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Reflections of the Future of Legal Education

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REFLECTIONS ON THE FUTURE OF LEGAL EDUCATION

Erwin Chemerinsky*

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I. INTRODUCTION

It is remarkable to me how similar legal education is today to how it was when I started law school over four decades ago. Law students still sit in the same classrooms. They use the same books. They study red books and the blue books and the grey books that were brown when I was in law school.

Teachers teach basically the same way. For those who are law students, I hope and expect that your law professors are better teachers, and more humane, than mine were in my first year. But overall, legal education today is much like what it was in 1975 when I was a 1L.

There are, of course, things that have changed. There are many more women who are students than there were four decades ago. In my law school class, 25% of the students were women. Five years earlier at my law school, only 5% of the students were women. Today, nationally, about half the law students are women. This year at Berkeley Law, almost two-thirds of the students are women.

There are also other differences. If you walk into law school classrooms today, you often see people with metal boxes in front of them with an apple on the cover. None of us would have known what that was in 1975.

However, as I talk about the future of legal education, it is important to look at the past to try to figure out why have there been so few major changes over a relatively long period of time. In part, I think the answer to that is that law schools generally do a good job of preparing students for the practice of law. I very much disagree with those who, such as Brian Z. Tamanaha—who had a book titled *Failing Law Schools*—argue that laws schools are not doing the job for society.

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The reality is that if law schools were not preparing students for law firms, for government positions, or for public interest posts, the profession would demand much more change in law school than what has occurred. I think the primary reason why there have been few major changes in legal education is that the traditional model is very cost-effective.

I do not know if it is true that Dean Christopher Columbus Landell invented the current form of legal education. But overall, as it has operated traditionally, it is very cost effective for universities. Faculty salaries are higher than for many other parts of the university, but law professors often can teach large numbers of students. There are not—compared to science and engineering—lab costs or large start-up costs.

I do not want to discount the importance of institutional inertia: it is really difficult to change major institutions. Several years ago, I was in a meeting of the Board of Trustees in my university and they allowed some of the faculty, especially some of the deans, to be there. And one of the speakers talked about how he believed that in ten years, half of the universities in the United States would cease existing. I listened for a while and then raised my hand. I tried to politely say that I thought that was nonsense.

Institutions that have been here for twenty-five, fifty, or seventy-five years, or more, are not likely to go away. And besides that, ultimately the quality of any law school or any university is a function of its faculty, its students, and the programs it creates. That was true 100 years ago, it was true fifty years ago, it is true now. And it is going to be true fifty years or 100 years from now.

So, it is in this context that I want to talk about the future of legal education. I want to address three questions. First, what are the problems now facing American law schools? Second, what are some of the solutions that seem to be pointing in the wrong direction? And third, are the problems facing legal education likely to be solved, and if so, how? All of this leads to the conclusion that the future of legal education is likely to be much like what the past of legal education has been. I do not foresee major changes coming with regards to law schools.

II. THE PROBLEMS FACING LEGAL EDUCATION

I would identify four major problems facing law schools. The first is the cost of legal education. When I went to law school in 1975, tuition for the year was \$2,400. This was at a private university. In my second year, tuition went up to \$2,700. In my third year, it went to \$3,100, and the students protested.

My wife went to the University California Berkeley School of Law. She began law school in 1983 and tuition for each semester was \$750. Now, tuition at elite private law schools is in the high \$50,000 to mid-\$60,000 range. If you look at the University of California, for in-state residents the tuition is \$45,000, and the tuition for out-of-state residents is \$55,000.

There is no longer a dramatic difference between the tuition at the University of California and comparable private law schools and universities such as the University of Southern California or Stanford. I can present this to you in a statistical way: since 1986, tuition at public universities has gone up 448%. Tuition at private universities has gone up 220%.

The cost of living during this same time period has gone up 77%. Few things have gone up more in cost than education over this time period. It is important to think about why. For public universities, it is because the states no longer are willing to subsidize public education in the way they previously were willing to pay for it.

This is especially true for professional schools. The Regents of the University of California have decided they are longer going to subsidize professional school education. Being in a state that provides far too little for K-through-12 education, it is hard to complain that they are not paying more for legal education. Across the country we have seen, especially for those that consider themselves elite public universities, costs that are now comparable to private universities.

But generally, what is going on in law schools reflects what is going on in higher education. In fact, if you look since 1986, the cost of college and university education generally has gone up 498%. This is significantly mirrored across legal education, be it public or private legal education.

This is no different for undergraduate education. Having had four children go private colleges, I can attest to the costs. It is not that law schools have gone up more than college and university tuitions. If anything, they have gone up a bit less. But the cost of education is enormous and puts so many constraints on students; many graduate with crushing debt that limits their career choices and is a constant source of stress.

There is no easy solution to the rising costs of higher education. Of course, law schools—and universities—must provide much more in the way of financial aid. But there is no realistic way to significantly decrease costs. Faculty and staff salaries and benefits often account for two-thirds or more of budgets. Reducing them is impossible without cutting the quality of education and services.

A second problem facing legal education is the decrease in applications. You are all familiar with this, but I did some research before coming, and I can present to you the statistics about the decrease in numbers of law school

applications.¹ In the Fall of 2010, there were 87,900 applications to law schools. In the Fall of 2011, there were 78,500 applications, or a one year decrease of 10.7%. In the Fall of 2012, there were 67,900 applications, that is a decrease in one year from the prior of 13.5%. In the Fall of 2013, we had 59,400 applications, a decrease from the year before of 12.4%.

In Fall of 2015, there were 57,000 applications, which is a decrease from the year before of 6.3%. By contrast, in 2010, law schools received 87,900 applications. This, of course, is a challenge for every law school. What are the options? Law schools can decrease the size of the entering class, but that has enormous financial consequences. Virtually every law school is tuition-driven. If you decrease the size of the class, you are decreasing the revenue that is available. Alternatively, law schools can cut the quality of their class. Law schools can take students who previously would not have been accepted based on the usual measures of the LSAT and GPA. Every law school in the country has had to confront the problem of decreasing applications.

It should be noted that applications nationally are up about 10% for the Class of 2021, that will begin in August 2018. I perceive that there really is a “Trump bump,” with many wanting to go to law school out of a desire to bring about change and fight the injustices that they see. I always have thought of the quantity of law school applications as cyclical and I predict we now will be seeing an upward trend.

The third problem for law schools is the lack of diversity. Law schools are a bit more diverse than when I started law school forty years ago, but not nearly as much has been accomplished with regard to diversity as is needed. Again, the best way to show this to you is to give you statistics. African Americans are 12.3% of the population in the United States. Of the J.D. students in the United States, 6.5% are African American. And 4.7% of the attorneys in the United States are African American. Latinos are 15.8% of the population. But they represent 7.2% of the J.D. students, and only 2.8% of attorneys.

The pool in terms of minority students wanting to go to law school is not increasing greatly. So, for example, in 2012 (the last statistics available when I delivered this lecture), there were twelve African American students applying to law school with an LSAT score above 170, and a GPA above 3.5.

In the entire country in that year, there were about 118 African Americans applying to law school with an LSAT score of around 165 and a GPA above a 3.5.

I know that this law school is among the very best in the country when it comes to diversity. I am proud of the diversity at my own school. Forty-

¹ *Archive: ABA End-of-Year Summary—Applicants, Admitted Applicants & Applications*, LSAC, <https://www.lsac.org/lisacresources/data/aba-eoy/archive> (last visited July 7, 2018).

five percent of this past year's entering class at Berkeley Law were students of color. But there is, overall, an enormous problem in the country with regard to the lack of diversity in law schools.

The fourth and final problem is in terms of the curriculum. Every major study that has been done about legal education for decades has said that law schools do not do enough to give law students the skills that are necessary for the practice of law. Law schools do a very good job of teaching substantive law. Law schools do, I think, a very good job of teaching analytical skills. When it comes to the practical skills of lawyering—counseling clients, negotiating deals, writing briefs, arguing in courts—law schools do not traditionally do a very good job.

Contrast legal education with medical education. Could you imagine if medical schools graduated doctors where the medical students had never seen patients? If the medical schools said, "We are just going to teach our students to think like doctors," none of us would want to be treated by those doctors. And yet, for a century, the mantra of law schools said, "We are going to teach our students to think like lawyers." I think if you would have gone to my law school's administration in 1975 and asked them to list the ten most important functions of law school, I do not think preparing students for the practice of law would have made that list.

If you focus on what medical schools do, many medical schools now have medical students seeing patients in their first year of medical school. They require clinical experience. In fact, they require rotations in many different areas of clinics. At the two law schools where I spent most of my career before becoming a dean—the University of Southern California and Duke—I would estimate at each, less than a quarter of the students participated in a legal clinic representing real clients over the course of law school. And at many law schools, it is a much smaller percentage than that.

I think there are other curricular challenges for law schools. I do not think law schools do enough to provide interdisciplinary education for law students. I think if somebody wants to be a good criminal lawyer, they really need to know some psychology. I think if they are going to be a corporate lawyer, they need to know much more about business. I think that interdisciplinary education has increased greatly since when I was in law school, but I still do not think overall law schools do a very good job of integrating interdisciplinary education into legal education. And I also do not think law schools have done enough to deal with the realities of globalization. Most law students at some time, or often, deal with international legal problems. But at most law schools, a relatively small percentage of the students take courses that have an international or comparative law focus.

III. THE WRONG APPROACHES

If you accept that those are the problems facing law schools, let me go to the second part of my remarks and tell you what I think of some of the ideas that would be bad solutions. Some of the most frequently-discussed answers to these problems lead in the wrong direction.

Let me give some examples of this. One proposal that I think would be very undesirable is a two-year J.D. None other than the President of the United States, Barack Obama, spoke in favor of having a two-year J.D. Now, assuming it were truly a two-year J.D., a person would go to law school for two years rather than three. I think this would turn out to be counterproductive to some of the goals I just said. The profession wants students to be better trained for the practice of law. We need students who learn more in terms of skills, more in terms of interdisciplinary education, more about international law and comparative law. How can we expect law schools to do more in two-thirds of the time?

If ever it were a truly two-year J.D., what would go first would be the clinical education and interdisciplinary education. And those, I believe, are the two best advances in law schools since I was a law student. Now some law schools in the country are advertising that they have a two-year J.D., but it is a bit misleading. It is just that a student takes three years of courses compressed into two years. The student still pays the school three years of tuition, but he or she gets out sooner. The benefit to the student is the student can begin earning money sooner. The student can begin paying back the loans and recouping the investment. But I think that this, too, is educationally counterproductive.

The way that this has worked is that students have to take classes during the summer, delaying the opportunity for full-time work. I believe full-time work during the summer is enormously important. I think it give students some practical skills and education. It gives students a taste of practice areas. The only way to really know, as a student, if you like an area of practice is to do it. For many students, it is summer employment that leads to full-time employment, and to cut back on summer employment has real consequences. I do not think you can cram three years of education into two years and have the same education.

Take, for example, clinical education. I think if somebody is really going to cram three years of legal education into two years, what would be most compromised would be the ability to do clinical programs. The idea of a two-year J.D. that is much talked about would not be something that would be desirable for law schools.

Another proposal that is talked about frequently is trying to have students be able to get a law degree as an undergraduate degree and going to a

continental model of no longer having a J.D. degree after they have gone to undergraduate institutions. I think this, too, would be something that would be undesirable. In fact, a number of countries in the world, like South Korea, have abandoned the continental model in favor of the American model of legal education. The reason for that, I think, is that law students benefit from having had undergraduate training and training in disciplines that they can bring to law. I also think that students are better at making their career choices at age twenty-two or later than at age eighteen.

But there is one other thing that law schools sometimes do in the name of curriculum reform that I do not think gets very far: changing around what is taught in the first year of law school. I have been a law professor for over thirty-five years and I have been part of so many conversations on law faculty about what should be taught in the first year, and for how long. But whether Contracts is four or five or six units, whether Constitutional Law is in the first year or an upper-level class, really doesn't matter and debates over that aren't about meaningful curricular reform.

At the University of California, Irvine Law School, where I taught for nine years and was the founding dean, for example, the first-year curriculum is all required. But there is nothing required in the upper levels, except a clinical experience and a major paper. It is hard to know, in that context, what it means to do a curriculum reform in the second and third years of law school. The temptation is to want to do curriculum reform by changing what is taught in the first year of law school. Scott Bice, who spent twenty years as the dean of the University of Southern California, said, "Every generation of law professors wants to redo the first-year curriculum."

My experience is that it really does not matter what is taught in the first year or the upper level. It does not matter whether it is taught for a semester or a year. It does not matter if it is taught in the fall or the spring. Ultimately, what we are dealing with is the same thing and the students are all getting ultimately the same analytical skills, the same knowledge.

These are the kind of reforms that I do not think would do very much to meaningfully change legal education. I do not think they will solve the kinds of problems that I am talking about so far.

IV. LOOKING FOR SOLUTIONS

Which of the key problems can be solved, and which ones cannot be solved? What does it likely mean for the future of legal education?

The first problem that I identified is the cost of legal education. Here, I believe there is no solution. There is no way to make law schools less expensive without severely compromising the quality of the program. But I can tell you that in terms of my law school, three quarters of the law school budget

each year goes to faculty and staff salaries and benefits. There is only a quarter of the budget that pays for all of the other operating costs of the law school.

So, there is relatively little, then, in terms of discretionary funding. There is relatively little that can be cut without cutting the quality of education or the services. One of the reasons why higher education has become more expensive is that faculty and benefits salaries in all parts of the university have gone up. It is certainly true in the law school. One thing that is not talked about often is that the cost of benefits has gone up enormously; anybody who we hire, faculty or staff, means that an additional 50% has to be paid for benefits. Of course, that is true of employment outside universities as well. What I draw from that as a conclusion is that the only way to create a truly low-cost law school is to have a small faculty and a large number of adjunct professors.

When Brian Tamahana wrote his book about law schools, he devoted about ten pages to criticizing UC Irvine law school and, implicitly, me. He said, “You squandered the opportunity to create a low-cost law school.” He said that we should have created a low-cost law school, at about a quarter of the cost that we are charging. There is only one way to do that, and that is with a very small faculty and a large number of adjuncts.

And that would not be a good law school. The reason, of course, is that as good as adjunct faculty are—and we have many terrific ones, as you do here—overall, they are not as accomplished as teachers as those who are doing it full-time. Also, adjunct faculty can never be around for the students as much as full-time faculty can be around for the students. The informal interactions that can occur in the halls, in the student lounge, in the time after class that professors can have are just crucial to the educational experience. I would never want to recommend that my children go to, or that my undergraduate students go to, a law school that has a small faculty and a large number of adjuncts. But there is no other path that I can identify for a truly low-cost law school.

The great irony of Tamahana’s criticism of my choices for UC Irvine law school is that his most powerful attack is on the bottom tier of law schools. Yet, that is what UC Irvine would have been if I followed his advice. By contrast, because of our choices and the support of our campus, UC Irvine was ranked 21 in the most recent US News rankings in March 2018.

The high cost of legal education is going to deter some people from ever applying. There are some people who simply will suffer sticker shock and think, given the cost of legal education, that it is just not worth it. And I think part of the decrease in the applications over the last five years has been people saying, “It is just too expensive.” Law schools have the obligation to provide

substantial financial aid based on financial need and to get out the word that they are doing so.

We also have to accept that the existence of law schools, and I think the existence of education institutions in the United States, depends very much on the availability of student loans. We have created an educational system, both for public and private universities, that can continue to exist only as long as student loans are available. If relatively low-cost student loans were to dry up, that would cause many law schools in this country, and many universities, to close. But it also means that we have to face that staggering debt that our students are graduating with.

At the individual level, I constantly am talking to students who are facing graduating from law school with \$200,000 or more of student loan debt and how that constrains the choices that they face. This creates real obligations for law schools, and I can talk about what my school is doing. We have scholarships that are available for students both on merit and on need. I fear that law schools across the country have decreased their need-based aid, as scholarships are increasingly used to compete for students.

We also have scholarships especially designated for students who show a demonstrated interest in public interest and in public service. We provide fellowships after the second year and after the third year of for every student who wants to work at a public service type job. We have bridge-funding for students after they take the bar to work in a public interest organization while they search for a full-time public interest job.

We fund fellowships for students for a year after law school to work in a public interest job. We have a Loan Repayment Assistance Program that repays loans for students who are doing public service type work. One of the things to admit is what we are doing then is using the tuition dollars from the current students to pay the loans off of the graduates. That raises difficult ethical questions, but it is imperative, given the size of debts that our students are graduating with.

I think that every educational institution and every law school has to face the consequence of student debt and how we are going to help our students deal with it. But I do not see any realistic way to decrease the costs of legal education.

The second problem that I identified is the decrease in applications. Here, I am much more optimistic, maybe precisely because I have been doing this for a while. I believe that law school applications are cyclical. They go up, and they go down. When the recession began in 2008, a predictable pattern occurred. Law school applications went way up. There was a record high in 2010. Then, as prospective law students saw the shrinking job market, law school applications went down. I think law school applications will again rise and we have seen this for the class that will enroll in August 2018.

I remember the 1980s, when I was teaching at USC, there was a significant decrease in law school applications. Then, the television show *L.A. Law* premiered, and there was a surge of law school applications. Now, for those who remember *L.A. Law*, that is not necessarily the image of lawyers that we most want to encourage.

I often get asked by prospective law students and sometimes their parents, “Is it worth it to go to law school?” I always respond with two questions. First, “What would you do instead, and are your economic prospects better? And second, “Do you want to be a lawyer? Do you want to do those things that you only can do with a law degree?” And I think for many people, the answer will always be “yes,” that being a lawyer is what they want. My oldest son is a lawyer. He is nine years out of law school, and he loves the practice of law. Never for a moment have I regretted my choice to go to law school.

At the time I delivered this lecture, I asked my Assistant Dean of Admissions at UC Irvine, Jay Austin, to try to figure out something for me. As law school applications were going down, I was curious about what were people doing instead. My hypothesis was that many were pursuing MBAs and going to business school instead. Turns out that is not so. Business school applications for MBAs had gone down just the same with law school applications. So, I asked, “What is it that they are doing instead?” And Jay had two answers for me: many more people were applying for things like Teach for America, AmeriCorps, and programs like that, with public service missions. It is worth noting that those are temporary, and the individuals after those programs are likely to pursue graduate professional study. The other thing Jay found is many more recent college graduates were living at home with their parents. Jay found that for the prior year, 25% of the college graduates were home living with their parents. As a parent of four children, I tell you, I hope that is temporary as well.

About the same time, I had a conversation with the then-dean of NYU Law School, Ricky Revesz. And I mentioned this to him and he said, “It is so coincidental. I asked my assistant dean for admissions to figure out what were people doing instead.” And he gave me three answers. The first two were the same. And, he said, more people were going into the financial industry and staying there for a longer period of time. I can understand why in New York that would be seen much more than in Southern California or in South Florida.

But a lot of that leads me to believe that law school applications will rise again. Now, I think there is probably some structural decrease. It is not all cyclical. I think there was a time when people go to law school because they did not know what else to do. I think it is now too expensive for that. But I have no doubt that law school applications will rise.

I think, though, that there is a challenge here for law schools and the legal profession. I think we have to do much more to get out the word that being a lawyer is an attractive, exciting, and enjoyable profession. The legal profession has taken a real hit in the press in recent years and I think that we have the obligation to do more to restore the image of the profession.

The third problem that I identified is the lack of diversity in the profession. It is absolutely clear to me that diversity requires continued aggressive action by law schools and affirmative action.

In 1996, California voters passed an initiative, Proposition 209, which says that neither state nor local governments in California can discriminate or give preference on the basis of race or gender in education, conflict, and employment. Five years before Proposition 209, in 1991, at the University of Southern California, a private school, 11.5% of the students were African-American. In Stanford University, a private school, 9.5% of the students were African-American. At the University of California Berkley Law School, a public law school, 3.2% of the students were African-American, and at UCLA Law School, also a public law school, 2.4% of the students were African-American.

When I was in the faculty at USC, from time to time I would help out by teaching a course at UCLA. The students would always ask me, "What is the difference between USC and UCLA?" And the last time I did that at UCLA was the spring of 2002, and I was teaching a federal courts class of about 100 students. There was not a single black student in the class and only a few Latino students. A student remarked to me that she was a third-year student about to graduate and never had a law school class with an African-American student in the room."

That is the effect of Proposition 209 in the many years after it was adopted. That will be the effect you see across the country if the Supreme Court holds that there no longer can be affirmative action. I think this creates a real burden on law schools to try to find those neutral proxies that will mirror diversity. I think it also creates a real burden on law schools to find ways of increasing the number of qualified African-American and Latino students from disadvantaged backgrounds to apply to law school.

When I became dean, I said I did not want us to simply compete with other law schools in terms of diversity. I also want to really increase the pipeline. At UC Irvine, we created a program with the Santa Ana public schools which are almost 100% Latino, where twice a year, in the fall and spring semesters, we have a six-week program called the Saturday Academy of Law. It is for ninth graders. I can show you, statistically, the students who participate in the Saturday Academy of Law are much less likely to drop out, much more likely to graduate, and much more likely to go to college. I cannot

yet tell you how many more go to law school, and I am not claiming a causal connection, just that such programs matter.

We have created a pre-law outreach program for college students with disadvantaged backgrounds. We measure disadvantaged by 200% of the poverty level or less. The program takes forty students in the summer for a six-week program. Any student who successfully completes the program gets a free LSAT preparation quiz from Kaplan or Princeton Review. And we are now seeing the first students in our law school who have gone through this program, and many who have gone on to other law schools. We need to do far more to create these kind of pipeline programs, maybe even at the elementary school age, as well as at high school and colleges across the country.

The fifth and final problem that I saw with legal education is in terms of the curriculum and the lack of adequate skills-based training. Here, I am pretty pessimistic about major reforms across all law schools and it goes back to cost. Cost is the major problem for universities today, a major problem for law schools. Declining applications and enrollment make this even more acute. Clinical education is really expensive. The best practices for a clinic are one faculty member per eight students. That is far more expensive than a faculty member standing in front of a large classroom. The reality is that the academic tenure-track faculty generally would rather see hiring of people like them than clinical faculty hired.

I had a tremendous advantage being the founding dean of a law school at UC Irvine and believing very much in clinical education. We decided that we were going to require a clinic of all students in order to graduate and to allocate the faculty slots for that before the faculty even arrived and were able to stick with that. We required an in-house clinical experience for all students. Every student has to do a clinic supervised by a full-time faculty member in order to graduate. We have tried to emulate the medical model in other ways. We place every second-semester, first-year law student in a legal aid or public defender office to do intake interviews. First, they get classroom instruction on doing interviewing. Then, they have to watch an experienced lawyer do interviews. Then, they have to do it. So, every first-year student is interacting with real clients. But I think the only way to learn the skill of practicing law is to do it under supervision.

Some states are now imposing skills requirements for graduation. New York has adopted a pro bono requirement in order to be able to be admitted to the New York Bar. California considered that. California and New York are so important as markets for lawyers that I think that could change what law schools do if other major states follow suit. And then law schools would have no choice but to do more in the realm of skills education, but the form it would take remains uncertain. Will it be simulations, often taught by adjuncts, or will it be live client clinics? I am a strong believer that nothing can

substitute for the live client clinic. Nothing can substitute for a law student representing a real person under the supervision of a faculty member, but the costs of that are great.

Lately, I have seen law schools making great strides in terms of increasing interdisciplinary education, increasing global education. There is more of both than when I was in law school, but not nearly as much as there needs to be. This, though, seems less about cost and more about orientation, so it is something that may be easily fixed in the years ahead.

V. CONCLUSION

My conclusion is that, forty years from now law schools probably will look much like the law schools of today. Students will probably be sitting in the same chairs, same desks, the same red and brown and gray and blue books, and be taught in basically the same way. There is much to applaud in legal education so that it is not all a bad thing. But there is so much that could be made better in legal education. And I think the challenge for law school faculties, for lawyers, for law students, is what can we do to solve these problems and make it even better for the future?