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Michael A. Fitts

University of Pennsylvania Carey Law School

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What Will Our Future Look Like and How Will We Respond?

*Michael A. Fitts**

Over the past quarter century, American society has served as a global model in a number of different arenas: scientific research, technological innovation, university education, and business entrepreneurship. There are many reasons for our comparative leadership, including a dynamic economic and social structure, a relatively diverse and open society, and stable political institutions.

Legal education is an excellent example of just such an American model. As Judith Areen nicely describes in her accompanying article, the decentralized and dynamic quality of the American educational system, which lacks the intrusive governmental presence or control that is found throughout much of the world, has been a major ingredient in our leadership.¹ For these and other reasons, the scholarship that emanates from our universities, on a theoretical as well as a more practical level, is in many respects the envy of the world. It is no accident that thousands of law faculty and students flock to the United States each year to study in our classrooms, work with our faculty, and gain an understanding of how our legal system works. Equally important is exposure to the academic process through which we analyze and teach the next generation how to understand and shape legal institutions. If the measure of excellence is the level of external interest in, and imitation of, an institution, we are very successful indeed.

In spite of—or perhaps because of—the preeminence of our system of legal education, the last thirty years have seen sustained debates over questions surrounding where legal education should develop most and the nature and extent of the regulatory framework that helps oversee its development.² Almost every aspect of this system and its regulation has been

* Dean and Bernard G. Segal Professor of Law, University of Pennsylvania Law School.

1. See generally Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1472–79 (2011) (discussing the evolution of higher-education accreditation in the United States and its early and continued independence from state and federal governmental control).

2. See, e.g., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) (“Cramton Report”); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (“MacCrate Report”); WILLIAM M.

discussed and criticized. In light of our academic accomplishments during this same time period, it would be a mistake to suggest that our system of legal education or its regulatory framework under the American Bar Association's ("ABA") peer-review process is fundamentally flawed. Whatever criticisms are raised, legal education in the United States remains a significant success by most social and economic measures—intellectual excitement, pedagogical innovation, scholarly productivity, professional placement, professional imitation, and global application. Interest in a legal career and legal education in the United States, as compared to interest in other professions or legal education in other nations, has skyrocketed.³ We continue to attract the best and brightest minds domestically and internationally—a demonstration that the intellectual elite understand the value of a legal career.

Having said this, I wish to focus on a related but separate question: how the recently changed professional environment may affect this process in years to come. While this system of legal education has proved highly successful, we should be mindful of the challenges we all face going forward. To put the matter succinctly, our past success is due at least in part to an extraordinary infusion of resources to the legal profession and the legal academy over the past quarter century. This financial cushion has allowed us to attract the best and the brightest—and for the best and brightest to do what they do best, namely, to develop a legal environment that stands second to none. Our regulatory system of ABA accreditation—which explores each aspect of a legal institution through rigorous peer and professional review—brings representatives from each field and intellectual style to the evaluation process.⁴ In many ways, it is ideally suited for developing an academic program with comprehensive coverage as well as high degrees of academic depth and intellectual and professional diversity.

The question becomes: will we be able to pursue this type of regulatory strategy in the same way in the future as we have in the past? By raising the issue, I do not suggest that I have an answer. But from almost any

SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) ("Carnegie Report").

3. See Section of Legal Educ. & Admissions to the Bar, *Enrollment and Degrees Awarded*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_1.authcheckdam.pdf (last visited Apr. 6, 2011) (citing statistics showing that from the 1976–77 academic year to the 2009–10 academic year, the number of ABA approved law schools increased from 163 to 200, while first-year law-school enrollment increased from 39,996 to 51,646 students).

4. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, THE LAW SCHOOL ACCREDITATION PROCESS 3–4, 10 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/accreditation/Accreditation_Brochure_October_2010.authcheckdam.pdf (describing the diverse composition of the ABA's Accreditation Council, Accreditation Committee, Standards Review Committee, Questionnaire Committee, and site-evaluation teams).

perspective, we have experienced a period of unprecedented expansion that has allowed us to pursue multiple and diverse professional and academic strategies simply because we have not had to make highly constrained choices. If we do not enjoy such continued expansion going forward, and there follows a need to undertake substantial innovations, does this implicate not only the programmatic decisions we are able to make in the future but also the nature of the regulatory system that oversees us?

A natural starting point for this discussion is a look at the existing system. What is our current regulatory structure? As Jay Conison nicely describes in his accompanying article, our current system of ABA regulation pursues an educational model geared to developing and ensuring diverse programmatic offerings.⁵ We include requirements on inputs, outputs, transparency, and empowerment of numerous actors. As a result, the process ensures internal institutional diversity. Broadly defined, all of the different constituencies that make up the law-school community have a seat at the table. Nobody truly dominates—though everyone thinks someone else does! The likelihood of radical change within this structure is small, since decisions will tend to be made through a series of incremental adjustments and debates, but valuable input will be solicited on any major proposed change.

Such a system works well in a world of expanding resources and evolutionary change. To the extent a law school offers depth and breadth, it furthers what many people think of as the ideal professional training: teaching students how to navigate intellectually across complex issues and problems. In this sense, legal training may be the quintessential generalist education for the modern world. Since lawyers must be able to navigate across different fields and approaches and work with a variety of diverse groups and perspectives, a richly diverse program furthers one important element of our shared professional ideal.

How does the system work when resources are more constrained and institutions must react increasingly quickly to a more fast-paced external environment? Take, for example, the ABA's standards regulating law libraries, which tend to be more input oriented. American law libraries (like American law schools in general) are historically among the best and best-resourced in the world. On our university campuses, law libraries are more often than not the best funded when measured per student and faculty member. Yet over the last twenty years, the revolution in information technology has changed the use of traditional library buildings, the use of

5. See generally Jay Conison, *The Architecture of Accreditation*, 96 IOWA L. REV. 1515, 1525–28 (2011) (analyzing different choices that can be made in choosing an accreditation system and describing the ABA's current system as one in which the chosen primary purpose relates to "program quality" rather than "quality of outcomes").

(and access to) books, and the profile of library staff.⁶ Similar systemic changes have occurred in other university professional schools, especially medical schools, and in professional legal practice—leading to a radical restructuring of their physical and staffing systems. One needs only to compare the library at a major law firm a decade ago to its counterpart today to understand the transformation that has occurred.

The traditional, input-oriented regulation of law libraries, however, took relatively more time to adapt to the changed environment. Until recently, the ABA had fairly narrow restrictions for law libraries, including specifying the minimum number of seats a library needed to have. Whatever the value of these requirements twenty or thirty years ago, they became more open to question in the face of rapidly changing information technology, study and research patterns by students and faculty, and management approaches. A situation at my own institution, the University of Pennsylvania Law School, illustrates these tradeoffs. In the 1990s, the ABA's Accreditation Council required us to build a new law library because we were viewed as having an insufficient number of seats. Today, such a requirement seems odd. Students research and study all over our campus and not necessarily at desks in the law library. The ABA since dropped this rule from its Standards, but not before Penn expended a significant amount of its resources to build its new library. At the time, there was a sustained debate over whether the funds would be better devoted to expanding the faculty or scholarships, but fortunately, this occurred during a period of rapidly expanding resources, and we were able to grow in these areas as well.

My purpose is not to debate the regulation of libraries. Most of the law-school accreditation requirements probably made sense when they were originally adopted. Indeed, input restrictions are often a reasonable method to ensure maintenance of certain minimal standards and reflect traditional professional norms developed over time. But most people would agree that the input requirements on law-library seating remained on the books too long, which becomes problematic in a world of rapid change and cost pressures.

What does the future look like for the legal profession, as well as the legal academy? Obviously, nobody knows. In assessing this question, however, it is important to appreciate the period of rapid expansion we have experienced over the last quarter century in the markets for legal

6. See generally Theodora Belniak, *The Law Librarian of the Twentieth and Twenty-First Centuries: A Figuration in Flux*, 101 LAW LIBR. J. 427 (2009) (describing the evolution in skill sets, knowledge areas, and personality characteristics of law librarians over the past century); Philip C. Berwick, *Academic Law Librarians in Transition: The Librarian As Educator*, 16 TRENDS L. LIBR. MGMT. & TECH., no. 2, 2005, at 6 (describing the changing role law librarians play in legal education); Richard A. Danner, S. Blair Kauffman & John G. Palfrey, *The Twenty-First Century Law Library*, 101 LAW LIBR. J. 143 (2009) (discussing the changing purposes of law libraries in the digital age).

professions and legal education. Until recently, the size of the legal profession grew at an extraordinary rate, especially at the high end, with the revenue of the top 200 firms growing at an annualized rate of 9.8%.⁷ Correspondingly, the number of lawyers entering major law firms rose substantially, as did the median income of partners at these firms.⁸

The consequences of this economic growth for law schools have been clear: tuition at American law schools has risen at a rate greater than overall inflation for every year of the last twenty-five years.⁹ As Marc Galanter and William Henderson write, “[E]lite and semi-elite law schools are able to take a proportionate share through ever-higher tuition (and corresponding debt loads).”¹⁰ Since 1987, “law school tuition rose 448 percent for in-state residents at public institutions and 224 percent at private institutions,” far outpacing overall inflation.¹¹ Government-guaranteed loans¹² and private philanthropy have added to the infusion of resources.¹³

As a result, the resources available to major law schools have increased logarithmically. The average per-student expenditure at ABA approved law schools quadrupled in the 1980s and 1990s, from \$5000 in the 1979–80 academic year to \$20,713 in the 1999–2000 academic year.¹⁴ The same type of increases occurred in the 2000–08 period.¹⁵ This influx of resources has supported the growth of law schools in almost every direction: increasing the size of faculty, legal clinics, international programs, legal-writing programs, skills programs, and career planning. I would guess that there has not been a major contraction in coverage or offerings in almost any American law school during this period. The same could probably not be said for the different institutions in any other sector of the American economy outside education.

7. David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 *RUTGERS L. REV.* 1127, 1129 (2009).

8. *Id.*

9. See Bureau of Labor Statistics, *Consumer Price Index*, U.S. DEP’T OF LAB., <http://www.bls.gov/cpi/tables.htm> (follow “Table Containing History of CPI-U U.S. All Items Indexes and Annual Percent Changes From 1913 to Present” hyperlink) (last visited Apr. 6, 2011) (listing overall rates of inflation in the United States); Section of Legal Educ. & Admissions to the Bar, *Law School Tuition 1985–2009*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_5.authcheckdam.pdf (last visited Apr. 6, 2011) (charting annual rise in law-school tuition at ABA-approved public and private schools).

10. *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867, 1870 (2008).

11. Andrew P. Morriss & William D. Henderson, *The New Math of Legal Education*, *YOUNG LAW.*, July 2008, at 1, 1, available at http://www.americanbar.org/content/dam/aba/publishing/young_lawyer/yld_tyl_july08_july08.authcheckdam.pdf.

12. See Daniel J. Morrissey, *Saving Legal Education*, 56 *J. LEGAL EDUC.* 254, 263 (2006).

13. See Jay Conison, *Financial Management of the Law School: Costs, Resources, and Competition*, 34 *U. TOL. L. REV.* 37, 45–46 (2002).

14. Morrissey, *supra* note 12, at 262.

15. *Id.* at 263–64.

The structure of legal education almost certainly assists this growth. As Conison has observed:

[T]he more a school spends to enhance the quality of students, faculty, and programs, the better it is likely to be and the better the education it is able to provide The competitive incentives on cost are, to a significant degree, the exact opposite of the incentives in most for-profit businesses.¹⁶

The *U.S. News & World Report's* ranking system further reinforces this process. The more money a school spends, the higher—all else held equal—its rankings, which hold disproportionate influence in a world where potential students may find it difficult to evaluate the substance of a school's academic offerings and its long-term effect on their careers. Legal education's regulatory environment has undoubtedly meshed well with this type of expansion. Extensive peer review for the many different elements of law-school education has proven well suited for supporting and providing feedback on each program as we grow the breadth of our programs. And our responsiveness to each peer assessment enriches the overall program. American law schools have become internally incredibly diverse institutions in virtually every way.

Will changes in the size and nature of the legal profession place different pressures on our academic programs and, indirectly, on our regulatory structure? As we all know, the United States and our profession are going through a period of major transition, the scope and extent of which is still unclear. On a systemic level, the U.S. economy is significantly deleveraging, causing a contraction in the GNP and overall employment levels. We are probably looking at a period of less significant growth in our economy over the next five to ten years. As the Congressional Budget Office ("CBO") recently observed, "The recovery in employment has been slowed not only by the moderate growth in output in the past year and a half but also by structural changes in the labor market, such as a mismatch between the requirements of available jobs and the skills of job seekers."¹⁷ The CBO expects that the unemployment rate will fall only to 8.2% in the fourth quarter of 2012 before ultimately reaching what it calls the "natural rate of unemployment" at 5.3% in 2016.¹⁸

A similar contraction has occurred within the legal profession. The general downturn has created more domestic and global competition among law firms. At the same time, in-house counsel have scrutinized billing to outside law firms much more significantly, increasing pressure on billing

16. Conison, *supra* note 13, at 43 (citation omitted).

17. CONG. BUDGET OFFICE, CONG. OF THE U.S., PUB. NO. 4236, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021 xi (2011), available at http://www.cbo.gov/ftpdocs/120xx/doc12039/01-26_FY2011Outlook.pdf.

18. *Id.* at xii.

rates in general and in particular for younger associates, who are perceived as less able to justify the fees.¹⁹ The immediate impact is clear: large numbers of associate layoffs, deferring hiring, reducing summer classes, freezing salaries, and de-quitizing partners.²⁰

The downturn also may well have disproportionately impacted the professional training of young lawyers.²¹ Unlike medical schools (which have profitable hospitals as part of student training), law schools have not partnered with external professional institutions in-house to jumpstart students' training while in school. Instead, they have relied on their graduates' first employers to offer much of their skills training. But in the present environment, firms may be less likely to train associates, billing out their time to clients as they have in the past, or to carry them over the years with the same level of overall profitability.²² We have begun to see a number of major changes in the levels of hiring, starting salaries, and training. Several large firms have even discussed the need for two-year law degrees, have sent their first-year associates to mini-business-school programs, and have pressed for significant changes in the training of law students entering the firm in order to ensure they will be better able to "hit the ground running."²³

19. DealBook, *Chill of Salary Freezes Reaches Top Law Firms*, N.Y. TIMES DEALBOOK (Jan. 26, 2009, 7:50 AM), <http://dealbook.nytimes.com/2009/01/26/chill-of-salary-freezes-reaches-top-law-firms/>; see also Karen Sloan, *The Apprentice: Three Firms Claim Success with a New Model for Training and Mentoring Legal Associates*, NAT'L L.J., June 14, 2010, at 19, 22 (sidebar entitled "Training Goes In-House") (stating that in-house counsel are closely watching associate costs and training as a result of the recession).

20. See DealBook, *supra* note 19; see also Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, COLUM. BUS. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1680624> (examining why law firms continually grew at such a rapid rate and in such an unusual way as they did in the decades leading up to the economic downturn); Jeffrey D. Grossman & Brian P. Seaman, *Learning to Think Like a Client: Legal Education in the Aftermath of the Great Recession*, LEGAL INTELLIGENCER, Apr. 13, 2010, available at 2010 WLNR 7624308 (discussing how changes in the legal-employment market affect traditional law-school curriculum); Leigh Jones, *Vanishing Act: Year II*, NAT'L L.J., Nov. 8, 2010, at S4 (recounting data showing that 2009 and 2010 saw the largest declines in lawyers employed at the 250 largest U.S. firms since the publication began collecting these statistics); *Law Firms Permanently Adapting in Downturn*, BROWARD DAILY BUS. REV. (Fla.), June 25, 2010, available at 2010 WLNR 12833146 (discussing law firms' focus on greater efficiency and productivity in the wake of the recession).

21. See Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 605-07 (2010).

22. Rachel Littman, *Training Lawyers for the Real World: Part One*, N.Y. ST. B.A.J., Sept. 2010, at 20, 22; Rachel Littman, *Training Lawyers for the Real World: Part Two*, N.Y. ST. B.A.J., Oct. 2010, at 31, 32-34.

23. See generally Frank Michael D'Amore, *Five Future Trends Could Impact Young Lawyers*, LEGAL INTELLIGENCER, Apr. 9, 2009, available at 2009 WLNR 22652969 (discussing law firms' needs for law-school graduates to be immediately profitable in the wake of the economic downturn as well as post-economic recovery); Kimberly K. Egan, *Everything Associates Didn't Learn in Law School*, NAT'L L.J., Feb. 28, 2011, at 17 (same); Jeff Jeffrey, *Apprentice Programs Give First-*

The pressures are even greater on law schools that have not, or cannot expect in the future, to send a significant number of their students to these large employers.²⁴ As Morriss and Henderson note:

law school pays handsome dividends [as a general matter]. With starting salaries at \$160,000 and above at large New York City firms, even students who borrow \$100,000 or more to attend law school [should] reap substantial economic rewards. But most lawyers do not start at \$160,000; the median starting salary at a two- to 10-lawyer firm is a whopping \$110,000 less than at a Wall Street powerhouse.²⁵

Because the nature and extent of these changes are still unclear, the consequences for law schools are still unfolding. Nevertheless, it is not obvious we will enjoy the type of extraordinary bull market and growth we have seen over the last thirty years. Will starting salaries and hiring continue to increase at the same rate over the next decade in the way they have in the past? Will the historical yearly expansion in entry-level positions continue, along with salary increases? And if they do not, will tuitions rise over the next decade as they have in the past? More to the point, how will this impact the resources law schools have and their needs to innovate? Will we be able to rely on the employers of our graduates to the extent we have in the past, or will there be increased pressure for us to change our academic programs?

Depending on how the professional world changes, a series of issues legal education has not previously had to confront quite so directly may be brought to the fore more concretely. How can we continue to support and expand the interdisciplinary scholarship, which is the envy of the world, but which we recognize is not financially self-sustaining? How do we train students in practical skills when they must hit the ground running without direct links to financially profitable institutions in the profession (as medical schools have) to provide them? How do we evolve to offer the business and

Years Extra Training: Business of Law Trying to Undo the 'Old Model', BROWARD DAILY BUS. REV. (Fla.), July 2, 2009, available at 2009 WLNR 21612832 (describing apprentice programs implemented by law firms to teach new associates practical skills); Katy Montgomery & Neda Khatamee, *What Law Firms Want in New Recruits*, N.Y. L.J. (Apr. 27, 2009), <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202430432895&slreturn=1&hbxlogin=1#> (citing opinions of hiring partners at large law firms who believe law schools could better prepare students for law practice by offering more coursework on business training, transnational studies, management skills, and writing instruction); Christian Nolan, *Next Year, Summer Won't Be the Same: New Day Pitney Program Turns 'Summer Associates' into 'Apprentices'*, CONN. L. TRIB., Aug. 10, 2009, available at 2009 WLNR 21611165 (describing one firm's change in terminology of its summer program to focus on instructing new associates in practical skills); Sloan, *supra* note 19, at 19, 22 (describing recently implemented apprentice programs for new associates at three large national firms).

24. Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, N.Y. ST. B.A.J., Oct. 2010, at 20, 23-25.

25. Morriss & Henderson, *supra* note 11, at 1.

management training for law students of the future that may prove critical to success in a changing legal environment?

If we are subject to these evolving forces, my guess is that the institutional response to these challenges will, and should be, quite varied. In some cases, law schools may simply act as they have in the past and continue to expand their offerings dramatically across the board. These schools' future world will look much like their past—only more of the same. For such institutions, the traditional model, which expands internal pedagogical breadth and depth, will simply continue—their fundamental goal of educating students through experiences across the broadest spectrum of possible professional and leadership capacities will remain. As those potential experiences expand, so should the offerings within the educational environment.

In other instances, more resource pressures may lead schools in a somewhat different direction: to pursue greater individualization and specialization. This may mean maintaining the size of certain programs or reducing them, while expanding strategically in particular areas. In this vein, institutions might, for example, pursue creative partnerships with outside institutions such as private firms and government entities along the medical-school model; others might integrate horizontally with other professional programs (such as business or engineering schools) with two- or three-year degrees; still others might look to a pared-down model and offer reduced tuition with less intensive training across the board.

If some schools want to, or must, pursue these or other strategies, we may need to ask whether our regulatory system will be sufficiently flexible to accommodate such innovation. In short, if our future looks more like the library world in the 1990s, we may need to be less input focused in terms of regulation; more open to the possibilities of law schools defining alternative outputs and goals (since the practice of law and legal careers may be different and more varied going forward); and more willing to support greater variation between law schools as they seek to differentiate the programs they offer within a changing and evolving profession. The pursuit of different relationships with institutions inside and outside of the academy, as well as greater specialization in programmatic focus, may not be as easy in a world that specifies tightly institutional inputs or does not allow for a wider variety of professional goals. Indeed, if one of the sources of the success of the American academic system is, as Areen observes, its relatively decentralized structure and control, this ability to continue to innovate on an individual institutional level may need to be supported more directly.²⁶ We share a common goal of continuing the tradition of American legal education as the leader in this changing environment. The principal question we must answer is how much legal institutions, as well as the

26. See Areen, *supra* note 1, at 1473–74, 1493–94.

regulatory structure of legal education, must change to allow us to continue to play that role.