THE NEED FOR PROMPT ACTION TO REVISE AMERICAN LAW SCHOOLS

Richard Westin, University of Kentucky
THE NEED FOR PROMPT ACTION TO REVISE AMERICAN LAW SCHOOLS

Richard A. Westin,
Distinguished University Professor
University of Kentucky College of Law

I. INTRODUCTION

The lobster industry and the law school industry are developing an eerie parallel. Ghost fishing in the lobster industry happens when a lobster trap separates from its control line and breaks away. As planned, it attracts a lobster that entered to eat the carrion bait, but—thanks to the broken line—instead of being harvested, the lobster starves. Later, another lobster enters, devours the dead lobster, becomes trapped, dies and the cycle thus continues indefinitely. The same applies for many law students—they enter law school with high hopes, baited by false promises, only to find that they vastly exaggerated their hopes for success, and, if they are unlucky, find nothing in the legal field. Next year another crop of young competitors enter the field, compounding the improbability of finding a job close to what they expected.

American law students are in a crisis. The ghost fishing crisis was cured when the law required the lobster trap’s door eventually open, thanks to biodegradable metal hinges or gates. Unfortunately, there is no such relief for the glut of law students. The ABA Journal reports that 85 percent of accredited law schools graduates in 2010 were burdened with debts averaging $98,500, but they are graduating into a weak economy where their prospects for employment have narrowed greatly (Henderson & Zahorsky, 2012). Students in previous classes have far from been absorbed into the legal industry and classes behind them promise a continuing flow of competitors.

In the meantime, law schools have stood shoulder-to-shoulder behind the false numbers law schools have generated about their success in placing recent graduates into the job market, because no law school dares to be the first to tell the truth. The result is a mass of private tragedies and extensive economic waste in the form of large debts for an investment that, for many, represent money wasted leaving only haunting, unpayable education loan obligations. Ever since the New York Times published Segal’s (2011a) article Is Law School a Losing Game?, the cloud hanging over law school education has become thicker and more unsavory. Here is an illustrative case written by Lorin (2011) and published by Bloomberg News:

My thanks to Franklin Runge of the UK law Library and to Jerrad Howard for his meticulous research assistance.
Trapped for Decades

Gerrald Ellis, 28, took about $160,000 in federal loans to attend Fordham Law School, and then spent a year searching for a job. He eventually found work at a four-lawyer firm in White Plains, New York, doing consumer protection work.

Because his student debt is so high compared to his salary, Ellis said he expects to qualify for a plan that would let him pay 15 percent of his salary for 25 years, and whatever debt is left after that is forgiven.

“I’m trapped for at least two decades,” said Ellis, who lives in Harlem with a classmate who also borrowed more than $100,000. “The debt has an impact on everything, where I decide to live, what job I take. I can’t even imagine having kids with this kind of debt burden. Multiply that by a whole generation.

What follows is an attempt to lay out the problem and propose some serious changes promptly to make it more humane and economically efficient before the opportunity for taking advantage of faculty attrition for restructuring the law school system has faded.

II. CHONIC PROBLEMS

PROBLEM ONE: A SATURATED LEGAL SERVICES MARKET

Reliable figures on the employment status of lawyers are hard to come by. The following tabular source is the federal Bureau of Labor Statistics, Those employed as attorneys obviously make up a relatively small percentage of the American labor force. According to U.S. Department of Labor (2009) statistics, 556,790 people were employed as attorneys nationally. While this seems a significant number, the total national employment was 130,647,610—thus, by the BLS reckoning attorneys made up only 0.426 percent of national employment, but the percentage of people employed as attorneys—notwithstanding small declines in 2005 and 2008—has followed an upward trend.

Table 1
Table of those employed as attorneys compared to total employment nationally

<table>
<thead>
<tr>
<th>Year</th>
<th>Attorneys</th>
<th>Total Employed</th>
<th>Percent of</th>
<th>Percent Change from</th>
</tr>
</thead>
</table>

2 The American Bar Assn. put the number of licensed attorneys in 2008 at 1,180,386.
1.http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demo graphics.authcheckdam.pdf. Someone has to be wrong.
Since 2001, the ratio of employed attorneys to the national employees has risen 0.0433 percent, a significant number in light of the small percentage of people employed as attorneys nationally. While the number of people employed as attorneys has increased, this increase has not kept up with the number of people passing the bar and flooding the market with eligible attorneys. For example, in Kentucky 3,597 people passed the state bar between 2002 and 2009, while the number of people employed as attorneys in Kentucky only increased by 480 during the same period (AdaptiBar, n.d.).

Table 2
Table of those employed as attorneys compared to total employment in Kentucky

<table>
<thead>
<tr>
<th>Year</th>
<th>Attorneys</th>
<th>Total Employed</th>
<th>Percent of Attorneys</th>
<th>Percent Change from Previous Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>4,250</td>
<td>1,726,230</td>
<td>0.2462 percent</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>4,330</td>
<td>1,718,680</td>
<td>0.2519 percent</td>
<td>0.00574 percent</td>
</tr>
<tr>
<td>2003</td>
<td>4,480</td>
<td>1,721,470</td>
<td>0.2602 percent</td>
<td>0.00831 percent</td>
</tr>
<tr>
<td>2004</td>
<td>4,730</td>
<td>1,728,300</td>
<td>0.2737 percent</td>
<td>0.01344 percent</td>
</tr>
<tr>
<td>2005</td>
<td>NA*</td>
<td>1,754,590</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>4,710</td>
<td>1,779,830</td>
<td>0.2646 percent</td>
<td>-0.00905 percent**</td>
</tr>
<tr>
<td>2007</td>
<td>4,600</td>
<td>1,801,800</td>
<td>0.2553 percent</td>
<td>-0.00933 percent</td>
</tr>
<tr>
<td>2008</td>
<td>4,560</td>
<td>1,817,860</td>
<td>0.2508 percent</td>
<td>-0.00446 percent</td>
</tr>
<tr>
<td>2009</td>
<td>4,810</td>
<td>1,748,610</td>
<td>0.2751 percent</td>
<td>0.02423 percent</td>
</tr>
</tbody>
</table>

Source: U.S. Department of Labor, 2009
*Data not released, **Reflects change over two years (2004 to 2006)
Table 3
Table of those people passing the bar in Kentucky and the number of people employed as attorneys in Kentucky

<table>
<thead>
<tr>
<th>Year</th>
<th>People passing bar</th>
<th>Cumulative Number</th>
<th>Number of Attorneys Employed</th>
<th>Change from Previous Year</th>
<th>Cumulative Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>363</td>
<td>363</td>
<td>4,330</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>392</td>
<td>755</td>
<td>4,480</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>2004</td>
<td>461</td>
<td>1,216</td>
<td>4,730</td>
<td>250</td>
<td>400</td>
</tr>
<tr>
<td>2005</td>
<td>461</td>
<td>1,677</td>
<td>NA*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>459</td>
<td>2,136</td>
<td>4,710</td>
<td>-20**</td>
<td>380**</td>
</tr>
<tr>
<td>2007</td>
<td>481</td>
<td>2,617</td>
<td>4,600</td>
<td>-110</td>
<td>270</td>
</tr>
<tr>
<td>2008</td>
<td>502</td>
<td>3,119</td>
<td>4,560</td>
<td>-40</td>
<td>230</td>
</tr>
<tr>
<td>2009</td>
<td>478</td>
<td>3,597</td>
<td>4,810</td>
<td>250</td>
<td>480</td>
</tr>
</tbody>
</table>

Source: U.S. Department of Labor, 2009
*Data not released, **Reflects change over two years (2004 to 2006)

Though attorneys would be leaving the market place during that same time period, considering the total number of those employed as attorneys in Kentucky in 2009 was 4,810, it is impossible to imagine enough attorneys retired or otherwise left the market place from 2002 to 2009 to absorb the flood of recently admitted lawyers. Despite that ominous insight, the number of people taking and passing the bar in Kentucky has seen a general upward trend (AdaptiBar, n.d.). This implies that more people qualified to be employed as attorneys are finding jobs in non-traditional legal fields, whether by choice or necessity, if they are lucky enough to find employment at all.

Table 4
Table of Law School Enrollment

<table>
<thead>
<tr>
<th>Year</th>
<th>First Year Enrollment</th>
<th>Total Enrollment</th>
<th>J.D. and LL.B Awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001-02</td>
<td>45,070</td>
<td>135,091</td>
<td>37,909</td>
</tr>
<tr>
<td>2002-03</td>
<td>48,433</td>
<td>140,612</td>
<td>38,605</td>
</tr>
<tr>
<td>2003-04</td>
<td>48,867</td>
<td>145,088</td>
<td>38,674</td>
</tr>
<tr>
<td>2004-05</td>
<td>48,239</td>
<td>148,169</td>
<td>40,023</td>
</tr>
<tr>
<td>2005-06</td>
<td>48,132</td>
<td>148,273</td>
<td>42,673</td>
</tr>
<tr>
<td>2006-07</td>
<td>48,937</td>
<td>148,698</td>
<td>43,920</td>
</tr>
<tr>
<td>2007-08</td>
<td>49,082</td>
<td>150,031</td>
<td>43,518</td>
</tr>
<tr>
<td>2008-09</td>
<td>49,414</td>
<td>152,033</td>
<td>43,588</td>
</tr>
<tr>
<td>2009-10</td>
<td>51,646</td>
<td>154,549</td>
<td>44,004</td>
</tr>
</tbody>
</table>

Source: American Bar Association, n.d. b.
While Lowry (2010) points out that this trend has not gone unnoticed by law students or the general public, this is not the first era in which concern over this issue has been raised. In the early to mid-nineties, there was a flurry of law journal articles about the huge growth in the numbers of attorneys and whether that was good or bad for the profession (Clark, 1992; Lasson, 1994; Schechter, 1997). For example, Harvard Law School Dean Robert C. Clark (1992) said in one essay that “although the recent recession was accompanied by a drop in the demand for legal service, in 1991, for the fifth consecutive year, the total enrollment at ABA-approved law schools actually increased.”

Lowry points out that this sentiment seems to ring as true today as it did in 1992, as the market for new attorneys collapsed in the midst of the recent recession, and yet law schools continue to graduate new attorneys in greater numbers each year.

**PROBLEM TWO: LAW SCHOOL EXPANSION**

This author believes, and Lutzer (2010) agrees, that law schools and the American Bar Association are much to blame for the saturation of the law market. To put it simply, law schools have attracted excessive applications by issuing deliberately misleading employment statistics; the American Bar Association has failed to rein in this deceptive conduct and continues to accredit additional law schools, which equates to more graduates every year.

The number of ABA accredited law schools rose 9 percent since 2000 (Lowrey, 2010). There are now 200 ABA accredited law schools (one of which is provisionally accredited), as compared to 182 accredited schools a mere decade ago (American Bar Association, n.d. b). The number of graduates now averages well over 40,000 per year, and seems to only be on the rise (Greenbaum, 2010). Between 2007 and 2009, Henderson and Zahorsky (2012) report that the number of LSAT takers increased by 20.5 percent as law school became a more popular career choice, evidently in response to a poor economy. The enrollment of 1Ls in 2000 was 43,152, but by 2011, 1L enrollment was 52,448—a stunning increase of over 21 percent (American Bar Association, n.d. b).

**PROBLEM THREE: LAW STUDENT EMPLOYMENT IS DETERIORATING**

In 2007 when the economy had a rosy sheen, the United States Department of Labor (2009) cheerfully reported that “[e]mployment of lawyers is expected to grow 13 percent during the 2008-18 decade, about as fast as the average for all occupations.” However, even if this prediction had been true, this projected 13 percent increase was too small to keep up with the increasing number of law graduates. The BLS hinted at this when it explained that competition for jobs in the legal field is keen because of the number of law school graduates, with many discouraged graduates turning to jobs outside of the legal field. In reality, Henderson and Zahorsky (2012) report that the total number of attorney positions has fallen about 5.4 percent since 2007. In fact, *The Economist*
(2010) reported that the 250 biggest law firms in the U.S. cut 4 percent of their workforce.

As a practicing profession, the field grows at a mere 1 percent per year. Taking into account deaths and retirements, the number of new jobs in the legal profession is likely to be in the realm of 30,000 per year (Greenbaum, 2010). This is not nearly enough to accommodate the floods of well over 40,000 law school graduates each year. Employment ratings for the class of 2009 were 88.3 percent, but 25 percent of those were temporary jobs and 10 percent were part-time—a significant decrease from the peak of legal jobs seen in 2007 (Henderson & Zahorsky, 2012).

In the meantime, some disturbing trends have emerged for recent graduates. One is the outsourcing overseas of legal research, especially by the West Corporation, which employs Indian law graduates to replace American researchers. Another is a small but growing resistance on the part of some larger clients to pay for work done by first year lawyers. According to a September survey for The Wall Street Journal completed by the Association of Corporate Counsel, more than 20 percent of the 366 in-house legal departments that responded are refusing to pay for the work of first- or second-year attorneys, in at least some matters (Henderson & Zahorsky, 2012). These trends will necessarily make prospective law firm employers more cautious about hiring rookies coming straight from law school. The only question is how much?

PROBLEM FOUR: LAW SCHOOLS’ FALSE REPORTING OF EMPLOYMENT DATA ATTRACTS DOOMED POPULATIONS

A. Background

Law schools across the country have trapped themselves in a bog of false hiring data. They all know it, but no one wants to be the “first mover” by telling the truth about the hiring picture. When a potential law school applicant sits down to determine whether pursuing a legal degree is a worthwhile economic endeavor, the process becomes much harder to evaluate accurately due to the elevated statistics provided by law schools. Many law schools imply that, within a few months of graduation, practically all their graduates obtain jobs as lawyers, by trumpeting employment figures of 95 percent, 97 percent, and even 99.8 percent (Campos, 2011). This encouraging information is obviously enough to skew rational thought. However, the ABA appears to finally be catching onto this growing issue and is imposing new rules, discussed below.

Historically, there have been two main sources of information on post-law-school employment rates. The first is U.S. News and World Report (USNWR), which gathers employment data as a part of the methodology it uses in compiling its annual rankings. These rankings carry great weight because potential students pay close attention to them. In March of this year, USNWR, in response to heavy criticism, revised the methodology used in gathering this employment data (Morse & Flanigan, 2011). Before the revision, new J.D.s counted as employed at graduation and at nine months out if they were
working full or part time in a legal or non-legal job, or pursuing additional graduate school (Morse & Flanigan, 2011). Those who did not respond with their employment status were most likely ignored for purposes of the computations. All that is sure is that USNRW was not transparent about their treatment on non-responders. As a result, almost all ABA-accredited law schools were reporting nine-month employment rates of more than 90 percent, and it was rare that a top 100 school had a rate of less than 95 percent (Campos, 2011).

USNWR’s new system is supposed to assure that employment ratings at graduation and nine months after are based solely based on the number of graduates employed in full- or part-time positions in a legal or non-legal job at that point in time divided by the total number of J.D. graduates (Morse & Flanigan, 2011). Graduates who are not seeking employment are now counted as part of the total number of J.D. graduates (previously they were excluded). This was a glaring flaw in the previous methodology because the discouraged graduates likely ignored polling requests. This revision makes the USNWR at least somewhat less inaccurate: schools that before the change were claiming one in 500 graduates were unemployed claimed one in 30 afterward and those who advertised 95 percent employment rates said one in six graduates don't have jobs (Campos, 2011).

Incidentally, there appears to be no charge in how law school placement personnel falsify the data that they receive. Instead, these individuals mold the data, converting the statistics to information for public consumption which is misleading at best. Moreover, the methodology is not explained in footnotes or text, rendering the data confusing. It would be a great improvement if law schools would openly explain exactly how they arrived at the employment numbers they display.

The other key source of employment information is the National Association for Law Placement (NALP)—the group to which the American Bar Association delegates the compiling of employment statistics that ABA-accredited law schools are required to report. According to NALP, 88.2 percent of all law school graduates are “employed” within nine months of graduation (Campos, 2011). Campos concluded that if we exclude people employed in non-legal jobs, and people doing part-time work, the NALP number drops to 62.9 percent. NALP’s numbers are especially poor because they disregard non-reporting graduates—the very people who are most likely to be unemployed. However, as Professor Campos (2011) detailed in his article in The New Republic, many problems still remain with the statistics even if you include non-reporters.

In his study, Campos used employment data drawn from 183 individual NALP forms, in which graduates of one top-50 school reported their employment status nine months after graduation. From this data, Campos determined that one-third of those graduates reporting that they are working in full-time jobs requiring a law degree were temporary, rather than permanent, positions. This is a consistent failing of the NALP statistics—NALP does not distinguish between temporary and permanent positions. Campos concluded that when temporary employment is taken into account, approximately 45 percent of 2010 graduates from this particular top-50 law school had
real legal jobs nine months after graduation. Furthermore, Campos argued that the actual number is most likely lower—several instances were discovered of people improperly describing themselves as employed permanently or full-time when in fact they had temporary or part-time jobs.

The degree of inaccuracy described here strongly suggests that prospective law students need access to both more information and better information than that currently available. It is unlikely that law schools will provide this information willingly because doing so makes them look like worse investments, therefore lowering their enrollments and their ability to demand ridiculous tuition payments.

One interesting aspect of this arena is the increasing number of private players that are being founded to divulge more-accurate information to potential students. For example, a new employment-data organization recently came on the scene in the legal arena—Law School Transparency (lawschooltransparency.com). The business is a Tennessee non-profit dedicated to encouraging and facilitating the transparent flow of consumer information about law schools. The organization was founded by two Vanderbilt University Law School students in 2009 and operates independently of any legal institutions, legal employers, or academic reports related to the legal market. Law School Transparency advocates for more stringent rules to protect potential law students from information asymmetries. The independence of the organization and the fact that it is a non-profit presumably assures that the information it provides will be less biased than that promulgated by NALP and USNWR.

In response to Law School Transparency and the recent wave of litigation against law schools (Weiss, 2011; Randag, 2011; Lat, 2011; Sloan, 2011), the American Bar Association has stated that it plans to evaluate the possibility of collecting its own data rather than relying on the NALP (Hansen, 2011a; Hansen, 2011b). Standard 509 of the American Bar Association (n.d.a) Standards and Rules of Procedure for Approval of Law schools requires that publish “basic consumer information” in a “fair and accurate manner.” The ABA Standards Review Committee met the weekend of November 11 in Chicago and discussed possible changes to Standard 509; however, there is nothing to report as of the writing of this document (American Bar Association, n.d. d; Hansen, 2011c).

The issue is definitely heating up and not just with respect to misrepresentations about hiring. There has been an increasing amount of negative publicity surrounding the inaccurate reporting of application and performance information relating to law students at Villanova and the University of Illinois (Neil, 2011; Hansen, 2011d). At least one U.S. Senator, Barbara Boxer of California, is perturbed enough that she is strongly considering Senate Hearing on the matter (Jones, 2011).
B. The ABA Finally Acts

In December of 2011, the ABA changed its tune presumably as a result of the November conference regarding Standard 509. Standard 509, which law schools must comply with to obtain and retain their accreditation, requires that law schools publish basic consumer information, including placement data information, “in a fair and accurate manner reflective of actual practice.”

The American Bar Association formally announced in December that The Council of the American Bar Association Section of Legal Education and Admissions to the Bar approved changes in the section’s collection and publication of graduate placement data provided by law schools (Hansen, 2011e). The changes are meant to enhance the accuracy, timeliness, completeness and specificity of the data. ABANow (2011) issued a press release detailing those changes recommended by the section's Questionnaire Committee and adopted by the Council, which included the following:

- **Law schools will be required to report placement data collected nine months after graduation directly to the section of the American Bar Association.** This will help ensure the accuracy of the data, and permit its expedited publication. In the past, this information was reported only to NALP, which aggregated the data for individual graduates of each school, and sent a report to the schools that was then reported to the ABA in its Annual Questionnaire.

- **Placement data information will be posted online the year following its collection.**

- **Information collected will be more detailed and complete as a result of expanded data collection and reporting requirements.** For instance, law schools must report for each graduate:
  - Employment status (employed, unemployed/seeking, unemployed/not seeking, pursuing graduate degree full-time, unknown);
  - Employment type (law firm, business, government, public interest, clerkship, academia);
  - Employment location;
  - Salary;
  - Whether a position is short or long term; and
  - Whether a position is funded by the school itself.

- **In addition, law schools will be required to collect and report what the particular graduate’s employment requires including:**
  - Bar passage required;
  - J.D. advantage;
  - Other professional/nonprofessional; and
  - Full time or part time.
Two things still remain very troubling despite these integral changes. First, why must the American Bar Association hold onto the information for a full year before releasing it to the public? This means that another year, possibly two, will lapse before law students receive the benefit of these additional disclosures necessary for making a smart economic decision. In addition, it remains to be seen how law schools will answer this demand for honesty. Given the level of which information is inflated by personnel currently in general advertising schemes to lure students, it seems unlikely that the institutions will provide better information when it will likely result in lower profit.

**PROBLEM FIVE: READY EDUCATIONAL DEBT**

In January 2011, the law school debt issue reached new proportions when Hassan Jonathan Griffin, a recent graduate of Ohio State University Moritz College of Law, was denied admission to the Ohio bar (*In re Griffin*, 2011). The Board of Commissioners on Character and Fitness of the Supreme Court of Ohio based its denial on the fact that Griffin owed around $170,000 in student loans, $150,000 of which stemmed from attending law school (*In re Griffin*, 2011).

Mr. Griffin serves as an example of the staggering debt that is facing graduates of law schools in the United States. Skyrocketing tuitions coupled with easy-to-obtain loans are serving to cripple the financial state of law school graduates. As Cauchon (2011) correctly reports, lenders currently have no incentive to stop issuing debt as there is little or no risk in providing students with education loans. Unlike mortgages and credit cards, education debt, until recently, was never eliminated in bankruptcy. These factors result in the credit risk falling on the students. When graduates leave schools with large amounts of debt, they delay purchasing cars, homes, and other “life-cycle” events. Such delays will have negative impacts on the economy. When high amounts of debt are coupled with the inability to find employment, the effects on the economy are magnified. In the words of Henderson and Zahorsky (2012):

Direct federal loans have become the lifeblood of graduate education and they shelter law schools financially from the structural changes affecting the profession. The bills are now coming due for many young lawyers, and their inability to pay will likely bring the scrutiny of lawmakers already moaning about government spending. (p. 32)

The debts are virtually non-dischargeable in bankruptcy. At the same time, Henderson and Zahorsky (2012) concluded that only 68 percent of those jobs obtained by students at the 29 law schools with graduates maintaining the highest debt loads even needed a J.D. to get the job they wound up with—meaning that up to 32 percent were unwittingly wasting their time at law school.

At the same time, easy credit for students makes it easier for law schools to raise tuition because the student population is, for the moment, flush with ready cash. The outcomes can easily include wasteful deployment of funds into frivolous uses and expansion of administrative staffs. This problem is especially acute for law schools, which are generally seen as cash cows and tend to enjoy relaxed treatment by central
administrations, on top of which the US News rankings count money spent per student as a favorable factor (9.75 percent of the weight of all factors) (Segal, 2011b).

Be that as it may, the nearly six-digit debt figures have apparently not served to scare potential students away from pursuing law degrees. In fact, a law degree is in such demand that law schools have been able to raise tuition four times faster than undergraduate colleges (Segal, 2011b). From 1989 to 2009, college tuition rose by 71 percent (Segal, 2011b). During the same period, law school tuition rose 317 percent (Segal, 2011b).

College and professional degrees are generally thought of as investments in future earning capacity, but when increasing costs of a degree are combined with decreasing job prospects, the act of obtaining a degree loses much of its aura of a prudent investment begins look like a bad strategy resulting in the destruction of accumulated saving and wasted time. Unlike taking out a mortgage on a house, a student loan does not provide any guarantee of a return at all, or even of an asset. Even if one defaults on a mortgage, one still received the benefit of owning a house for whatever period prior to the default; the enjoyment of home ownership, even for a short period of time, has value. Additionally, a debtor can shed the liabilities of a mortgage through bankruptcy. Unlike a home mortgage, a student loan does not guarantee any enjoyment that can be valued. In fact, most law students think of school as drudgery. Nevertheless, capable students are investing in law degrees, often as large as a mortgage, but are unemployable after graduation because the market is saturated. A J.D. funded through borrowed money produces a high cost with potentially non-existent benefit.

After the housing-bubble burst several years ago, lenders began implementing higher credit-score requirements and more extensive income documentation requirements, which discouraged consumers from becoming homeowners (Handley, 2011). With so much risk associated with obtaining a law degree, one would think that education lenders and institutions would take similar steps to discourage potential students from pursuing a degree. Unfortunately for many unemployed recent graduates, this was not the case. Admissions rates to law schools remain high and student debt based on “easy money” continues to increase (Segal, 2011b).

As noted above, student loans have typically been considered non-dischargeable in bankruptcy proceedings. However, one recent Maine opinion indicates that courts may be willing to step in to address instances where student loan presents an undue hardship (Ackley v. Sallie Mae Student Loans, 2011). Though courts perhaps do not ordinarily apply the provision, it seems that section 523(a)(8) of the bankruptcy code provides for discharging of student loan debt when it imposes an undue hardship of the debtor and their dependents. However, whether courts will become more willing to discharge student debt given the exponential growth of student loans when coupled with today’s low employment rates for recent graduates remains to be seen.
PART III. TOOLS AND SOLUTIONS

If the subject were overproduction of an industrial product, the solutions would be obvious: reduce output; consolidate factories; cut back on the labor force; and streamline operations so as to reduce the cost of the product. It might even require management buy-out packages. All of these methods are commonly used in various industries when it is suffering from similar ailments.

Law schools have a number of available options, which will become all the more important to use if and when law school applications drop as a result of full and fair disclosure of prospective employment. These options include:

- Consolidating law schools, particularly in large cities that have multiple small, often lower-tier, law schools, which alone could lead to improved efficiencies including reducing the number of administrators; combining overlapping classes; centralizing libraries; and making greater use of existing facilities and eliminating others.
- Adopting a well-developed distance learning program;
- Not filling faculty positions that become available due to retirement of professors; and
- Allowing the use of recordings, rather than requiring live lectures, in courses that can be taught effectively predominately by lecture.

A. Consolidation of Law Schools

Consolidating public or private law schools is inherently possible, but consolidating public and private laws schools into one seems improbable, given their vastly different constituencies. A close inspection of the problem may instead suggest that simply closing some law schools is a better solution. However, the problem is the same—there are too many law schools in existence today turning out far too many lawyers—and the solution to the problem is all too clear—the profession must close some of the flood gates. By consolidating (and closing) some institutions, this will work as a limit on the amount of J.D.s that are graduating into the over-saturated market every year, and will also result in a better use of resources by those remaining institutions.

One concrete example of such a consolidation is Dickenson Law School, which integrated two law school campuses into one single institution. The striking feature is that the entire building on each campus is wired to the other campus, allowing real time delivery of classes. The larger classrooms and seminar rooms have push-to-talk buttons at each seat, allowing a free flow of communication between campuses, “facilitating the use of the Socratic method” and allowing conversations between students (Harvard Law School, n.d.).
B. Adopt a Well-Developed Distance Learning Program

i. Efficiency gains

At this point the technology for distance learning is readily available and not costly. Though Dickenson Law School represents an amazing display of technology, not all distance-learning programs need to go to such lengths. Distance-learning can be implemented using very rudimentary foundations—computer-based applications, such as TWEN or Blackboard, which many institutions already use. Institutions can provide necessary computers and electronic equipment for students to access these materials—which often times includes merely a standard computer. Clearly, the absence of technology is not the problem with the failure to integrate law school’s resources. The problem is institutional.

Done right, distance learning can readily improve the richness of law school learning while holding the number of teachers at a constant, in a best case scenario, lead to a decline in the number required. The results simply depend on the number of law schools to which a subject is beamed. The logical place to begin is with the truth that the average law professor teaches four courses per year. His or her four courses can proliferate very productively:

To illustrate: There are three law schools in Small State. Each has its own set of courses, which largely overlap. School A has a full-time professor of intellectual property, School B pays an adjunct $5,000 per year to teach the course and School C has no course at all, but is considering hiring a full time professor to teach some intellectual property courses. The adjunct in well meaning, but is a busy practitioner and students have expressed dissatisfaction at her lack of preparation. Realizing that intellectual property is in short supply, the schools agree that School A will beam its patent laws course to Schools A and B. One course offering has now become three. School A incurs no further costs because the infrastructure for distance learning is in place and there is no line charge for in-State calls. School B saves $5,000 and School C can stop worrying about hiring a new professor. The State has saved a small fortune while enriching its educational programs.

In this example, the State added two courses for free. If a teacher of a different subject at School B could then contribute a unique course, there would then be four new offerings—six if School C likewise contributed. These six courses equates to the elimination of a professor and a half for the indefinite future, which would ultimately millions of dollars.

Students in turn benefit because they can claim a stronger educational back. With any luck they will pay less in tuition and other costs, thereby reducing their personal investment risk associated with attending law school. Even if they do not get the job they wanted, the failure would cost less than it would otherwise have.
ii. **Quality of distance learning**

Educators have reason to be suspicious of claims about distance learning. It is easy enough to determine if the student is physically present by means of a proctor or by having the professor-at-a-distance take a roll call; in distance learning scenarios, how can one be sure that understanding and retention are really occurring? What about the lack of eye contact to keep the student alert?

Perhaps surprisingly, studies of distance learning show it to be an effective method of educating students. According to law professors Purdom and Farmer’s distillation, “[w]hile many education leaders still aren’t sure whether online learning stacks up against face-to-face classroom instruction, early and continued evidence suggests that students using technology in distance education have at least similar learning outcomes to students in traditional classrooms (Purdom & Farmer, 2011; Tucker, 2001; Sonner, 1999). In some studies, distance learning students out-learn and outperform students educated in the traditional classroom (Souder, et al., 1993; Purdom & Farmer, 2011). In a meta-analysis and review on distance learning studies, the U.S. Department of Education concluded that, on average, students in online learning conditions performed moderately better than those receiving face-to-face instruction (Means, Toyama, Murphy, Bakia, & Kones, 2009; Purdom & Farmer, 2011). The majority of studies reviewed involved college and graduate school students, and those students particular appeared to benefit from online and distance education models. (Purdom & Farmer, 2011; Means, et al., 2009, p. 14).

iii. **Cutting Edge Examples of Distance Learning**

In spite of a technological revolution swirling around law schools and rapidly-increasing numbers of cyber-school programs worldwide, few law schools have tapped into the resource. There are however many examples outside the law school sphere (Harvard Law School, n.d.).

- Various business school offer online degrees, including Kenan-Flagler Business School's program at the University of North Carolina.
- A medical consortium has been formed for the time would be spent in a clinical setting, such as a hospital or outpatient clinic. The participants are prestigious.
- Stanford University offers certificate programs over the internet.
- Harvard offers open enrollment courses on the internet through its “Harvard University Extension School.” Such courses can be profitable and easy to prepare, and once they are “canned,” they could be sold repetitively.
- Maine evidently has the most comprehensive library of distance education materials. It is a poor state with a widely dispersed population, but Maine considers its distance learning experiments to be a great success. It offers a wide array of undergraduate and graduate degrees and certificates at off-campus sites via the “University College”, which is an extension of the University of Maine, utilizing the web, interactive television and video conferencing.
- IVIMEDS, an international consortium of medical schools.
The ABA has inflated law schools by letting NALP set the rules for misinforming prospective students about their job prospects, and has steadily approvals of new law schools, with resultant damages to students, but it has kept the cost of legal education up by constricting the availability of distance learning. Specifically, in 2002, the ABA amended its law school accreditation standards to allow students to take up to twelve hours of distance learning courses over the internet or other means of electronic delivery, including closed-circuit television (Wang, 2008). To qualify, American Bar Association Standard 306 requires that the distance education course have both “ample interaction with the instructor and other students both inside and outside the normal structure of the course throughout its duration” and “ample monitoring of student effort and accomplishment as the course progresses.”

So, while the ABA now allows law schools to at least offer distance education courses under Standard 306, students can only take a total of 12 credit hours toward their J.D. degree and no more than four credit hours in any single term. Additionally, no student can take distance education courses during their first year of law school. Finally, Interpretation 306-3 states that a course consisting of two-thirds or more of regular classroom instruction will not be treated as a “distance education” course. This is important because as a result, the ABA Standards set not limit on the number of law school courses that have a distance education component of one third or less.

Despite the ABA’s refusal to accredit schools that allow more than 12 total credit hours of distance education courses, schools have begun offering more and more courses of this nature. Many law schools have experimented with partially or completely eliminating the live classroom component of a course (Wang, 2008, p. 361; Goldman, 2001).

New York Law School, for example, has used distance education to teach mental disability law courses since 2000. The program began with a single course and has expanded to five courses. After teaching well over twenty-five sections of those online mental disability law courses, Professor Perlin (2007) of New York Law School declared that “[s]tudents are consistently better prepared, more intellectually engaged, employ more critical thinking, and participate at a greater rate in online courses than in traditional classes (p. 995).” Perlin went as far to say that he believes “[t]he single most important pedagogic development since [he] entered law school (nearly 40 years ago) has been the creation of online distance learning programs as part of the law school curriculum (p. 992).”

The teaching method employed at New York Law School combines several different techniques and technologies. A typical distance education course at NYLS consists of:

- 14 hours of DVDs;
- a casebook and book of readings, as well as two supplemental books, one a “table setter,” and one a mid-term “palate cleanser”;
- weekly reading assignments with ‘focus questions’;
• a midterm and final take-home exam;
• on-going, threaded, on-line message boards;
• a weekly, moderated on-line chat room; and
• two live day-long seminars, one about a month after the course begins, and one at
the course’s conclusion (p. 996).

This broad array of techniques helps appeal to all possible learning styles so that each
individual student experiences a class that is almost tailored for them. Professor Paula
Berg (2003) also offers several recommendations for distance learning courses,
particularly with regard to interdisciplinary law school courses.

Additionally, proprietary law schools such as Concord Law School, offer classes
entirely online. Concord is not accredited by the ABA, but the State Bar of California
permits Concord graduates to seek admission by taking the bar examination.

The future is uncertain for online courses in the legal arena, but it is clear that
distance education is something that should be seriously considered by law schools, the
sooner the better in light of the opportunity to take advantage of attrition and the
collapsing job market. It will be difficult for schools to offer a large distance education
curriculum as long as the ABA keeps the limit at 12 total credit hours to keep
accreditation. Being accredited by the ABA is not something that a law school can really
afford to lose if it wishes to escape being confined to one state. The NYLS model has
been successful and seems a good template for a teacher interested in implementing a
distance education course. In addition, there seems to be an increasing interest in
distance learning courses and willingness on the part of instructors to, at the very least,
experiment with this type of instruction.

It should be noted that some private internet-based educational institutions have
failed under sorry circumstances. For instance, Phoenix Online University was subject to
severe punishment for submitting false claims, which resulted in a $78M settlement
(United States v. University of Phoenix, 2006). This risk of course must be balanced
with the successes discussed previously.

C. Take Advantage of Law Professor Attrition

Obviously it is more attractive for the employer to reduce employees by means of
attrition than by discharging them. In addition, universities are a special case because
firing professors undermines the credibility of tenure, the rock of security for older
professors and the justification for the comparatively low salaries most professor consider
they earn compared to their counterparts. In addition, terminating law professors would
alarm existing law professors and professors in general across any campus and so should
be applied sparingly.

On the other hand, when corporate America “downsizes” it often does so by
offering substantial financial packages to executives. Unlike business corporations which
can finance such payments out of borrowings and future cash flows, law schools
generally operative within tighter financial constraints. Still, this third path may be possible in some cases; it will, however, require the cooperation of financial administrators. The more savings the school can show from using more technology the stronger the case for the severance package. Evidently a common way to apply such severance offers is to offer a package to several people on a first-come-first-serve basis. This is not only more humane that simply terminating employees, but also eliminates those individuals who feel the least attachment to the institution.

So is there room for cutting law professors via attrition? The answer is an overwhelming ‘yes.’ One can deduce this from looking at the AALS Statistical Report on Law Faculty, which is available on the internet (Association of American Law Schools, n.d.). What this report shows is a large numerical bulge of law professors moving into retirement age. The following figures are from 2008-2009:

<table>
<thead>
<tr>
<th>Age Grouping</th>
<th>Number of Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>26-30</td>
<td>14</td>
</tr>
<tr>
<td>31-35</td>
<td>315</td>
</tr>
<tr>
<td>36-40</td>
<td>797</td>
</tr>
<tr>
<td>41-45</td>
<td>908</td>
</tr>
<tr>
<td>46-50</td>
<td>1,181</td>
</tr>
<tr>
<td>51-55</td>
<td>1,147</td>
</tr>
<tr>
<td><strong>56-60</strong></td>
<td><strong>1,490</strong></td>
</tr>
<tr>
<td><strong>61-65</strong></td>
<td><strong>1,480</strong></td>
</tr>
<tr>
<td>66-70</td>
<td>894</td>
</tr>
<tr>
<td>71-75</td>
<td>470</td>
</tr>
<tr>
<td>76-80</td>
<td>330</td>
</tr>
<tr>
<td>81-85</td>
<td>198</td>
</tr>
<tr>
<td>86+</td>
<td>155</td>
</tr>
</tbody>
</table>

Approximately two years have elapsed since the study, and the cadres have shifted to the right, but it remains obvious that there is an especially large cadre of professors who are soon to retire.

D. Using Canned Lectures as a Method of Replacing Professors

One of the little-discussed truths about law school, as well as other academic areas, is that some professors give the same old lectures year after weary year off their yellowed notes. In extreme cases, the students have outlines that were prepared by their colleagues in prior years that show the location and content of a joke the professor is just about to tell. These professors also tend to have a poor history of publication and may have been demoralized by some past event. They are almost impossible to remove because they met the standards for tenure years ago and terminating their employment would yield more problems that outweigh the benefits of eliminating their salary.
Nevertheless, the truth is that these lectures can be replaced by disks containing either the professor’s lectures, or even with the lectures by a more effective professor. The author asked a student of his to informally poll students at a different law school and got result that may seem surprising: almost 40 percent of the professors at the other law school (intentionally not known to this author) could be replaced with disks. None of these negative results were as to first-year classes, where the professors historically apply the Socratic to train rookie law students to “think like lawyers.”

Clearly students can learn effectively from video casts of canned lectures. The largest bar review crash-course provider, BAR-BRI, delivers most of its non-written materials this way, and their customers achieve excellent results on bar exams. The real difficulty is not showing that canned lectures would both save money and improve educational results; it is setting limits once one accepts the concept. For example, should students still be required to be present in a single physical classroom to watch the lecture? It made sense to insist on that in the past because there was no alternative; one either got the lecture by attending it or cut the class. Now, one could easily receive the lecture on the internet, but how could the ABA, which insists on substantial mandatory attendance, be satisfied that student at home really watched the lecture? Once could build in security measures, such as a quiz after each lecture as evidence of the student’s “attendance”. What about the student who hires another student to watch the lecture while she goes out for a game of tennis? Should canned lectures of mechanical subjects that require more memory than thought be allowed, while those requiring abstract thinking are left to physical classes? Could one ever get a consensus on which courses did and did not qualify? The answers are not obvious. At the same time, the current situation has preposterous features that cost law students and other stakeholders a lot of money for no good reason, particularly when the ABA has authorized at least some form of distance learning programs.

AN ALTERNATIVE VIEW

Whether there is an overproduction of law graduates or too many factories turning them out is debatable because law school provides an intellectual experience that lasts a lifetime and is difficult to value. That graduates are taking on obscene amounts of debt is certain. The problem is price.

On the first point: Law is a learned profession. There is nothing bad about increasing the percentage of learned professionals in the labor force. At least arguably it would be better to increase the percentage of engineers or accountants, but Americans have to work smarter to maintain a standard of living, a competitive advantage. As the percentages of farmers went down, the percentages of factory workers went up. As the
percentages of factory workers and secretaries go down, the percentages of professionals, including lawyers, should go up.

What went before at least to some extent overstates the overproduction issue; clearly since 2008 there has been downturn of business cycle. When the author was in law school, my classmates widely believed that only about 60% of law graduates practiced law five years out. Whether this number is right or wrong, there is no doubt that law has always been preparation for business and government and a finishing school for the educated person.

Talking with practitioners one regularly hears tales of how a number of the practitioner’s clients who have been successful in business, have law degrees At least some of my classmates entered law school with no intention of practicing law, but instead viewed it as another subject worth knowing, like philosophy or history, but also a tool for getting things done.

As to student debt, when I got out of law school (an expensive one), we had little or no debt. Tuition then was $3000 per year, or $15,000, inflation-adjusted. Last year, tuition at my old law school was $46,000. The culprit is student loans, made or backed by the federal government. They were small potatoes in 1971. The availability of credit drives up price, hence, the housing bubble. When a third party funds purchases, prices go up. Likewise, one can fairly argue that the same phenomenon of price inflation has occurred with medicine; enter third-party funded health insurance, Medicare, and Medicaid, and health care and the cost of medicine has become 16% of the GDP, amounting to over $2 trillion. Just as the defense budget gave us $6,000 coffee pots, federal funding of education gave us $150 thousand law degrees.

The solution is to twist the tap of easy credit counter-clockwise. Cut back the loans, and one drives down the price. Law professors will go back to teaching as a calling. Deans, administrators, and coordinators can find more productive work.

CONCLUSION

What cannot be denied is that the legal educational system is not functioning properly in its current form. Law schools are popping up all over the country, increasing the number of graduates and the size of the student loan bubble. What none of the institutions can increase, however, is the current industry demand for new hires. Despite the information admissions counselors champion to trap prospective students, whether obtaining a J.D. is truly a wise investment is questionable in today’s market.

Given the current surplus of graduates, law schools should take prompt action to reorganize the educational system. This reorganization can take the form of: evaluating the level of attrition and eliminating the surplus of faculty members;
merging smaller law schools; and using distance learning opportunities and new technology to provide richer curriculum with significantly less overhead.

In addition, the system of cheap credit has to be analyzed carefully. Congressional hearings would be a good start. Aggregate student debt is now in the realm of one trillion dollars. Chairman Bernanke warned Congress about this looming problem on February 29 of this year, and with good reason. His son’s educational loans amount to over $400,000. His son is lucky, however, because he is a medical student. The legal industry is not a safe one, and never was, but this time its students and younger practitioners are menaced by dangerous levels of debt.

References

Trouble with the law: Graduates of American law schools are finding that their chosen career is less lucrative than they had hoped. (2010, November 11). The Economist. Retrieved from http://www.economist.com/node/17461573


In re Application of Griffin, 943 N.E.2d 1008 (Ohio 2011).


Lowrey, A. (2010, October 27) A case of supply v. demand: Law schools are manufacturing more lawyers than America needs, and law students aren’t happy about it.


United States v. University of Phoenix, 461 F.3d 1166 (9th Cir. 2011)
