

## Rankings, Economic Challenge, and the Future of Legal Education

Gene R. Nichol<sup>1</sup>

I was asked, some months back, to speak to the assembled law school deans about the future of legal education – particularly in the crush of economic challenge.<sup>2</sup> At one level, I was surprised by the invitation, since this was one of the few times, in the last two decades, that I was neither a dean nor university president. So I was an unlikely choice to address those still bold, or foolish enough, to remain in the saddle.

But then it occurred to me that the conference organizers might have pressed other motives. Perhaps this was an AALS “leadership protection effort.” I had been a law dean for many years. Like a lot of my colleagues, I’d been recruited off and on for various university presidencies. But until four or five years ago, I had consistently said no – explaining I was reasonably certain that being a law school dean was, all told, a better job than being president. But then, inexplicably, I succumbed and moved to that other level. Given the modestly public challenges of my controversial tenure at the College of William & Mary, perhaps the AALS planners thought I was living testament to the accuracy of my initial assessment. How better to demonstrate, than by bruising example, the wisdom of staying put?

If so, there were risks, still, in the strategy. After a year as a regular faculty member – teaching thrillingly large classes, running engaging seminars, studying only what you choose, setting your own schedule, seeing your wife, enjoying your kids – I could also report to my former colleagues, first hand, that there is indeed a reason we all came into this line of work in the first place. It is, lo and behold, still available. And the luxury of being able to say exactly what you want, in exactly the way you want to say it -- without worrying what some spewing, flat-earth legislator or boorish, bullying, billionaire might think – these are sweet pleasures too delicious to surrender. If you can resist the temptation to run the shop, happiness protrudes at every turn.

Still, I was confident that my assignment lay in other quarters. I became convinced, like many, three or four three years ago, that we faced a perfect storm in legal education. For public universities, at least, we started to see wrenching cuts in state appropriations. Jaw-dropping losses in endowment portfolios, on which so much depends, soon followed. Unsurprisingly, given the effects of great recession, legislatures and boards of trustee expressed heightened skepticism about a steady cascade of tuition increases. Raising private funds, the essential lifeblood for all law schools, no matter the pedigree, became surpassingly more difficult. Even if a potential donor has a couple hundred million dollars – if he used to have five hundred million –

---

<sup>1</sup> Professor of Law and Director, Center on Poverty, Work and Opportunity, University of North Carolina, President Emeritus, College of William & Mary.

<sup>2</sup> I refer here to the AALS Deans Conference at the annual meeting of the American Bar Association in Orlando, 2010.

he feels like a pauper. So problems multiplied; or perhaps squared; one atop of the other, adding to the deficits, both emotional and economic. .

But then the perfect storm got more perfect. It honed itself. The bottom fell out of perhaps our greatest sugar daddy – a bountiful and lucrative hiring market for our graduates. Jobs deferred, jobs disappeared, interviews cancelled, alumni layoffs, nervous graduates, nervous parents, nervous bankers, nervous chief financial officers.<sup>3</sup> Lots of graduates, and would be graduates, began openly complaining that they had taken on such huge debt burdens in the first place. No dean, regardless of her bluster, willingly signed up for all this. I can remember the days, long departed, when we received more from the legislature with each new budget, rather than less. It sounds almost quaint. It also, I'll concede, makes my constitutional law class seem all the more ennobling.

If asked to offer advice, under such daunting strictures, from the perspective of the university president, as I was, not much heartening could be proffered. It is surprising how rapidly, in times of economic duress, law schools can come to seem – for presidents, chancellors and provosts – miles distant from the center of institutional gravity. Without the immediacy, the numbers, the parents, the alumni, and the legislators of the undergraduates, law schools readily appear secondary amid the raging fire. They carry neither the absurd claims and tensions of athletics, nor the faculty clout of the College of Arts & Sciences. They trigger neither the massive costs nor bestow the corresponding grant-generated income of the hard sciences, engineering and medicine. [Only those with medical schools can fully attest that when a hospital medical gets a cold, the university gets pneumonia, or at least deeply contagious dose swine flu.] So it can't be completely unexpected when a president's reaction to a law school during times of immense exigency is, in effect, "it would be nice if you'd simply be quiet and help me get out of this mess."

And, of course, at least a modicum of good citizenship is called for here. We are part of a broader, and absolutely essential, whole. I understand that there are a couple of outliers, exceptions to every rule. But ask yourself how many great law schools are not part, even a central part, of a great university?

My own sense of it has been, from both chairs, that it can be crucial for the law school, and even the law school dean, in these moments, to be regarded as vital, and as vital ally, to the president. In different schemes, there will be different justifications for the needed kinship. In many private institutions, the link will be economic. It will be essential to avoid further theft, or taxation, from the most successful markets. For public law schools – which, again, with a few exceptions, are not the cash cows they typically believe themselves to be – the institutions and their deans can frequently be among the greatest political assets presidents possess. When the provost and the

---

<sup>3</sup> See, "Law School Grads Face Tougher Economic Times", U.S. News & World Report, April 15, 2010. [www.usnews.com/education/best-law-schools/articles/2010/04/15/law\\_school\\_grads\\_face\\_tough\\_economic\\_times](http://www.usnews.com/education/best-law-schools/articles/2010/04/15/law_school_grads_face_tough_economic_times).

president gather at the final cutting table, one wants them to be thinking, for whichever reason, “tell us we don’t have to face a big cut to the law school.”

### Economic Privilege and Exclusion

But these tensions and dynamics are predicted and understood. Given that this would surely be my last keynote to decanal colleagues, I wanted to move closer to the core. To say things they might be less happy, and less fully expecting, to hear. I am no longer a young man. I’m a dean emeritus, twice, a president emeritus, and, most precious, a tenured professor. So I was, perhaps, game for a little annoyance. After all these years, it’s my huckleberry.

I believe, given the economics, that we are in for more than a modest dose of change in legal education – public and private, national and regional, elite and virtuously middle-tier. I also think that we are not as well positioned as we should be to deal with the unfolding challenge. We have gone far, in the last twenty-five years or so, toward breaking the bank; pushing costs beyond both call and sustainability. I doubt that we have done so to good end; that we have made optimum investments. I am quite sure that we have failed to bolster a mission in the common good. Now that our options are constricting, these choices may come back to bite us. They may have bitten a lot of our fellows already.

Consider a set of straightforward facts. The costs of legal education – tied to either per student expenditure or to tuition – have risen very markedly, even dramatically, in the last two and a half decades. We know the anecdotal reports. We’ve experienced them. At least one broad-ranging study indicates that legal education expenditures have risen from about \$5,000 per student to \$25,000 or more.<sup>4</sup> Even law school websites concede that the costs of legal education have increased dramatically, in real terms, beyond anything attributable to inflation.<sup>5</sup> The GAO study of a year or two ago concluded that tuition has risen by over 8% a year, on average, for the last 15 years. A good deal sharper, it explained, than other branches of professional education.<sup>6</sup>

Average public law school tuition now is well over \$15,000 a year for residents; over \$30,000 for non-residents and for privates. At least six public schools charge over \$30,000 for in-state students.<sup>7</sup> Several privates now exceed \$50,000.<sup>8</sup> California state schools, perhaps predictably, have gone up by shots of 20% or more per annum; Indiana recently, by 25%; my good

---

<sup>4</sup> I extrapolate very modestly here from John Sebert’s 2002 study. See, John A. Sebert, *The Cost and Financing of Legal Education*, 52 J.L.Ed. 516 (2002) (“American per-student expenditures at ABA-approved law schools have quadrupled in the past twenty years, from about \$5,000 in 1980, to \$20,713 in 2000.”).

<sup>5</sup> James Vescovi, “Why Does Law School Cost So Much?”, [www.law.columbia.edu/law\\_school/communications/reports/summer06/lawschoolcost](http://www.law.columbia.edu/law_school/communications/reports/summer06/lawschoolcost): (“... so much more than twenty years ago, even after inflation is taken into account.”).

<sup>6</sup> GAO, *Issues Related to Law School Cost and Access*, October, 2009, GAO-10-20, at pp. 11, 16 [hereafter, “GAO Study”].

<sup>7</sup> See, [www.equaljusticeworks.org/files/aba\\_tuition\\_fees.pdf](http://www.equaljusticeworks.org/files/aba_tuition_fees.pdf).

<sup>8</sup> Yale’s tuition in 2009 was \$50,140; Hastings non-resident tuition was reportedly \$50,310.

colleagues at Colorado, 20%; at Iowa 20%, and at Texas, my alma mater, 16%.<sup>9</sup> One noted scholar has compared the law school “tuition bubble” with the imploded sub-prime mortgage market.<sup>10</sup> A much-discussed average student debt load is over \$90,000; or over \$100,000, upon graduation – depending on the study, and the date.<sup>11</sup> A dramatic drop in the percentage of law schools whose tuition burden can be met on lower interest Stafford loans has occurred.<sup>12</sup> It is no surprise, therefore, that Dean Prager would worry “middle class access” to legal education has been hugely compromised.<sup>13</sup> Our good colleague at Cal-Davis, Kevin Johnson, has put it more brutally: “affordable public legal education is no longer in existence.”<sup>14</sup>

And then there is that task of unpacking why this is so. Surely diminished public support is part of the calculus.<sup>15</sup> But the GAO study, confirmed and saluted by the ABA,<sup>16</sup> concluded that “more resource-intensive approaches to legal education and competition among schools for higher rankings are the main factors driving law school costs.”<sup>17</sup> Officials “at most... ABA-accredited law schools ... reported that [efforts] to increase *U.S. News and World Report* ranking ... had [a major impact on tuition levels [because] ... “rankings are determined in part by such cost-related factors as per student expenditures, student-faculty ratios, and library resources.”<sup>18</sup>

This confirmed the more thoughtful and comprehensive study commissioned earlier by the Law School Admission Council.<sup>19</sup> It had concluded that rankings “have put pressure on law schools to redistribute resources in ways that maximize scores on U.S. News criteria ... even when [law school officials ] are skeptical that this is a productive use of resources.”<sup>20</sup> Both studies identified

---

<sup>9</sup> Kevin Sloan, “At Public Law Schools, Tuition Jumps Sharply,” Law.Com. [www.law.com/jsp/LawArticleFriendly/isp?id=1202432727154](http://www.law.com/jsp/LawArticleFriendly/isp?id=1202432727154).

<sup>10</sup> See, Christine Hunt, [www.theconglomerate.org/2010/04/death\\_of\\_the\\_big\\_law\\_forum\\_student\\_loan\\_bubble](http://www.theconglomerate.org/2010/04/death_of_the_big_law_forum_student_loan_bubble).

<sup>11</sup> See, GAO Study, \$91,500; “Does U.S. News Make Law Schools More Expensive?”, Frank Macchiarola & Michael Macchiarola, *Minding the Campus*, [www.mindingthecampus.com/originals/2010/01/does\\_us\\_news\\_make\\_law\\_schools](http://www.mindingthecampus.com/originals/2010/01/does_us_news_make_law_schools); Katherine Morgan, Law Schools Could Take a Hint from Medical Schools on Curricular Reform,” *Chronicle of Higher Education*, April 24, 2010. <http://chronicle.com/article/Law-Schools-Could-Take-a-Hint/65264/>.; Deborah Weiss, “Law Students Push for Transparency”, April 21, 2010; [www.abajournal.com/weekly/article/law\\_student\\_plan\\_website\\_to\\_publish\\_better](http://www.abajournal.com/weekly/article/law_student_plan_website_to_publish_better).

<sup>12</sup> See, GAO study.

<sup>13</sup> See, Kevin Sloan, at note 8 above.

<sup>14</sup> Id.

<sup>15</sup> See, GAO Study at p. 11. See, also, John Seibert, *The Cost and Financing of Legal Education*, 52 *J.L.Ed.* 516, 517 (2002)(dramatic drop in percentage of state funding from 1986-96).

<sup>16</sup> “Your conclusions, based upon the sampling of law school deans and others, replicates the conclusions reached by the Section (on legal education) in its own study of the costs of legal education in 2002/3.” Letter from Hulett Askew, October 2, 2009, Appendix II, GAO Study.

<sup>17</sup> GAO Study at 16.

<sup>18</sup> Id at 11-17. See also, Eric Kelderman, Law School Cost is Pushed Up by Quest for Prestige, Not Accreditation, GAO Survey Finds, *The Chronicle of Higher Education*, Oct. 26, 2009, [www.chronicle.com/article/Competition-Not/48940](http://www.chronicle.com/article/Competition-Not/48940).

<sup>19</sup> See, Michael Strauder and Wendy Espeland, “Fear of Falling: The Effect of U.S. News & World Report Rankings on U.S. Law Schools”, Law School Admissions Council, Grants Report 07-032, October 2007.

<sup>20</sup> Id.

massive marketing expenses, merit scholarships to attract high LSAT students, huge dean and star-faculty salaries, and personnel and expenditures to game” -- or I suppose we could say “cheat” -- the system as principal triggering causes.<sup>21</sup> A broad competition, gingerly put, to excel by spending more per student than one’s competitors. A race to become the most inefficient. An odd competition that. Like a Toyota gas pedal. A one-way ratchet. An elevator heading in but direction.<sup>22</sup>

I know what you’re thinking. There are likely weaknesses in these studies – particularly the GAO report. They are but partial pictures, they overstate, they miss the larger focus. I’m guessing all that might be true – though we’d have to concede, they have used our own words, interviews with law school deans, to make their case.

My worry, having been around legal education for three decades, is that though they may not be completely true, there is far too much truth in them. Too much truth, by a large margin, for us to remain unembarrassed.

Here’s another way of making the broad point. I went to the website recently of one of my favorite law schools -- a great one, one of the best in the nation, by any standard. It is not important to name it. It is, for these purposes, merely illustrative. The site included a special section – given the times – explaining why law school costs so much more than it did 25 years ago, as I said, even given any concessions for inflation. Why, in this case, do students now have to pay more than \$150,000 to get a degree?<sup>23</sup>

It explained that law plays a larger role in society than a quarter century ago. Students must be better prepared to take on the roles it envisions. The discipline is now global. It entails large international components. It attracts greater numbers of international students and faculty. It is significantly more interdisciplinary; drawing on efforts from across the academy. It employs more professor-student intensive courses. It has required huge technological expenditures, linking faculty to their students and the world. Student-friendly capital facilities, new research centers, and new student services are now essential.<sup>24</sup>

It didn’t mention huge increases in dean and faculty salaries,<sup>25</sup> significantly reduced teaching loads, dramatically expanded leave policies, apparently necessitated, hugely-expensive

---

<sup>21</sup> Id. John Sebert’s study in 2002 reached the same result: “a more significant portion of the cost increase is due to competition by law schools for students and for reputational rankings ... a positional arms race...ever increasing competition for students, faculty and ranking ... resulting in rapidly increasing tuition costs and debt that non-scholarship students bear.” See, note 12 above at p. 524.

<sup>22</sup> Deborah Rhode, *Legal Education: Professional Interests and Public Values*, 34 *Ind.L.Rev.* 23, 26 (2000) (“rankings distort law schools’ priorities...the temptation is to invest in features the editors of U.S. News & World Report find important”).

<sup>23</sup> See, note 5 above.

<sup>24</sup> Id.

<sup>25</sup> See, National Jurist study, discussed below at note 24.

marketing campaigns,<sup>26</sup> money charged to redistribute to high-end merit scholarship recipients,<sup>27</sup> and other drivers that have marked the reality of most modern decanal careers.<sup>28</sup>

But even before these omissions, I have to say, I wasn't convinced. It's not that we haven't done a lot of the things outlined. I just don't believe they have had that impact described, or, more candidly, that they have been driving the train. I am fearful that we have pushed to the edge economically, past sustainable standards, towards breaking the budget, without dramatically improving, or perhaps even paying close attention to, the actual learning experience of our students. I hope we haven't weakened it; but I don't think we've marched over the hill to lift it up either.<sup>29</sup>

And it's not that we are beyond improvement. For other purposes, I have been reviewing, of late, a number of graduate history programs. Admittedly, at least one of them approaches greatness. But I have been modestly embarrassed at the depth and the quality of faculty supervision, editing, intellectual challenge and exchange. They reflect remarkable exercises in rigor, analysis, writing, argument, and impressively relentless revision. Qualities that I am not sure are seen with such keenness in American law schools. Maybe I am wrong. But I don't think so.

So, finally put, I am worried that we have exploded an economic model, or cracked it, moved toward its outer edges, without dramatically improving legal education in the process. We have, undoubtedly, made life better for ourselves. We've managed, broadly speaking, to assure the highest faculty salary levels, or at least among the very highest, in the academy.<sup>30</sup> Our research support, leave policies, and teaching loads have become extraordinarily, and unnecessarily, generous.<sup>31</sup> We have, in short, made certain that legal education works powerfully for us.

---

<sup>26</sup> See, Michael Stauder study, note 16 above. See also, William Hines, Ten Major Changes in Legal Education Over Past Twenty-Five Years, [www.aals.org/dservices\\_newsletter\\_pres\\_Aug\\_05.php](http://www.aals.org/dservices_newsletter_pres_Aug_05.php).(discussing "torrent of promotional materials").

<sup>27</sup> See, John Seibert study, at note 18, p.525.

<sup>28</sup> See, for example, the National Jurist study finding that law faculty salaries have increased by 40% in the last decade; resulting in 48% of the costs which have driven up tuition 102% at public law schools and 71% at private schools. ABA Journal, March 10, 2010, [www.abajournal.com//tuition\\_study](http://www.abajournal.com//tuition_study); Richard Matasar, The Rise and Fall of American Legal Education", 49 N.Y.L.S. L.Rev. 465, 483 (2005) (faculty hiring competitions and increased benefit packages, and research focus, "have only a tangential relationship to the core education of law students ... but are essential to the arms battle for reputation."

<sup>29</sup> Deborah Rhode, Legal Education: Professional Interests and Public Values, 34 Ind.L.Rev. 23, 23 (2000)("America offers the worlds most expensive system of legal education, yet fails to address routine legal problems at a price that most low and many middle income Americans can afford.")

<sup>30</sup> See, David Margolis, The Trouble With American Law Schools, N.Y.T. Magazine, May 22, 1983, at 21, 39 (reporting law faculty salaries as the highest in the academy); and see the National Jurist study cited above in note 28..

<sup>31</sup> Id. See also, Richard Matasar, The Rise and Fall of American Legal Education, 49 N.Y.L.S.L.Rev. 465, 483 (2002).

At the same time, we have added, inadvertently, to a crisis in equal justice – wrought from the effective exclusion of so many millions from access to our system of civil adjudication.<sup>32</sup> Through the heightened cost of legal education; through barriers which restrict low and middle income students from attending law school in the first place; through soaring debt levels; through constrained opportunities to work in the public service; through the indirect elevation of the ultimate cost of the delivery of legal services. We have not played our role in the equal administration of justice admirably.

And now, it seems, the bloom fades from the vaunted rose. Students protest exorbitant tuition increases across the land.<sup>33</sup> They also move to demand “more transparency” in law school employment and placement data. With reason, they complain that the ratio of costs to actually-derived economic opportunities doesn’t add up.<sup>34</sup> In the meantime, a distinguished professional study urges that legal education be dramatically, and expensively, transformed to assure more valued and transformational learning experiences.<sup>35</sup> And lawyers, judges and employers seek a wholesale overhaul of the law school curriculum to better meet the needs of a constrained marketplace.<sup>36</sup> Deans predictably fret that now they don’t have the money.<sup>37</sup>

My hope is, as we adjust, necessarily, to the changes headed our way in the next decade, that we will focus, far more meaningfully, pointedly, and successfully, on the actual experiences of our students. Remembering, as well, that our institutions are essential components in an actual system of justice. Access to the legal profession has, historically, produced a powerful democratizing influence on the corridors of power and persuasion in the United States. The last thing any of us ever went into this line of work to accomplish was to merely replicate and fortify privilege – whether that privilege belongs to our most economically-blessed students, or to us.

---

<sup>32</sup> See, Gene R. Nichol, *Judicial Abdication and Equal Access to the Civil Justice System*, Case Western Law Review, forthcoming, 2010. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551586).

<sup>33</sup> See, “California Students Arrested Amid Protests Over Fee Increases,” November 20, 2009, Raleigh News & Observer, [www.newsobserver.com/2009/11/20/print/202673/california\\_students\\_arrested\\_amid\\_protests](http://www.newsobserver.com/2009/11/20/print/202673/california_students_arrested_amid_protests); Clarissa Leon, “An Educated, Escalated Movement”, The Nation, April 19, 2010. ( [www.thenation.com/doc/201005031/leon](http://www.thenation.com/doc/201005031/leon) )(tens of thousands protest in thirty states).

<sup>34</sup> Deborah Weiss, “Law Students Push for Transparency in Law School Employment Stats,” [www.abajournal.com/weekly/article/law\\_students\\_plan\\_website\\_to\\_publish\\_better](http://www.abajournal.com/weekly/article/law_students_plan_website_to_publish_better).

<sup>35</sup> *Educating Lawyers: Preparation for the Profession of Law*

William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman. San Francisco: Jossey-Bass. See, [www.carnegiefoundation.org](http://www.carnegiefoundation.org).

<sup>36</sup> Katherine Morgan, Chronicle of Higher Education, “Law Schools Could Take A Hint From Medical Schools on Curriculum Reform, Experts Advise”, describing conference at Arizona State University law school entitled “National Forum on the Future of Legal Education.” April 27, 2010. <http://chronicle.com/article/Law-Schools-Could-Take-a-Hint/65264/>.

<sup>37</sup> Id.