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## Legal Education and Its Innovations

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# LEGAL EDUCATION AND ITS INNOVATIONS

Daniel B. Rodriguez\*

## INTRODUCTION

A few years ago, I had the occasion to work on the executive committee in the Association of American Law Schools (“AALS”). One of the proudest times in my tenure was having the opportunity to consider and vote on new members of the AALS. During my time I had the great privilege, when Dean Strickman was at FIU Law, to play a very small role in welcoming Florida International University into the ranks of AALS members. So, it is especially serendipitous to be able to come here. The Dean was nice enough to credit me, or at least acknowledge my advocacy for some amount of innovation.

I see my principal role as AALS president as promoting and advocating on behalf of those law schools, including this one, who are really pushing the envelope and doing tremendously innovative things. These schools are responding to the critique that what we are mostly seeing in American legal education is business as usual. Secondly, and relatedly, being an advocate for American legal education. I am not pollyannaish about the predicaments and challenges we face, but at the same time, I advocate from the vantage point of the AALS, in favor of the value proposition of law school, and what law schools are *really doing* to contribute to the marketplace, to the economy, and to the rule of law. I have never had, in my quarter century in legal education, any regret about the work I do as a faculty member or the work I do as a dean. But let me turn the clock back and begin with a quick story. It is a story that takes place in the fall of my first year in law school, at Harvard, in 1984.

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\* Dean and Harold Washington Professor at Northwestern University Pritzker School of Law. This piece is essentially a transcript of the inaugural lecture on legal education delivered at Florida International University College of Law on February 5, 2014. These reflections from more than four years ago touch upon issues in legal education which remain, on the whole, timely and even urgent. Some of the key themes about innovation in law schools—where we succeed, where we fail, where we must try harder—are still, I trust, of relevance to legal educators and others thinking about these important subjects. And, of course, the larger topic of how we ought to think about educating this generation of law students for a dynamic professional world is an enduring one. That said, there are various references and anecdotes in this lecture that, because it was prepared several years ago, are no longer as pertinent. Time marches on and, if I were to give a lecture on a similar topic today, I might emphasize some different themes, and I would certainly provide some more contemporary examples. Nonetheless, I am leaving this lecture in more or less the same state as it was given. I will leave it to the good judgment of readers whether and to what extent it captures important insights here in 2018.

It actually takes place a couple months before that, during the summer. I received a letter in the mail that, in addition to, “here, are your classes, here, is when you have to show up, here, is your tuition bill,” basically trumpeted what they called at the time an “experimental first year curriculum.” The note said, “We are going to do something different at Harvard,” what they called the “experimental section.” Harvard had, at the time, four sections, and the experimental section consisted basically of three overlapping elements.

Element number one was that five members of the faculty would teach the core first year subjects—torts, contracts, procedure, property, and criminal law—which would build the base of the common curriculum. For example, when the criminal law faculty member was teaching about intentionality, or *mens rea*, we would also study intentionality in the context of tort law. There would be an effort to have, not a fully-integrated curriculum, but a curriculum that had common elements. We were not just studying disparate courses.

Second, we had a period of time during the course of the semester that we called “bridge sections.” We basically took a timeout from the regular course materials and took about three or four days to study interdisciplinary subjects, like law and economics, legal history, and the law and society. This created a base from which we could bring perspectives outside of the law to the courses that we were studying.

Lastly, part of this experimental section was that some of the work would be student-initiated, so as not to be content to just have four days’ worth of classes, we also had classes on Friday afternoons every couple of weeks or so. The students would get together, assign readings, and have a general discussion, which sounded sort of exciting. At the time, it created, in those of us who were just starting law school, a mixture of apprehension and excitement. There was the notion that we were guinea pigs on the one hand, but the notion that we were doing something different than our classmates was not always thrilling.

The experimental section, while highly successful during the year we were there, ended after two years. One lesson to draw from this experiment was that this adjustment in the first year was hard to sustain. The incentive structure of the modern-law faculty made it very hard for the faculty to justify the time and energy that went into this experiment to do this kind of collaborative and cooperative work. In the end, no real data was collected as to how, or if, this experiment mattered to those of us who were part of it.

Another lesson to draw from this story is, what counts as a major innovation is basically what meets the eye. What we might think of as a major innovation may not, in fact, be one. The experimental section seems, in retrospect, to be so obviously valuable and it indeed was so obviously productive, but it was hard, to see it, at the time, as any major innovation.

What I want to talk to you about this afternoon is, in essence, what counts as an innovation and, in particular, what counts as an innovation in legal education and legal education reform. What initiatives or ideas really push the ball forward?

## DISCUSSION

We are in a period of great ferment in legal education, with every day bringing more criticism and more news about how our present model is broken and needs to be fixed, if not junked altogether. Recently, the American Bar Association (“ABA”) released the report of its task force on legal education.<sup>1</sup> I will say a little bit more about that in a moment.

A number of state bars, including Florida, have either issued reports or are working hard on reports which recommend, or even in some cases require, significant reform to legal education in the respective states. All of these efforts share a vigorous and vehement call for innovation. They call for meaningful change and meaningful innovation. Those of us responsible for administering law schools, and I use the “us” in the broadest sense to include not only deans of law schools, but members of the faculty, university administrators, and other senior staff, are focused, like a laser beam, on what is going on now.

While we are consumed by present predicaments, we should not look at these developments historically. The history of legal education in the United States provides many instances of changes in the way we do business in law schools. What is interesting, when you take a moment to think about it, is how quickly some of these major changes penetrated into our practices over the years.

Take, for example, the case method, and go all the way back to the 19th century. It was introduced by Christopher Columbus Langdell at the Harvard Law School in the latter part of the 19th century.<sup>2</sup> At the time, it was a departure from both the practice-oriented model of legal education and the characteristic of education at that time. It was also a departure from the deeply-embedded law school as part of the university in the Germanic tradition. The case method was revolutionary back then, but it seeped well into the DNA of legal education. The case method survives in roughly the

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<sup>1</sup> TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS’N, REPORT AND RECOMMENDATIONS (2017) [hereinafter ABA TASK FORCE], [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf).

<sup>2</sup> *The Trajectory of Legal Education*, NYU LAW, <http://www.law.nyu.edu/experientiallearninglab/methods/origins> (last visited June 9, 2018).

same form as it existed at the time of Langdell's innovation, more than a hundred years ago.

Take, as another example, the penetration of legal research and writing into the law school curriculum, which is something we take for granted in ABA-accredited law schools. Indeed, many of us go so far as to think, "Well, of course, you have legal research and writing, as that is a requirement."

However, it has never been a requirement as such. The core substantive focus on legal research and writing in some form or fashion in the first year is a development that, relatively speaking, is fairly modern. It has not only penetrated into the law school core and canon, but in some respects, it is taken for granted to be as foundational as the study of torts, contracts, property, or civil procedure. Although legal research and writing is framed differently in different law schools, this is an example of an innovation whose time came and stayed as an important component part of legal education, but there are contrary examples.

There are examples of innovations that have been pushed in a myriad of ways, by many influential stakeholders over the course of many years, that have influenced many law schools in their curriculum, but have not taken hold as part of the canon in the same way as the case method or legal research and writing. There are a couple of examples, very different examples, including the rise and not the fall of an emphasis on negotiations and alternative dispute resolution ("ADR"). If you had asked me, or many legal educators who were hard at work at teaching at law schools two decades ago, the question of whether two decades later negotiation and ADR, in some form, would be required in law schools and sit alongside legal research and writing, I would wager that most of us would have said yes. It was, after all, all the rage. The notion that part of a first-class legal education requires some exposure to negotiation techniques—whether you were going to go into transactional work, or you were going to catch the wave of the ADR movement in some form—penetrated curriculum reform in very significant degrees.

Twenty years later, while many law schools have very robust programs in negotiation and ADR, it is a rare law school that has ADR and negotiation as part of the canon in the same way that legal research and writing or externships are part of the canon, which is an interesting story in its own right.

Take the rise of the law and society movement as another, very different, example from thirty to forty years ago. The rise of the law and society movement was not just interdisciplinary education, but the notion that the understanding of doctrine and practice in the law, required a deep knowledge in breadth and depth of the way in which law interacts with society and

society interacts with law. Roscoe Pound certainly contrasted law in books from law in action a hundred years ago.<sup>3</sup>

With a few conspicuous exceptions, the law and society movement still exists fairly peripherally, and in some law schools fairly remotely, from the canon of first-year instruction, and for that matter, instruction in the advanced wave. That, to some extent, is a surprise. Hence the point, why do legal research and writing and the case method penetrate into the core of the law school curriculum as meaningful innovations and reforms while other innovations and reforms remain at the periphery?

To put it more succinctly, what explains the success and stickiness of some innovations and the failure of others to take hold? The story of reform in legal education, not unlike the story of reform in higher education, is a story of sound ideas getting traction, notwithstanding the obstacles in the way.

We can think of some reasons why some innovations stick and others do not. We could talk about economics, such as the economic structure of higher education, particularly of legal education. We could talk about the politics of the matter, and the ways in which reforms navigate the shoals of politics within law schools and universities. We can talk about the impact of regulation, be it at the ABA level, or at the level of state bars in promoting or resisting innovation. Finally, we could talk about the merits of some ideas that stick because they are good ideas or why others do not stick because they are less successful ideas.

Despite these obstacles, some meaningful innovations get adopted and some get folded into the way we do business. So, let me take a step back. Rather than focus on why some ideas are adopted and others are not, a conversation wholly for another day, I want to focus on what characteristics meaningful innovations have.

I began my advertisement for this lecture with a biblical quote from Ecclesiastes. “What has been is what will be, and what has been done is what will be done. And there is nothing new under the sun.”<sup>4</sup> As a descriptive matter, that is not right at all. There are new things happening all the time in American legal education.

From a normative perspective, we want, and ought to believe, that the current challenges in the legal profession, and in the legal academy, can be met by meaningful innovations. So, again, what counts as a meaningful innovation? I want to suggest two things that exist side-by-side as part of the definition.

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<sup>3</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>4</sup> *Ecclesiastes* 1:9.

A meaningful innovation is one that reflects, to an appreciable degree and extent, patterns and practices in the legal profession that change the profession. Moreover, a meaningful innovation is one that reinforces the core objects of the law and legal study as a coherent subject; not an added mystic subject, but one that has an integral structure around which adaptations can form.

I want to pick on innovation a little bit, and say something about how best to know what we are talking about when we describe and promote innovation. As a bit of an aside, there is a deeply practical reason why this is important, wholly apart from the sort of intellectual or academic quality of the effort to get out a definition. The practical reason why this is important is because we are encountering a distinct set of criticisms of law schools these days.

These criticisms are built, in essence, on two pillars. First, law school is too expensive; that is to say, it is not worth the price. Second, law school is unimaginative and increasingly decoupled from the legal profession. Moreover, it is argued that this gap is widening between legal education and the legal profession. So, when we say “innovation,” innovation from what? To say something is an innovation of change, there must be a baseline. The baseline I want to suggest is the basic apparatus of legal education in the United States, at present. This apparatus has six parts, some structural and some tactical. The bullet points are:

- *It is postgraduate.* It is distinct from many of our international counterparts. It is expected for law schools to provide legal education after an individual has received their undergraduate degree, not as part of their undergraduate study.
- *It is three years long.* Even in the case of accelerated programs, like the one at Northwestern, which is three years packed into two. But, at the moment, I will not characterize the reasons for it. Law school is, in essence, three years’ worth of work on legal education.
- *Legal education is taught, principally, by full-time faculty.*
- *Legal education primarily takes place by in-class lecture.* The pedagogy in law school, to paint with a broad brush, is principally a combination of in-class lecture that may or may not be supplemented by the so-called “Socratic method.” But again, it is principally an in-class lecture. Innovations in the experiential space and clinical space, while very important, still remain peripheral to the basic way in which you learn legal

subjects. Notwithstanding the plugs on the table and the plushness of this room, it is not that different than it was sixty, seventy, or eighty years ago. A man or woman stands behind the podium and lectures to you or engages you in conversation through the Socratic method.

- *Foundational knowledge is critical.* Again, as one of my torts teachers of Harvard used to put it, if you woke up a lawyer from sixty years ago and said, “Quick describe to me what goes on in the first year of law school,” what he or she would describe would look a heck of a lot like what the first year of law school looks like today. Many differences to be sure, but the emphasis and the priority on foundational legal knowledge, particularly in the first year, is essential to the objective of how we teach law school. Let me rephrase that—it is characteristic of how we teach law schools in the United States today. This is not required by the ABA, the AALS, or any state bars, but it is, nonetheless, characteristic of how we do legal education.
- *Law school is funded, principally, by two sources of revenue: (1) student tuition and, in the case of public universities, (2) some amount of state support.*

I say this about legal education to make a point, but as a historical matter, you could make those six points about the structure of legal education probably fifty years ago and say very much the same thing.

Let me talk a little bit about examples where innovation has taken hold, which is to say innovations that persist in this basic apparatus. When I say, “innovations to this basic apparatus,” let me be clear what I mean, and what I do not mean. I mean that, basically, they have moved in and advanced the legal education project forward from what I have described as the six characteristics of legal education in the United States. But, they have not fundamentally reshaped, abandoned, or jumped any part of those enterprises.

They are, in other words, variations on the same theme, which is how legal education, or the basic structure of legal education, is in the United States. Let me mention just two: (1) curricular reform and (2) experiential work. With respect to the first, we see now a very different mix of courses in law schools, which are mostly additive as opposed to subtractive, including at Florida International University and Northwestern law schools, than you saw ten, twenty, or thirty years ago.

So again, to return to the example from my torts teacher: if you woke up that lawyer from fifty or sixty years ago and said, “Describe the structure of



legal education to me, and tell me the courses in the curriculum,” it would be a much thinner and a very different list.

We could consider many curricular examples. I tend to write and teach in the public law area, so the rise of administrative law and regulatory subjects—both in decor and periphery—is very much on my mind as innovations. Some courses are hardwired into the first-year curriculum, others are not. But, some of the courses that have blossomed in the era of the so called, “modern administrative state” are environmental law (as a boutique, but important subject), food and drug law, and professional responsibility. The notion that professional responsibility is a core and required subject, is very much characteristic of a reform, and a meaningful innovation that is a variation on the theme of the basic structure.

International law, intellectual property, telecommunications, and business planning are all changes of substance in the curriculum. However, this is certainly not a complete list. Although still nested in the theory of the legal curriculum in which the first year on foundational subjects are central and which advance these subjects, there are all the ones I have mentioned. Possibly with the exception being professional responsibility, all of these subjects are layered atop the basic core subjects in the first year.

Take the example of experiential learning. That bucket includes live client clinics, simulations, and externships. Experiential learning, and the development of experiential learning, is so much on the mind of those focusing on legal education, and more importantly, on the minds of students who are taking law school courses these days at all American law schools.

Experiential learning is tied to three reinforcing notions. First, that students should get hands-on practical work. This is an important project in law school. Second, students should be exposed, under supervision by folks on the law faculty, to the contours of legal practice. In other words, what it means to be a lawyer and act like a lawyer, not just to think like one. Third, is the notion that this should happen while in law school. This often goes neglected, so I want to reinforce it.

Why do I reinforce that? Because you could have a lot of experiential learning, as many advocate for, irrespective of what goes on in law school. For example, when President Obama, says in passing, a number of weeks ago at a town hall meeting,<sup>5</sup> that you do not need the third year of law school, and that all of the training can be provided through postgraduate externships and clerkships, the assumption here is that all the fundamental value of law school is contained in the curriculum of the first two years and the rest is more or less surplusage. That is a very different model, which is why we do not call

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<sup>5</sup> Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, N.Y. TIMES (Aug. 23, 2013, 5:31 PM), <https://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/>.

judicial clerkships part of the experiential learning in law school. We regard them as important, but we regard them as what comes *after* the work that we have done in law school in the three years.

Experiential learning that is hands-on practice gives you exposure to being a lawyer. Acting like a lawyer, and doing so within law school, is a meaningful innovation, but a meaningful innovation tied to the basic contours and structure of legal education.

You can all see where I am going. I am trying to juxtapose these—incremental reforms—with changes more radical, and with meaningful innovations that just might shake up, for better or worse, the basic structure of legal education. Let me again say that it is a sign of the times that calls for reform, for meaningful innovations, that are principally directed toward expanding and advancing these kinds of basic developments and this basic structure. These developments are more curricular innovations and more experiential learning opportunities. Last noticed, but soon to be noticed quite a bit, are suggested reforms and innovations that go to the heart and change the space of the apparatus. In recent years, there have been more substantial calls for reform. Here, I want to mention a few of those.

First, there is a challenge to the notion that law school should be postgraduate. One often hears about how legal education is conducted in other countries, which is described for the benefit of giving a comparative point of view. It is the same reason why we look at how contract law is practiced in other countries or how bankruptcy is practiced in other countries. As of late though, there have emerged some advocates (I am not one of them) that suggest the model of legal education nested in the undergraduate experience, in fact, makes a lot of sense for the United States. What is interesting about that advocacy, is it joins together not only the argument that, that would provide at least as good a modality of legal education, but moreover, it responds to the drumbeat of criticism that law school is too expensive. Op-eds and the occasional blog post that talk about the justification for law being an undergraduate experience argue that you get out and get to practicing law in a shorter period of time. Now, promising much reform in that area requires a number of assumptions, but nonetheless there is advocacy in that space.

Now here is a caveat, there are those of us in the space of American legal education that think that is not only misguided—the notion that we should move away from legal education as a postgraduate endeavor—but actually think we should be moving in the opposite direction. This is a brief commercial announcement for Northwestern Law. There is nothing particularly patentable about what I am about to say. 95% of our entering class has had work experience between college and law school. I think that, at its nadir, it was 90%. Yet, most law schools are moving in that direction.

Business schools, as many of you know, have basically been in that business not forever, but for many years, and indeed the very top business schools in the United States essentially require you to be out at least two years between college and law school.

I think that is a very welcome trend. I played no hand in inventing that; it long predates me. But, the notion that work experience, life experience, and maturity benefits law students, once they come to law school, is a key component of our enterprise, and in many American law schools that is the trend.

It is not only resistant to the notion that law school should be nested with undergraduate students, but it has been suggested that it should go the other way and that law students should be, in essence, older when they come to law school.

Here, is another meaningful reform that responds to the basic apparatus. That is the debate concerning the three-year model and the two-year model. However, I have one point of correction; I have to defend my honor. I have not been advocating that law school should be completed in a two-year period. This is something the President has gotten a lot of attention for, and something that is in the press a lot. What I have associated myself with is the proposition that is floating currently among the folks in the New York bar. The idea is that you should be able to sit for the bar after two years, but you would not be able to get a law degree until you have completed the work in the law school, as required by that law school. You could move away from law school and sit for the bar after two years, but the juris doctorate degree could only be conferred after three years.

Here, is what I think: The fact is that there is an increase in folks who are advocating two years of law school or insisting that law school is too expensive. They note that two-thirds of tuition hits the sweet spot and that the third year of law school is a vast wasteland in which little meaningful learning goes on. Much of the resistance to that idea has come from the brute fact that the ABA proscribes it. But, in this space of significant criticism of law schools and efforts toward reform, it would not be at all that surprising. If the regulatory movement shifted around, then law school students should and would be able, in the near future, to vote with their feet. By that I mean that some law schools would adopt the two-year model while other law schools would adopt the three-year model.

Notice the fine print: It is basically three years of law school in two years, so it is not a break from tuition. A meaningful two-year law school is just two years' worth of tuition. That is a challenge to the basic structure.

There are a couple of other challenges to the basic structure. One is the challenge to the notion that law school should be taught principally by full-time faculty. There is pressure, to put it mildly, to reduce the reliance on full-

time faculty. The ABA section on legal education, as many of you know, is presently considering reform to their accreditation standards, which if implemented on the subject of full-time faculty, would permit law schools to have folks teach law students who are not given security in employment.

That is not the same as saying there should be a move to part-time faculty. But, it is tantamount to saying it is up to the law school to decide who should be teaching their students. It should not be for the ABA to decide. I should say in the interest of disclosure that the AALS position is even more conservative than that. It is required of law schools, as one of the core values, that governance be shared by the Dean and a full-time faculty, whether tenured or untenured. Nonetheless, the basic point is this: there will continue to be pressure brought on law schools to revisit the question of how secure should our commitment be to having a full-time faculty teach law students.

Lastly, we have changes in pedagogy. This will be the bullet point version. I said one of the key elements of the structure of legal education is essentially in-class lecture as the norm. So, the development of the so-called “flipped classrooms,” focusing more on outside clinics and the expansion of externships, is becoming, if not all the rage, a very characteristic alternative of higher education. NYU announced a curriculum reform a number of months ago that essentially expanded, significantly, the scope of externships—supervised externships, throughout the world, have become key component parts of legal education.

With regard to these and other kinds of reforms, we need to evaluate these innovations in a clearheaded way. They reflect important changes and meaningful innovations, but there are many impediments to their implementation, again economic, political, regulatory, and such.

Let me take a step back and try to draw a contrast between these and other kinds of meaningful innovations, and look at what other folks in the space of management science are doing, most notably Clayton Christensen. Clayton Christensen is a very influential public business school professor who is famous for what he calls “disruptive innovations.” These are innovations that are concerned with a very different cure. With respect to meaningful innovations generally, the pressure, again, to make the point to do something is intense.

In March 2013, a group of more than two dozen “academic heavyweights,” as the law professors were called in the press, wrote and distributed a letter to the media and the ABA entitled *The Economics of Legal Education: A Concern of Colleagues*, and it was signed by what was called “The Coalition of Concerned Colleagues.”<sup>6</sup> It basically notes the recent calls

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6 THE COAL. OF CONCERNED COLLEAGUES, *THE ECONOMICS OF LEGAL EDUCATION: A CONCERN OF COLLEAGUES* (2013),

of complaints about the crisis in legal education and “has brought new urgency to longstanding concerns.”<sup>7</sup>

While “crisis” may not be the most appropriate term, law schools are operating in a difficult climate characterized by rising costs, shrinking endowments, reduced governmental assistance, disaffected students, and declining applications. The price of legal education has risen as the job market for lawyers has declined. “A recent report found only half as many entry level job openings as individuals passing the bar. Most knowledgeable observers believe that the situation is unlikely to improve even if the economy fully rebounds. Law schools are themselves in an increasingly difficult financial position.”<sup>8</sup> It goes on in some detail about that and here is how it concludes:

Legal education cannot continue on the current trajectory. As members of a profession committed to serving the public good, we must find ways to alter the economics of legal education. Possible changes include reducing the undergraduate education required for admission to three years; awarding the basic professional degree after two years, while leaving the third year as an elective or an internship; providing some training through apprenticeship; reducing expensive accreditation requirements to allow greater diversity among law schools; building on the burgeoning promises of internet distance education; changing the economic relationship between law schools and universities; altering the influence of current ranking formulas; and modifying the federal student loan program. As legal educators, it is our responsibility to grapple with these issues before our institutions are reshaped in ways beyond our control.<sup>9</sup>

That is what was signed by a number of law professionals, including nine former presidents of the AALS, and I should say, in the interest of disclosure, including myself. Earlier this year, the ABA released the report of its Task Force on Legal Education. It has four essential clusters of recommendations.<sup>10</sup>

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[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/032013\\_coalition\\_revcomment.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/032013_coalition_revcomment.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> ABA TASK FORCE, *supra* note 1.

The first recommends changes in the pricing and funding model, in particular, to reduce and urge law schools to move away from so-called “merit-based financial aid” towards “need-based aid,” thus reducing the subsidy by those students paying sticker price to those receiving scholarships.<sup>11</sup>

Second, is deregulation and the advocacy of deregulation by the ABA.<sup>12</sup> Just as a footnote you might say, “Well, it is the ABA causing itself to deregulate.” But, to make a long story unduly short, the big ABA is distinct from the ABA Task Force on Legal Education, which controls accreditation for law schools. So, this is the big ABA recommending to the ABA section Task Force on Legal Education that it ought to deregulate in order to reduce costs and promote innovation.

Third, it suggests and advocates more emphasis on skills-based and competency-based learning in the law school curriculum, even going so far as urging that those be required.<sup>13</sup> Fourth, it advocates broadening access to legal services.<sup>14</sup> It is a strange report in some respects. It navigates between interesting data-driven insights about the structure and economics of legal education while at the same time advancing such odd comments as, “the world would be in a better place if law professors would stop being so status-conscious, just give up on the notion that they should climb up the ladder of success, and that their law school should be highly-ranked and the world a better place.”<sup>15</sup> At the same time—and I alluded to this at the beginning of my remarks—a number of state bars in recent months (California, New York, Florida is underway, and other states as well) have advocated, and in many instances decreed, significant reforms to legal education. Examples are California’s effort, now essentially moribund, to require fifteen units of skills-based training<sup>16</sup> or New York’s efforts to impose a pro bono requirement.<sup>17</sup>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See ELIZABETH R. PARKER, ADMISSIONS & EDUC. COMM., EXCERPTS FROM A STATE BAR OF CALIFORNIA COMMITTEE AGENDA (2016), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August2016CouncilOpenSessionMinutes/2016\\_california\\_bar\\_admissions\\_requirements.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August2016CouncilOpenSessionMinutes/2016_california_bar_admissions_requirements.pdf).

<sup>17</sup> James Podgers, *New York’s New Rule Requires Bar Applicants to Perform 50 Hours of Pro Bono*, ABA JOURNAL (Mar. 1, 2013, 9:10 AM), [http://www.abajournal.com/magazine/article/new\\_yorks\\_new\\_rule\\_requires\\_bar\\_applicants\\_to\\_perform\\_50\\_hours\\_of\\_pro\\_bono/](http://www.abajournal.com/magazine/article/new_yorks_new_rule_requires_bar_applicants_to_perform_50_hours_of_pro_bono/).

To what extent these reforms will reflect and usher in an era of truly meaningful innovation and change the structure of legal education, of course, remains to be seen.

## CONCLUSION

I want to conclude by noting another species of innovation that may go unnoticed, but it is important to bring into the conversation. I referenced Clayton Christensen before, but let me reference him again to say he coined the term “disruptive innovation.” A disruptive innovation is this: it is one that creates a new market or value. It improves a product or service in ways that the market does not expect.

This can happen by, for example, bringing in new consumers to the market or lowering price. This may happen to the so-called bottom of the market, but to the extent that the innovation disrupts existing practice, it has ripple effects up the food chain. Or, it may happen at the top of the market where products reach a market segment that is not being served by existing producers. The rise of e-mail, the advent of the smart phone, the development of ultrasound technology as a replacement of x-rays; he has got a long and fascinating list of precisely these sorts of disruptive innovations.<sup>18</sup>

This framework has relevance to law schools and legal education reform. As law schools experiment, I would suggest there may well be these sorts of disruptive innovations. Interestingly, the most successful of these innovations may come from both segments or ends of the market, including the most prestigious schools who have the resources, and that have the bandwidth to engage in these innovations as they strive to capture a net market share from equally well-resourced and vigorous competitors.

They might, by the way, worry less about cost because of the inelasticity of demand and less about employment, because employers will, quite frankly, hire their graduates irrespective of what they do and what they take in at the law school. The least prestigious schools will innovate and engage in disruptive innovations because they have, again frankly, less to lose and very much to gain from market differentiation and from serving the new consumers.

In the law school context, this need not just be about serving the consumer law student. It may be about serving other, new markets. For example, something I talked about with this faculty yesterday was the rise of non-lawyer training. The emphasis in law schools on training non-lawyers is

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<sup>18</sup> See Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, 73 HARV. BUS. REV. 43, 43–53 (1995).

bringing an entirely new market into law schools, or limited license professions.

Whether it be paralegal programs or training individuals who will have a limited license to practice, engagement in the law school space in training clients or in-house counsel, or professional legal education or undergrads, all of these share something in common: the bringing of new consumers and, thus, new markets into the law school space.

Lowering prices is a disruptive innovation. We are going to see soon, I predict, and I am not alone in this prediction, although maybe a little more out there than some, an era of law schools undercutting their competitors significantly by a much lower price model. It might be a lower price in the entirety of the curriculum, or it might be a menu of choices. But suffice it to say, we are going to see slashes in tuition by schools that need not be law schools of low quality. If the strategy rests on a business model which emphasizes quantity and efficiency, for example, through the use of technology or in cross subsidy by the central campus or the state, they are actually priming the pump for significant success.

Another example of disruptive innovation is the effort on the part of law schools to serve a different kind of law student consumer. Here, is the point I want to end on. I know this is a room full of a bunch of law students. The kind of consumer, the kind of law student that is characteristic of the future, to put it a little bit more precisely, is someone who looks to use their legal training to pursue either right away or later, a so-called “non-traditional career.”

What I have in mind is the legally-trained professional who aspires to be not only or principally a practicing lawyer in a large or medium size law firm, but to be an entrepreneur someday, or immediately, or perhaps a C-Suite executive. In short, a client, in the long run, rather than an attorney.

In the blogosphere, be careful what you read: these are seen as fairly marginal consumers. There is, indeed, an excoriation of law schools to market. Every dean who puts his or her chin out and says that law school is a flexible degree is smacked by *Above the Law*, or another blog, by saying that is entirely beside the point.

So, the debate about whether or not *U.S. News and World Report* should count jobs for which a J.D. is an advantage or preferred, or limit their calculus to only jobs for which a J.D. is a requirement, goes right to the heart of what I am talking about. Once you have permitted ranking services and other organizations to basically regard legal education as only suitable for those who are going to go into positions for which a J.D. is required, you are basically running upstream against the disruptive innovations that are characteristic of law schools. Most law schools, are quite conscious of the



notion that legal training is a wide, variable, flexible training that promotes careers in a variety of areas.

To be more specific, law schools who are working to service these new kinds of law students are doing such things as advancing and having courses on problem solving, quantitative skills, teamwork, and leadership. Advancing programs and initiatives in the area of entrepreneurship are mobilizing what has been called the “inner disciplinary turn” to give law students a complement of skills.

And last but not least, some schools are working with colleagues in other departments and schools, such as business schools, engineering departments, and public policy schools to train these new kinds of professionals. These kinds of innovations are potentially destabilizing. They are disruptive innovations that may in fact portend a new market, and may, if successful, respond to the drumbeat of criticisms about costs.

Most of what I said are about exemplars of those kinds of techniques. What has been missing is a full-throttle defense or articulation of what the ends of legal education should be, and that will await a different conversation.