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## **Beyond Curricular Tinkering: Real Reform of Legal Education (Broadly Considered)**

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BEYOND CURRICULAR TINKERING: REAL REFORM OF  
LEGAL EDUCATION (BROADLY CONSIDERED)

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PROFESSOR J.P. “SANDY” OGILVY\*

FOR THE  
DISCUSSION GROUP: EXPERIENTIAL LEGAL EDUCATION –  
ASSESSING THE PRESENT AND IMAGINING THE FUTURE  
2013 SOUTHEASTERN ASSOCIATION OF LAW SCHOOLS  
(SEALS) CONFERENCE

“The sky is falling, the sky is falling.”

*Chicken Little*

“All is for the best in the best of all possible worlds.”

*Candide*

The truth is surely somewhere in between.

THE LEGAL ECONOMY

We are familiar with the reports documenting the downturn in legal employment of new law graduates and the downturn in recent years both in the number of students sitting for the Law School Admission Test (LSAT) and the number of students applying to and being admitted to law school.

The National Association for Law Placement (NALP) has reported that the overall employment rate for new law school graduates has

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fallen for five years in a row since 2008.<sup>1</sup> The twenty-four-year high point was 2007, when 91.9% of new graduates had some form of employment nine months after graduation.<sup>2</sup> Of these jobs, 84.6% were Juris Doctor (J.D.)-required or J.D.-preferred.<sup>3</sup> For the class of 2013, the overall rate of employment was 86.5%.<sup>4</sup> Of these jobs, only 75.8% were J.D.-required or J.D.-preferred.<sup>5</sup>

The historic high first-year enrollment was in 2010, when 52,488 new law students began their studies.<sup>6</sup> In the last three reporting years, there have been decreases in first-year enrollment, from 48,697 in 2011, to 44,481 in 2012, and 39,675 in 2013.<sup>7</sup> Applicants to American Bar Association (ABA)-accredited law schools have fallen from about 98,300 in 2003 to 68,000 in 2012.<sup>8</sup> ABA-collected data indicates that approximately two-thirds of ABA-approved law schools experienced declines in 2013 first-year enrollment.<sup>9</sup> Eighty-one of these schools reported declines exceeding 10% from 2012, while only twenty-seven schools had increases of 10% or more.<sup>10</sup>

#### CONTINUING MISMATCH OF LEGAL NEEDS AND LEGAL SERVICES

At the same time as we are seeing some softening in the job market for lawyers, there continues to be a significant mismatch between

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<sup>1</sup> Press Release, NAT'L ASS'N FOR LAW PLACEMENT, *Law School Class of 2012 Finds More Jobs, Starting Salaries Rise—But Large Class Size Hurts Overall Employment Rate* (June 20, 2013), available at [http://www.nalp.org/uploads/PressReleases/Classof2012/SelectedFindingsPressRelease\\_june2013.pdf](http://www.nalp.org/uploads/PressReleases/Classof2012/SelectedFindingsPressRelease_june2013.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Employment Market for Law School Graduates Wavers*, NAT'L ASS'N FOR LAW PLACEMENT (July 2010), <http://www.nalp.org/july10trendsgadempl>.

<sup>4</sup> *2013 Law Graduate Employment Data*, A.B.A. SEC. LEGAL EDUC. & ADMISSION TO BAR, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2013\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduate_employment_data.authcheckdam.pdf) (last visited July 23, 2014).

<sup>5</sup> *Id.*

<sup>6</sup> *ABA Section of Legal Education Reports 2013 Law School Enrollment Data*, ABA NEWS ARCHIVES (Dec. 17, 2013, 7:30 AM), [http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba\\_section\\_of\\_legal.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba_section_of_legal.html).

<sup>7</sup> Mark Hansen, *Law School Enrollment Down 11 Percent This Year over Last Year, 24 Percent over 3 Years, Data Shows*, A.B.A. J. (Dec. 17, 2013, 9:30 AM), [http://www.abajournal.com/news/article/law\\_school\\_enrollment\\_down\\_11\\_percent\\_this\\_year\\_over\\_last\\_year\\_data\\_shows](http://www.abajournal.com/news/article/law_school_enrollment_down_11_percent_this_year_over_last_year_data_shows).

<sup>8</sup> Dan Miner, *Law Schools Face Facts: Dwindling Enrollment*, BUFFALO BUS. FIRST (June 19, 2013, 8:21 AM), <http://www.bizjournals.com/buffalo/news/2013/06/19/law-schools-face-facts-dwindling.html?page=all>.

<sup>9</sup> Hansen, *supra* note 7.

<sup>10</sup> *Id.*

the need for legal services and the provision of legal services. The 2009 publication by the Legal Services Corporation (LSC), *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans*, noted that roughly half of the people who seek help from LSC-funded providers are denied service, most because of inadequate program resources.<sup>11</sup> A 2010 report from the Task Force to Expand Access to Civil Legal Services in New York found:

Each year, more than 2.3 million New Yorkers try to navigate the State's complex civil justice system without a lawyer. The statistics are staggering, to cite a few: 99 percent of tenants are unrepresented in eviction cases in New York City, and 98 percent are unrepresented outside of the City[;] 99 percent of borrowers are unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City[;] 97 percent of parents are unrepresented in child support matters in New York City, and 95 percent . . . in the rest of the [s]tate; and 44 percent of home owners are unrepresented in foreclosure cases throughout [New York] State.<sup>12</sup>

The data are undoubtedly similar in other states.<sup>13</sup>

Although much more difficult to research and document, it is likely that there is a large unmet need for civil legal services among middle-income individuals as well. In fact, Professor Deborah Rhode suggests that two-fifths to three-fifths of the needs of middle-income individuals are unmet.<sup>14</sup>

#### HIGH COST OF A LEGAL EDUCATION

Certainly one of the reasons that there is a mismatch between the number of recent law graduates who are unemployed or underemployed and the unmet demand for civil legal services is the reality (or perception at least) that many students are graduating with very high

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<sup>11</sup> LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1* (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) (“[F]or every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources.”).

<sup>12</sup> TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1* (2010), available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf> [hereinafter *TASK FORCE REPORT*].

<sup>13</sup> David Liu, *Civil Legal Aid by The Numbers: Budget Cuts Would Hurt Low- and Moderate-Income Litigants*, *CTR. FOR AM. PROGRESS* (Aug. 9, 2011), <http://www.americanprogress.org/issues/open-government/news/2011/08/09/10080/civil-legal-aid-by-the-numbers/>.

<sup>14</sup> DEBORAH L. RHODE, *ACCESS TO JUSTICE 3* (2004).

student loan debt, and they believe they cannot afford to engage in a solo or small firm practice and provide services at an affordable rate to low- and middle-income individuals.

The high cost of a legal education has fueled the loan burden—some say it is a bubble that is poised to burst with devastating economic consequences.<sup>15</sup> The high cost of a legal education can be traced, in part, to the “arms race” among universities and law schools to build state-of-the-art buildings with all the amenities, to raise faculty salaries well beyond what is paid to most other faculty in the university, and to discount tuition to attract students with high LSAT scores and undergraduate Grade Point Averages (GPAs).<sup>16</sup>

#### RESPONSIBILITY OF LAW SCHOOLS

It is my thesis that law schools have a shared responsibility to confront their continuing viability as institutions by addressing the mismatch between the number of lawyers available to provide civil legal services and the dearth of affordable civil legal services to low- and moderate-income individuals. It is necessary that law schools continue to rethink and revise the legal curriculum to better prepare graduates for the practice of law—and more attention to experiential education is surely a part of that effort, but it alone is not sufficient. Law schools must be part of the search for real and sustainable solutions for the lack of access to affordable civil legal services in this country.

#### AREAS OF RESPONSE

Surely a response to the slowing of the job market for new lawyers is to shrink the number of new graduates each year to more closely approximate the number of available J.D.-required/preferred positions. This could be accomplished by shrinking the number of law schools. Although there currently are 203 ABA-approved law schools (including those provisionally approved),<sup>17</sup> there are only 141 medical

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<sup>15</sup> 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. 1, 2012), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills).

<sup>16</sup> See, e.g., Elizabeth G. Olson, *The Financial Aid Arms Race at Law Schools*, FORTUNE (Aug. 15, 2013, 2:16 PM), <http://fortune.com/2013/08/15/the-financial-aid-arms-race-at-law-schools>.

<sup>17</sup> *ABA-Approved Law Schools*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) (last visited May 13, 2014).

schools supplying new doctors to the growing health care industry.<sup>18</sup> Alternatively, law schools could admit fewer first-year students. Again, compared to medical schools, law schools admit much larger entering classes. The average entering class size for all medical schools is less than 160.<sup>19</sup>

These steps may become necessary for some law schools unless the employment outlook for new law graduates improves significantly in the short term. But, they would come at a great human cost to faculty and staff and their families at the schools affected, not to mention the diminution of opportunity for prospective lawyers. And this response would do nothing to close the access-to-justice gap. In fact, it is likely to worsen it because even fewer lawyers would be available to serve the individuals.

There are other responses to the crisis that might address both the loss of employment opportunities and the access gap. Law schools are a part of the coalition of stakeholders needed for imagining and creating the changes that will be required in order to respond to the employment crisis. The others include the courts, state and local bar associations, and federal and state legislatures. Law schools should take the lead in experimenting with a variety of initiatives.

Some schools already have begun modest experiments to provide employment for new graduates while expanding the availability of civil legal services to individuals unable to pay prevailing market prices. Beginning with CUNY School of Law in 2007, approximately twenty law schools now sponsor incubator projects that permit recent graduates to jump-start their careers while providing much-needed legal services in disadvantaged communities.<sup>20</sup>

However, more systemic changes are needed to close the access-to-justice gap and to provide meaningful and adequately compensated employment to persons seeking careers in the legal services sector of the economy.

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<sup>18</sup> *About the AAMC*, ASS'N AM. MED. COLLS., <https://www.aamc.org/about> (last visited May 13, 2014).

<sup>19</sup> *Table 1: U.S. Medical School Applications and Matriculants by School, State of Legal Residence, and Sex, 2013*, ASS'N AM. MED. COLLS. 1–5 (Dec. 5, 2013), <https://www.aamc.org/download/321442/data/2013factstable1.pdf>.

<sup>20</sup> G.M. Filisko, *Law Firm Incubators Help Both Grads and Needy Clients, Fred Rooney Says*, A.B.A. J. (Sept. 18, 2013, 8:30 AM), [http://www.abajournal.com/legalrebels/article/2013\\_legal\\_rebel\\_profile\\_fred\\_rooney](http://www.abajournal.com/legalrebels/article/2013_legal_rebel_profile_fred_rooney).

Rather than offering only one degree (the J.D.) or two (the J.D. and Master of Laws (LL.M.)), law schools will need to serve a broader range of prospective students. I can envision a law school offering short-course certificate programs; one- or two-year post-baccalaureate programs; a J.D. program; short-course, post-J.D. certificate programs; and LL.M. programs, each targeted at a different segment of the justice services sector.

In June 2013, a task force of the Committee on Professional Responsibility of the New York City Bar Association released a report, *Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners*, recommending, in part, "the implementation of a pilot program to permit *appropriately trained* nonlawyer advocates to provide out-of-court assistance in a discrete substantive area."<sup>21</sup> In June 2012, the Washington Supreme Court adopted the Limited License Legal Technician (LLLT) Rule, which authorizes non-attorneys *who meet certain educational requirements* to advise clients on specific areas of law.<sup>22</sup> With this rule, the Court established the LLLT Board, which is charged with creating and administering the program.<sup>23</sup> The LLLT Board hopes to begin accepting applications in 2015.<sup>24</sup>

Already, nonlawyers are authorized to represent clients in administrative proceedings and to charge fees for the representation.<sup>25</sup> In federal Social Security disability proceedings, nonlawyers may be compensated from a claimant's award of retroactive benefits, and in immigration cases, firms employing nonlawyers may charge a nominal fee for their services.<sup>26</sup> In many states, nonlawyers may also appear in state unemployment and workers' compensation proceedings.<sup>27</sup> Federal and state agencies permit nonlawyers to practice before them.<sup>28</sup> The number of independent paralegals nationwide is large enough that

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<sup>21</sup> COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR ASS'N, *NARROWING THE "JUSTICE GAP": ROLES FOR NONLAWYER PRACTITIONERS 1* (2013) [hereinafter COMM. ON PROF'L RESPONSIBILITY] (emphasis partially omitted) (quoting TASK FORCE REPORT, *supra* note 12, at 1), available at <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>.

<sup>22</sup> *Limited License Legal Technicians (LLLT)*, WASH. ST. B. ASS'N, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians> (last visited May 13, 2014).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> COMM. ON PROF'L RESPONSIBILITY, *supra* note 21, at 17.

<sup>26</sup> *Id.* at 18–19.

<sup>27</sup> *Id.* at 19–20.

<sup>28</sup> *Id.*

there is a National Federation of Paralegal Associations, comprised of more than fifty member associations, representing over nine thousand individual members.<sup>29</sup>

All of these nonlawyers require training in order to be certified to engage in limited practice,<sup>30</sup> and law schools could provide some of this training.

As the unbundling of legal services becomes more prevalent and jurisdictions relax their rules on the unauthorized practice of law, more and more avenues will open for nonlawyers to take on tasks once reserved for licensed attorneys. The medical profession has already moved well ahead of the legal profession in this regard. Much of the work of a medical practice is performed by medical technicians, nurses, nurse practitioners, or doctors' assistants.<sup>31</sup>

#### FUNDING MODELS

With law schools becoming more entrepreneurial and the state bar associations permitting expanded roles for nonlawyers in providing legal services, the access to justice gap may shrink, but it is so large that it is unlikely to disappear absent a concerted effort by all interested stakeholders in addressing the funding of civil legal services.<sup>32</sup> As

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<sup>29</sup> *About NFPA – Introduction*, NAT'L FED'N PARALEGAL ASS'NS, <http://www.paralegals.org/default.asp?page=1> (last visited May 13, 2014).

<sup>30</sup> *See, e.g.*, WASH. R. ADMIS. PRACTICE 28(D)(3), which states:

- (D) Requirements for Applicants. An applicant for licensure as a Limited License Legal Technician shall:
- (3) *Education*. Have the following education, unless waived by the Board through regulation:
- (a) An associate level degree or higher;
  - (b) 45 credit hours of core curriculum instruction in paralegal studies as approved by the Board with instruction to occur at an ABA approved law school or ABA approved paralegal education program; and
  - (c) In each practice area in which an applicant seeks licensure, instruction in the approved practice area, which must be based on a curriculum developed by or in conjunction with an ABA approved law school. For each approved practice area, the Board shall determine the key concepts or topics to be covered in the curriculum and the number of credit hours of instruction required for admission in that practice area.
  - (d) For the purposes of satisfying APR 28(D)(3), one credit hour shall be equivalent to 450 minutes of Instruction.

<sup>31</sup> Bruce Jaspen, *Doctor Shortage Could Ease as Obamacare Boosts Nurses, Physician Assistants*, FORBES (Nov. 4, 2013), <http://www.forbes.com/sites/brucejaspen/2013/11/04/doctor-shortage-could-ease-as-obamacare-boosts-nurses-physician-assistants>.

<sup>32</sup> *See, e.g.*, Alan W. Houseman, *The Crisis in Civil Legal Aid*, AM. CONST. SOC'Y BLOG (Sept. 25, 2012), <https://www.acslaw.org/acsblog/the-crisis-in-civil-legal-aid>.

stakeholders, law schools should be taking the lead in proposing and devising solutions to the lack of funding.

For the truly poor, expanded government funding of legal services must be a centerpiece of this effort. But for the near poor and middle-income individuals who cannot afford needed legal services, other solutions must be explored.

The possibilities include the expansion of insurance for civil legal services. Individuals may be able to purchase policies or have policies provided as an employee benefit through their employers. Unions might expand the provision of civil legal services as a benefit of membership.

Relaxing the prohibitions on nonlawyer ownership of law practices would permit other businesses to offer legal services as part of a menu of services. This could lead to a legal services department in Sears or Walmart, where shoppers could get legal advice and simple, direct services.<sup>33</sup>

For some serious civil legal issues, recognizing the right to representation could provide the government funding needed for representation; this is the goal of the Civil Gideon movement.<sup>34</sup>

#### CONCLUSION

None of these proposals are without problems. Indeed, it is possible that none of these will address the two issues raised above in any significant way. But it is important that more legal educators move beyond the task of tinkering with the curriculum and begin to participate in a meaningful and sustained way with the more fundamental and intractable problems within legal education (in the broader sense suggested above) and the lack of access-to-justice services available to a large majority of the American population.

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<sup>33</sup> Francine Kopun, *Walmart Shoppers Can Now Get \$99 Wills*, TORONTO STAR (Apr. 21, 2014), [http://www.thestar.com/business/personal\\_finance/2014/04/21/walmart\\_shoppers\\_can\\_now\\_get\\_99\\_wills.html](http://www.thestar.com/business/personal_finance/2014/04/21/walmart_shoppers_can_now_get_99_wills.html).

<sup>34</sup> Mark Walsh, *Fifty Years After Gideon, Lawyers Still Struggle to Provide Counsel to the Indigent*, A.B.A. J. (Mar. 1, 2013), [http://www.abajournal.com/magazine/article/fifty\\_years\\_after\\_gideon\\_lawyers\\_still\\_struggle\\_to\\_provide\\_counsel/](http://www.abajournal.com/magazine/article/fifty_years_after_gideon_lawyers_still_struggle_to_provide_counsel/).