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Legal Education and the Legal Profession: Convergence or Divergence?

JEROME M. ORGAN*

For several decades, law schools have been the essential intermediary between prospective law students and the legal profession. With the vast majority of states requiring a law degree from an ABA accredited law school to sit for the bar exam and be eligible for admission to practice,¹ and with ABA accreditation standards requiring an undergraduate degree for those admitted to law schools,² those considering becoming lawyers have little choice but to go to college and then pursue a legal education at an ABA accredited law school. But legal education is not just the essential pathway to the legal profession—it also serves multiple functions in preparing graduates for the legal services market and in “sorting” graduates for jobs in the legal services market. In regard to preparation, law schools

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1. See Nat’l Conference of Bar Examiners & Am. Bar Assoc. Section of Legal Educ. & Admissions, Comprehensive Guide to Bar Admission Requirement 2012, at 8-13 (2012), http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (indicating that there are eighteen jurisdictions that require a J.D. from an ABA-accredited law school to be eligible to sit for the bar exam and that in the vast majority of remaining jurisdictions that allow graduates from non-ABA-accredited law schools to sit for the bar exam it is only if they have passed the bar exam in another jurisdiction and generally have five or more years of practice experience in the state in which they are licensed to practice).

2. ABA Accreditation Standard 502(a) provides as follows: “A law school shall require for admission to its J.D. degree program a bachelor’s degree, or successful completion of three-fourths of the work acceptable for a bachelor’s degree, from an institution that is accredited by an accrediting agency recognized by the Department of Education.” AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 502(a) (2011-2012) [hereinafter ABA STANDARDS], available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_standards_chapter_5.authcheckdam.pdf. Standard 502(b) provides for a very limited exception:

In an extraordinary case, a law school may admit to its J.D. degree program an applicant who does not possess the educational requirements of subsection (a) if the applicant’s experience, ability, and other characteristics clearly show an aptitude for the study of law. The admitting officer shall sign and place in the admittee’s file a statement of the considerations that led to the decision to admit the applicant.

Id. at Standard 502(b).

provide the context in which graduates acquire specialized knowledge and critical thinking skills, training in lawyering skills, and formation in professional identity—the three “apprenticeships” of the Carnegie Foundation’s study, *Educating Lawyers: Preparation for the Profession of Law* (“*Carnegie Report*”).³ In regard to “sorting” graduates for the legal services market, students sort themselves by their choice of law school⁴ and then law schools and law students together accomplish a “sorting” of those within any given law school through the assessment of each student’s performance over three years.⁵

This essay looks at the training and sorting functions of law schools and asks whether legal education and the legal profession are on paths that are converging or on paths that are diverging, or both. Phrased differently, in fulfilling the training functions and sorting functions described above, do law schools (collectively “legal education”) support sufficiently the needs of their graduates as members of the legal profession in the twenty-first century and of society and the clients their graduates will serve?

I. EXPLORING THE TRAINING FUNCTION OF LEGAL EDUCATION

A. *Providing Specialized Knowledge and Critical Thinking Skills—The Intellectual and Cognitive Apprenticeship—Largely Convergent with Some Divergence*

With respect to the “first apprenticeship” of the intellectual and cognitive, the acquisition of specialized knowledge and the development of critical thinking skills—“thinking like a lawyer”—legal education largely converges with the legal profession with some divergence. William Sullivan and his co-authors in the *Carnegie Report* acknowledged that law schools generally are effective with respect to the “first apprenticeship” of helping law students acquire specialized knowledge of the law and develop critical thinking skills—“thinking like a lawyer.”⁶ Indeed, the *Carnegie*

3. The Carnegie Foundation for the Advancement of Education in its study of the professions discusses these in terms of three “apprenticeships”: the intellectual and cognitive, training in practical and expert skills, and identity and purpose. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 28 (2007) [hereinafter *CARNEGIE REPORT*].

4. As discussed in more detail *infra* notes 79-86 and accompanying text, elite or prestigious law schools effectively serve different segments of the legal services market than less elite or prestigious law schools.

5. As discussed in more detail *infra* notes 87-92 and accompanying text, within a given law school, those students who perform particularly well in law school generally will have a different set of employment options available than those who do not perform as well.

6. See *CARNEGIE REPORT*, *supra* note 3, at 77-78 (quoting KARL NICKERSON LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 116 (1930)). See, e.g., Michelle M. Harner, *The Value of “Thinking Like a Lawyer”*, 70 MD. L. REV. 390 (2011); Jess M. Krannich et al., *Beyond “Thinking*

Report notes that legal education's "signature pedagogy"—the case method—is particularly effective in instilling in students the habits of mind associated with being a lawyer.⁷ Therefore, to the extent that "thinking like a lawyer" is an essential attribute of successful members of the legal profession, legal education largely converges with the needs of the legal profession.

In reality, however, while "thinking like a lawyer" is necessary, it is not sufficient for success as a member of the legal profession, as it is only one of many competencies of successful lawyers.⁸ Indeed, the *Carnegie Report* is critical of legal education for an overreliance on the "signature pedagogy" of the case method after the first year, partly because of the "shadow pedagogy" of the case method.⁹ The *Carnegie Report* describes the shadow pedagogy in two contexts: first, an emphasis on cases rather than clients; and second, a lack of emphasis on ethical values.¹⁰ Thus, while there is convergence found in the excellent way in which the "signature pedagogy" of the case method accomplishes training in the first apprenticeship—the intellectual and cognitive—this convergence is counterbalanced by divergence found in the "shadow pedagogy"—a lack of client contact (impacting the second apprenticeship of "practical skills")—and a lack of contextualizing what students are learning about the law and about being a lawyer in relationship to the values of justice and the profession (impacting the third apprenticeship of "identity and purpose").¹¹

In addition, whether the acquisition of "specialized knowledge" itself remains a point of convergence may merit further reflection. Lawyers used to be both the keepers of specialized knowledge and the exclusive doorway

Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education, 86 DEN. U. L. R. 381 (2009); Kris Franklin, *Sim City: Teaching "Thinking Like A Lawyer" in Simulation-Based Clinical Courses*, 53 N.Y.L. S. L. R. 861 (2008/2009).

7. See CARNEGIE REPORT, *supra* note 3, at 50-54.

8. See, e.g., Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Decisions*, 36 LAW & SOC. INQUIRY 620, 629 (2011); Neil W. Hamilton & Verna Monson, *Ethical Professional (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. (forthcoming 2012) (U. of St. Thomas Legal Studies Research Paper No. 11-11, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804419.

9. See CARNEGIE REPORT, *supra* note 3, at 56.

10. *Id.* at 56-58. See also Roger Cramton, *Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250-51 (1978) (which also discusses the messages communicated implicitly through the style and focus of conversations grounded in the case method, including an emphasis on tough-mindedness and cold hard facts and a disregard for emotion/psychology/human reality that can result in a disregard for morality and values and the humanity of the law and legal process).

11. See CARNEGIE REPORT, *supra* note 3, at 56. See also Krannich, *supra* note 6, at 382, 392 (discussing need for broader, integrated education that includes problem-solving, leadership, and social and ethical skills). For further discussion of the lack of normative values in legal education, see Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 913-27 (2009).

to that specialized knowledge, but technology has made “the law” much more accessible to the public and to clients and has changed the economic model for the provision of legal services.¹² Without a monopoly on specialized knowledge of “the law” and access to “the law,” and with increasing systematized analysis of factual situations and outcomes, the role of the lawyer might be changing, as clients want help more with what the law means for them rather than what the law is, and what it might mean for them.¹³ As a result, while lawyers still have to acquire specialized knowledge to be able to assist their clients, their value to their clients will be derived less from their specialized knowledge and more from their ability to use technology and their knowledge of the law to help clients understand how the law interacts with and facilitates or constrains their range of options for dealing with a given situation. Recognizing how technology is making “the law” more readily available to the general public, legal education may need to be more nuanced in preparing graduates for a different environment/relationship with clients in which less emphasis is placed on providing clients access to “the law” and more emphasis is placed on providing clients with value derived from helping clients better understand how the law relates to their specific factual circumstances and their specific goals and interests.¹⁴

12. See Harner, *supra* note 6, at 392 n.8. Harner’s article discusses RICHARD SUSSKIND’S, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008) and Larry E. Ribstein’s, *The Death of Big Law*, 2010 Wis. L. Rev. 749 (2010). *Id.* at 400-16. Harner quotes Susskind as follows: “My aim is to explore the extent to which the role of the traditional lawyer can be sustained in coming years in the face of challenging trends in the legal marketplace and new techniques for the delivery of legal services.” *Id.* at 392 n.8 (quoting SUSSKIND, *supra*, at 1). Harner quotes Ribstein as follows: “This Article focuses on the structure and function of large law firms. Its goal is to analyze big law firms as a type of business firm and to question whether these firms are economically viable under modern business conditions.” *Id.* (quoting Ribstein, *supra*, at 752); Stephen Gillers, *A Profession if You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 972-97 (2012); Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology* 2-18 (April 15, 2012) (unpublished manuscript) (on file with NKU Chase L. & Informatics Inst.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2040560.

13. Just as patients increasingly come to doctors with information in hand about possible indications and treatment options, clients increasingly will come to lawyers with at least some understanding of a statute or a case that might be relevant to the client’s situation. Lawyers need to be prepared to deal with more informed clients seeking more efficiency in accomplishing results.

14. See Thomas Morgan, *Educating Lawyers for the Future Legal Profession*, 30 OKLA. CITY U. L. REV. 537 (2005). This does not even begin to touch upon other consequences of technology—outsourcing, e-discovery and document review, etc.—all of which are impacting the market for legal services. See Gillers, *supra* note 12, at 978-85; Garon, *supra* note 12, at 15-17.

B. Providing Training in Competencies of the Expert Practitioner—The Practical Skills Apprenticeship—Generally a Point of Convergence with Some Divergence

With respect to the “second apprenticeship” of practical skills, legal education has generally been on a path of convergence with the legal profession with some divergence.

Two decades ago a special ABA Committee, chaired by Robert MacCrate, made a call for legal education to do more in providing training in “skills and values” of the profession in *Legal Education and Professional Development—An Educational Continuum* (“MacCrate Report”).¹⁵ The response of legal education was somewhat grudging, with some commentators concerned about the “costs” of skills instruction¹⁶ and others within the academy exploring possible ways to integrate skills into doctrinal classes without significant additional costs.¹⁷ Nonetheless, in the ensuing years, the ABA Section of Legal Education and Admissions to the Bar (“Section”) changed the law school accreditation standards to impose additional obligations on law schools to assure more skills instruction.¹⁸ As a result, legal education is doing a better job of providing skills instruction—experiential learning in clinics, externships, simulation courses and drafting courses—something the *Carnegie Report* acknowledges.¹⁹

While there has been convergence on skills instruction over the last two decades, there also has been some divergence. First, as commentators observed in response to the *MacCrate Report*, most skills instruction and experiential learning that fosters skill development involves a lower student-teacher ratio than doctrinal instruction resulting in increased costs.²⁰ In response to accreditation mandates and student demand for more skills instruction and experiential learning opportunities, law schools have

15. See AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT].

16. See, e.g., John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 162-63 (1993).

17. See, e.g., R. WILSON FREYERMUTH, JEROME M. ORGAN & ALICE NOBLE-ALLGIRE, PROPERTY AND LAWYERING (3d ed. 2010) (integrating into a doctrinal property text a set of exercises to give students opportunities to exercise and reflect upon lawyering skills and values); MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK (2009).

18. See ABA STANDARDS, *supra* note 2, Standard 302(a)(4), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_a_ba_standards_chapter3.authcheckdam.pdf. The Council for the Section approved the revised Standard 302 in 2005. Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909, 909 (2008).

19. CARNEGIE REPORT, *supra* note 3, at 87-88.

20. See Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 309, 315 (2012).

expanded their course offerings, but the expansion of experiential learning opportunities has come at a price reflected in ever increasing tuition costs.²¹

Second, skills instruction generally is not the “heart” of the law school experience, but remains “second-class,” in the sense that many clinical and skills faculty are non-tenure track and do not have the same security of position as doctrinal faculty generally have.²² The *Carnegie Report* noted that clinical and skills courses tend to be taught by “a faculty that is not typically tenured and that has lower academic status. In many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance.”²³ This is consistent with others who have observed that “although clinical legal education is a permanent feature in legal education, too often clinical teaching and clinical programs remain at the periphery of law school curricula.”²⁴ This can inadvertently send a message to students that skills courses and clinics are not as “important” as doctrinal courses.²⁵

Third, legal education and the legal profession are identifying a variety of competencies that successful lawyers possess, most of which law schools are not teaching and may not be well-positioned to teach.²⁶ Shultz and Zedeck identified that excellent lawyers are recognized as possessing strengths in twenty-six competencies.²⁷ These competencies include listening, creativity/innovation, ability to see the world through the eyes of others and integrity among others.²⁸ Similarly, Hamilton and Monson, in their study of exemplary lawyers, noted that their set of lawyers exhibited similar competencies.²⁹ Needless to say, law professors are not hired for

21. *See id.* at 312-17 (but noting that many other factors are driving up tuition costs in addition to more hands-on learning).

22. One way of reducing the costs of skills instruction is to hire adjunct professors to teach skills courses, or to hire full-time faculty who are not on the tenure track, but instead are on some type of long-term renewable contracts. *See, e.g.,* Brian L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEG. PROF. 353, 373-75 (2012) (noting that more than half of clinical faculty do not have unitary tenure-track status or clinical tenure-track status); Lisa T. McElroy et al., *The Carnegie Report and Legal Writing: Does the Report Go Far Enough*, 17 J. LEGAL WRITING INST. 279, 287-96, 301-06 (2011) (discussing status, pay and title differences for lawyering skills faculty).

23. CARNEGIE REPORT, *supra* note 3, at 88.

24. Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 32 (2000).

25. Indeed, as discussed *supra* notes 9-11 and accompanying text, with respect to the “shadow” side of the “signature pedagogy,” an excessive emphasis on the intellectual and cognitive can sometimes diminish the extent to which law students appreciate the importance of other competencies to their success as a lawyer.

26. *See supra* note 8 and accompanying text.

27. Shultz & Zedeck, *supra* note 8.

28. *Id.*

29. Hamilton & Monson, *supra* note 8, at 21-26.

their strengths in offering instruction in emotional intelligence and other relationship skills.³⁰ In sum, while legal education has made progress on fostering some skill development in students, there is more to be done regarding a wider array of skills.

C. Providing Formation in Professional Identity—The Third Apprenticeship—Mostly Divergence

While the *MacCrate Report* emphasized the importance of having law school provide instruction in the skills and values of the profession, at most law schools professional identity formation—the inculcation of professional values—has gotten much less attention than skills.³¹ Although the ABA’s accreditation standards require instruction in “the history, goals, structure, values, rules and responsibilities of the legal profession and its members[,]”³² in most law schools this manifests itself in one required two-credit or three-credit course in Professional Responsibility—focused largely on the minimal standards set forth in the Model Rules of Professional Conduct.³³ The *Carnegie Report* notes that the “third apprenticeship” of professional identity formation is the area in which legal education has had the least success.³⁴

This is a point of divergence between legal education and the legal profession for several reasons. First, formation of professional identity and purpose simply is not a priority reflected in law school mission statements. At fifty-seven law schools as of 2010, there was no stated emphasis on professional identity and purpose because there were no mission statements

30. Indeed, if anything, legal education is understood to erode relationship skills. See Cramton, *supra* note 10, at 260-62 (discussing the atomistic aspect of legal education, in which one is disconnected from relationships with others).

31. See CARNEGIE REPORT, *supra* note 3, at 14, 127.

32. See ABA STANDARDS, *supra* note 2, Standard 302(a)(5).

33. See, e.g., Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 n.43 (1992) (citing 1991 survey by the ABA Section on Professional Responsibility indicating that nearly every law school responding to the survey had a mandatory professional responsibility course, with slightly more than half being two credits and the rest being three credits). Professor Rhode, as noted by the title of her article, favors teaching professional responsibility through the pervasive method. Notably, these mandatory courses have not been well received by students or faculty. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEG. ETHICS 31, 37-38 (1995) (citing Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 4 LAW & SOC. INQUIRY 247 (1979)) (describing the legal ethics course as “the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts and generally disregarded by the faculty at large.”); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65-66 (1991) (describing predominant methods of teaching legal ethics as boring, disappointing and dispiriting).

34. See CARNEGIE REPORT, *supra* note 3, at 132-33.

at all.³⁵ Among those law schools with missions, only half make reference in their mission statement to professional values.³⁶ The University of St. Thomas School of Law, at which I am a founding faculty member, is relatively unique in its institutional emphasis on professional identity formation throughout its curriculum and culture.³⁷

Second, a Professional Responsibility course, by itself, is not enough to foster professional identity formation, particularly if it is the only place in which professional identity and the values of the profession are discussed explicitly.³⁸ As a general matter, there should be concerted emphasis—intentionality throughout curriculum and culture of law school—to instill an understanding of identity and purpose—of what it means to be a lawyer.³⁹

This highlights the third, and even larger, problem. Law schools are not teaching about identity and purpose because law schools are not well-structured to teach identity and purpose given that this would require explicit conversations about values and specific goals in terms of formation, neither of which are strong suits for legal education. First, recent faculty hiring favors non-lawyers or those without significant practice experience as the legal academy seeks the academic prestige and value associated with those possessing a J.D. and a Ph.D., or sometimes just the Ph.D.⁴⁰ Second, perhaps because faculty hiring favors non-lawyers or those without significant practice experience, many faculty members have a disdain for practicing lawyers rather than a respect for those engaged in practice.⁴¹ Third, on most law school faculties there is little discussion about, and little agreement on, what professionalism means and little consensus about the

35. Jerome M. Organ, *Missing Missions: Further Reflections on Institutional Pluralism (or Its Absence)*, 60 J. LEGAL EDUC. 157, 161-63 (2010).

36. Report on analysis of missions (on file with author).

37. See Jerome M. Organ & Neil W. Hamilton, *Being Intentional: Shaping Curriculum and Culture to Advance the Mission of Professional Formation* (June 19, 2012) (unpublished manuscript draft) (presented at Renewing Mission and Identity in Catholic Business Education Conference, University of Dayton) (on file with author).

38. See Rhode, *supra* note 33, at 37, 43-44. As noted in his *Ordinary Religion of the Law School Classroom*, Cramton suggests there are a number of unstated or hidden values being communicated through the classroom experience, in what the *Carnegie Report* now describes as the “shadow” side of the signature pedagogy of the case method. Cramton, *supra* note 10, at 247-48.

39. See Organ & Hamilton, *supra* note 37; Rhode, *supra* note 33, at 53-56.

40. See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 130 (2010); Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 599-01 (2003) (describing hiring patterns which show less and less practice experience among new faculty hires, particularly at elite schools, and more hiring of Ph.D.s).

41. See Newton, *supra* note 40, at 126-31 (discussing that more law professors have less practice experience and that many law professors have a disdain for the legal profession).

professional identity or purpose to which law schools should form law students.⁴²

A fourth significant problem stems from the prevailing perception among law faculty that students come to law school as fully formed moral creatures and that law school cannot change them.⁴³ The available literature on moral development suggests that this view was widely accepted historically, but no longer accurately reflects the reality of human lifespan development.⁴⁴ Accordingly, law schools can and do impact the development of character and values among their students, they just rarely do it intentionally and with purpose.

Harvard psychologist Robert Kegan has developed a life span development model reflecting stages of moral development that can inform our understanding of professional identity development—students at a stage two level of professional identity are focused on their own self-interest and conformity with externally imposed rules; at stage three, students define professionalism as meeting the expectations of influential others, including “gold standard” professionals whom the students have identified as models; at stage four, students and professionals have developed a self-defined, internalized personal moral compass informed by the ethics of the profession.⁴⁵ In his 2009 book, *Immunity to Change*, Kegan notes that earlier understandings of identity development in which adults were assumed to reach a plateau by age twenty have been superseded by a more refined understanding of identity development, which recognizes both a range of identity development within any given age cohort as well as a growth over time toward higher stages of an internalized identity that is less

42. See Organ, *supra* note 35, at 161-64 (discussing lack of a mission at nearly one-third of law schools and highlighting reality that at many schools this means the faculty function more as a collection of independent contractors than as a community of scholar-teachers pursuing some common educational goals).

43. The *Carnegie Report* found that law school faculty members

often argue that by the time students enter law school, it is too late to affect their ethical commitment and professional responsibility Skeptics argue that moral character is the only thing that really matters in determining ethical conduct, and that character is established earlier in life in the context of the family Many students share the belief that it is too late to develop morally by the time people enter law school.

CARNEGIE REPORT, *supra* note 3, at 133. See Neil W. Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)*, 20 No. 4 PROF. LAW. 3 (2011) [hereinafter *Answering the Skeptics*].

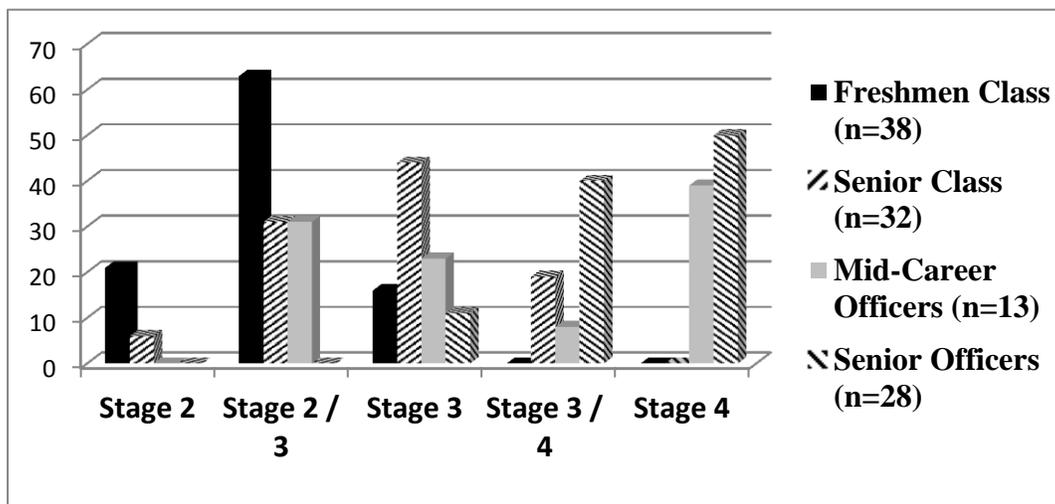
44. See ROBERT KEGAN & LISA LASKOW LAHEY, *IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK THE POTENTIAL IN YOURSELF AND YOUR ORGANIZATION* 13-14 (2009) [hereinafter *IMMUNITY TO CHANGE*].

45. See ROBERT KEGAN, *THE EVOLVING SELF: PROBLEM AND PROCESS IN HUMAN DEVELOPMENT* 52-53, tbl. 3 (1982) [hereinafter *THE EVOLVING SELF*].

egocentric and more other directed.⁴⁶ This modern view demonstrates that it is possible for legal education specifically to foster each student's ethical professional identity, and indeed, supports the assertion that those involved in legal education should understand that they have a responsibility to promote self-defined moral formation.⁴⁷

This data is further validated by research on military personnel and on lawyers and law students. Forsythe, Snook, Lewis and Bartone studied professional identity formation of United States Military Academy cadets.⁴⁸ Figure 1.1 below indicates that the West Point education is making a difference in moving students who enter West Point principally at a stage two professional identity toward stage three by graduation and then toward stage four as they advance in their careers.

Figure 1.1
Percentage of Respondents at Each Developmental Stage



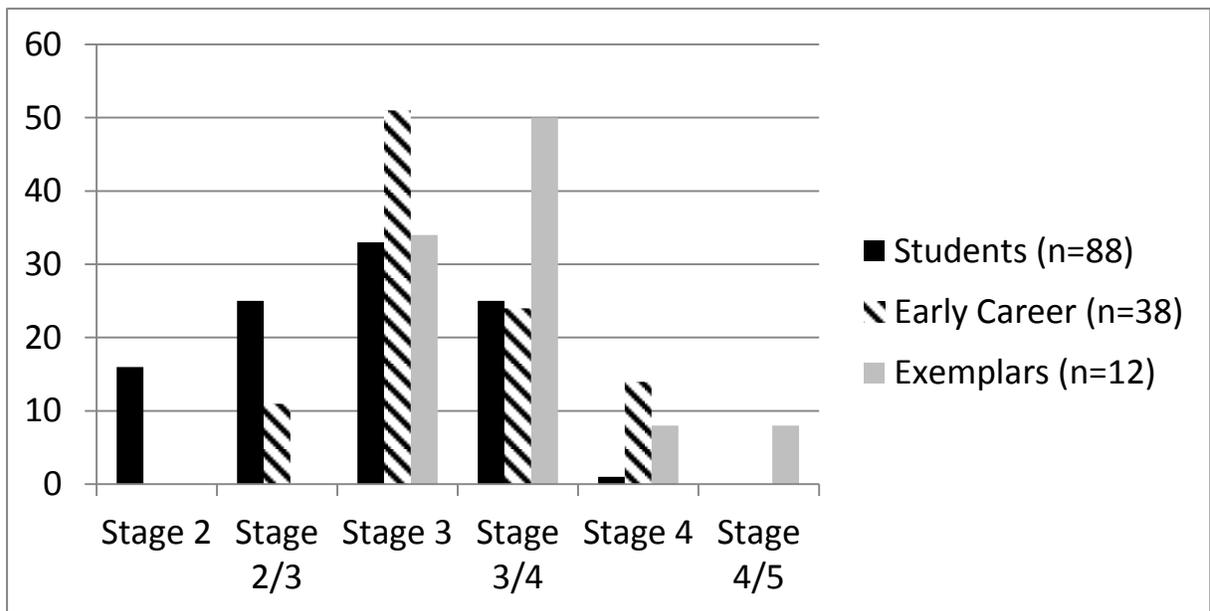
46. IMMUNITY TO CHANGE, *supra* note 44, at 13-14.

47. The *Carnegie Report* specifically notes that law schools are "formative," just as Cramton, *supra* note 10, suggested in *Ordinary Religion*, and that the culture of law school shapes law students in often unstated ways. See *CARNEGIE REPORT*, *supra* note 3, at 84-85. As the *Carnegie Report* states, the goal should be for law schools to be more intentional about their formation efforts. *Id.* at 30.

48. George B. Forsythe, *Identity Development in Professional Education*, 80 *ACAD. MED.* S112 (Oct. 2005), available at http://journals.lww.com/academicmedicine/Fulltext/2005/10001/Identity_Development_in_Professional_Education____.29.aspx.

Figure 1.2 below shows similar life span moral development in law students, early career lawyers and exemplary lawyers, based on research by Hamilton and Monson.⁴⁹

Figure 1.2
Percentage of Respondents at Each Developmental Stage



Finally, perhaps because of the lack of mission emphasis on professionalism and professional values and perhaps because law faculty are not populated by people with a strong attachment to and affinity for those who are practicing lawyers, law schools have not modeled “professional behavior.”⁵⁰ If professionalism is reflected in lawyers who have an

49. See Hamilton & Monson, *supra* note 8, at 27, fig. 1 (including data from Verna Monson & Neil Hamilton, *Entering Law Students' Conceptions on Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEG. PROF. 385, 396 (2011) and Verna Monson & Neil W. Hamilton, *Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism*, 8 U. ST. THOMAS L. J. 129, 148 (2011)). Notably, these studies are not longitudinal studies of one population, but studies of three different populations showing differing levels of moral development at different stages of professional development.

50. See, e.g., Ameet Sachdev, *U. of I. law school falls 12 spots, to No. 35, in U.S. News & World Report list*, CHI. TRIB., Mar. 15, 2012, http://articles.chicagotribune.com/2012-03-15/business/ct-biz-0315-law-rankings-20120315_1_median-gpa-median-lsat-score-admissions-scandal (discussing the admissions scandal involving a few years of misrepresented LSAT and GPA data for incoming students

internalized moral core directed to service and responsibility to others—a service ethic that overrides one’s self-interest⁵¹—the behavior of some law schools has provided precisely the wrong example for law students.⁵² When schools purposely misrepresent admissions data, the schools are implicitly suggesting to students that it is acceptable to act out of self-interest rather than out of a sense of responsibility to others. This creates a culture in which it becomes much harder to inculcate professional identity and purpose grounded in an internalized set of values geared toward serving others.

D. Conclusion on the Training Function of Legal Education—Convergence and Divergence

Legal education and the legal profession are largely in convergence with respect to training focused on the first apprenticeship—the intellectual and cognitive—“thinking like a lawyer.” With greater emphasis on training in skills and experiential learning, legal education has been somewhat convergent with the legal profession regarding the second apprenticeship—practical skills—although, legal education remains somewhat divergent from the legal profession in that the seemingly excessive emphasis on the “signature pedagogy” that fosters “thinking like a lawyer” has meant that many of the competencies of successful lawyers do not get sufficient emphasis in law schools. Finally, with respect to the third apprenticeship—professional identity and purpose—legal education and the legal profession are largely divergent.

at the University of Illinois College of Law); Chris Mondics, *Villanova Law censured by ABA over admissions-data fraud, but retains accreditation*, PHILADELPHIA INQUIRER, Aug. 16, 2011, http://articles.philly.com/2011-08-16/business/29892664_1_law-school-american-bar-association-lsat-scores (discussing sanction against Villanova for misreporting LSAT and GPA data in some years between 2005 and 2010).

51. See Hamilton & Monson, *supra* note 8, at 20-22.

52. See Jerry Organ, *The Need for Auditing of Law School Admission Data*, U. ST. T.M. BLOG (Oct. 4, 2011, 5:02 PM), <http://blogs.stthomas.edu/ethicalleadership/2011/10/04/364/>; Brian Tamanaha, *Why Law Schools Need External Scrutiny*, BALKANIZATION BLOG (Oct. 11, 2011, 7:00 AM), <http://balkin.blogspot.com/2011/10/why-law-schools-need-external-scrutiny.html>; Memorandum from Kyle E. McEntee, Executive Director of Law School Transparency, to the ABA Questionnaire Committee 5-6 (Dec. 13, 2010), available at <http://www.lawschooltransparency.com/Kyle%20P%20McEntee%20Statement%20for%20Law%20School%20Transparency.pdf>.

II. EXPLORING THE SORTING FUNCTION OF LEGAL EDUCATION

A. *Providing a Supply of Lawyers to the Marketplace—Divergence with some Convergence*

Legal education and the legal profession have shifted from convergence to divergence with respect to the “sorting” function of legal education. The market for lawyers and law graduates is dysfunctional, largely because prospective law students have a four-year to five-year delay between their decision to pursue a legal education and their actual entry into the legal services market.⁵³ From the early 1990s, the last time there was a significant economic downturn, through 2007 or 2008, the growth in the legal services market masked this dysfunctionality—those entering law school consistently found employment opportunities awaiting them upon graduation.⁵⁴ As a result, the “signal” sent to prospective law students by legal employers and law schools suggested that law school was a “good investment” because of very positive employment prospects for law school graduates. This was a period of relative convergence between legal education and the legal profession with respect to the supply of lawyers for the marketplace.

For those who entered law school in 2006, 2007, and 2008, however, the dysfunctionality of the legal services market proved significantly problematic. While employment prospects looked rosy when those students entered law school, by the time they graduated in 2009, 2010, and 2011, the mortgage crisis and resulting economic decline had dramatically reduced the employment prospects for law school graduates as law firms responded to the economic crisis by laying off attorneys and slowing hiring.⁵⁵ Public

53. For full time law students, this is a four-year gap. For part-time law students this can be a five-year gap.

54. From 1998 through 2004, legal services employment jumped sixteen percent before flattening out and beginning to decline. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession – And it May be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011, 4:40 AM), http://www.abajournal.com/magazine/article/paradigm_shift/. During the period from 1998-2008, law schools generally reported employment results in excess of eighty-eight percent. Chart comparing NALP’s annual employment percentage (between 88.89% and 91.85% throughout this period) with the average of the employment percentages for law schools reported by *U.S. News* (between 89.95% and 93.99% throughout this period in years with data on more than 170 schools) (on file with author). In recent years, much has been made, quite appropriately, about the inadequacy of reported employment outcome data to reflect the softness of the legal market during the mid-to-late 2000s. While much of that criticism is justified, very few people anticipated the profound economic recession that began with the mortgage meltdown in 2008.

55. See, e.g., John Schmid, *Foley and Lardner trims 39 lawyers*, J. SENTINEL (Oct. 14, 2009), <http://www.jsonline.com/business/64302042.html>; Ameet Sachdev, *Big Firms cut back on law school recruiting*, CHI. TRIB., Sept. 1, 2009, <http://newsblogs.chicagotribune.com/chicago-law/2009/09/big-firms-cut-back-on-law-school-recruiting.html>; *Layoff Tracker*, LAW SHUCKS, <http://lawshucks.com/>

employers facing revenue shortfalls and budget challenges also curtailed hiring to some extent.⁵⁶

As further evidence of the market dysfunctionality, first-year enrollment increased in 2009 and 2010 to record levels,⁵⁷ even as 2009 and 2010 law school graduates found the job market for law school graduates in decline.⁵⁸ Frustrated law graduates turned to “law school scam blogs” to begin calling attention to the unreliable employment statistics law schools were publishing, which failed to accurately signal the extent to which law school graduates were finding meaningful employment opportunities.⁵⁹ *The New York Times* also picked up the story with articles highlighting the reality that legal education is expensive and that employment opportunities may not justify the costs.⁶⁰

The groundswell of concern about law schools publishing unreliable data relating to employment results for graduates prompted congressional attention⁶¹ and ultimately regulatory action by the Section.⁶² First, the

layoff-tracker/ (last visited Jul. 12, 2012) (tracking lay-off data for big law firms); Lindsay Fortado, *Cravath Asks Incoming Lawyers to Delay Start a Year (Update3)*, BLOOMBERG (June 12, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aMEgtmRcLY.I>.

56. See, e.g., *New Jersey Uses Fleet of Volunteer Attorneys* (Eugene Sonn, Nat’l Pub. Radio broadcast Dec. 10, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=121274655> (discussing hiring freeze in state government in New Jersey); *Agencies brace for cuts’ impacts*, HUTCHINSON NEWS, Nov. 24, 2009.

57. The LSAC Volume Summary notes that from 2008 to 2010 the number of entering first-year law students rose from 46,500 to 49,700. Data – LSAC Volume Summary, LSAC, <http://www.lzac.org/LSACResources/Data/LSAC-volume-summary.asp> (last visited Jul. 12, 2012) [hereinafter LSAC Volume Summary].

58. NALP, *Employment for the Class of 2010 – Selected Findings, Class of 2010 Graduates Faced Worst Job Market Since Mid-1990s: Longstanding Employment Patterns Interrupted*, at 1 (2011) (noting that “[t]he overall employment rate of 87.6% of graduates [Class of 2010] for whom employment status was known” down from a 20-year high of 91.7% for the Class of 2007), available at <http://jonathanturley.files.wordpress.com/2011/06/classof2010selectedfindings.pdf>. The NALP report further noted that the percentages of jobs requiring bar passage—68.4%—was the lowest it had recorded and was down six percent from 2008. *Id.* at 12 (note that even these percentages slightly overstate employment outcomes by excluding those graduates whose employment status is unknown from the denominator used in calculating employment percentages).

59. See, e.g., THIRD TIER REALITY, <http://thirdtierreality.blogspot.com/> (last visited July 30, 2012); LAW SCHOOL TUITION BUBBLE, <http://lawschooltuitionbubble.wordpress.com/> (last visited July 30, 2012); LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com/> (last visited July 30, 2012).

60. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all>; David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, April 30, 2011, <http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=all>.

61. See Letter from Sen. Barbara Boxer to Stephen N. Zack, A.B.A. President (May 20, 2011), available at <http://boxer.senate.gov/en/press/releases/052011.cfm>; Letter from Sen. Barbara Boxer to William T. Robinson, III, A.B.A. President (Oct. 6, 2011), available at <http://boxer.senate.gov/en/press/releases/100611b.cfm>; Letter from Sen. Charles E. Grassley to Stephen N. Zack, A.B.A. President (July 11, 2011), available at <http://www.grassley.senate.gov/about/upload/2011-07-11-Grassley-to-ABA.pdf>.

Questionnaire Committee recommended and the Council for the Section approved an expanded format for gathering employment results directly, including a specific delineation of whether employment positions are full-time or part-time, long-term or short-term, or funded by law schools.⁶³ More recently, the Standards Review Committee recommended and the Council for the Section approved a standard reporting format for law schools, which will make it easier for prospective law students to make apples to apples comparisons across law schools.⁶⁴

This increased media attention on the employment challenges law school graduates have been facing finally appears to have found its way to the eyes and ears and minds of prospective law students, resulting in a decline in applicants and matriculants between 2010 and 2011, with applicants down from 87,500 to 78,500, and matriculants down from 49,700 to 45,600.⁶⁵ This decline manifested itself widely with 142 law schools showing a decline in first-year enrollment between 2010 and 2011, sixty-five of which saw a decline of ten percent or greater in enrollment.⁶⁶ While the decline in enrollment was experienced by law schools distributed throughout the rankings, the decline was more pronounced among schools in the bottom 100 of *U.S. News* rankings.⁶⁷ Notably, a majority of schools

62. The Questionnaire Committee for the ABA Section on Legal Education and Admissions to the Bar proposed changes to the collection of employment outcomes for law school graduates that the Council for the Section approved in December 2011. Mark Hansen, *ABA Legal Ed Sections' Council Approves Changes in Law Graduate Employment Data*, A.B.A. J. (Dec. 6, 2011, 12:39 PM), http://www.abajournal.com/news/article/council_approves_changes_in_law_school_employment_data/. This data collection effort is now published on the ABA website. See ABA Section of Legal Education – Employment Summary Report, A.B.A. SEC. L. EDUC. AND ADMISSION TO THE B., <http://employmentsummary.abaquestionnaire.org/> (last visited July 13, 2012) [hereinafter ABA Employment Summary Report]. More recently, the Council approved recommendations from the Standards Review Committee regarding Standard 509—Consumer Information—setting forth a standardized format law schools must use to disseminate information regarding the employment outcomes of their graduates and regarding the rate at which conditional scholarships are renewed. *Reforms to Reporting of Law Graduate Employment Data Proposed by ABA's Section of Legal Education and Admissions to the Bar*, A.B.A. SEC. L. EDUC. AND ADMISSION TO THE BAR, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2012_proposed_standard_509.authcheckdam.pdf (last viewed on June 27, 2012) [hereinafter *Reforms to Reporting of Law Graduate Employment Data*].

63. See Hansen, *supra* note 62 (discussing Questionnaire Committee recommendations).

64. See *Reforms to Reporting of Law Graduate Employment Data*, *supra* note 62 (discussing Standards Review Committee recommendations).

65. See LSAC Volume Summary, *supra* note 57 (2010 and 2011 summaries). Notably, nearly half of the decline in applicants came from the top sixty-seven feeder schools. See *Top 240 ABA Applicant Feeder Schools for: Fall Applicants*, LSAC, <http://www.lsac.org/lsacresources/data/pdfs/top-240-feeder-schools.pdf> (last visited July 13, 2012) (calculation on file with author).

66. Jerome M. Organ, *Comparison of 2010 and 2011 Enrollment and Profile Data Among Law Schools*, THE LEGAL WHITEBOARD (Aug. 16, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/>.

67. *Id.*

also saw a decline in the LSAT/GPA profile of their first-year class.⁶⁸ Perhaps most significantly, there were thirty-nine schools that saw a decline in enrollment of ten percent or greater and saw a decline in their LSAT/GPA profile.⁶⁹

With applicants projected to be down to around 67,000 for the fall 2012 admissions cycle,⁷⁰ one can expect matriculants to fall possibly to as low as 41,000 for fall 2012, assuming many law schools choose to admit students at a higher rate than in the past to make sure they can come as close as possible to meeting revenue goals.⁷¹ With applications down more significantly among those with higher LSAT scores, the fall 2012 enrollment cycle is likely to be a repeat of the 2011 cycle, with a significant percentage of schools experiencing both a decline in enrollment and a decline in LSAT/GPA profile.⁷²

Even so, the ready availability of federal educational loans probably has meant that the demand for legal education has remained exaggerated because the loans reduce the price sensitivity of prospective law students.⁷³ Responding to this demand, since 1990, over two dozen new law schools were opened, with twenty-four of the new law schools receiving full

68. *Id.* A decline indicates that more scores went down than up, so if a school had none up and five down that would be a decline. Similarly, if a school had one indicator up and two down, that would be a decline.

69. *Id.*

70. The LSAC volume summary for the 2011-2012 admissions cycle shows that there were slightly over 66,496 applicants as of June 29, 2012, a point in time at which ninety-nine percent of applications normally have been processed. *See* Data: Current Volume – Three-Year Summary, LSAC, <http://www.lsac.org/LSACResources/Data/three-year-volume.asp> (last visited August 9, 2012).

71. *See* LSAC Volume Summary, *supra* note 57 (shows an increase in the percentage of applicants admitted from 55.5% in 2004 to 71% in 2011). The LSAC Volume Summary also shows that an average of roughly eighty-two percent of admitted students matriculated over the last several years. *Id.* If schools admit seventy-five percent of the 67,000 applicants, that would result in 50,250 admitted students. If eighty-two percent of admitted students matriculate, that would result in 41,200 matriculants. Notably, the decline of 4,000 matriculants for 2011 translates roughly to a loss of \$100 million in net tuition revenue among law schools for the 2011-2012 academic year. Assuming an average tuition of \$35,000 and an average scholarship of \$10,000 net revenue would be roughly \$25,000 per student. When this is multiplied by 4,000 fewer matriculants, the lost revenue is \$100 million per year—roughly \$300 million over three years. If matriculants drop below 42,000 for fall 2012, there likely would be another loss of close to \$100 million in net tuition revenue per year—roughly \$300 million over the next three years and a total of \$600 million over four years.

72. LSAC also tracks distribution of LSAT across applicants. For the 2011-2012 admissions cycle, there has been a greater decline in applicants among those with LSAT scores of 160 to 175, where the decline is eighteen percent or more. *See* LSAC Current Volume Summary as of March 16, 2012, *ABA Fall 2012 Applicant and Application Counts*, LSAC, <http://lsac.org/members/data/PDFs/Current-Volume-031612.pdf> (last visited Sept. 11, 2012). It is going to be very hard for schools to maintain their LSAT profile for 2012.

73. *See* Brian Tamanaha, *A Proposal for Imposing Fiscal Restraint on Law Schools*, BALKANIZATION BLOG (Oct. 19, 2011, 12:05 AM), <http://balkin.blogspot.com/2011/10/proposal-for-imposing-fiscal-restraint.html>.

accreditation from the Section.⁷⁴ Notably, enrollment at these new law schools is responsible for a significant percentage of the growth in enrollment at law schools generally between 1990 and 2010.⁷⁵ Now that the demand for legal education is in decline, legal education is discovering that it may not be well-structured to absorb significant losses in revenue affiliated with significant reductions in enrollment.⁷⁶ This would be a point of divergence at the present time.

B. Serve as a “Sorting Hat” for the Legal Market—Convergence and Divergence

While one could argue that the changes in the legal services market mean we arguably need fewer lawyers in the United States,⁷⁷ and that one aspect of divergence between legal education and the legal profession arises simply because of the number of law school graduates entering the legal services market; another aspect of the divergence between legal education and the legal market is that there remains a significant “access to justice” problem for middle-class and lower-middle-class individuals and families who cannot find legal services at price points that are affordable.⁷⁸ Thus, we appear to have both too many lawyers and yet not enough lawyers to meet the specific needs of sub-populations within our community.

i. Sorting Among Law Schools

Law schools themselves generally function as an initial sorting mechanism, as prospective law students with the best “objective profile”—combination of LSAT score and undergraduate GPA—are invited

74. Since 1990, the ABA Section of Legal Education and Admissions to the Bar has granted full accreditation to 24 new law schools. See *ABA Approved Law Schools by Year*, A.B.A. SEC. L. EDUC. AND ADMISSION TO THE B., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited July 13, 2012).

75. Roughly twelve percent of the fall 2011 population of first-year law students were enrolled in one of the twenty-four schools receiving full accreditation from the ABA Section of Legal Education and Admissions to the Bar since 1990. See chart of enrollment across all law schools for fall 2011 (on file with the author).

76. As noted above, *supra* note 71, as of fall 2012, legal education may be seeing an annual decline in net tuition revenue of \$200 million or more as compared to net revenue in 2010. For some schools, this financial burden will be very hard to absorb, particularly given the extent to which human capital—faculty, administrators and staff—tend to represent significant percentages of the budgets of many law schools and many faculty are tenured and not easy to terminate.

77. See *supra* notes 12-13, 54-56 and accompanying text.

78. See, e.g., Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*, 13 U. PA. J. L. SOC. CHANGE 265, 265-70 (2009-2010) (describing surveys summarizing the state of unmet legal needs in the United States).

to, and elect to go to, the most elite “national” law schools.⁷⁹ Similarly, prospective law students with the least impressive “objective profile” may only be invited to and will elect to go to less well regarded regional law schools.⁸⁰ Law school scholarship programs, largely designed to attract high quality candidates, result in some reallocation of those with the “best” objective profiles from more elite schools to less elite schools.⁸¹ But these scholarship programs also tend to have a reverse “Robin Hood” effect. To the extent that better objective profiles are associated with higher socio-economic status⁸² and to the extent that law school scholarship programs tend to be “internally funded” through tuition-discounting, these scholarship programs tend to impose additional tuition costs on those of lower socio-economic status (with the least impressive “objective profile”) to fund the scholarships for those of higher socio-economic status (with the best “objective profile”).⁸³

79. The most elite law schools, such as Yale and Harvard, for example, have a class profile in which three quarters of their entering law students have an LSAT score of 171 or better and have an undergraduate GPA of 3.75 or higher. See chart on file with author; *Entering Class Profile*, YALE L. SCH., <http://www.law.yale.edu/admissions/profile.htm> (last visited July 13, 2012); *Class Profile and Fact Sheet*, HARVARD L. SCH., <http://www.law.harvard.edu/prospective/jd/apply/classprofile.html> (last visited July 13, 2012).

80. The least elite law schools in terms of class profile in the forty-eight contiguous states include Appalachian School of Law, Southern University Law Center, and Texas Southern University Thurgood Marshall School of Law, all three of which have an LSAT profile completely in the 140s. See chart on file with author; ABA-LSAC Guide 2013, LSAC, https://officialguide.lsac.org/release/OfficialGuide_Default.aspx (last visited Aug. 16, 2012) (with links to profiles for each law school); Appalachian School of Law, TOP L. SCHOOLS, <http://www.top-law-schools.com/appalachian-school-of-law.html> (last visited Aug. 16, 2012); Southern University Law Center, TOP L. SCHOOLS, <http://www.top-law-schools.com/southern-university-law-center.html> (last visited Aug. 16, 2012); Texas Southern University Thurgood Marshall School of Law, TOP L. SCHOOLS, <http://www.top-law-schools.com/texas-southern-university.html> (last visited Aug. 16, 2012).

81. Many prospective law students will opt for a less prestigious law school if the cost of their legal education is significantly reduced by scholarship assistance. Thus, a student with a high LSAT and undergraduate GPA, let us say a 165 and 3.8, might have the opportunity to attend law school at Vanderbilt University or Duke University (at a cost of \$45,000 to \$50,000), but also may have the opportunity to go to the Indiana University Maurer School of Law on a \$20,000 scholarship, or to the University of St. Thomas School of Law on a \$30,000 scholarship. Particularly for a student considering practicing law in the upper Midwest, the decision to go to Indiana or to the University of St. Thomas, at a savings of more than \$60,000 or \$90,000, respectively, over three years (given that tuition is lower to begin with at Indiana and at the University of St. Thomas than at Duke or Vanderbilt) might make significant sense from an economic standpoint.

82. See Richard H. Sander, *Class in American Legal Education*, 88 DEN. U. L. R. 631, 636-40 (2011) (presenting a chart showing the direct correlation between socioeconomic status and eliteness of law school attended); Ronit Dinovitzer, *The Financial Rewards of Elite Status in the Legal Profession*, 36 L. & SOC. INQ. 971, 990-91 (2011) (“[S]ociological research on the profession highlights that advantaged social origins increase the likelihood of attending elite law schools with higher graduating grades, and having career opportunities in large corporate firms, and that these are institutional mechanisms that command prestige through which social advantage is produced.”).

83. See Jerome M. Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 J. LEGAL EDUC. 173, 186 n.22 (2011) (“[T]hose with lower objective criteria (LSAT and

Analysis of the “after the J.D.” survey data and the employment outcome data recently gathered and disseminated by the Section demonstrates the extent to which elite schools fill distinct markets—with large percentages of graduates from elite schools going to large law firms and prestigious judicial clerkships with smaller percentages going to other job categories.⁸⁴ This employment outcome data also suggests the extent to which the vast majority of law schools, in fact, serve “regional” markets—a geographical “sorting,” if you will.⁸⁵ In addition, because of the much more transparent data being gathered and disseminated, those looking at employment prospects following law school now have a much better sense of the extent to which “jobs” are full-time, require a J.D., or are funded by law schools.⁸⁶

UGPA), effectively subsidize the legal education of those with higher scores, as most scholarship programs are not funded by endowments but are funded by tuition discounting—by tuition-paying students. Daniel J. Morrissey, *Saving Legal Education*, 56 J. Legal Educ. 254, 269 (2006.); See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS 98-99* (2012) (discussing “reverse Robin Hood” scholarship dynamic).

84. See Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC’Y REV. 1, 11, tbl. 3 (2007) (analysis of job data indicated a linear relationship between the rank of law school and the size of firm in which the largest percentage of graduates worked. Among top ten schools, over half of the graduates were in firms of 251 or more attorneys and fewer than three percent were in firms of 2–20 attorneys. By contrast, among fourth tier schools, nearly forty percent of graduates were in firms of 2–20 attorneys, and fewer than four percent were in firms of 251 or more attorneys). This is consistent with the employment outcome data recently published by the ABA for the class of 2010. ABA Employment Summary Report, *supra* note 62. For graduates employed in firms of 2-10 lawyers, the bottom twenty law schools had percentages ranging from 5.7% to 0.3% and were all ranked among the top fifty law schools, while the top twenty law schools had percentages ranging from 31.3% to 40.8% and included no law schools ranked in the top fifty. See chart on file with author (compiled from data obtained by ABA Employment Summary Report, *supra* note 62). Similarly, for graduates employed in firms of 501 or more, the bottom twenty law schools are all at zero and are predominantly fourth tier law schools, while the top twenty law schools had percentages ranging from 19.6% to 60.4% and are all ranked among the top fifty. *Id.* Similarly, the top twenty law schools for percentage of graduates who had federal clerkships range from 6.7% to 30% and almost all are law schools ranked in the top fifty, while the bottom twenty schools are all at zero and are predominantly fourth tier law schools. *Id.*

85. On average, two-thirds of employed graduates from the Class of 2010 are employed in the state in which the law school from which they graduated is located. See chart on file with author (compiled from data taken from ABA Employment Summary Report, *supra* note 62). 120 law schools had at least two-thirds of employed graduates employed in the state in which the law school is located. *Id.* For 140 law schools, at least two of the top three states in which their graduates are employed are the state of the law school and a neighboring state. *Id.* Moreover, for the vast majority of states, the top feeder schools for jobs in that state are law schools in the state or in a neighboring state. *Id.*

86. See ABA Employment Summary Report, *supra* note 62 (report for 2010 and 2011). For the Class of 2010, the data included whether jobs were long-term or short term or law school funded. *Id.* For the Class of 2011, the data included whether jobs were bar passage required or JD advantage and included whether the jobs were full-time or part-time, as well as whether they were long-term or short-term or law school funded. *Id.*

ii. Sorting Within Law Schools

Within law schools, particularly the less elite law schools, performance results in its own sorting among employment options. Those who perform the “best” in law school have the opportunities to go to big firms or prestigious judicial clerkships along with the wide array of other opportunities.⁸⁷ Those who are not at the top of the class fill out the balance of medium and smaller firm, prosecutor and public defender positions and less elite judicial clerkship opportunities, along with other professional opportunities and non-professional opportunities.⁸⁸

Grading in law schools, however, tends to focus on the “first apprenticeship”—the intellectual and cognitive—“thinking like a lawyer.”⁸⁹ While all first-year students take some type of legal writing course, the vast majority of course credits in the first-year curriculum relate to doctrinal courses in which the assessment focuses on acquisition of knowledge and the critical thinking skills reflected in the concept of “thinking like a lawyer.”⁹⁰ Thus, first-year GPA, upon which some employment opportunities will be determined and upon which selection for law review or research assistant positions with faculty frequently will be determined, is narrowly based upon intellectual and analytical abilities, not other competencies that also will determine one’s ultimate success as a lawyer.⁹¹ While experiential learning opportunities may help those students who thrive more in a “learning by doing” environment, these will not become available until a student’s second year or third year and generally will still

87. At most regional law schools, many of the jobs that are considered most worth pursuing, federal judicial clerkships and jobs with large law firms, which are viewed as attractive either because of prestige or salary or both, are available only to those in the top ten percent or top fifteen percent of the class, and maybe not even to many of those students. For the Class of 2010, there were 128 law schools who placed fewer than ten percent of their graduates in firms of 101 or larger or in federal court clerkships, and of those, eighty-three law schools placed fewer than five percent of their graduates in firms of 101 or larger or in federal court clerkships. See chart on file with author (compiled from data taken from ABA Employment Summary Report, *supra* note 62).

88. For the Class of 2010, the top twenty schools for percentage of graduates who were working in business ranged from having 20.5% to 30.3% of their graduates employed in business and none were top fifty schools. See chart on file with author (compiled from data obtained by ABA Employment Summary Report, *supra* note 62).

89. CARNEGIE REPORT, *supra* note 3, at 165-70.

90. The standard first-year curriculum includes Civil Procedure, Contracts, Torts, Property, and generally Criminal Law and Constitutional Law, in addition to a Legal Research and Writing course. Some law schools have added a doctrinal “elective” to expose students to a course featuring statutory analysis or international legal concerns.

91. See *supra* note 8 and accompanying text.

represent less than a majority of the “grades” a student receives while in law school.⁹²

Three further notes on quandaries associated with the “sorting” aspect of law school merit attention. First, because much of the sorting revolves around grades and opportunities associated with grades, preferences/experiences of students may not get significant weight in the “sorting” process. For example, a student with an educational background in environmental sciences and one or two years of work experience working with an environmental consulting firm may have a profound interest in practicing in the environmental law field. Much environmental law work in the private sector, however, tends to be in larger law firms which represent larger business clients (that might have environmental problems and can afford to pay for sophisticated legal assistance). If the student with experience in environmental consulting and a real interest in environmental law earns grades placing her in the middle of the class, her background and passion may mean nothing in terms of her having access to jobs in larger private firms dealing with environmental law because they may interview only those in the top ten or fifteen percent of the class. Of course there might be government positions available for which the student could interview and there might be opportunities to “network” her way into positions with a smaller environmental boutique firm that may place more weight on education and experience than on law school performance, but the big firm environmental law job is likely to go to a student who performed exceedingly well in law school regardless of her actual interest in or experience with environmental law.⁹³

Second, given the increased student loan obligations with which many law school graduates are completing law school, some jobs that might be consistent with a law graduate’s interests and preferences may not be feasible positions for the graduates to pursue because the cost of servicing their law school debt will require income in excess of that associated with some positions.⁹⁴ Government loan forgiveness programs, such as income-

92. Clinical courses, skills courses and simulation courses at many schools are known to have more generous grading, but for many students it is “too little, too late” to help their cumulative GPA given the sheer number of doctrinal credits reflected in the first-year curriculum and upper-level required curriculum.

93. This concern may arise in other subspecialties as well, but is less manifest with other “facets” of the legal services market. Family law, employment law, criminal law and workers compensation law are done throughout a state in big firms, small firms and by sole practitioners. Law students with some of these interests and passions may be able to pursue employment opportunities consistent with their interests and passions with their academic performance in law school having less of an impact on overall opportunities.

94. See TAMANAHA, *supra* note 83, at 107-14 (discussing significant increases in debt among law graduates); Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a*

based repayment, may ease some of the financial burden, and make some positions more viable for some law school graduates.⁹⁵ In reality, however, even these types of government subsidies have the net effect of reducing pricing pressure on law schools, allowing law schools to continue to raise tuition and thereby increase the burden on law graduates trying to manage significant debt.⁹⁶

Third, many law school graduates appear not to have a very refined understanding of the type of job or work environment that is likely to be most fulfilling for them. Data from a variety of empirical surveys consistently shows that recent graduates are among the least satisfied members of the legal profession.⁹⁷ The empirical data demonstrates that levels of satisfaction increase over time⁹⁸ and generally increase with each job change,⁹⁹ suggesting that over time, graduates begin to find jobs or work environments that are more consistent with their skills and preferences. Recognizing that finding any job is challenging for many graduates at the present moment,¹⁰⁰ and that economic necessities may force some graduates to take jobs that are unsatisfying, it would be helpful if law schools did more to help students obtain a richer understanding of the range of job opportunities and work environments in the profession so that students could be more actively engaged in exploring options while in law school that will help them advance in their understanding of types of jobs or work environments that are likely to be fulfilling for them.¹⁰¹

Basic Measurement of a Law School Graduates' Economic Viability, 38 WM. MITCHELL L. REV. 1185, 1200-02 (2012); William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will it Last if Law Grads Can't Pay Bills?*, A.B.A. J. (Jan. 2012), http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/.

95. See FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/plans/income-based> (last visited Aug. 16, 2012); Eryk J. Wachnik, *The Student Debt Crisis: The Impact of the Obama Administrations' "Pay as You Earn" Plan on Millions of Current & Former Students*, 24 LOY. CONSUMER L. REV. 442, 446-50 (2012); TAMANAHA, *supra* note 83, at 119-122 (discussing potential burdens associated with income-based repayment of federal loans).

96. See TAMANAHA, *supra* note 83, at 122.

97. See Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers: A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. J. 225, 264 (2011).

98. *Id.*

99. *See id.*

100. See ABA Employment Summary Report, *supra* note 63 (report for 2010 and 2011).

101. Examples of two schools with such programs include the University of St. Thomas School of Law's Mentor Externship Program and the Northeastern University School of Law's Cooperative Education Program. *About the Program*, U. OF ST. THOMAS SCH. OF L., http://www.stthomas.edu/law/current_students/mentorexternship/abouttheprogram/ (last visited July 13, 2012); *Cooperative Legal Education Program*, NORTHEASTERN U. SCH. OF L., <http://www.northeastern.edu/law/co-op/index.html> (last visited July 13, 2012).

III. SYNTHESIZING CHALLENGES AND PREPARING FOR THE FUTURE

A. *Promoting Professional Formation Should Facilitate Better “Sorting”*

The divergence between legal education and the legal profession relating to professional identity formation is directly linked to some of the divergence with respect to the “sorting” function of law school. If law schools did more to explore with students their understanding of professional identity, their students would grow in their self-understanding and their understanding of the profession in a way that results in students being better prepared for their responsibilities as members of the legal profession. This starts with better information about employment outcomes, something the ABA is already providing on a school by school basis so that prospective law students have more realistic expectations coming into law school regarding job opportunities coming out of law school.¹⁰² In addition, this increased emphasis on professional formation should mean that students would direct their job search efforts in ways that are more likely to be professionally and personally fulfilling. Recognizing that some of the stratification in the legal job market will always function to constrain choice to some degree, increased emphasis on professional formation nonetheless would enhance the “sorting” function of legal education because students and graduates, in theory, should be positioned to pursue most vigorously those job opportunities they are likely to find more fulfilling.

While many law schools place significant emphasis on experiential learning, whether through clinics, simulation courses, or externships, which help foster professional formation for some subset of students, the University of St. Thomas School of Law has been more intentional than almost any other law school about fostering professional identity formation for its law students through its mandatory mentor externship program in addition to other components of its curriculum and culture.¹⁰³ The Northeastern University School of Law’s cooperative education program similarly reflects a significant degree of intentionality in fostering professional identity formation through structured experiential learning opportunities for all of its students.¹⁰⁴ These are models other law schools should think about following.

102. See *supra* note 62-64 and accompanying text.

103. See *supra* notes 37, 101.

104. See *supra* note 101.

B. Understanding the Failure to Pursue Synergies: To What Purpose is Legal Education Organized?

While there is some discussion earlier in this essay regarding reasons why law schools do not emphasize professional identity formation more significantly,¹⁰⁵ there is an overarching question that might explain this divergence between legal education and the legal profession: To what purpose is legal education organized—for the benefit of students, for the benefit of the legal profession, or for the benefit of the faculty?

In his new book, *Failing Law Schools*, Professor Brian Tamanaha paints a portrait of an institution focused more on self-interest—the benefit of the faculty—than on the benefit of law students and the legal profession.¹⁰⁶ The lack of discernible missions among nearly one-third of law schools as of 2010 suggests that those law schools have not organized their existence for the benefit of their students or the legal profession.¹⁰⁷ The excessive emphasis on rankings that drives the unprofessional behavior of schools, like Villanova and Illinois, suggests that those law schools have not organized their existence for the benefit of their students or the legal profession.¹⁰⁸ The present cost structure of legal education, with increasing tuition even in the face of a retrenchment in the legal services market that has resulted in fewer jobs and lower starting salaries or flat starting salaries, suggests law schools have not organized their existence for the benefit of their students or the legal profession.¹⁰⁹ The lack of emphasis on formation of professional identity and purpose suggests law schools have not organized their existence to benefit their students or the legal profession.¹¹⁰

Does it matter that legal education is not organized for the benefit of law students or the legal profession? It does matter, because legal education is still impacted by market forces and if legal education remains more focused on the interests of faculty members than on the interests of law students and the legal profession, its lack of responsiveness to the market will become a problem. The market for legal education is not exceptional. Economic forces will ultimately control the future of legal education—the market will not tolerate inefficiency and non-responsiveness to market demands forever. Both employers and prospective law students will be making demands for a different model of legal education. Employers will

105. See *supra* notes 31-52 and accompanying text.

106. See generally TAMANAHA, *supra* note 83, at ix-xiii, 186-87.

107. See Organ, *supra* note 35 and accompanying text.

108. See *supra* note 50 and accompanying text.

109. See TAMANAHA, *supra* note 83, at 107-25.

110. See *supra* notes 31-52 and accompanying text.

be looking for a broader array of competencies in law school graduates.¹¹¹ The ABA is moving toward “outcomes measures” for assessment and toward greater transparency in “consumer information.”¹¹² Prospective students will demand a more reasonable cost equation or value proposition, and if prospective law students do not make this demand directly, the federal government may make this demand through changes in the availability of federal education loans.¹¹³ If prospective law students become more price sensitive, law schools will have no choice but to find more economical ways to respond to a changing market or risk becoming victims of a changing market. If legal education remains on a path of significant divergence from the interests of law students and the legal profession, it will soon face upheaval similar to that seen in other industries that were slow to respond to a changing economic marketplace.

111. *See supra* note 8 and accompanying text.

112. *See supra* notes 61-64 and accompanying text; Interim Report of the Outcome Measures Committee, A.B.A. SEC. L. EDUC. & ADMISSION TO THE B., at 3 (May 12, 2008), *available at* apps.americanbar.org/legaled/committees/OutcomeMeasures.doc.

113. *See supra* note 95 and accompanying text.