

University of South Dakota School of Law

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The Changing Practice of Law and Law Schools: Why Would Anyone Go to Law School Today?

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FARBER LECTURE

On the afternoon of September 16, 2014, in Farber Hall at the University of South Dakota, Dean and Professor Emeritus Barry R. Vickrey delivered the Farber Lecture. That lecture is reprinted here, with minor stylistic edits and footnotes to identify sources and provide additional information. The Farber Lectures are invited presentations by notable individuals about topics of political, social, and cultural interests to students, faculty, and the community.

THE CHANGING PRACTICE OF LAW AND LAW SCHOOLS: WHY WOULD ANYONE GO TO LAW SCHOOL TODAY?

BARRY R. VICKREY†

Thank you, Clay,¹ for the introduction. I also want to thank all of you for coming today.

It is a privilege to be asked to deliver a Farber Lecture, because I knew Dr. W. O. Farber. I would like to tell you about the first time I saw Doc Farber, which was before I knew who he was.

In my first semester as dean of the Law School, back in the fall of 1993, I was at a campus-wide discussion on some topic I can't recall. The discussion had gone on for about an hour, which was half an hour longer than the topic deserved. At that point, a small man in the audience stood up and said something that made more sense—that was more insightful—than anything else that had been said in the previous hour. After the session ended, I found out that the small man with the insightful comment was Doc Farber.

Doc Farber had retired from the University of South Dakota (“USD”) faculty in 1976, but he was still a force on campus.² In part, he was a force because of his history. Chairing a department—the Political Science department—for almost four decades earns you some measure of respect and credibility. But the main reason he was a force was because he had a combination of intelligence, experience, and dedication that was hard to match. It was a privilege to know him.

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† Dean & Professor Emeritus, University of South Dakota School of Law. The author wishes to thank Dr. William D. Richardson, Odeen-Swanson Distinguished Professor of Political Science, and Chair, Department of Political Science & Director, W. O. Farber Center, University of South Dakota, for the invitation to deliver the Farber Lecture and for suggesting the topic. Financial support was provided by the W. O. Farber Center for Civic Leadership.

1. Clay Hoffman, a member of the University of South Dakota Political Science League, introduced the lecture.

2. For more information on Dr. Farber, see *About Doc Farber*, UNIV. OF S.D., <http://www.usd.edu/arts-and-sciences/political-science/farber-fund/about-doc-farber.cfm> (last visited Nov. 26, 2014); WILLIAM OGDEN FARBER & ANN GRAUVOGL, *FOOTPRINTS ON THE PRAIRIE: THE LIFE AND TIMES OF W.O. FARBER* (Chiesman Foundation for Democracy, Inc. 2005).

If you didn't know Doc Farber, please study the portrait of him on the wall to my right. It was painted by Bobby Penn, a great artist of American Indian heritage.³ I have always admired the way in which Penn captured not only the likeness but also the spirit of Doc Farber.

I think Doc Farber would have enjoyed watching someone talk about a topic that reflects the difficulties facing the legal profession and legal education. Although many of his protégés became successful and prominent lawyers, Doc always seemed ambivalent about his students pursuing legal careers. He would have preferred that they get MPAs or PhDs and pursue careers in government or academia. So I always enjoyed letting him know when a Political Science graduate was doing well in Law School or that more of our students had majored in Political Science than any other subject.

The topic I agreed to talk about today is daunting for reasons other than Doc Farber's ambivalence about lawyers. I was involved with education policy, working for a governor of Tennessee,⁴ before I went to law school. At the American Bar Association ("ABA"), where I worked for five years right after law school, I directed the Division of Professional Education. For the past thirty-two years, I have been a legal educator, including five years as an associate dean and eighteen years as a dean. I have devoted roughly 100,000 hours of my life to this topic or something related to it. It is a challenge to condense 100,000 hours down to a 40-minute lecture.

Another reason this topic is so difficult for me is that so much has changed in the last five or six years. This summer, I was talking with a friend⁵ of mine who has been in legal education even longer than I have. He commented that he and I had experienced the "golden era" of legal education. We agreed that it was unlikely that legal education would ever again enjoy the prosperity we experienced.

As a former dean of this University's Law School, I do not want you to think that I mean by the use of the word "prosperity" that we had more money than we needed. When it comes to government services, no place values frugality more than South Dakota. I recall a national law deans' meeting many years ago during an earlier decline in law school applications, when deans from other schools were bemoaning the cuts they were having to make. I commented that this was not a problem in South Dakota, because you can't cut it if you never had it.

But although we were never flush here, the financial pressures I faced as dean were rarely as difficult as they are now for my successor.⁶ There was one

3. See Robert Penn: *Wichapi Cik'ala (Little Star)*, AKTA LAKOTA MUSEUM & CULTURAL CTR., <http://aktalakota.stjo.org/site/News2?page=NewsArticle&id=8857> (last visited Nov. 26, 2014) (biography).

4. Winfield Dunn, Governor of Tennessee, 1971-75.

5. Peter A. Winograd, Emeritus Professor, University of New Mexico School of Law; 1999 recipient of the Robert J. Kutak Award from the ABA Section of Legal Education and Admissions to the Bar for "significant contributions toward increased cooperation between legal education, the practicing bar, and the judiciary."

6. Thomas Earl Geu, Dean & Professor, University of South Dakota School of Law.

year when the legislature and Board of Regents, over my objections in which I pointed out that law school applications were declining nationally, made decisions that produced a 70% increase in our nonresident tuition rate. Our nonresident applications and projected enrollment dropped precipitously, and we estimated that our entering class would be two-thirds of its normal size. I went to President Abbott⁷ and told him we could either lower our admissions standards or have a very small class. He told me *not* to lower our admissions standards, and we had an entering class of only 45 students as compared to our target of 75.

I had previously sectioned several of our first-year classes to improve the educational experience of the students, so these students spent their first year of law school mostly in classes with fewer than 25 students. As you may know, legal education is built around a model, especially in the first year, of intensive classroom instruction that includes calling on students randomly to discuss the cases assigned for the day. The typical class size of 75, or even 100-plus at some schools, is appreciated by students as decreasing the likelihood of being called on. The students in our classes of less than 25 had nowhere to hide. I doubt that any law students in the country could match them in the rigor of the education they received. Not surprisingly, the bar passage rate for that class was 100%.

Although there were some valleys among the peaks from the 1970s to the first years of this century, legal education had not experienced over those three decades a sustained decline in applications like that of the last decade. In 2004, law school applications exceeded 100,000.⁸ By 2014, they were down to about 55,000.⁹ Over the past four years alone, applications have decreased about 37%.¹⁰

The decline was a logical response of prospective students to the news of weakness in the job market for law graduates. Even before the new century, the market for legal services had begun to change. Clients were less willing to pay whatever law firms chose to charge. Some were hiring auditors to look behind the legal bills they received.¹¹ Technology also had an impact, making it easier

7. James W. Abbott, an alumnus of the University of South Dakota School of Law, has served as president of the University of South Dakota since 1997.

8. *End of Year Summary: ABA Applicants, Applications, Admissions, Enrollment, LSATs, CAS*, THE LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/lisac-volume-summary> (last visited Nov. 5, 2014) [hereinafter *ABA End of Year Summary*] (compiling data from fall 2004 to fall 2013).

9. This is based on data as of August 8, 2014. *Three-Year Applicant Volume Graphs*, THE LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/three-year-volume> (last visited Nov. 5, 2014) (compiling data from applicants and applications from fall 2012 to fall 2014).

10. See *ABA End of Year Summary*, *supra* note 8 (showing that for fall 2010 there were 87,900 applications).

11. See Amy Stevens, *Ten Ways (Some) Lawyers (Sometimes) Fudge Bills*, WALL STREET JOURNAL, Jan. 13, 1995.

to package legal services as commodities or even outsource legal research to India.¹²

Then came the “great recession” of 2008. The economic woes of the United States and the whole world caused law firms to reduce hiring and lay off lawyers as clients disappeared or reduced their demand for legal services.¹³ Prospective openings for new graduates did not materialize, as older lawyers saw their retirement funds disappear and realized they no longer could afford to retire.¹⁴

Some in legal education initially thought that the demand for legal services and thus for law graduates would bounce back when the economy recovered. Others—and I was one of them—thought that this downturn was different than earlier ones. As the Georgetown Law Center for the Study of the Legal Profession stated in its 2013 Report on the State of the Legal Market:

[T]he market for legal services in the United States and throughout the world has changed in fundamental ways and . . . even as we work our way out of the economic doldrums, the practice of law going forward is likely to be starkly different than in the pre-2008 period.¹⁵

The Georgetown Center based its conclusion on solid economic data. My conclusion was based on more anecdotal evidence. When my son, who was working on his PhD in computer science at Stanford, told me he was studying Chinese, I was confronted with the economic realities of the United States and the world. I concluded that the economy of the United States—because of the new world economy—was unlikely to ever again produce the demand for legal services that drove the market for law graduates and the resulting abundance of law school applications and enrollment.

As the job market for law graduates weakened, the concerns of prospective students grew. This concern was heightened by stories of law schools overstating the placement rates of their graduates. The job market is now showing some signs of improvement as the economy slowly recovers from the 2008 recession, but prospective students are reluctant to believe the encouraging data, and rightly so.

The nation’s economic downturn and its effects on the job market for law graduates were beyond the control of legal educators. So those of us in legal education can rightly consider ourselves victims of those events. But the deans

12. See Eileen Libby, *A Qualified Yes*, 94 A.B.A. J. 32, Nov. 2008, available at http://www.abajournal.com/magazine/article/a_qualified_yes1.

13. See Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051 (2010); William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, 97 A.B.A. J. 40, July 2011.

14. See Jack Zemlicka, *Senior Lawyers Working Longer*, WIS. L. J., July 27, 2009, available at <http://wislawjournal.com/2009/07/27/senior-lawyers-working-longer/>; Carolyn B. Lamm, *Leadership When It's Needed Most*, 95 A.B.A. J. 9, Nov. 2009, available at http://www.abajournal.com/magazine/article/leadership_when_its_needed_most.

15. 2013 Report on the State of the Legal Market, GEO. LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, available at <http://www.law.georgetown.edu/continuing-legal-education/executive-education/upload/2013-report.pdf>.

and other administrators of some law schools were the perpetrators, not the victims, of the misleading information that caused prospective students to distrust reports that the job market is improving. From 2004 to 2010, I served on the ABA committee that collects this data, chairing it from 2007 to 2010. I tried, but failed, to convince others in the ABA leadership that there were problems with the collection and dissemination of this data. I regret that I was not more effective in making this case. Changes have now been made, and that data is more reliable and useful than it was. But the changes came only after the confidence of prospective students in the placement data—and perhaps in the integrity of legal educators—had been severely weakened. It will be a while before that confidence is restored.

Fueling prospective students' concern about the weak job market for new law graduates is a powerful accelerant: the staggering educational debt load amassed by many law graduates. According to data from the ABA, the average 2012 graduate of a public law school borrowed almost \$85,000 during law school, and the average private law school graduate borrowed more than \$120,000.¹⁶ One study noted that by adding accrued interest, undergraduate debt, and bar study loans, the debt burden of new attorneys frequently increases to \$150,000 to \$200,000, levels of debt that impose a crushing burden on new lawyers.¹⁷

At USD, a relatively inexpensive school, even a resident student can borrow more than \$80,000. This is like carrying a mortgage—and for a pretty decent starter home, at least in South Dakota—but without a roof over your head. Why would anyone take on that much debt, or even more at other law schools, when the prospects of having the means to repay it seem so dim?

I cannot answer that question for you. The best I can do is to give you some things to think about if you are trying to make this decision.

First, what causes law students to have such heavy debt loads? The most obvious factor is the cost of legal education, which keeps going up. Why is that?

One reason is that legal education, like all education, delivers services rather than goods. Industries that deliver services typically have to hire people to deliver the services, and people are expensive. Service industries cannot—or do not—use technology to increase productivity as well as industries that produce goods. Think about how difficult it has been to control costs in the health care industry. The economics of education are similar.

16. *ABA Approved Average Amount Borrowed: Fall 2013*, ABA 2013 ANNUAL QUESTIONNAIRE, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_fall_avg_amnt_brwd.xls. Additional financial information can be found at http://www.americanbar.org/groups/legal_education/resources/statistics.html under the section “Financial Information.”

17. *Final Report, Findings & Recommendations on The Impact of Law School Debt on the Delivery of Legal Services*, ILL. STATE BAR ASS'N (June 22, 2013), available at <http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%202013-13.pdf>.

Some critics of legal education, and higher education in general, see this economic analysis as a smokescreen for the greediness of faculty members and the incompetence of administrators in managing budgets.

During my eighteen years as a dean, I heard enough complaints by other deans about the demands of certain faculty members to conclude that faculty greed is a contributor to the increase in the cost of legal education nationally. There are some faculty at some schools who want to get paid as much as possible to do only the work that equates with their high opinions of themselves. But with rare exceptions, I have not seen this attitude at the two schools where I have been employed, the University of North Dakota ("UND") and USD. While this attitude is more common at some of the two dozen law schools I have inspected as part of the ABA accreditation process, I would not consider it the norm. Most of the law faculty I have seen at other law schools are productive and committed to the mission of educating future lawyers.

As for the competence of law school administrators in controlling costs, one might question my objectivity, at least for the two schools where I was an administrator. Nevertheless, my less than objective opinion is that the administrators at UND and USD, present company included, have done an amazing job of providing an outstanding legal education with extremely tight financial resources.

As I look at legal education nationally, I do have concerns about how well administrators have managed budgets to contain costs. To a significant degree, this is because most law schools are trapped in the rankings game fostered by U.S. News and World Report.

Without providing meaningful information for prospective students, the U.S. News rankings drive up the costs of legal education, directly and indirectly. The rankings factors include expenditures per student, so a school is rewarded in the rankings for expenditures that increase the cost of the education it provides, whether or not the expenditures actually enhance a student's educational experience. Another rankings factor is the number of volumes and titles in a law school's library. Because of the impact of electronic resources, these numbers are misleading and largely irrelevant to the education of most students. While spending money on volumes and titles is not nearly as important as spending money on capable librarians, schools continue to be rewarded in the rankings for expenditures on library volumes and titles.

The U.S. News rankings also increase the cost of legal education for most law students by using students' LSAT scores and undergraduate GPAs as rankings factors. These factors have driven the financial aid policies of most law schools. Schools raise their tuition for all students and then use some of the revenue to offer scholarships to the students whose LSAT scores and undergraduate GPAs will increase their rankings. The effect of this discounting of tuition for the students with high-test scores and grades is to increase the debt load for most students. Even more invidiously, it reduces the debt load for those students whose admission indicators predict that they are most likely to get higher-paying positions after graduation. It increases the debt load for those

students who are less likely, based on their admission indicators, to secure the employment they need to repay their educational loans.

I hope you see where I am heading with this. I hope you see that you, if you are a prospective student, can help curb the rising cost of legal education by one simple action: *ignore the U.S. News rankings*. If law school administrators didn't hear a reference to rankings from almost every prospective student, they might have the courage to cut costs and take their lumps in the rankings game.

If you want to use data to help make your decision about where to attend law school, all you have to do is go to the website of the Law School Admission Council.¹⁸ You can find there much more data than U.S. News uses. If you are smart enough to go to law school, you are smart enough to evaluate that data yourself and avoid the inherently misleading nature of the U.S. News rankings.

There are some other things you can do as a student to reduce the debt you take on for a legal education. One is to evaluate and control your other expenditures. If you are a South Dakota resident, the maximum amount you can borrow is double the resident tuition. You aren't required to borrow the maximum. Deciding to forego some non-necessities for three years may be a good trade-off for a reduced debt load when you graduate.

You can also decide to work during law school to reduce the amount you have to borrow. This is not something I would recommend, but it is something you can consider. I don't recommend it because working outside law school almost certainly will affect your law school education negatively. In addition to the intangible cost of not being as well educated, there is the tangible cost of a lower law school GPA. Since most employers consider the law school GPA and resulting class rank when making hiring decisions, working too much during law school can exacerbate the debt load problem by reducing your employment prospects. Prior to its elimination in August 2014, an ABA accreditation standard prohibited full-time law students from working more than twenty hours per week. Working even twenty hours a week is too much, since a full commitment to law school study can easily occupy sixty hours a week. If you want to work a substantial amount to reduce your debt load, you can go to law school part-time at many law schools, including USD.

The financing option that made it possible for me to go to law school was to get married before law school, so that my wife could work while I went to school. That option is not without its risks, I should warn you. At the least, you may have to hear your spouse tell people, as my wife does, that we have been married for 40 good years plus three years of law school.

Another thing you can do, if you are trying to decide whether to incur the debt to go to law school, is to look behind the job market information you may be seeing. Most of this data comes from the National Association for Law Placement ("NALP"). The membership of NALP and the data it disseminates disproportionately represent large law firms in big cities. This information is not very helpful if you are considering a legal career in South Dakota or another

18. The Law School Admission Council's website is www.lsac.org.

smaller market. It will take some work to do this, but if you know where you would like to locate after law school, you need to find out what the job market looks like there. One advantage to being on a campus with a law school is that you are only a short walk away from our career services office, where you can get assistance in obtaining that information.

You can also expand your thinking about employment after law school to include locations or types of practice you might not have previously considered. If you work full-time in a public-service job after law school, you may qualify for a federal loan forgiveness program.¹⁹ This includes employment by local, state, and federal government agencies and by nonprofit entities. In South Dakota, you may also qualify for incentive payments to practice in counties with a population of 10,000 or less.²⁰ State funding for this program was obtained through leadership from the Unified Judicial System and the State Bar of South Dakota.

You will increase your chances of employment if you pursue a course of education that prepares you for practice areas that are likely to have increased demand in the future. National data indicate that these include corporate law generally and more specific business-related areas, such as labor and employment law and intellectual property law. The expected demand for intellectual property law includes not only patent law, from which most of us are eliminated by our lack of aptitude for science, but also copyright, trademark, and intellectual property licensing. In South Dakota and other states with significant American Indian populations, learning Indian law may enhance your job prospects. The same is true for water law and more generally natural resources law, especially in the Western United States.

Or you could use your legal education to pursue a career other than the practice of law. The most recent issue of *Student Lawyer*, a publication of the ABA Law Student Division, focuses on alternative career paths.²¹ One article features law graduates who have chosen careers other than the practice of law: a vice president of a commercial real estate management business; a public relations professional specializing in litigation communications; an investigator for legal, real estate, and business clients; and a former entertainment lawyer who now has an online business that helps law graduates find alternative careers.²² Actually, the article features five law graduates who have pursued alternative careers, because it was authored by a freelance writer who has a law degree.

19. U.S. Dep't of Educ., *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service> (last visited Nov. 5, 2014).

20. S.D. Unified Judicial Sys., *Rural Attorney Recruitment Program*, <http://ujs.sd.gov/Information/rarprogram.aspx> (last visited Nov. 1, 2014).

21. See, e.g., Erin Binns, *How to Rethink Interview Preparation for Alternative Careers*, STUDENT LAWYER, ABA, Sept. 2014.

22. G.M. Filisko, *Finding Your Legal Niche*, STUDENT LAWYER, ABA, Sept. 2014.

The suggestion of considering alternative careers leads me to the final two points I want to make. I have saved these for last because I was afraid you would not listen to anything else I said if I started with these. There are two major reasons I think a person should consider going to law school, though I would not presume to tell you how to weigh the value of these benefits against the cost.

The first reason is that legal education is great education. In 2007, the Carnegie Foundation for the Advancement of Teaching published its study entitled *Educating Lawyers: Preparation for the Profession of Law*.²³ The study criticizes law schools for not providing adequate instruction in practical skills.²⁴ But listen to what the study says law schools do:

From this comparative perspective [comparing law schools to institutions that educate teachers, doctors, engineers, and the clergy], law schools are impressive educational institutions. In a relatively short period of time, they are able to impart a distinctive habit of thinking that forms the basis for their students' development as legal professionals. In our visits to over a dozen schools of different types and geographical locations, our research team found unmistakable evidence of the pedagogical power of the first phase of legal education. Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules. Despite a wide variety of social backgrounds and undergraduate experiences, they were learning, in the parlance of legal education, to "think like a lawyer." This is an accomplishment of the first order that deserves serious consideration from educators of aspirants to other professional fields.²⁵

I was astounded and perplexed by the study's conclusion that law schools were changing fundamentally the way students think but that this amazing achievement was overshadowed by our failure to teach practical skills. I am not opposed to instruction in practical skills. I teach mediation and have taught legal writing, appellate advocacy, and legislative drafting, all of which are skills courses. As dean, I expanded our skills curriculum and advocated successfully for equal status for those who teach skills. This year, I will be assisting our Academic Affairs and Curriculum Committee and our administration as it works toward compliance with recently adopted ABA standards that place greater emphasis on skills courses. But while I support skills instruction, I believe the most important thing we do is to provide law students an intensive form of liberal education.

23. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter SULLIVAN].

24. *Id.* at 188.

25. *Id.* at 186.

Before I elaborate on this, I need to be sure you know what I mean by “liberal education.” It is not education in liberal politics. The word “liberal” equates to “liberty.” It comes from the Latin word that means “free.” Liberal education makes a person free to think critically and act responsibly.

According to the Association of American Colleges & Universities:

Liberal Education is an approach to learning that empowers individuals and prepares them to deal with complexity, diversity, and change. It provides students with broad knowledge of the wider world (e.g. science, culture, and society) as well as in-depth study in a specific area of interest. A liberal education helps students develop a sense of social responsibility, as well as strong and transferable intellectual and practical skills such as communication, analytical and problem-solving skills, and a demonstrated ability to apply knowledge and skills in real-world settings.²⁶

Legal education does all this. With respect to “broad knowledge of the wider world,”²⁷ the cases law students read deal with every aspect of the human enterprise. The human behavior that provides the facts of the cases displays the complexity and diversity of the human experience. Students see how the rules of law change—or sometimes don’t—to accommodate changes in society.

We don’t teach science or art in law school, but students read cases that deal with both these subjects and many more. In the first weeks of the Property course I teach, students read a case about property rights in human body parts²⁸ and a case involving paintings by Georgia O’Keeffe.²⁹ They don’t learn human anatomy or how to paint from this course, but they learn that they may need to know something about both to be competent lawyers.

As for the “social responsibility” aspect of liberal education, law students are required by ABA accreditation standards to take a course that provides “substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members[.]”³⁰ Nevertheless, the Carnegie Foundation criticized law schools for not providing students an adequate grounding in the ethical responsibilities of the profession.³¹

I teach the required Legal Profession course at USD, and I taught the required course at UND. I have published on this subject, and I have served on numerous bar association committees related to professional responsibility at the state and national levels. So, I must admit, I took the Carnegie Foundation criticism personally. Based on my own teaching and professional experience, along with what I have seen in accreditation inspections of other law schools, I

26. *What is a 21st Century Liberal Education?*, ASS’N OF AM. COLL. & UNIV., <https://www.aacu.org/leap/what-is-a-liberal-education> (last visited Nov. 5, 2014).

27. *Id.*

28. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

29. *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

30. *ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015*, ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 16 (2014), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_a_ba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf.

31. SULLIVAN, *supra* note 23, at 188.

believe the Carnegie Foundation study underestimated what students learn in the required professional responsibility course.

Perhaps because I have been teaching this course for a long time in one place, I have a feedback loop that confirms that this course is preparing students for the ethical issues they face in practice. I frequently get calls from practicing lawyers for advice about ethical issues they are dealing with in the representation of clients. They almost always start with their understanding of the relevant rules—they know I won't appreciate it if they don't read the rules before they call me—and then explore the nuances of their reading with me. There is usually something I can add to their understanding—after all, I have taught this subject for three decades—but that does not detract from the fact that they both appreciate their ethical responsibilities and have at least some understanding of the relevant rules. I then close the loop by sharing these calls, without identifying the lawyer or revealing confidential client information, with my current students.

Law schools excel, as the Carnegie Foundation study admits, in developing the analytical and communication skills that are essential parts of a liberal education. The Carnegie Foundation study does not, however, give us high marks in teaching problem-solving skills or in developing the ability of students to apply knowledge and skills in real-world settings. I think there is some justification for this negative assessment. Law students do need more education in the application of their knowledge and skills to solve the kinds of problems they will face in the practice of law or in other career paths they may take. The dilemma is how to fit this into the limited instructional time of a three-year course of study without sacrificing what we are now doing well. When what we are now doing well includes changing fundamentally the way students think while also providing them the knowledge and skills needed to pass a bar examination and gain admission to the practice of law, finding the time to do even more is a daunting task.

I mentioned earlier that service industries, like education and health care, struggle to use technology to increase productivity. Think about how hard it seems to be for health care providers to use modern technology for patient records. For law schools, we have not made effective use of computer technology to support instruction. Unfortunately, many law professors are generationally challenged in the use of technology.

I was fortunate to be in a position that required familiarity with modern technology when I directed the ABA Division of Professional Education some thirty-five years ago. My division produced continuing legal education videotapes for lawyers. For those of you who are too young to know what a videotape is, I won't bore you with the differences between a Beta tape and a VHS tape. I also was exposed to some of the earliest uses of computer technology for law-related instruction. I did not invent the Internet, but Al Gore and I *were* law school classmates.

More recently, I have had the benefit of exposure to modern technology through my children. My son is a research scientist at Facebook. His wife, my

daughter-in-law, is a software engineer at Google. My younger son is also studying computer programming and has used computer applications for graphic design and animation. So I am neither unfamiliar with modern technology nor easily fooled by its false promises.

Legal education needs to use the power of computers to enhance the education we provide. But we must be sure we do not allow the use of this technology to undermine what we currently do well. For example, I believe we will lose a lot if online law courses replace the intensive personal interaction of the current law school classroom. As long as lawyers routinely deal with clients in person, the face-to-face interaction of the live classroom will better prepare law students for the practice of law. Admittedly, there may come a day when law school instructors, students, practicing lawyers, and clients are all holograms. At that point, technology will have redefined personal interaction, and our method of instruction should adapt accordingly.

For now, we need to be using computer technology in a way that will enhance the classroom experience. In the ideal law school classroom, the teacher engages students in analysis of a court opinion dealing with a real-life case. The Carnegie Foundation and other critics seem to miss the fact that these opinions are actual cases involving real people. The case I mentioned earlier on property rights in human body parts involved a real person whose cells were used without his knowledge to create a highly profitable cell line for medical research.³² The teacher also presents students with hypothetical scenarios drawn from other real-life cases: either from other reported opinions or from the teacher's professional experience. The problem is that many of the students are not ready to do an analysis or an application. They don't have a grasp of the relevant legal rules, so they cannot confidently analyze and apply those rules when discussing the cases or hypotheticals.

Computers can help us with this. Using well-written, computer-assisted instruction, students can be drilled and required to demonstrate a mastery of the black-letter law before they come to class. Then the limited classroom time can be used more effectively, as students more confidently engage in the face-to-face interaction with an expert in the subject area to analyze the actual and hypothetical cases.

There are many more ways modern technology could be used to support and enhance—rather than undermine—what we currently do well. Just to mention one more example, law schools might have students complete courses offered by Coursera³³ or another reputable provider of MOOCs—massive open online courses—to fill in gaps in students' liberal education. Most law students need to know more than they do about many subjects, ranging from accounting to zoology. MOOCs might fill that gap without taking time away from what law schools do well now.

32. *Moore*, 793 P.2d at 481-82.

33. Coursera offers 861 free, online courses. COURSERA, <https://www.coursera.org> (last visited Nov. 5, 2014).

I have one final point—it's my *second* final point—I want to make about why anyone should go to law school. I realize I used the word “final” a few minutes ago. I said I had two final points. I just didn't tell you how long the first final point would be. I hoped that by saying “final” back then, I could give you hope that you could stay awake long enough to get through the rest of my remarks. This really is my final point, so hang in there just a bit longer.

I want to reiterate that this final point, like my contention that legal education is great liberal education, is not conclusive evidence that anyone should incur the debt involved in getting a legal education. It is just a part of that equation.

My final point—really final—for going to law school is that a legal education allows you to serve others. A law degree allows you to provide an essential service to society as a whole and to the individual people who will be your clients.

Lawyers are essential to an ordered society. That may not sound like much, especially to those who like to think that the high calling of lawyers is to produce justice. While I believe in promoting justice, I have lived long enough to learn that there is not universal agreement on what constitutes justice. In fact, it seems that most people think that justice is when their side prevails, and injustice is when their side loses.

While order is not nearly as lofty as justice, I think most people agree on what order is and that it is essential to a functional society. Some dissidents oppose order, and some of them are right in certain circumstances. But most of us need and appreciate—to use a dictionary definition of “order”—“the state of peace, freedom from confused or unruly behavior, and respect for law or proper authority[.]”³⁴ Without order, we find it difficult to feed our families or walk safely down the street where we live. Without lawyers, it would be impossible to adopt, interpret, and enforce the laws that support an ordered society.

Just as important is the service that lawyers provide to the individual people who are their clients. Whether it's the lawyer who drafts the documents that allow a person to accomplish the dream of starting a new business or the lawyer who helps a person get out of an abusive marriage, the lawyer provides a service that far exceeds the legal knowledge that the lawyer imparts and representation that the lawyer provides. The lawyer listens to and then guards zealously the confidential information the client shares. The lawyer gives the client the benefit of the doubt when another person calls into question the actions of the client. The lawyer establishes a relationship of trust with the client that allows the lawyer to tell the client when the client is wrong.

Jeff Larson is a criminal defense lawyer in Sioux Falls.³⁵ For many years, he was the public defender, which means he represented people he was appointed to represent because they could not afford to hire a lawyer. It also

34. *Order* *Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/order> (last visited Nov. 5, 2014).

35. JEFF LARSON LAW, <http://jefflarsondefense.com> (last visited Nov. 25, 2014).

means he didn't get to pick his clients, and he didn't get paid a lot for representing them. And yet, he represented them so well that he was recognized by the South Dakota Trial Lawyers Association as the trial lawyer of the year, which is unusual for a public defender.

Jeff represented James McVay, who fatally stabbed a 75-year-old woman in Sioux Falls as part of his plot to assassinate President Obama. McVay was convicted and sentenced to death, and he hanged himself while in prison earlier this month.³⁶ Although Jeff was not McVay's lawyer at trial, he didn't quit caring about McVay when the representation ended. He tried to help McVay's lawyers establish that McVay should not be executed for a crime that resulted from his mental illness.

Jeff cares about his clients, even those who have committed heinous crimes, because that's what good lawyers do. They care even if their clients are heartless murderers or heartless business executives. They provide the clients the representation to which they are entitled and also the human caring that many would claim these clients are not entitled to receive. It is part of the price good lawyers pay for the privilege of being a lawyer.

Jeff is the keynote speaker on Friday evening, October 3rd, for the South Dakota Peace & Justice conference in Sioux Falls entitled, "The Human Face of the Death Penalty." If you are thinking about going to law school, you should hear Jeff's presentation. If you want more information about the event, send me an email message.

John Adams, our second president, was a prominent lawyer as well as a politician. In 1770, he successfully defended the British soldiers charged in the Boston Massacre, losing half his law practice as a result. His courage in taking the case when no one else would was consistent with remarks he had written a few years earlier about the privilege of being a lawyer:

Now to what higher object, to what greater Character, can any Mortal aspire, than to be possessed of all this Knowledge, well digested, and ready at Command, to assist the feeble and Friendless, to discountenance the haughty and lawless, to procure Redress of Wrongs, the Advancement of Right, to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice.³⁷

Is that worth incurring substantial debt to get a law degree? Is it worth incurring the wrath of those who don't understand or accept the role of lawyers in our ordered society? If you are considering law school, I can't answer those questions for you. All I can do is to tell you that I hope you make the right decision, both for yourself and for our society. And if there is any way I can help you with that decision, my office is in Room 202 in the Law School.

36. See Mark Walker, *Death Row Inmate James McVay Found Dead in Cell*, ARGUS LEADER, Sept. 5, 2014, available at <http://www.argusleader.com/story/news/crime/2014/09/04/james-mcvay-found-dead-prison-cell/15066593/>.

37. John Adams Diary, *Extract of a Letter to Jona. Sewall, Octr. 1759*, MASS. HISTORICAL SOC'Y 2 (1759), <http://www.masshist.org/digitaladams/archive/doc?id=D4> (last visited Nov. 25, 2014).