriers, internal preferences, and the ambition to rise in prestige must give way to lower costs, improved outcomes, and differentiation or there will be a massive retrenchment in most schools and an end to others. Should such changes be embraced, law schools of the future will certainly come in many new flavors.

Some schools will try to accelerate the time to graduation. This might be accomplished in numerous ways—extensive use of summers and intersessions, use of “competency-based” assessments that allow students to complete courses as quickly as they can demonstrate appropriately measured learning outcomes, and increased use of online tools to scale the number of students taught by each faculty member.

Some schools may reassess the value of in-person education and embrace the use of online tools to convey information, and even Socratic dialogue drill work, thereby leaving the classroom only for projects, clinics, and practical training. Some schools may combine study with actual practice by providing students with online classes at night and unpaid work during the days. Other schools may create hybrid education consisting of highly concentrated periods of in-person study, followed by extensive time away learning practical skills or working as interns. Some schools may eschew a national focus and work solely to fulfill local or state needs. Other schools may seek to globalize, using online education to permit students to seek work wherever it exists (and fulfill course work requirements online). Some schools may become fully interdisciplinary, with courses for students from many places in the university (and a reduction in fixed instructional cost). Some schools may use their resources to teach undergraduates, engage in CLE, and deliver executive education (and downsize their J.D. programs). Some schools may give up doing research and hiring research faculty in favor of a smaller faculty, with higher teaching loads, focused primarily on practice.

The bottom line is this: only a handful of schools will survive on reputation and high price alone.¹⁴¹ A few schools may provide an inexpensive, no-frills

141. *See id.* at 1580 (suggesting only “[l]aw Schools with ancient and powerful reputations” can continue to succeed under the current model).

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education. Many schools will have to occupy a value-oriented niche, in which they effectively claim and prove that their unique approach provides sufficient value to justify whatever they charge. And, some schools will surely fail.

B. Innovation and Outcomes

Change for change's sake and innovation for innovation's sake are senseless activities. They smack either of desperation or hokum. To become successful, innovation and change must be driven to achieve clear, mission-driven outcomes—less expense, better training, higher value, whatever. To survive and prosper, law schools must clarify their goals and move inexorably to execute on them, and fulfill them.

The drivers seem clear: (1) find ways to lower, not merely stabilize, costs; (2) find ways to get students to their ultimate careers more quickly; (3) better utilize personnel to achieve improved student learning outcomes; (4) assure that educational objectives are aligned with students' and employers' needs, both of which should be aligned with clients' needs; and (5) create financially sustainable models for a legal education. Anything short of this will put all but a handful of schools in jeopardy.

Innovations tied to these goals will fail unless many of the pesky restrictions contained in current accreditation standards are eased. The standards require that students be prepared to pass the bar and practice law, but also prescribe *how* the goal must be accomplished: restricting admission to students with an undergraduate degree, who have taken a standardized test; limiting online courses over the whole of law school, and permitting none in the first year; preventing payment for student work that also receives academic credit; requiring classes be taught in a building with sufficient library seating for every student and a private office for a faculty member who should be doing research,¹⁴² etc. Schools can implement significant and effective responses to cost concerns and produce better learning outcomes only when accreditation shifts from asking *how* schools educate, to *whether* they succeed in educating.

C. Getting There by Whatever Means That Work

Law school is neither the beginning point of a legal education nor its end. Long before students begin the exclusive study of cases, statutes, and legal concepts, they have learned to write and think critically, have studied history and other social sciences, and have been exposed to civics and the study of American government. Similarly, long after they leave school, they must continue their

142. *See id.* at 1613–27 (2011) (describing the extensive ABA standards and rules regulating law schools).

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education—through formal CLE and more importantly through the life-long learning that takes place by staying current in law and surrounding disciplines.

Law schools have rarely deeply-engaged in providing life-long teaching and learning opportunities. They rarely are active in undergraduate education and cede to others continuing education of their graduates. Schools that embrace a life-long learning mission, seek out undergraduates, and find ways of keeping graduates coming back for more can diversify their sources of income. By finding revenue from “students” over a longer period of time, they can hedge against the precipitous fall in enrolled JD students. Diversification can help schools to lower the price of a core legal education. It permits schools to extend their offerings to non-law students by providing courses to students in allied disciplines, such as undergraduate social sciences, business schools, public policy schools, engineering schools, etc. If knowledge of law is critically important within our society—as most legal educators believe—law schools should use their teaching capacity to reach any potential learner needing some legal knowledge. With declining enrollments, this is not merely a wish, but a necessity!

Law school content could be made widely available through the use of information technology. Law MOOCs would likely be very popular; they could provide gateway content to students who are interested in law, but uninterested in enrolling in a degree program. Participation in a law MOOC is likely to inspire some of these students to try law school. For others, gaining certificates could prove valuable to them in their careers—giving them domain knowledge that might be useful in business, management of intellectual property, or compliance with environmental, financial, employment and other business regulations. Law schools should seek students from any institution that is informed by legal knowledge. Should the ABA lift its current restrictions on the use of distance learning, law courses could be positioned to provide for-credit education, scaled to large numbers of interested students, and priced significantly under current market prices. Such education could provide certificates to be added to other degrees, thereby creating new revenue for the law school and flexible ways to use legal educational products to cushion the cost of full-time legal study.

Perhaps the most important unexplored approach is to create an accelerated educational path to becoming a lawyer. Under current ABA rules, students generally must have completed at least three years of undergraduate education before being admitted to law school—most have an undergraduate degree before they begin study. We have not always delayed legal study until graduate school.¹⁴³ Moreover, in other countries, law is an undergraduate major whose

143. See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 600–01 (2012) (describing early American apprenticeship and clerkship programs, which stood in place of graduate school); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: AMERICAN LEGAL THOUGHT AND LEGAL EDUCATION, 1800–1920, at 45 (1993) (examining the various forms of legal education as it existed in the nineteenth and early twentieth centuries).

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graduates can qualify as lawyers without specialized, lengthy graduate study.¹⁴⁴ Students from these countries can also qualify to sit for the bar examination in the United States without completing three years of post-bac education.¹⁴⁵ New York still permits those with some legal study to sit for the bar exam after working with a mentor in a legal practice.¹⁴⁶ If non-US students can become lawyers without three years of graduate education, and if interns can do so by learning law in a practice setting, it seems unlikely that the current model can be sustained as mandatory.

These alternatives to the standard three- or four-year law degree suggest that other accelerated models will emerge. By making legal studies an undergraduate field (perhaps a five-year program) whose graduates could sit for a bar, schools could reduce the cost of a legal education by two years of out-of-pocket and opportunity cost. Such an accelerated pathway could solve several problems: (1) reduce student out-of-pocket and opportunity costs by several years; (2) permit graduates to begin earning an income more quickly; (3) make it easier for students with lower salaries to manage their debt; (4) increase the attractiveness of legal study in comparison with alternate study and career path; (5) assure the cost of training a lawyer in the United States does not place American lawyers at a competitive disadvantage internationally; and (6) reduce the government's exposure to loan defaults and forgiveness for students of legal education.

144. Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's so Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107, 146 (2008) ("Legal education in the EU traditionally has been an undergraduate course of study."); see also Jaime B. Berger Stender, *Mexican Legal System Overview*, MEX ONLINE, <http://www.mexonline.com/lawreview.htm> (last visited Sept. 25, 2013) (on file with the *McGeorge Law Review*) ("Law school [in Mexico] is 5 years, includes liberal arts related courses and is broader and more formal and theoretical in scope and focus than is law school in the U.S."); *China*, JURIST L. INTELLIGENCE, <http://jurist.law.pitt.edu/world/china.htm> (last visited Sept. 5, 2013) (on file with the *McGeorge Law Review*) (noting Chinese legal education consists of three years of undergraduate study, followed by "two years of judicial work..."); *Some Salient Features of the Legal Profession in Sweden*, SWEDISH BAR ASS'N 4, http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf (last visited Sept. 19, 2013) (on file with the *McGeorge Law Review*).

145. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 520.4 (2012) (permitting individuals with one year of legal education and three years working under a member of the New York Bar Association to sit for the New York State bar exam); CAL. CT. R. § 4.26 (West Supp. 2013) (authorizing students who "studied law . . . for at least four years . . . in a law office . . . [or] in a judge's chambers" to take the California State Bar Examination); VT. STAT. ANN. Tit. Administrative Orders and Rules § 6(g)(1) (Supp. 2012) (enabling individuals who study the law "for a period of not less than four years within this state under the supervision of an attorney in practice in the state" to take the Vermont State Bar Examination); VA. CODE ANN. § 54.1-3926(4) (West Supp. 2013) (allowing individuals who study law under a retired circuit court judge for three years to sit for the state bar examination).

146. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.6 (2012); Esteicher, *supra* note 143, at 600 n.6 (2012).

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D. What Can Be Learned From Law School Canaries?

The rise and fall of American legal education (and its chance to rise again) provides a cautionary tale to the rest of the university. As beguiling as our educational system is, as much as we have created the gold standard of higher education, the price of an education must be commensurate to its perceived value. For decades, legal education grew, fueled by expectations that the ROI was great and that taking on debt was sensible given the robust market for lawyers and legal services. In turn, these expectations fueled growing enrollments and expansions of the legal education enterprise. The last few years have shown how quickly fortunes can be reversed. Schools' viability will be jeopardized when student demand erodes and serious questioning of the value proposition begins.

Within the academy, the legal education turmoil has been observed, but not understood. Other graduate disciplines have generally escaped attack. Demand for their training has not deteriorated—yet. Undergraduate education has also been spared from serious attack. It is perceived as distinctively different from professional or graduate study and not subject to the same cost/benefit calculus that has been driving both the attack on legal education and the decrease in demand for law school.

Nonetheless, in recent years, the first wave of questions has arisen about the cost, quality, value, effectiveness, and legitimacy of other disciplines and even undergraduate study.¹⁴⁷

I fear that universities will see the law school story as exceptional. Maintaining a sense that decline could never happen university-wide, schools will ignore the law school story and press forward in a continuing spiral of ever-increasing tuition, growth in graduate programs with job placement opportunities that pay too little to service their debt, and growth in expenditures for faculty, staff, and physical plant.

This would be a mistake. The same forces that have affected legal education are afoot in higher education generally, but the stakes are even higher. Our country needs educated students, but not students who begin life significantly burdened by costs that they have borne through debt or depletion of their

147. See Jacob McMillen, *The Real Reasons College is a Bad Investment*, HUFFINGTON POST (June 12, 2013, 11:28 AM), http://www.huffingtonpost.com/brazen-life/the-real-reasons-college-is-a-bad-investment_b_3423566.html (on file with the *McGeorge Law Review*) (arguing college is a bad investment compared to on-the-job learning and work experience); *Is College Worth It*, TIME MAG., <http://content.time.com/time/interactive/0,31813,2072670,00.html> (last visited Sept. 7, 2013) (on file with the *McGeorge Law Review*) (“As the cost of higher education skyrockets, a new Pew study finds that students and families are questioning its value.”); Stacey Patton, *As Debt Rises and Job Prospects Dim, Some Say It's Time to Put a Warning Label on Graduate School*, CHRON. HIGHER EDUC. (Dec. 9, 2012), <http://chronicle.com/article/Some-Say-Its-Time-to-Put-a-136217/> (last visited Sept. 7, 2013) (on file with the *McGeorge Law Review*) (“The student-debt problem, coupled with the dearth of jobs, has sparked a national conversation about whether going to graduate school is worth it.”).

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family's resources. Education that is focused primarily on serving the needs of faculty, providing subsidy to the university research mission, or funding higher priority parts of the school will increasingly be subjected to scrutiny. Modest levels of transparency were firmly embedded in legal education before the crisis and have sharpened considerably since then.¹⁴⁸ It is inconceivable that the same bright light will not be shined on every nook and cranny of higher education.

Unlike law schools, whose regulations have encouraged them to ignore technology as a time and cost saver, universities are already facing disruptive competitors hell bent on undercutting price *and* promising improved academic outcomes as well.¹⁴⁹ However, unlike law schools, whose unified student bodies are tied to a single profession in which the status quo is under attack, the university as a whole is diversified. It faces no single determined group of students and allied graduates banded together to challenge their model. Nor is it facing aggressive regulators demanding better outcomes at a lower price. With no urgent pressure to change, threats only dimly perceived, and challenges diffuse, stasis prevails in most universities.

Seeing law schools going into the mine, becoming sick, and suffering some fatalities should spur more than passive observation by other departments. Law schools are not merely an interesting sideline spectacle; they provide lessons for the rest of the university.

Law schools have some clear advantages over other programs. They have coherent, well-organized curricula, clear career pathways, historically prestigious outcomes, and financially remunerative rewards for graduates at the top of the class (even in recent tough times). And yet, their survival is being tested. Other parts of the university may not have such advantages—especially those whose value to its graduates is not immediately obvious and whose likely pathways are not sufficient to provide job prospects. For such programs, if a value crisis

148. See *Principles and Standards for Law Placement and Recruitment Activities*, NAT'L ASS'N L. PLACEMENT, http://www.nalp.org/fulltextofnalprinciplesandstandards#Part_II.Principles (last visited Sept. 23, 2013) (on file with the *McGeorge Law Review*) (encouraging law schools to make salary and employment information concerning graduates available to the public and employers); STANDARDS OF RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS §509 (A.B.A. 2006–07), available at [http://www.Americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2006_2007_standards.uthcheckdam.pdf](http://www.Americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2006_2007_standards.authcheckdam.pdf) (on file with the *McGeorge Law Review*) (requiring accredited law schools to “publish basic consumer information,” including admission and placement rates); see also *Total Number of Resident and Active Lawyers: 1989–2008*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/market_research/PublicDocuments/lawyer_count_by_state_1989_2008.authcheckdam.pdf (last visited Sept. 23, 2013) (on file with the *McGeorge Law Review*).

149. See COURSEERA, <https://www.coursera.org/about> (last visited Sept. 7, 2013) (on file with the *McGeorge Law Review*) (offering free online lectures taught by “world-class” university professors); DEVRY UNIV., <http://www.devry.edu/financial-aid-tuition/financial-aid-tuition-overview.html> (last visited Sept. 7, 2013) (on file with the *McGeorge Law Review*) (freezing tuition rates and focusing on preparing students for their careers, similar to a vocational school); KAPLAN UNIV., <http://www.kaplanuniversity.edu/academic-programs.aspx> (last visited Sept. 23, 2013) (on file with the *McGeorge Law Review*) (offering online undergraduate and graduate degree programs).

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arrives, it may not be a simple matter of downsizing to survive, especially if new lower cost alternatives are available and produce similar learning outcomes.

The changes likely to emerge in legal education may, however, provide some solace to the remainder of the university. As law schools experiment to survive their crisis, the university as a whole can learn from their use of technology, acceleration, and lifelong learning. Similar tactics might effectively be deployed throughout the university. Innovations in legal education provide hope that changes can be made, that creativity can be unlocked, and that a focus on value to students can drive core educational missions.

The days of merely “building it” and “expecting that they (students) will come” are over. Schools will have to use technology and other innovations creatively to obtain cost savings and pass them on to students. They must become more efficient and pass on opportunity cost savings. They must expand their services to other learners to find additional revenue that subsidizes core full-time residential study.

In the coming years, schools will quest to provide value. The focus will not be on making education cheap. Nor can it be on becoming elite. The reality for most schools is that they must optimize what they provide—doing inexpensively things that can be mechanized and utilizing savings to spend on what must be done at full cost. The right mix will produce the best student learning outcomes at a sensible cost. Anything less will jeopardize any school whose reputation is less than elite. Only a handful will be able to extract tuition at any price without regard to outcomes and cost.

The death rattles of legal educational canaries tell us that the next time law schools descend to the mine they will inoculate themselves against the toxins and seek ways to clear the air. As they do so, the rest of the university needs to take note, use the same techniques, and be open to change—if they want to safely breathe.