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Brian Z. Tamanaha. *Failing Law Schools*. Chicago: University of Chicago Press, 2012. xvi + 235 pp. \$25.00 (cloth), ISBN 978-0-226-92361-1.

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## The Self-Fulfilling Prophecy of Law School Crisis

U.S. law schools are under pressure. A drumbeat of criticism against the national enterprise of legal education labels it a “scam”; a confidence game; and, for a few schools, actionable fraud.[1] That criticism may have struck a chord among potential students: as of 2013, applications to law schools in the United States had fallen by 32 percent from 2010, leading some critics to rejoice.[2] *Failing Law Schools* is a centerpiece of this movement, hailed for its “disturbing, scandalous truth” about legal education (back cover).[3] In it, Brian Z. Tamanaha, a law professor at Washington University at St. Louis, offers criticism and calls for change, based on observations intermixed with claims from economics and the history of legal education.

Tamanaha seeks to expose “the disconnect between the cost of legal education and the economic return it brings” and to find “ways to fix it” (p. xi). Broadly, he argues that law school is overly expensive because of needless regulation created by faculty to serve their own ends, inflated faculty salaries and low teaching loads justified by a “scholarly model” of law school, and detrimental interschool competition provoked by the annual rankings of schools by *U.S. News and World Report*. Thus law school, he contends, costs more than some students’ later salaries can afford. He argues that schools should lower the cost of legal education by slashing the national curricular standards, ending the three-year requirement, and replacing full-time scholarly faculty with adjunct practitioners or non-scholarly teachers. Tamanaha’s arguments are important, if for no other reason than some

of these claims have been echoed by others, including a task force of the American Bar Association (ABA).[4]

Yet the roots Tamanaha asserts in history and economics are incomplete, and his conclusions drawn from them are misleading. The economic arguments have been considered elsewhere.[5] This review will focus on the book’s use of history, though it will also consider some consequences inherent in the recommendations said to flow from that history.

To support his argument that law school is too expensive and so costs and content should be dramatically reduced, Tamanaha makes several distinct claims. First, he notes that the ABA’s accreditation standards favor the interests of law professors rather than students. Presented over the first three chapters, the argument opens with a discussion of the 1995 antitrust suit by the U.S. Department of Justice (DOJ) against the ABA (*United States v. American Bar Association* [1996]). The DOJ claimed that the ABA used its standards to increase faculty pay. The suit settled, the ABA admitting no wrongdoing but agreeing to changes that went far beyond compensation issues, including the allowances of for-profit law schools and of students to transfer from unaccredited law schools to accredited law schools.[6] Though the ABA repealed standards that affected faculty pay, Tamanaha concludes that “the enduring legacy of these actions was to entrench a culture within legal academia that presumes a legitimate law school must be academically oriented” (p. 18).[7]

The second major claim is that a unitary professional

bar—in which all law students are taught over three years how to think like a lawyer and exposed to a broad array of professional knowledge and skills—is unnecessary because many lawyers need only to be taught a narrow set of legal rules. Rightly noting that some law professors have recurrently argued that the third year is unnecessary, Tamanaha contends that its requirement is a matter of history. “The third year exists for reasons almost wholly detached from substance: at the turn of the twentieth century a determined effort by elite law schools used the ABA and the Association of American Law Schools [AALS] to entrench the three-year standard” (p. 21). Deans of established schools, he maintains, used the new AALS to require the third year, to limit access to the bar by recent immigrants and other undesirables who resorted to inexpensive night schools, forcing a more expensive education in the science of law, over the objection of at least one delegate who sought to keep shorter courses. Contrasting the teaching of law as a science with the practical training of law, the book claims that practical courses were “cheaper, shorter, and more narrowly focused,” which “delivered students what they needed and no more” (p. 24).

Tamanaha claims that there is no reason for the bar to be a unitary profession. He says defenders of the unitary national bar must prove that lawyers in “routine” jobs or representing the poor should be given the same costly education as other lawyers. Still, he does not seek to abolish elite education. For instance, he accepts that the third year “can be useful to many.” Yet he says that such an experience—now standard in law school—should not be required of those who will be ill-paid lawyers for the poor or those who engage in “routine” legal work (p. 27).[8]

A core thesis of *Failing Law Schools* is that “legal egalitarians” cannot honestly argue that students from the poor or the middle class deserve such education. The real enemy of the poor and middle class is not the risk of unlearned lawyers but the “expensive academic model” and the debt it creates. It seems that this thesis presumes that poor and middle-class clients do not need sophisticated legal advice or assistance.

Three chapters then turn to the costs of the academic model. First, law professors over time have achieved higher pay and lower teaching loads. Teaching averages in many schools are now fewer than twelve semester hours per year, while some professors are paid more than some lawyers and judges. Even so, after pages of depiction, highlighting wealthy schools and highly paid

faculty, Tamanaha does not argue that tuition-paid faculty compensation may not be merited in the competitive market, only that it would be unmerited if it were the product of the manipulation of accreditation standards. Nonetheless, he states that the academic model produces coursework and scholarship fit for the university but not for the bar, which adds to students’ costs, because tuition funds faculty scholarship. Turning then to a seeming contradiction to this model, that law schools have added significant numbers of clinics and lawyering-skills classes, Tamanaha argues that these classes are too expensive to maintain in law schools dedicated to producing scholarship. Thus when considering growth of law faculties and slower growth of student enrollment, Tamanaha asserts that lower faculty-student ratios do not actually benefit students, his evidence being that student contact is contrary to the academic model.[9]

Despite his charge that the scholarly model increases the cost of law schools, Tamanaha is, at times, candid in admitting that scholarship is not the primary cause of rising tuition. Rather, he notes that market demand, the desire of students to acquire the law degree, is the primary functional cause for rising tuition (pp. 130-131).

Two chapters chronicle the influence on law school administrators of the *U.S. News and World Report*. He correctly emphasizes the widespread and sometimes harmful gaming behaviors of law schools seeking to increase their ranking, as well as the specific cases of fraudulent data use by Brooklyn and Illinois. He also examines the willingness of schools to change admissions criteria and raise tuition for some students to give discounts to others to improve rankings, as well as the faster pace of students who transfer schools to graduate from a school of higher rank.

Chapters 9, 10, and 11 argue that law school tuition has risen too high to be justified for students by their access to legal employment. The heart of this argument is that the Bureau of Labor Statistics projects an annual average of twenty-five thousand employment positions per year, though there are forty-five thousand new graduates (p. 139).[10] One-third of all graduates do not take employment as attorneys. Given the hierarchical nature of the competition for many legal jobs, the disparity makes it difficult for graduates of lower-ranked law schools to find work (and very difficult for graduates lower in their graduating classes). Further, pay for lawyers is bimodally distributed, so that a small group is highly compensated, and a large group is not well compensated. Tamanaha notes that nearly half of all law graduates find their start-

ing annual pay to be less than sixty-five thousand dollars, more likely for graduates of less competitive schools and much more likely for students who did not perform well in those schools.[11]

Chapters 12 and 13 present a coda to all of these arguments. Tamanaha provides helpful guides to warn students and schools of circumstances that should make students wary of the return on their investment and schools of the dangers of increasing student application decline.

The culmination of the book is chapter 14's wide-ranging plan for reform. The first proposal is to differentiate legal education into two tracks. Tamanaha claims that law schools were "wrongheaded from the outset": wrong to teach students the law, because students need to learn law by observation of practicing lawyers (p. 172). Thus, accreditation standards should be changed to allow legal education with the flexibility and variability of "vocational colleges and community colleges" (p. 174). This wholesale change would make optional the third year, the full-time faculty, the library, and most of the curriculum content. Schools could offer programs that amount to nothing more than apprenticeships or courses on lawyering skills, taught by adjuncts. States would be presumed to continue to license schools that are accredited under these standards. In addition, the book recommends that states cease to require ABA accreditation and that the government cap federal loans to be offered to students according to the school in which they enroll, so that no school's entering year could borrow over a particular limit, thus limiting tuition and enrollment.

For this reviewer, *Failing Law Schools* is frustrating to read, but I do not think my frustration arises, as Tamanaha forecasts, because it challenges me, my salary, or my work ethic (p. 186). Indeed I have the luxury of working at one of the state law schools like those that Tamanaha sees as potential exceptions from his indictments.[12]

Rather, the book is frustrating because of its rhetoric and use of sources. Each chapter seizes one charismatic point (or a few points), presents the point in detail but without essential context, and then draws inferences that the point cannot support. In the first chapter, for example, Tamanaha describes the accreditation antitrust suit at length and to dramatic effect, but he presents it without mentioning other suits that the DOJ was then bringing against, for instance, the Ivy League, Massachusetts Institute of Technology (MIT), and other academic institutions, and private suits against the National Collegiate Athletic Association (NCAA) or medi-

cal schools.[13] This emphasis on salaries in accreditation then enmeshes arguments from 1995 that move far beyond the problem of salaries to suggest that this suit "entrenched" the academic study of law, a position quite unsubstantiated by either the suit or the one later illustration. Indeed, chapter 2 makes clear that Tamanaha understands that the academic study of law was entrenched far earlier, although it is not clear that he sees that the actual history of accreditation standards is one of increasingly lighter, if more detailed, prescription.[14]

Further, in a discussion of law school accreditation, the preoccupation with accreditation by the ABA is understandable, but this cannot neglect the additional requirements on most law schools of complying with university regulations and policies, regional university accrediting agencies, state accreditation, and state bar oversight. These increasing demands for compliance have added to the administrative burden and costs of law schools in recent decades, but they also dilute the role of ABA standards as the source of law school "regulations." Such acontextualism is particularly difficult to accept in discussing the history of the legal curriculum.

Chapter 2's discussion of the three-year curriculum is poor history. At best, *Failing Law Schools* cherry-picks its sources and omits important predicates and contexts for the story presented. The book suggests that self-serving law professors were bent on a power grab through the ABA and AALS, ignoring the idea that the bar would be naturally inclined to study legal education, and that lawyers were often as involved as professors in developing the ABA's institutional oversight. Tamanaha appears negligent in saying that the Section of Legal Education was "created" in 1893 at "the urging of legal educators in the ABA who wanted a committee devoted to law schools" (p. 22). It was already a committee of long standing, which was renamed a section (as were other committees). The committee had been one of the very oldest in the ABA, its officers reporting to the whole association in the second annual ABA meeting. Indeed in one of the earliest reports of the Committee on Legal Education, in 1879, a committee of two professors and a judge called for three years of legal study.[15]

Even when the book focuses on a single datum, it distorts the significance of the evidence. Tamanaha quotes at length a challenge to the three-year rule, raised in the first AALS meeting (p. 23).[16] The quotation skirts the speaker's main objection, which was the short time schools would have to comply, and it fails to explain why the challenge was "unavailing." In fact, the objection was

unavailing because the discussion in 1900 was just a rehash of an argument that had been held in ABA meetings for the prior five years. The three-year curriculum had indeed been promoted by deans of leading schools, but from the start, it was much more widely supported. By the time the issue was before the AALS in 1900, delegates to the ABA believed it had already adopted the rule.[17]

Yet the context lost here is more than just the ABA's history or the actual timeline in adopting the three-year rule.[18] What is missing is the depth of debate on the three-year requirement, held in meetings over two decades, with lawyers, judges, and professors, who presented and debated about comparisons to the English experience, law office study, shorter courses, and the benefits of reform.

True, a closer study of that history would unearth more objections, more biases, and more than a bit of bigotry, but that study also makes clear that the proponents of the three-year model were concerned, first and foremost, with the development of the skills, knowledge, and ethics of the student. The view that then prevailed was that law was a science and to teach properly the whole of that science required the development of a technique and the explanation of that technique, rather than just the teaching of rules.[19] That this view of both the nature of the law and the time needed for its study was encouraged by university-affiliated schools was beside the point as well as incomplete, as adopting the new rule would also have been a victory for such schools as the Dickinson Law School and National Normal University (in Wilmington, Ohio), both of which had moved to three-year programs by 1895.[20]

Tamanaha offers the idea that university-affiliated schools had trouble attracting students, presumably during the 1890s. This decade was marked by considerable change in curriculum and philosophy; university legal education overall grew considerably and persistently, a detail lost in *Failing Law Schools's* admission that legal education grew over 900 percent between 1870 and 1900. During this period, in which a reader is led to think that the growth of legal education was by "night law schools taught entirely by legal practitioners" (p. 21), law schools were founded at Georgetown, Richmond, Alabama, Boston University, Missouri, Vanderbilt, California-Hastings, West Virginia, Valparaiso, Willamette, Texas, Oregon, Buffalo, Cornell, Minnesota, Nebraska, Washington, Tennessee, Ohio State, Colorado, Denver, (Case) Western Reserve, Marquette, Stanford, Kansas, California-Berkeley, Wake For-

est, Indiana-Bloomington, Missouri-Kansas City, Syracuse, Pittsburgh, University of Southern California, American, Catholic, DePaul, and Illinois.[21] Though independent and night schools might have grown faster, it was hardly a period in which university law schools were in retreat.

Buried in Tamanaha's argument is a slander against a past generation of the leaders of the bar that cannot go unchallenged. This is his idea that the third year was created by "elite professors" for reasons wholly detached from substance (p. 21).

The move toward a three-year program, indeed the move to university education, was promoted and lauded by dozens of lawyers, judges, and professors over decades. They argued at length for the need for greater competence in the bar to promote law reform and legal compliance by the populace. They argued for benefits to clients and to the law itself. They argued for a learned profession because that is in the profession's interest.[22] I have found no argument, by a professor or lawyer of the time, that suggested that the reason to add another year was to benefit the faculty or law schools. Indeed, it is not clear to me that individual faculty members did believe, at the time, that they would be better off by having to offer more lectures or to expand the number of persons with whom they would have to share their privileges.

To suggest that these people—professors the like of William Draper Lewis or Harlan Fiske Stone, and lawyers such as Frederic R. Coudert and Elihu Root—were self-serving, creating a curriculum to benefit professors rather than the public or the bar, requires them to have been dishonest in their public pronouncements. That implication requires some actual evidence. It must be evidence related to their individual motives, not some spurious and anachronistic appeal to a *zeitgeist*.

Indeed, even the bigoted arguments from privilege that *Failing Law Schools* does adduce, rotten to the modern observer as they are, do not prove that the purpose of these genteel lawyers was to use cost or curriculum to drive out immigrants or the poor. Tamanaha quotes a speech of AALS President Harry S. Richards for his hostility to immigrants (made in 1915, some years after the period one might think is under discussion), yet Tamanaha omits language that is essential to understanding Richards's actual view of the problem. The quotation in the book is: "night law schools enrolled a 'very large proportion of foreign names. Emigrants and sons of emigrants ... covet the title [of attorney] as a badge of

distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes' (pp. 21-22).[23]

What Richards actually said, xenophobic as it was, was neither a call to close night schools nor a wholesale attack on immigrant lawyers, only a complaint against those whose sharpness, ascribed to alien culture, led them to violate American professional norms. Richards said: "Admission to the bar is sought, not because of any desire to practice, or with any sense of the responsibilities and duties of a lawyer, but because such admission is regarded as an asset, a sort of privateering commission, that will help the holder to get on. If you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. Emigrants and sons of emigrants, remembering the respectable standing of the advocate in their old home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble." [24]

Similar gaps plague the rest of the history. In discussing the re-adoption of a three-year law school requirement in 1921, Tamanaha quotes critics of the proposal,[25] yet fails to note the arguments for the proposal or that it was made (not by professors but) by Nobel laureate Elihu Root and seconded, at length, by Chief Justice William Howard Taft (pp. 25-56).[26] More troubling, he fails to mention the comments of George E. Price, the lawyer from West Virginia, who clearly considered the arguments of the critics quoted and rejected them. Though Price had not graduated from law school, he thought the times had changed from when he had read the law, and the new standards would be achievable by young would-be lawyers in West Virginia, as well as by immigrants in larger cities.[27]

Such difficulties with detail and context recur in later chapters, in places running a risk that specific schools would be placed in a false light by, for instance, encouraging the reader to think that what might be true in one case must be true in another. For example, chapter 5's assertion of the low numbers of hours taught by law professors is made without comparison to hours taught in other university graduate schools and business schools,

and the extensive discussion of law faculty salaries is not only oddly selective but also made with little reference to the salaries of graduate faculty in business, medicine, or other graduate fields. More, by narrating the high salaries and low workloads of a few schools, rather than collecting data on all schools, *Failing Law Schools* risks the impression for many readers that all law professors are as cosseted as the examples. Even the evidence that legal scholarship requires higher tuition, from noted scholar Edward L. Rubin, lacks its most essential context (p. 202nn81-82).[28] After citing the first five pages of Rubin's article to prove that scholarly teachers cost students more than non-scholarly teachers might, *Failing Law Schools* ignores the twenty-five pages in which Rubin argues that the student subsidy of scholarship is generally fair but could be made fairer. Rubin reaches a conclusion directly counter to that reached by Tamanaha, a point that might have been mentioned more clearly in *Failing Law Schools*. Rubin says, "to conclude from this that the scholarship is of no value, and should not be supported, is the sort of narrow-minded populism that characterizes societies in their declining years. It is important, it is worth supporting, and the research-oriented law school provides that support in a reasonably fair and socially responsible manner." [29]

So acontextualism may explain why, in considering law school economics in chapters 9 and 10, *Failing Law Schools* nearly ignores the significance of schools with lower tuition. There is no explanation of why schools with tuition well below the average, some less than one-third of the expensive schools discussed at length in *Failing Law Schools*, do not satisfy the need for some lower-priced educational models. As of 2013, over fifty law schools, including private and public schools as well as schools with highly competitive and more democratic entrance requirements, had tuitions below twenty-five thousand dollars per year, but the significance of these programs or of their effects on the market are not developed in the book.[30] Similarly, *Failing Law Schools* fails to assess law schools that already employ high numbers of adjunct faculty and non-scholarly models of faculty engagement, but that maintain a high tuition rate.[31] There are expensive law schools, but without considering accessible schools, it is hard to hear the arguments of chapter 14 based on the economics of legal education as fairly presented.

Such analytical gaps persist in the discussion of tuition. Chapter 10 commences with a useful list of ten reasons for tuition to have risen faster than inflation. Yet the book does not then consider the potential influ-

ence of each reason on tuition, or evaluate the extent to which one or another law school would have considered, for example, more clinics or better buildings as essential to their mission or service. Instead, the ten reasons as a lump are more or less accepted as having something in them and then dismissed, because “we must not misapprehend effect for cause—mistaking what law schools have spent their stream of tuition dollars on for the reason tuitions rose ... the relationship between expenditures and revenue run the other way” (p. 128). Yet to suggest that law school taxes paid to parent universities are an effect rather than a cause of tuition, or to say that smaller classes and clinics are a result of rising tuition rather than a hard-fought cost does not reflect the inner logic of the arguments themselves.[32] Indeed, in too many places, *Failing Law Schools* asserts a single cause for a complex phenomenon, and more likely causes are rejected either without consideration or with a bald assertion.[33]

Further, some of the data appears routinely skewed. One reason for such skew may be reliance on Law School Transparency, a website that considers lawyers who earn a position in a graduate class after law school to be underemployed. Indeed this website considers lawyers who have opened a solo practice to be unemployed.[34] Perhaps reliance on this and similar sources explains why *Failing Law Schools* erroneously lists the reviewer’s own school’s 2009 JD-required employment number as 48 percent, though the law school’s own number for that year, collected and confirmed by its placement office, was 64 percent (a 25 percent error).[35]

Perhaps nowhere else in the book do the analytic, rhetorical, and contextual arguments raise concerns as great as in the discussion of law school debt. The provision for income-based repayment or income-contingent repayment of student loan debts, which became effective in 2009, is one of the most significant reforms of student loans in the history of U.S. higher education finance. These programs allow a graduate both to limit monthly debt service to a ratio of disposable income and to be forgiven the balance after twenty or twenty-five years of payments.[36] Yet this rather dramatic reformation of student loan programs that significantly reduced student burdens is presented here only for its “Negative Implications of Income-Based Repayment” (p. 119). Those negative implications include the facts that a longer repayment period for a debt increases its interest but, moreover, that a debt management program created mainly for undergraduates and used by professionals would signal to policymakers that the collective debt level is too

high relative to earning opportunities, and that lawyers would have loans to repay for much of their careers (pp. 120-121). The personal implications, including the risk that indebted lawyers will not marry, are considered in detail (p. 122). That these difficulties of national higher education policy affect doctors, veterinarians, public administrators, architects, and others with college degrees is a detail lost in the telling, as is how these difficulties are peculiar to legal education. Though the book does note in passing that student loan default by lawyers was once high but is now low, the potentially optimistic implications of this fact are hardly explored.[37]

Considering the causes ascribed to the fall in law school applications from 2008 to 2012, *Failing Law Schools* again omits needed context. The book rightly notes the ratio of LSATs to law school applications has changed, and the number of applications has fallen, yet the complicated bases for student selections to attend law school are not depicted by these data alone. The book does not meaningfully compare law school applications with, for instance, other graduate admissions, such as comparing LSAT test rates with GMAT test rates. Indeed, the idea that the “the word is getting out” is the primary explanation offered for declining admissions and with a theory that students with lower test scores are opting not to apply (p. 160).

A final word concerning Tamanaha’s rhetoric. This prose has an occasional, distracting breathlessness to it. He tends not just to state his points but to “reveal” them while others “splay” once hidden data (pp. xi-xii, 72). He expects to be provocative, “affronting” his colleagues because he questions matters of workload and compensation. And he does reveal points and affront colleagues in a variety of ways, as in gossipy asides, such as his note that the dean of Boston University was paid a half million dollars in 1996, or by claiming that law schools were swept up in “scholarship fever” in the 1990s, though making no effort to demonstrate that there was more or less scholarship produced (or expected) in the 1990s than before (pp. 13, 60).[38] Despite the accompanying flourishes of data, this rhetorical style is consonant less with traditional scholarship than with the provocative and performative styles of critical studies.[39] This reviewer cannot claim to be the first to label Tamanaha’s work as “critical law school studies,” one of several strains in recent criticism of higher education.[40]

*Failing Law Schools* raises many valid concerns, and Tamanaha has performed a service by aggregating an array of areas for reform into a single, extended criticism.

For a start, it is correct that, in the last decade, law schools did grow faster than the job market, taking into account the 2008 crash.[41] Problems for graduates arising from that crash have been particularly significant in some major urban areas, and for some law schools.

Other problems in legal education are also important and are clearly stated here. It would be better if most law schools were less expensive. It would be good if lawyers had no debts. Indeed, it would be much better if all higher education were less expensive. Tuition for many law schools, as with many universities, can probably be (and should have been) better controlled. Schools should better explain and better focus their curricula to better prepare students for the practice of law, though that focus must include not just skills but also the history, theory, and values essential to understanding and practicing the law. Competition for rankings, and student attention they focus, has made some law schools do bad things, notwithstanding whatever benefits rankings provide through diminished information costs in the market.

Questions of the curriculum and the role of law schools could be better explained to students and better managed in general. It would be better if all law students more clearly understood how legal scholarship could help them be good lawyers, and it would be better if scholars did a better job of explaining scholarship's importance to the law. The practical needs of students who will later practice solo or in small firms could be better met, just as the needs of students who will enter government or corporate practice could be better met in a curriculum still strongly influenced by the long-forgotten preferences of large law firms.

The question, then, is whether a reader should conclude that therefore law schools have somehow failed. Or at least, the question is whether the ABA's accreditation has failed. Put another way, are the reforms sought in this book justified so that law schools should embrace the institution of a two-track model or the conversion of law schools to be like community colleges? On the evidence presented in *Failing Law Schools*, the answer is "no."

The reasons for this answer are found not only in the arguments that the book raises and rejects but also in the larger arguments that the book does not consider. For example, to determine that an enterprise fails requires a measure of how it should succeed. In the case of legal education, that would be a model of what law schools exist to do, so that their performance can be compared to that model. Law schools exist for many reasons, but an im-

portant one is to examine all of the acts of the state and of private parties and to determine what it means to talk about and to practice law. This is not a foregone conclusion. How law is described and its practice is depicted—and what best practices are to be taught—are not obvious to most observers, even to practitioners (whose views in any event may be colored by client interest). Thus law schools are tasked with determining what is to be taught and then teaching it in a manner that protects and promotes the content and ideals of the law, promotes the values of the profession, protects the future clientele of lawyers, and promotes the interests of society in a just system of laws that is fairly and effectively developed and administered. Though it is one function of legal education, there is little evidence for the notion that law schools exist only to ease the path of students to a law license, at the expense of other values, including the protection of their future clients.[42]

The real objection of *Failing Law Schools* is against the market. Once the variables of curriculum are determined, the price of legal education is set by the market, and there is a wide range of prices available. The objection that the price is too high and so the costs must be contained by rejecting scholarship and study do not respond to the fact that there is a variety of price, mission, and access, but students are choosing to apply to expensive schools for other reasons. Thus, the remedy that *Failing Law Schools* proposes, of gutting the curriculum, does not respond to the objection and does not cure the problems of which it complains. Cheapening the curriculum of law schools does not assure lower tuition rates, which are set in the marketplace. Any doubts on this score are already measurable by whether significantly less expensive schools exist within the scope of the current curriculum and accreditation standards. They do.

Cheapening the teaching for poor students, or for students who will later serve the poor, harms the poor. There is no basis for the implication that the poor do not have complex legal problems. There is no proof that a particular impoverished student might not perform well in law school and in practice. Neither a student nor an admissions counselor could know in advance which students will have routine work or which will need to know only rules and need to have no skills in legal analysis or technique. Indeed, the graduate of a wealthy school, who works as an associate in a highly paid law firm, may find the work assigned to be much more routine than a solo practitioner or legal-aid attorney.

The proposal for two-track legal education would

provide less education to less academically able students. This does not serve the student, the student's later clients, or the law. It is certainly bound to raise issues for performance by such students on bar exams, and it will mark such students as less competent throughout their careers.

The third year of law school provides both depth (through more sophisticated classes that build on antecedents, like securities law after corporations) and breadth (through a first exposure to new fields, like family law, labor law, or environmental law). The time available in six semesters as opposed to four make possible, in many schools, access to fundamental courses like legal theory and legal history as well as courses in often-overlooked specialized fields that are recurrently important to nonspecialist practitioners, like employment law, environmental law, family law, international law, and intellectual property. In most schools, the third year is essential for student-led moot courts and interschool competitions, as it is for student-edited law reviews and journals. It also provides opportunities for precisely the forms of clinical and lawyering skills courses at the heart of earlier law school reform movements. That law students are bored in the third year may have less to do with its content than it has to do with the end of structural attrition, by which schools used the fear of failure to maintain students' work ethic.[43]

The practice of law in the United States is based in part on a common core of technique, skills, knowledge, ethics, and professionalism, a core that is both essential to the function of the legal system and to which every client should have a right of recourse. There is a functional minimum to the technique, understanding, and body of knowledge needed to practice law well. Determining the content of this body of knowledge is essential to its teaching. Therefore, at least some scholarship is essential to teaching: without scholarship no one would know what must be learned, or taught. A school may choose to consume the scholarship of other schools, but this does not suggest that the scholarship model in some degree is not essential to students.[44]

Law schools have shrunk in real terms, not expanded, for thirty years. Compared to population, graduate education, and college graduation rates, law schools have actually shrunk. What growth there has been is entirely accounted for by the increased access law schools have afforded to women and previously underrepresented communities.[45]

Though job growth slowed after 2008, and there have been cyclic difficulties of lawyer recruitment, the com-

petition for jobs has been keen for many years. Nationwide, law hiring has consistently grown and continues to grow.[46] Though hiring in some markets, notably New York City, has remained difficult since the 2009 crash, the criticisms of the national job market do not apply uniformly. More, the idea that law schools should all reduce enrollment when employment opportunities in a given market decline raises significant issues of antitrust law.

Too few U.S. lawyers choose to work for the poor, and the cost of law school is not the only reason why lawyers are not performing this role.[47] The solution to this serious problem in access to justice lies with the bar, courts, and governments, and with law schools, but not with law schools alone.

Law schools prepare students for a profession; though schools now offer placement help, the schools themselves are not created as placement services. In other words, law schools ought to prepare students to practice law or to employ it in a professional context, whether solo, in litigation or counseling, and for a variety of clients. In doing so, law schools could do a better job of teaching students how to manage the economics of law practice. Even so, "placement" is no more the obligation of a law school than it is of music school; the student bears the responsibility of determining how and why to study and what might happen if the study bears no fruit. Granted, law schools must be transparent in their placement histories and other data by which a potential student would make an informed decision as a consumer.[48]

Not every law school graduate should become a lawyer. Some do not want to do so. Yet, setting aside the students who do not desire to do so, some students graduate from law school unfit or unready for work in the profession: their academic performance is sufficient to pass the course, but their commitment to practice, their work ethic, their character, their senses of professionalism and ethics, their attention to detail, their willingness to accept responsibility, or their social skills are insufficient for work as an attorney and fiduciary. For these graduates, the law degree represents a credential that is proven to assist them in seeking other employment. There is only so much that education can do to enhance such qualities in the individual, and because these qualities may evolve for a given individual over time, it is not clear before admission to law school that many students who are academically qualified but who might lack some of these qualities should be denied access to law schools.

Law school cost and student debt are inseparable



from the costs and debts of higher education.[49] Any discussion of law school tuition must, to be honest, consider that law school tuition has grown faster than inflation in part owing to diminished governmental support for higher education and in part owing to the demands for revenue from law schools by universities and for-profit owners. As long as the national and state policies of the United States place the expense of education on the student and the family, debt will remain a serious issue and beyond the power of most law schools to change. Furthermore, law school tuition increases have benefited students directly, supporting smaller class sizes, increased and enlarged clinics, better spaces, more academic assistance, increased placement assistance, and other increased student amenities that their predecessors lacked.

The scholarly model may well help students directly more than a non-scholar model can. Though it is true that scholars are not necessarily any more effective teachers than non-scholars,[50] association with scholars and assistance from scholars for students seeking jobs may be highly beneficial to students. Furthermore, the nature of law school scholarship, as a whole, is much more practical in the law than is admitted in the recycled critiques of theoretical scholarship adopted in *Failing Law Schools*.<sup>[51]</sup>

Law schools have been engaged in a nearly continuous process of change for two hundred years. Much of the accreditation standards are the present result of past reforms. Indeed, recent criticism, such as the Carnegie Report and McCrate Report, follows a long line of such criticism, including the Reed Report chronicled in *Failing Law Schools*.<sup>[52]</sup> Each has had some influence, as will *Failing Law Schools*, though the central demands of each might not have been effected, because in each case, the response of law schools and the ABA has been to promote the best practices to prepare students for the practice of the law.

The recent fall in law school applications may be seen by some critics as proof of the criticism. Yet it may be as likely that the fall results from the fact of the criticism. The alarm for law schools sounded by *Failing Law Schools* and similar declamations, predicting further decline in applications based on structural problems it identifies, may be explained by a host of factors that are far beyond the scope of the book, not the least being the general decline in law school applications among college graduates since the end of the Vietnam War. Yet there is more reason to believe that the continuing downturn in applications, ex-

tending beyond the drop that would be expected from the jobs recovery in 2009-13, is partly attributable to the criticism itself. Certainly, the scamblog movement described in *Failing Law Schools* has had an effect, and its encouragement by law professors, such as Tamanaha and Paul Campos at Colorado, has given the scambloggers a veneer of accuracy. This is not to say that the effect of the scambloggers has been to open the eyes of law school applicants to their realistic economic opportunities four years in the future. Rather the effect on the perception of college graduates and other would-be applicants is more likely to be cultural than to be one of economic awareness.

The effects on law schools, however, will be both economic and cultural. One might hope that the cultural effects will be constructive engagement, a continued improvement in legal education, that encourages knowledge, skill, professional ethics, and a rich understanding of the role of law and its function in a democracy.<sup>[53]</sup> Understanding the need to fund legal services, not just legal education, would be a part of that engagement. It would be a great shame if the result were merely to dumb down law school. The price for that effect would be borne not just by the law students but also by their clients, and ultimately by the country.<sup>[54]</sup>

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#### Notes

[1]. On scams, see Paul Campos, "The Cost of Legal Scholarship," *Inside the Law School Scam* (blog), November 11, 2011, <http://insidethelawschoolscam.blogspot.com/2011/11/cost-of-legal-scholarship.html>. On confidence game, see Joe Queenan, "How Law School Is Like a Nigerian Scam," *Wall Street Journal*, March 16, 2009, <http://online.wsj.com/article/SB100014241278873233933045783583587338070.html>. On fraud, see *Gomez-Jimenez v. New York Law School*, 103 A.D.3d 13, 956 N.Y.S.2d 54 (App. Div. 2012) (dismissing complaint owing to lack of evidence). But see *Harnish v. Widener University School of Law*, F. Supp. 2d, 2013 WL 1149166, 11 (D.N.J. March 20, 2013) (pleading of misrepresentation under state consumer protection statute survives motion to dismiss). Former students have sued at least eleven schools, alleging harm from

inflated school claims of alumni employment. See Deborah L. Cohen, “Few Jobs, But a Rack of Suits, Led by N.Y. Attorney, Law Grads Claim Their Alma Maters Duped Them,” *ABA Journal* 98 (2012): 18.

[2]. See Jordan Weissmann, “Law School Applications Are Collapsing (As They Should Be),” *The Atlantic* (January 31, 2013), <http://www.theatlantic.com/business/archive/2013/01/law-school-applications-are-collapsing-as-they-should-be/272729/>. Though the decline is serious, Weissmann’s report and others got the final math wrong, anticipating the number of applicants in 2013 and basing their reports on early numbers down 38 percent from 2010. The Law Schools Admission Council reports 87,500 applicants to law school in August 2010, but as of August 2013, there were 59,426 applicants, a decline of 28,074 (32 percent). See <http://www.lsac.org/lisacresources/data/three-year-volume>.

[3]. The book has been reviewed by at least one law professor supportively and uncritically. See Nancy B. Rapoport, review of *Failing Law Schools*, *Law and Society Review* 47, no. 1 (2013): 229. Its central criticisms of legal education was initially widely accepted, even by more skeptical readers. See Paul Horwitz, “What Ails the Law Schools?” review of *Failing Law Schools*, *Michigan Law Review* 111, no. 6 (2013): 955.

[4]. See ABA, Task Force on the Future of Legal Education (working paper), 29-32, [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefutureoflegaleducation/taskforcedrafts.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefutureoflegaleducation/taskforcedrafts.html) (accessed October 18, 2013).

[5]. See Michael Simkovic and Frank McIntyre, “Populist Outrage, Reckless Empirics,” review of *Failing Law Schools*, *Social Science Research Network* (March 1, 2013), <http://ssrn.com/abstract=2306337>; and Michael Simkovic and Frank McIntyre, “The Economic Value of a Law Degree,” *Social Science Research Network* (April 13, 2013), <http://ssrn.com/abstract=2250585>. Tamanaha’s responses are, in part, at Brian Tamanaha, “How ‘The Million Dollar Law Degree’ Study Systematically Overstates Value: Three Choices That Skewed the Results,” *Balkanization* (blog), July 23, 2013, <http://balkin.blogspot.com/2013/07/how-million-dollar-law-degree-study.html>; and Brian Tamanaha, “Short Term versus Long Term Perspective,” *Balkanization* (blog), July 27, 2013, <http://balkin.blogspot.com/2013/07/sort-term-versus-long-term-perspective.html>. Brian Leiter proves to be a scathing referee of the debate. See Brian

Leiter, “Reflections on ‘The Economic Value of a Law Degree’ and the Response to It,” *Law School Reports* (blog), July 30, 2013, <http://leiterlawschool.typepad.com/leiter/2013/07/the-economic-value-of-a-law-degree-redux-1-1.html>.

[6]. The consent decree is at <http://www.justice.gov/atr/cases/f1000/1037>.

[7]. He cites Marina Lao, “Discrediting Accreditation? Antitrust and Legal Education,” *Washington University Law Quarterly* 79, no. 4 (2001): 1035.

[8]. He cites Alfred Zantlinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, with Some Account of Conditions in England and Canada* (New York: Carnegie Foundation for the Advancement of Teaching, 1921).

[9]. The benefits to students of smaller seminars is admitted, but no other small-class experiences are considered.

[10]. This number aggregates lawyers employed by others with the self-employed, or solo practitioners. Of the 2010 lawyer employment calculated by the U.S. Bureau of Labor Statistics, 157,400 (21.6 percent) were self-employed, a number predicted to rise to 186,000 (23.3 percent). U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook: Lawyers* (2012-13), <http://www.bls.gov/ooh/legal/lawyers.htm>. Depending on one’s view, this is either better or worse for law graduates than Tamanaha relates. Pessimistically, there were fewer jobs on offer that are paid by an employer than it seems. Optimistically, law graduates have more control over their fate than it seems.

[11]. He cites Ronit Dinovitzer et al., *After the JD II: Second Results from a National Study of Legal Careers* (Chicago: American Bar Foundation; Dallas: The NALP Foundation for Law Career Research and Education, 2009), 44.

[12]. The University of Arkansas, which is not the Bowen School and which is in Fayetteville, appears here to be implied, though it is omitted from Appendix B. These oversights appear unintended.

[13]. See, e.g., *United States v. Brown University, et al.* (1991) (consent decree at <http://www.justice.gov/atr/cases/f262600/262630.pdf>); and *United States v. Brown University*, 5 F.3d 658 (3rd Cir. 1993).

[14]. See John A. Sebert, “ABA Accreditation Stan-

dards and Quality Legal Education,” *Texas Review of Law and Politics* 11 (2007): 395.

[15]. ABA, “Report of the Committee on Legal Education and Admissions to the Bar,” Proceedings of the Annual Meeting (1879), 209. The committee report was submitted by Carleton Hunt, chairman, who was then dean of the University of Louisiana (now Tulane); Henry Stockbridge, a Maryland judge; and Edmund H. Bennett, dean of Boston University School of Law. The committee’s recommendation of the three-year curriculum is on pages 235-236.

[16]. ABA, Proceedings of the Section of Legal Education, Annual Report A.B.A. 23 (1900): 421, 450 (motion of J. Newton Fiero). Fiero was dean of the Albany Law School. See J. Newton Fiero, “The Albany Law School: An Address by Dean J. Newton Fiero at a Dinner Tendered Him by the Alumni of the School on the Twentieth Anniversary of His Deanship” (1915), in *Twentieth-Century Legal Treatises, in The Making of Modern Law: Primary Sources, 1800-1926*, Gale Digital Collections, Cengage Learning, <http://0-galenet.galegroup.com.library.uark.edu/servlet/MOML?af=RN&ae=F152543273&srchtp=a&ste=14>.

[17]. ABA, Proceedings of the Section of Legal Education, Annual Report A.B.A. 23 (1900): 452 (statement of John Henry Wigmore).

[18]. The history of ABA accreditation, and a mention of its influence on the third year, is in James P. White, “The American Bar Association Law School Approval Process: A Century of Public Service,” *Wake Forest Law Review* 40 (1995): 284.

[19]. See Robin West, *Teaching Law: Legal Pedagogy in the Service of Justice, in the Context of Politics, and within the Demands of Professionalism* (New York: Cambridge University Press, 2013); William P. LaPiana, *Logic & Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994); and Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1987).

[20]. ABA, Report of the Committee on Legal Education and Admission to the Bar, Annual Report A.B.A. 19 (1896): 378-380. Despite Tamanaha’s claims about schools in the South (p. 24), in 1895 Texas had a three-year program and two-year program; Shaw University in North Carolina and Maryland had three-year programs. Indeed, of the seventy-seven schools known in 1895 to

the ABA, of the fifty-two who provided reports, nineteen schools had three-year programs—five years before the vote reported in *Failing Law Schools* to establish the three-year requirement.

[21]. A full table of American law schools is in Stephen Sheppard, *The American Law School: What It Was, What It Is, and What It Should Be* (working title) (Cambridge: Cambridge University Press, forthcoming 2014), appendix.

[22]. See, e.g., Frederic R. Coudert, “The Crisis of the Law and Professional Incompetency,” Annual Report A.B.A. 34 (1911): 677; Harlan F. Stone, “The Function of the American University Law School,” Annual Report A.B.A. 34 (1911): 768; William Draper Lewis, “The Proper Preparation for the Study of Law,” Annual Report A.B.A. 23 (1900): 475; and Report of the Special Committee, Annual Report A.B.A. 44 (1921): 679-688 (Elihu Root, chair).

[23]. He quotes Harry S. Richards, “Progress in Legal Education,” address of the president, AALS Proceedings (1915), 60.

[24]. *Ibid.*, 60, 63.

[25]. Proceedings of the Section of Legal Education, Annual Report A.B.A. 44 (1921): 656-672 (remarks of Edward Lee, 662-665) (remarks of Charles Carusi, 661).

[26]. *Ibid.*, 661 (motion of Elihu Root) (remarks of Harlan F. Stone).

[27]. *Ibid.*, 672-677 (remarks of George E. Price).

[28]. He quotes Edward L. Rubin, “Should Law Schools Support Faculty Research,” *Journal of Contemporary Legal Issues* 139 (2008): 141-145.

[29]. *Ibid.*, 169.

[30]. See ABA-LSAC, *ABA-LSAC Official Guide to ABA-Approved Law Schools* (2013), [https://officialguide.lisac.org/release/officialguide\\_default.aspx](https://officialguide.lisac.org/release/officialguide_default.aspx).

[31]. The Thomas Cooley model, which fully meets the ABA standards and does have scholars on its faculty, is certainly built on a different model of educational access and faculty resource allocation than the scholarly model criticized in *Failing Law Schools*.

[32]. A timely narrative that contrasts *Failing Law Schools* in many ways is the new history of Fordham, which remarkably chronicles the efforts of the law school to control its revenue and develop more expensive