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### THE PROBLEM OF LAW SCHOOL DISCOUNTING—HOW DO WE SUSTAIN EQUAL OPPORTUNITY IN THE PROFESSION?

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#### INTRODUCTION

Even casual attention to legal publications, or for that matter the public press, reveals that legal education and the profession have had a hard decade—and that for lawyers and law schools the Great Recession continues. The central thesis of my remarks will be that our collective responses have been substantial and suited to the challenge, except in one respect. The changes we have made in student aid have the potential for lasting harm to the profession and the society. One cannot analyze the impact of changes in aid without laying out briefly what we've been through. It can be described in just eight words: rising tuition, massive debt, fewer jobs, and fewer applicants. So first, a few words about each.

Rising tuition is not solely a law school phenomenon.<sup>1</sup> Tuition rates for colleges and universities have been rising at more than twice the rate of inflation for decades, at least.<sup>2</sup> Indeed, prices in higher education have advanced so far

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1. The costs of attending higher education, more generally, have exploded in recent decades. See Adam Davidson, *Is College Tuition Really too High?*, N.Y. TIMES, Sept. 13, 2015, [http://www.nytimes.com/2015/09/13/magazine/is-college-tuition-too-high.html?\\_r=0](http://www.nytimes.com/2015/09/13/magazine/is-college-tuition-too-high.html?_r=0) [<https://perma.cc/34RN-S4CT>]. For example, in 1974, the cost of tuition for a public university for a year averaged about \$500. *Id.* Even attending a private university in 1974 only cost a student about \$2000 a year. *Id.*

2. See BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 108 (2012) (“Between 1993 and 2013 . . . undergraduate tuition for state residents more than doubled . . . .”); SANDY BAUM, A FRAMEWORK FOR THINKING ABOUT LAW SCHOOL AFFORDABILITY, ACCESS GRP. CTR. FOR RESEARCH & POLICY ANALYSIS 3 (Dec. 2015), [https://www.accessgroup.org/system/tdf/a\\_framework\\_for\\_thinking\\_about\\_law\\_school\\_affordability\\_dec\\_2015.pdf?file=1&type=node&id=642](https://www.accessgroup.org/system/tdf/a_framework_for_thinking_about_law_school_affordability_dec_2015.pdf?file=1&type=node&id=642) [<https://perma.cc/72UL-FB7T>] (stating during the same period, “law school tuition more than tripled”).

beyond the measure Americans commonly use for other goods and services, the Consumer Price Index (“CPI”), that the CPI no longer tells the full story. University finance officers have developed a new metric for measuring it, the Higher Education Price Index.<sup>3</sup> Law school tuition has been rising at a rate even higher than is generally true in education, something like 8% a year during much of the last two decades.<sup>4</sup> Only the crisis of the last sixty months has slowed this upward march.<sup>5</sup>

And, of course, how much students and families borrow to pay for post-secondary education has become very visible. When the amount Americans owe on student debt finally exceeded the amount they owe on their mortgages, it was inevitable that the cost of college would become a topic of daily conversation, and the material of presidential debates, including declarations by two leading candidates that college should be “tuition-free.”<sup>6</sup>

The legal press now covers new ideas for avoiding payment of student debt, though the default rate for law students is actually quite modest.<sup>7</sup> Whether the ready availability of student loans has made college less expensive or more expensive is a more complicated question than we usually imagine.

Tuition and debt have actually been on everybody’s mind for some time,<sup>8</sup> but

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3. See *What Is HEPI*, COMMONFUND INST., <https://www.commonfund.org/commonfund-institute/higher-education-price-index-hepi/> [<https://perma.cc/H73W-NHL8>] (last visited Sept. 29, 2016).

4. Between 1989 and 2009, higher education tuition rose 71%, while law school tuition increased an astounding 317%. David Segal, *Law School Economics: Ka-Ching*, N.Y. TIMES, July 17, 2011, at BU1, [http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?\\_r=0](http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=0) [<https://perma.cc/R285-83RW>].

5. BAUM, *supra* note 2, at 3.

6. *It’s Time to Make College Tuition Free and Debt Free*, BERNIESANDERS.COM, <https://berniesanders.com/issues/its-time-to-make-college-tuition-free-and-debt-free/> [<https://perma.cc/6XSZ-934W>] (last visited Sept. 29, 2016); Laura Meckler & Josh Mitchell, *Hillary Clinton Proposes Debt-Free Tuition at Public Colleges*, WALL ST. J., Aug. 10, 2015, <http://www.wsj.com/articles/hillary-clinton-proposes-debt-free-tuition-at-public-colleges-1439179200> [<https://perma.cc/5P7P-5RYS>].

7. One report estimated the two-year default rate in 2010 for law school graduates was only 1.7%. Debra Cassens Weiss, *Are Law Student Loans in Danger of Default? Not According to Past History*, LAW PROF SAYS, A.B.A. J. (Nov. 4, 2015, 5:45 AM), [http://www.abajournal.com/news/article/are\\_law\\_student\\_loans\\_in\\_danger\\_of\\_default\\_not\\_according\\_to\\_past\\_history\\_la](http://www.abajournal.com/news/article/are_law_student_loans_in_danger_of_default_not_according_to_past_history_la) [<https://perma.cc/K97X-CB5L>]. The three-year default rate was not much higher, totaling an estimated 2.8%. *Id.* Those rates appear even lower when compared to the default rates for individuals with graduate degrees more generally. *Id.* That same report estimated the two-year default rate for those with graduate degrees to be 7.1% and a three-year default rate of 11.6% for masters, doctoral or professional degrees. *Id.*

8. As of 2015, the average student loan debt for law school graduates from public law schools totaled \$84,000, while graduates from private law schools averaged \$122,000 in student loan debt. Martha Bergmark, *We Don’t Need Fewer Lawyers. We Need Cheaper Ones.*, WASH. POST, June 2, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-don-t->

it was the realization that there were fewer job openings for lawyers than most people believed that genuinely disrupted the system.<sup>9</sup> The Bureau of Labor Statistics has reported that the number of new legal jobs was below the number of new law graduates for a very long time.<sup>10</sup> Those graduates who could not find employment had long noticed this, but it did not enter our collective consciousness until two legal developments coincided.

First, the recession caused drops in just about every job category,<sup>11</sup> and it created a gap in legal employment that was wider than ever.<sup>12</sup> This gap led to tougher examination of the standard methods of reporting how many law school graduates could find jobs as lawyers.<sup>13</sup> The collection of this data had historically done little to distinguish law graduates who found lawyer jobs from law graduates who ended up working at something else.<sup>14</sup> Throughout the 1980s and 1990s, the headline reports said that about 90% found employment.<sup>15</sup>

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need-fewer-lawyers-we-need-cheaper-ones/ [http://perma.cc/FVV7-T3NL].

9. Part of this can be attributed to how law school graduate employment rates were reported. *See infra* notes 10-13 and accompanying text.

10. The Bureau of Labor Statistics projects jobs in legal occupations will increase between 2014 and 2024 from 1,268,200 to 1,332,800. *Employment Projections – 2014-24*, BUREAU OF LAB. STAT. (Dec. 8, 2015, 10:00 AM), <http://www.bls.gov/news.release/pdf/ecopro.pdf> [https://perma.cc/996L-VVV7]. This means 64,600 jobs are expected to be added during that ten-year period. *Id.* However, in 2014 alone, 43,832 students graduated from school. Mark Hansen, *Latest Employment Numbers for 2014 Law School Graduates Don't Add Up to a Clear Trend*, A.B.A. J. (July 1, 2015, 1:50 AM), [http://www.abajournal.com/magazine/article/latest\\_employment\\_numbers\\_for\\_2014\\_law\\_school\\_graduates\\_dont\\_add\\_up\\_to\\_tren](http://www.abajournal.com/magazine/article/latest_employment_numbers_for_2014_law_school_graduates_dont_add_up_to_tren) [https://perma.cc/DET2-WC2M]. The number of jobs for lawyers might be even lower considering the Bureau of Statistics includes court reporters and paralegal within the category of “legal occupations.” *Legal Occupations*, BUREAU LAB. STAT. (Dec. 17, 2015), <http://www.bls.gov/ooh/legal/home.htm> [https://perma.cc/74TX-TVVAZ].

11. During the 2007-2009 recession, there was a 44% overall drop in the new number of new job openings. *The Recession of 2007-2009*, BUREAU OF LAB. STAT. (Feb. 2012), [http://www.bls.gov/spotlight/2012/recession/pdf/recession\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf) [https://perma.cc/RG4F-9EVK].

12. Mark Koba, *Courtroom Drama: Too Many Lawyers, Too Few Jobs*, CNBC (Mar. 21, 2013), <http://www.cnbc.com/id/100569350> [https://perma.cc/N6V7-MFYM].

13. Some filed lawsuits against law schools directly, contending the schools failed to disclose job placement rates accurately. Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 444 n.47 (2013). The ABA responded by requiring schools to provide more information about graduates' employment information. Sam Favate, *ABA Makes Changes to Data Collection of Law School Graduates' Jobs*, WALL ST. J., Dec. 6, 2011, <http://blogs.wsj.com/law/2011/12/06/aba-makes-changes-to-data-collection-of-law-school-graduates-jobs/>, [https://perma.cc/L3WN-CMFP].

14. Previously, schools reported employment data in the aggregate, rather than individual student data. Favate, *supra* note 13. The change passed after the recession required schools to provide data about each student, so the ABA could determine whether a student's job was created by the school and if the full-time, post-graduate position actually required a law degree. *Id.*

15. *Employment and Salary Trends for New Law School Graduates, 1985-2000*, NAT'L ASS'N

At the worst of the recession, with new data collection methods that distinguished temporary work from permanent jobs and distinguished jobs that actually required a law license from jobs where you didn't really have to be a lawyer,<sup>16</sup> the picture was very painful to behold. Ten months after graduation, the class of 2013 had 59% of its members holding permanent jobs working as lawyers.<sup>17</sup> This was actually an improvement over previous years.<sup>18</sup>

Of course, college seniors and pre-law advisers can read this data just like everybody else. A good number of twenty-two-year-olds asked themselves a question they used to take for granted: "If I go to law school, do I get to be a lawyer?"<sup>19</sup> The new, less fulsome answer to that question led a good number who might have decided to attend law school to look elsewhere for a career, thus fewer applicants. Twice since 2000, the total number of applicants for American law schools stood near or at 100,000.<sup>20</sup> In an environment where the number of first-year seats exceeded 52,000, this meant that there were nearly twice as many applicants as people who would matriculate.<sup>21</sup>

For the students who entered last fall, the class of 2018, there were 345,944 applicants and the number who matriculated was 37,058.<sup>22</sup> Year after year, we

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FOR L. PLACEMENT (June 2001), <http://www.nalp.org/2001junemploymenttrends> [<https://perma.cc/MM9E-5QTZ>]. The employment rate reached as high as 92.2% during that time and exceeded 90% eight times during that twenty-year period. *Id.* Some law schools even reported 98% to 100% employment rates. TAMANAHA, *supra* note 2, at 71.

16. Favate, *supra* note 13.

17. *For Second Year in a Row New Grads Find More Jobs, Starting Salaries Rise — But Overall Unemployment Rate Rises with Historically Large Graduating Class*, NAT'L ASSOC. FOR L. PLACEMENT (June 19, 2014), [http://www.nalp.org/2013\\_selected\\_pr](http://www.nalp.org/2013_selected_pr) [<https://perma.cc/3PRT-DTLD>].

18. *Id.* However, the Executive Director of the National Association for Law Placement noted that "the variety and diversity of jobs that law grads take now is greater than ever." *Id.* But in 2011, only 55% of graduates had "full-time long-term jobs for which a law degree was preferred." Rhode, *supra* note 13, at 443.

19. "[E]ven the most rational students will have difficulties assessing the long-term return on investment on law school, given the lack of empirical information, and the disputes and uncertainties over how to calculate economic return." *Id.* at 444 (citing TAMANAHA, *supra* note 2, at 143-45).

20. The number of applicants peaked in 2004 with 100,600. TAMANAHA, *supra* note 2, at 65.

21. In 2010, there were over 52,000 first-year law students. *Enrollment and Degrees Awarded 1963–2012 Academic Years*, A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2012), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) [<https://perma.cc/6ULD-3MK2>] [hereinafter *Enrollment and Degrees*].

22. *2015 Standard 509 Information Report Data Now Available*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_fall\\_enrollment\\_announcement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_fall_enrollment_announcement.authcheckdam.pdf) [<https://perma.cc/42CA-RFDW>] (last visited Sept. 29, 2015). Over 50% of law students reported a decline in the number of matriculants from the previous year. *Comparison of 2015 and 2014 1L*

asked ourselves, “where’s the bottom?” It is at least possible that we have finally reached it. As of the end of January, about halfway through the admissions cycle, applications are up .1% and applicants up .9%.<sup>23</sup>

#### I. HOW HAVE THE SCHOOLS REACTED?

The task of managing through this crisis has been difficult, to say the least, for law faculties. Unsurprisingly, and with some justification, it was common early on to hear people say: “These numbers sometimes go up and sometimes they go down. This too will pass.” As time passed, the need for more robust responses became apparent and schools responded in ways that were aggressive and thoughtful. Many of the programmatic changes were very creative, and I will describe them later.

Managerial changes were more wrenching. First, many schools decided to get ahead of the applicant trend and shrink the size of incoming classes.<sup>24</sup> The number of first-year matriculants shrank by 30% over a period of five years.<sup>25</sup> To maintain even these numbers, many schools admitted students whose applications reflected lower measurable qualifications than those admitted in earlier, happier years.<sup>26</sup> A fair number of schools took actions similar to those private enterprise might take but are pretty rare in education: hiring freezes, staff layoffs, and faculty buy-outs.<sup>27</sup>

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*Matriculants*, A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2015), [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) [<https://perma.cc/282R-GSXC>]. One law school, the Charlotte School of Law, saw first-year matriculants drop by 137 students. *Id.*

23. Qi Xu, *Law School Not Concerned by Decline in Applications*, YALE DAILY NEWS (Feb. 5, 2016), <http://yaledailynews.com/blog/2016/02/05/law-school-not-concerned-by-decline-in-applications/> [<https://perma.cc/93YK-UHG7>].

24. *Enrollment and Degrees*, *supra* note 21. As mentioned previously, that number shrank to about 37,000 in 2015. *2015 Standard 509 Information Report Data Now Available*, *supra* note 22.

25. *Enrollment and Degrees*, *supra* note 21; *2015 Standard 509 Information Report Data Now Available*, *supra* note 22.

26. For example, the Indiana University Robert H. McKinney School of Law, where I serve as a visiting professor, saw a five-point drop in its median LSAT score for full-time students over a four-year period. See *Robert H. McKinney School of Law – 2015 Standard 509 Information Report*, A.B.A. (2015), <http://mckinneylaw.iu.edu/about/consumer-docs/2015%20Standard%20509.pdf> [<https://perma.cc/9B2U-BM75>]; *Indiana University*, A.B.A. (2011), <http://www.abarequireddisclosures.org/> [<https://perma.cc/BMS6-JYVW>].

27. For example, the Valparaiso University School of Law announced earlier this year that the school offered buyouts to several professors and also planned to shrink incoming class sizes. Dave Stafford, *Valpo Law Announces Faculty Buyouts, Smaller Future Classes*, IND. LAW. (Feb. 26, 2016), <http://www.theindianalawyer.com/valpo-law-announces-faculty-buyouts-smaller-future-classes/PARAMS/article/39615> [<https://perma.cc/JD5G-CGKX>].

## II. A SHIFT THE BENCH AND BAR HAVEN'T REALLY NOTICED

There has been yet another shift, driven partly by the drastic decline in demand, and partly by the rising tide of competition, made ever more fierce by the rankings issued each year by U.S. News & World Report (“U.S. News”).<sup>28</sup> This shift has to do with student financial aid.<sup>29</sup>

First, a few words about what financial aid really is in the modern environment. When lawyers and judges hear about scholarships, they think largely of endowed funds created over the decades, often named in honor of a distinguished faculty member or alumnus.<sup>30</sup>

But in most schools, endowments generate relatively little of the expense of operating the school.<sup>31</sup> Most American law schools operate primarily on how much tuition they can collect.<sup>32</sup> Thus, when the financial aid office says to an applicant, “We are offering you \$10,000 in assistance,” what is actually happening is that the school has discounted the tuition charge for that applicant.

The extent of such discounts has grown over the last decade, both in law schools and in universities more generally.<sup>33</sup> From one view, this discounting

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28. See generally Michael Sauder & Wendy Espeland, *Fear of Falling: The Effects of U.S. News & World Report Rankings on U.S. Law Schools*, LSAC (2009), [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-07-02.pdf?sfvrsn=2](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-07-02.pdf?sfvrsn=2) [<https://perma.cc/XVQ6-4GR4>]. This competition has led some schools to manipulate data to improve its position in the annual rankings. TAMANAHA, *supra* note 2, at 71; see, e.g., Chris Mondics, *Law Review: Villanova Law School Paying a Price Despite Doing it Right*, PHILLY.COM (Oct. 14, 2015, 1:08 AM), [http://www.philly.com/philly/business/law/20151014\\_Villanova\\_law\\_school\\_paying\\_a\\_price\\_despite\\_doing\\_right.html](http://www.philly.com/philly/business/law/20151014_Villanova_law_school_paying_a_price_despite_doing_right.html) [<https://perma.cc/97UZ-RKRG>] (noting law school administrators “obsess over rankings”). Villanova submitted false LSAT numbers, “reporting a 162 when it was actually 159.” TAMANAHA, *supra* note 2, at 74.

29. For example, as of 2015, Villanova Law School gave approximately 20% of its students free tuition in hopes of attracting top students, which could increase the school’s rankings. Mondics, *supra* note 28.

30. Another version of this is the financial aid powered at schools with relatively large endowments that generate income for whatever objectives the school identifies.

31. According to Rachel Moran, Dean of the UCLA School of Law:

Most public law schools have relatively small endowments, in part because of their traditional dependence on state support and their emphasis on keeping tuition and costs down to make their programs affordable and accessible. Consequently, many state law schools have become heavily tuition-driven as state support drops. With small endowments, public law schools struggle to offset rapid increases in tuition with equivalently large increments in financial aid.

Rachel F. Moran, *Clark Kerr and Me: The Future of the Public Law School*, 88 IND. L.J. 1021, 1031-32 (2013).

32. *Id.*

33. The average tuition discount rate for undergraduate students grew almost 10% between 2003 and 2010. *Tuition Discounts at Private Colleges Continue to Climb*, NAT’L ASS’N OF COLL. & UNIV. BUS. OFFICERS (May 16, 2016), [http://www.nacubo.org/About\\_NACUBO/Press\\_Room/](http://www.nacubo.org/About_NACUBO/Press_Room/)

seems like good news. More students are allowed to attend without paying what regular consumers might call the “sticker price.”<sup>34</sup> Indeed, the actual net tuition being paid has not been rising as fast as the stated tuition price.<sup>35</sup>

But, of course, a school must ultimately collect enough tuition to meet budget.<sup>36</sup> Because that budget is so focused on personnel—tenure-track faculty, non-tenure faculty, and staff—it is extraordinarily difficult to reduce expenses in the short run.<sup>37</sup> And despite energetic efforts at developing technology, it is difficult to cut costs through such efficiencies.

Thus, when one student is offered the chance to attend at a deep discount, the foregone revenue must be made up by charging higher tuition to those who are admitted on the basis that they pay the sticker price.<sup>38</sup> It does not prove too much to call this a cross-subsidy flowing from some students to other students.

Most of the developments I described earlier have seemed unlikely to affect who will get to be lawyers and what sort of legal profession we will be over time. One change will do that: it is the shift away from offering financial aid on the basis of the economic need of the applicant and instead allocating aid on the basis of the applicant’s measurable credentials, particularly the applicant’s score on the Law School Admissions Test (“LSAT”) and grade point average (“GPA”).<sup>39</sup>

This shift away from need-based aid has been going on almost from the moment that U.S. News began to issue rankings. Just twenty years ago, nearly 60% of the financial aid given to law students was based on the financial need of the individual students and their families.<sup>40</sup> There’s reason to believe that as we sit here today, less than 20% is dispensed solely on the basis of need.<sup>41</sup>

While merit aid surpassed need-based aid for the first time during the 1990s, that trend accelerated during the first decade of this century.<sup>42</sup> When the ABA

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2015\_Tuition\_Discounting\_Study.html [https://perma.cc/HDT9-RKGGK].

34. *Id.*

35. *Id.*

36. *See* TAMANAHA, *supra* note 2, at 63 (“An iron law governs law school finances: expenses must be paid for by the number of students multiplied by tuition.”).

37. *See id.* at 64 (“Because the roster of full-time faculty is difficult to trim, once expansion takes place it creates a voracious need for revenue that dictates law school policies in fundamental ways.”).

38. *See id.* at 98 (“Students who score below the median LSAT of a given school . . . are almost invariably the ones who pay the most tuition because, to put it in blunt terms, their score has no value to a school.”). Some have called this system a “reverse-Robin Hood arrangement,” because the students receiving the most merit-based aid are the students who are more likely to get jobs with higher pay after graduation. *Id.* at 99.

39. *Id.* at 97-103.

40. *Id.* at 97.

41. Letter from Randall T. Shepard, Chair, A.B.A. Task Force on the Future of Legal Educ., to the A.B.A. Task Force on the Future of Legal Educ. (Sept. 13, 2013) (on file with author).

42. From 1999 to 2000, 56% of all aid was merit-based. *Id.* A decade later, merit-based aid ballooned to approximately 84% of total aid. *Id.* (noting that 84% is an estimate given that some aid was a combination of both merit-based and need-based).

reported to the U.S. Senate on financial aid in 2011, it identified aid in three categories: need, merit, and combination.<sup>43</sup> In the previous five years, need-based aid had grown nationwide by \$23 million. Merit aid had grown by nearly a quarter billion.<sup>44</sup> Aid identified by schools as based on a combination had grown by nearly \$110 million.<sup>45</sup>

Just how much of that combination aid was motivated by need rather than LSAT scores is difficult to tell. One prominent academic, who is often likened to the skunk at the garden party, Dean Brian Tamanaha, has analyzed the available data and concluded that 84% of all aid is merit based.<sup>46</sup> My own examination of that data has led me to conclude that one cannot know whether Tamanaha is correct.

That said, when I have asked financial aid people about trends in college and law school aid, they mostly say Tamanaha is right about the transformation in aid. My friend Dean David Yellen of Loyola of Chicago reported that he had asked his admissions staff to examine the ten schools with which Loyola usually competed for students and they reported back that Loyola was the only one still offering any substantial student aid aimed at meeting economic need.<sup>47</sup> A similar assessment came from a committee the ABA Section of Legal Education and Admissions to the Bar appointed to examine the impact of law school rankings.<sup>48</sup> That committee represented a team with deep experience, individuals widely admired in the profession and the academy: Dean Kent Syverud, Dean Phoebe Haddon, Pauline Schneider, and Judge Martha Daughtrey to name a few.<sup>49</sup> That committee stated in its final report:

Because median LSAT score and median [undergraduate] GPA are so important to the current rankings, law schools have largely abandoned other measures of merit or need in awarding financial aid. This can have the effect of shifting financial aid to those students with LSAT scores that will assist a school in achieving its target median for rankings purposes. The result is that students with the greatest financial need often are relegated to heavy borrowing to attend law school.<sup>50</sup>

Lay that finding up against current debates about who does well on standardized tests and the impact of their use on access to education. Most of that

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43. *Id.*

44. *Id.*

45. *Id.*

46. TAMANAHA, *supra* note 2, at 97. Tamanaha concluded that \$143,361,001 of all aid in 2010 was need-based, while \$757,691,508 was merit-based. *Id.*

47. Interview with David Yellen, Dean & Professor of Law, Loyola Univ. Chi. Sch. of Law, in Chi., Ill. (Sept. 13, 2013).

48. *See generally* Section of Legal Educ. and Admissions to the Bar, A.B.A., *Report of the Special Committee on the U.S. News and World Report Rankings*, July 15, 2010, <http://ms-jd.org/files/f.usnewsfinal-report.pdf> [<https://perma.cc/3CJG-KBMG>].

49. *Id.* at 1.

50. *Id.* at 3.



conversation accepts as fact, regularly validated by psychometric inquiry, that the use of such metrics favors whites and the well-to-do.<sup>51</sup> This is also true of the SAT, and it has nothing to do with test design.<sup>52</sup> Surely, the focusing of student financial aid offers on such scores has the same effect.

Focusing on the test scores and shifting financial aid to boost the profile of the entering class means this: people with great scores can come to law school relatively cheaply regardless of their financial status, and those tuition losses are made up by people who stand at the back of the applicant pool, who end up borrowing a lot of money to attend.<sup>53</sup>

I could spend some time offering up the detailed proof that this is so, but time is limited. Look for it in the footnotes.<sup>54</sup>

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51. One 2006 study noted that when schools have increased their LSAT median scores, the number of minority students decreased. John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 171 (2006). This decrease was not insignificant, as the average decrease was 19%. *Id.* at 174.

52. However, some have attributed these performance gaps to other conditions like social conditions and educational opportunities. Lynn Letukas, *Nine Facts About the SAT that Might Surprise You*, C. BOARD., <http://research.collegeboard.org/sites/default/files/publications/2014/12/sat-rumors-stat-report.pdf> [<https://perma.cc/FSG5-U8TV>] (last visited Aug. 18, 2016).

53. TAMANAHA, *supra* note 2, at 97-103. This may disadvantage students who come from lower income families. In higher education more broadly, “[s]tudents from the lowest income quartile make up less than 4% of the enrollment of the country’s most selective colleges.” Eric Hoover, *Why the Debate Over a New Admissions Process Matters*, CHRON. HIGHER EDUC., NOV. 6, 2015, at A4.

54. The average LSAT score of minority groups helps show how metrics disfavor racial minorities. Susan P. Dalessandro et al., *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2005-2006 Through 2011-2012 Testing Years*, LSAT TECHNICAL REPORT SERIES (Oct. 2012), [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-12-03.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-12-03.pdf) [<https://perma.cc/AA3F-97ZW>]. Although the average score has been between 150 and 151, the average score for African-Americans has hovered around 142, while the average for Latinos was 146. *Id.*; see also William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 977 n.11 (2004) (reporting similar numbers). The Law School Admissions Council has even admitted that using LSAT cut-off scores “may have a greater adverse impact upon applicants from minority groups than upon the general applicant population.” *Cautionary Policies Concerning LSAT Scores and Related Services*, LAW SCH. ADMISSIONS COUNCIL (July 2014), [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/cautionarypolicies.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/cautionarypolicies.pdf) [<https://perma.cc/8ANK-XE4M>]. The LSAC’s fear appears to be reasonable. During the twenty-year period before 2003, the number of minority applicants to law school remained constant. However, in the five-year period following 2003—when LSAT scores became more influential in admissions decisions—“61 percent of black applicants and 46 percent of Mexican-American applicants were denied acceptance at all of the law schools to which they applied, compared with 34 percent of white applicants.” Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 7, 2010, <http://www.nytimes.com/2010/01/07/education/07law.html> [<http://perma>

### III. THE MYRIAD DEFENSES

In the course of the time I've spent engaging with people about these trends, four reasons have been lifted up for why this change in aid practice is a good thing.

The first defense is: We cannot really tell who is needy and who is not. Best to abandon the enterprise when the differentiation is so unreliable. I say that when the child of a physician or lawyer from a large firm applies, we can make a pretty good guess that such an applicant is in a better financial position than the applicant who grew up in a single parent household where the breadwinner was an hourly worker. Yes, as one comes closer to the middle of that continuum the harder it becomes to make the call.

The second defense: It is good for society to reward excellent performance. Yes, Americans believe in that, but we also believe that, over the long run, our nation is a more decent and a more successful place when we give an extra boost to young people who may not yet have the best metrics on their record, but who, with a little extra assistance, can make the grade and do good for society.

The third defense is to point at the student: An applicant who gets into Stanford but is not offered any student aid makes the choice to go there and load up on debt. If the applicant chose to attend a lower-tier school, that same student's LSAT would likely produce a good scholarship offer for her. Her decision reflects a choice. That's true enough, but it does not put responsibility for the nature of the choice in the right place.

Fourth and finally, an old friend said to me: "Randy, I know that you're just as competitive as the rest of us. If you were a law school dean you'd want your school to have the strongest performers you could possibly recruit. You'd do exactly what we're doing."

### IV. SOLUTIONS

That brings me to the dénouement, also styled as: "Okay, Shepard, what do you propose?" As with other dilemmas and developments, there are a number of possible approaches and a variety of possible actors. The ones I describe here all reflect the view that a school that decided to engage in unilateral disarmament and shift its money away from merit aid would get mauled in the market.<sup>55</sup>

#### *A. Government Action on Loans*

One action proposed to the ABA task force that I chaired came from a prominent academic, Professor Deborah Jones Merritt of Ohio State's Moritz College of Law, who said, "Tying tuition to LSAT scores is not an educationally

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55. One or two schools have deployed a version of this approach by announcing that they would dramatically lower their retail price to the same level as the discount price and not engage in much scholarship aid.

sound way to build a law school class or a multi-talented profession.”<sup>56</sup> She proposed that the ABA standards for accreditation be amended to require that all schools divide scholarship offers equally between need-based and merit-based awards.<sup>57</sup>

Our task force featured her proposal in our final report,<sup>58</sup> but it has seemed to me that the Council’s legal authority as an accreditor rests on actions that are necessary to provide a program of legal education that, to quote Standard 30I: “prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”<sup>59</sup> Mandating such a division of aid on all schools looks more like economic regulation than accreditation. Recalling that the Antitrust Division came down on the Ivy League for collaborating on tuition and scholarships,<sup>60</sup> and on the ABA for the simple act of publishing faculty salaries,<sup>61</sup> using accreditation for this purpose seems problematic.

On the other hand, Congress could build such a requirement into the laws on student loans. This idea rests on more solid legal grounds, but the cure might be more painful than the disease. It is possible that some members of Congress do not know that the government is subsidizing and turning out more lawyers; consequently, placing that fact before them might not lead to the best answer.

The most plausible approach would be use of the Department of Education’s authority to shape student loan programs, and a new study group of the ABA has generated some ideas that might be productive. In this setting, Professor Merritt’s ideas seem worth pursuing.

### *B. State Court Action*

One modest contribution state courts could make toward reducing the cost of becoming a lawyer would be permitting students to take bar examinations in

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56. Letter from Deborah Jones Merritt, John Deaver Drinko-Baker & Hostetler Chair in Law, The Ohio State Univ. Moritz Coll. of Law, to A.B.A. Task Force on the Future of Legal Education, at 2 (May 11, 2013) (on file with author).

57. *Id.* at 3.

58. A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUC., NAVIGATING THROUGH A STORM 26 (2014).

59. *ABA Standards and Rules of Procedure for Approval of Law Schools 2015-2016*, AM. BAR ASS’N (2015), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2015\\_2016\\_aba\\_standards\\_for\\_approval\\_of\\_law\\_schools\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authcheckdam.pdf) [https://perma.cc/76MP-S8H9].

60. See Anthony DePalma, *Ivy Universities Deny Price-Fixing but Agree to Avoid it in the Future*, N.Y. TIMES, May 23, 1991, <http://www.nytimes.com/1991/05/23/us/ivy-universities-deny-price-fixing-but-agree-to-avoid-it-in-the-future.html> [https://perma.cc/Y5NX-EPBD].

61. See Steven A. Holmes, *Justice Dept. Forces Changes in Law School Accreditation*, N.Y. TIMES, June 28, 1995, <http://www.nytimes.com/1995/06/28/us/justic-dept-forces-changes-in-law-school-accreditation.html> [https://perma.cc/2NXZ-YLMS] (noting the Justice Department alleged publishing faculty salaries led to increased faculty salaries).

February of the year they graduate rather than waiting until July. Indiana once permitted February sittings.<sup>62</sup> The state's law faculties urged the Indiana Supreme Court that a February bar distracted students during their sixth semester and that this practice should be abolished. We agreed to do so, perhaps two decades ago, a change in support of promoting diligence in class.<sup>63</sup>

In the present moment, Arizona and New York have moved in the opposite direction. They now permit February sittings, because it means that that law graduates receive their licenses earlier.<sup>64</sup> In New York, the traditional system has meant that a student who took the bar in July might not receive a license until the following winter.<sup>65</sup> If a student can instead obtain a license soon after graduation and can find work, they save money in the overall cost of becoming a lawyer. One of the reasons why the Arizona Supreme Court decided to act was the rising cost of legal education.<sup>66</sup>

### C. Legal Helpers

A more dramatic approach has been to permit people to render legal assistance who do not possess traditional six-semester law degrees.<sup>67</sup> The most prominent of these has been the Washington Supreme Court's actions to create what it calls "limited license legal technicians."<sup>68</sup> Washington has long permitted such people to perform legal work in the course of real estate closings.<sup>69</sup> These technicians must complete specialized education on the law of real estate, they have to pass a state examination, and they are subject to a code of ethics.<sup>70</sup> As you

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62. See IND. ADMIS. DISC. R. 14(IX) (1984).

63. Compare *id.*, with IND. ADMIS. DISC. R. 13 (2015). It should be noted that an applicant "who has fewer than five (5) hours to complete and is within one hundred (100) days of graduation . . . and otherwise has completed all requirements for admission to the bar, shall be entitled to take the examination for admission to the bar." IND. ADMIS. DISC. R. 13(V) (2015).

64. ARIZ. SUP. CT. R. 34(b)(2) (2015). However, third-year students may only take the February bar if they are a part of the Pro Bono Scholar's Program. N.Y. CT. RULES § 520.17. As part of the program, students use their entire last semester of last school to provide pro bono service. *Id.*

65. *Frequently Asked Questions*, N.Y. ST. BD. OF L. EXAMINERS, <https://www.nybarexam.org/faq/faq.htm#release> [<https://perma.cc/BQN5-Q7DN>] (last visited Aug. 18, 2016) (noting the July exam results are generally released in mid-November).

66. Debra Cassens Weiss, *Arizona Supreme Court OKs Proposal to Allow 3Ls to Take Bar Exam*, A.B.A. J. (Dec. 12, 2012, 2:28 PM), <http://www.abajournal.com/news/article/arizona-supreme-court-oks-proposal-to-allow-3ls-to-take-bar-exam> [<https://perma.cc/KE4M-9448>].

67. See *ABA Commission on the Future of Legal Servs., Issues Paper Concerning New Categories of Legal Service Providers* 1, 10 (Oct. 16, 2015), [http://www.americanbar.org/content/dam/aba/images/office\\_president/delivery\\_of\\_legal\\_services\\_completed\\_evaluation.pdf](http://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services_completed_evaluation.pdf) [<https://perma.cc/5RLF-NNQ3>].

68. *Id.* at 3, 7.

69. *Id.* at 7.

70. Additionally, Limited License Legal Technicians must "complete 3,000 hours of work

can imagine, they do all this at a cost far below what a J.D. requires. Washington has recently extended this technique to individuals who will render assistance in domestic relations cases, where a huge proportion of the people who come to court end up not being able to afford a lawyer at all.<sup>71</sup>

The New York Court of Appeals has similarly announced the creation of what it calls “Courthouse Navigators,” a similar scheme whose participants are authorized to conduct a fair amount of activity that most of us would call the practice of law.<sup>72</sup>

These actions serve to illustrate the odd situation in which we find ourselves as a profession. We are producing fewer lawyers, at fairly high cost, so many of whom cannot find a job as a lawyer—and at the same time there are more people than ever who cannot find a lawyer to represent them when they have a legal problem. As the Executive Director of Voices for Civil Justice titled a recent article in the *Washington Post*, “We don’t need fewer lawyers. We need cheaper ones.”<sup>73</sup>

This same impulse has led our comrades in the medical profession toward similar action.<sup>74</sup> Even the movement to slice a full year from traditional medical education has not slowed the new practice of providing certain kinds of medical assistance through professionals licensed for limited purposes, such as physician’s assistants, various degrees of nursing licenses, and so on—even over to giving certain injections in drug stores rather than in a doctor’s office.<sup>75</sup>

Indiana’s conversation in this field has been more modest, but it does include an Internet-based, court-sponsored self-help center, formal guidance for county clerks about how much they can do to advise unrepresented parties, and formal discussion about licensing paralegals and other legal assistants.<sup>76</sup> I place the McKinney School’s master of jurisprudence program in this same venue.<sup>77</sup> State

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under the supervision of a licensed attorney” and must “pass three exams prior to licensure.” *Id.*

71. *Id.* at 11 n.74.

72. Although courthouse navigators cannot give legal advice, they can perform activities ranging from legal research to retrieving information from the courthouse. *Id.* at 5; see also *Navigator Snapshot Report*, N.Y. ST. CT. NAVIGATOR PROGRAM (Dec. 2014), <http://nylawyer.nylj.com/adgifs/decisions15/022415report.pdf> [<https://perma.cc/6QCV-YRWE>].

73. Bergmark, *supra* note 8.

74. Many medical schools are looking into eliminating an entire year of medical school. See Denise Grady, *The Drawn-Out Medical Degree*, N.Y. TIMES, Aug. 1, 2014, <http://www.nytimes.com/2014/08/03/education/edlife/the-drawn-out-medical-degree.html> [<http://perma.cc/X8WN-FX4X>].

75. See, e.g., Lee Nelson, *The Rise of Non-Physician Roles in Medicine*, NURSE.ORG (Sept. 1, 2015), <http://nurse.org/articles/81/rise-of-non-physician-roles-in-medicine/> [<https://perma.cc/G7YY-VQVG>].

76. See, e.g., *Self-Service Legal Center*, IND. JUD. BRANCH, <http://www.in.gov/judiciary/selfservice/> [<http://perma.cc/EFT4-FEH6>] (last visited Sept. 29, 2016).

77. See Gary R. Roberts, *Legal Education is Navigating Turbulent Waters*, IND. LAW., May 8, 2013, <http://www.theindianlawyer.com/deans-desk-legal-education-is-navigating-turbulent-waters/PARAMS/article/31414> [<https://perma.cc/97MD-3WWV>].

courts, bars, and law schools should move this discussion ahead in a more purposeful way.

#### *D. Schools and Law Practice*

Crisis often prompts innovation, and the non-profit law firms recently opened by Arizona State's law school is such an example.<sup>78</sup> The Alumni Law Group will employ recent graduates, supervised by a seasoned attorney, and build a law practice inside the university which will also benefit citizens in need.<sup>79</sup> Likewise, the City University of New York and the Thomas Jefferson School of Law in San Diego have set up incubators to train future practitioners in their first year after graduation.<sup>80</sup>

#### CONCLUSION

We lawyers hold as an article of faith that our profession both helps individuals in need and builds a "more perfect union," to repeat the opening of the Constitution.<sup>81</sup> At its best, our profession offers us the opportunity to play a role in creating a more prosperous and a more decent society. We must put our collective shoulders to the wheel to make it so.

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78. See generally ARIZ. ST. U. ALUMNI L. GROUP, <http://asualumnilawgroup.org/> [<https://perma.cc/RR3L-4Q62>] (last visited Sept. 30, 2016).

79. About Us, ARIZ. ST. U. ALUMNI L. GROUP, <http://asualumnilawgroup.org/about-us-2/> [<https://perma.cc/59BS-LLC4>] (last visited Sept. 30, 2016).

80. CUNY SCH. OF L. PUB. SQUARE, <http://publicsquare.law.cuny.edu/home> [<https://perma.cc/6U9X-7YRD>] (last visited Sept. 30, 2016); *The Center for Solo Practitioners – A Lawyer Incubator Program*, T. JEFFERSON SCH. OF L., <http://www.tjssl.edu/tjssl-alumni/incubator-program> [<https://perma.cc/B4T3-LMSE>] (last visited Sept. 30, 2016).

81. U.S. CONST. pmbl.