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TALES OF A FOURTH TIER NOTHING, A RESPONSE TO BRIAN TAMANAHA'S *FAILING LAW SCHOOLS*

*Lucille A. Jewel**

This is a paper written in response to Professor Brian Tamanaha's Failing Law Schools. Much of the book is laudable for highlighting the serious structural, policy, and moral issues confronting legal education today. However, I disagree with several of Professor Tamanaha's ideas for reforming our system. In this paper, I write from the perspective of a tenured legal writing professor teaching at a for-profit fourth tier school, in fact, one of the schools that Professor Tamanaha repeatedly implies are the problem and not the solution for the legal education crisis.

Part One addresses the idea, which dates back to 1921, that students at lower-tiered schools should be able to receive a different education (impliedly lower quality) than those students matriculating at higher ranked schools. Part Two counters Professor Tamanaha's dichotomous view of legal scholarship and teaching, arguing that scholarship and legal theory carry a unique practical value for students, particularly in the context of a non-elite legal education. Part Three considers Professor Tamanaha's puzzling claim that clinical faculty and legal writing faculty must accept less job security and unequal pay in order to help save legal education.

Part Four of this paper presents an alternative explanation as to why students might choose to attend law school, even with the deep economic hardships involved. In terms of the continuing value of the J.D. degree, both Professor Tamanaha's narrow economic analysis and the predominant counterarguments (e.g., you can do anything with a law degree!) miss the point that, for many, a law degree carries cultural value that operates apart (but sometimes in tandem) with economic capital. The idea that we should impose restraints on the ability of students to obtain a law degree, if they so choose, is somewhat paternalistic and at odds with the free market aspects of his analysis. The paper concludes by briefly developing social policy arguments that explain why we must work on

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reducing the institutionalized elitism that afflicts the legal profession and its educational system. Legal education must be reformed. But my suggestion is that we look for ways to make it better—less elitist and less hierarchical—as well as cheaper.

INTRODUCTION

Brian Tamanaha's *Failing Law Schools* raises several important points relevant to legal education in the shadow of the great recession. Professor Tamanaha masterfully covers the exploding cost of law school and attendant student debt and the potential oversupply of lawyers in relation to the number of legal jobs available. Particularly compelling is the fact that law schools produce approximately 45,000 graduates per year, competing for only 25,000 available legal jobs (as projected by the Bureau of Labor Statistics).¹ However, even within these statistics, we know that segments of the American population continue to be underserved by lawyers and the legal system.² In other words, there is still a need for legal services that is currently unmet by American lawyers. The cost of legal education has become a key point of reform; if we can reduce the overall cost of legal education, some of our law graduates might be able to serve these segments of the American population.

Professor Tamanaha also touches on the fact that the structure of legal education, strangely tied to a rankings system created by a mostly has-been news magazine (*U.S. News & World Report*), has yielded an educational hierarchy that produces differing amounts of return for a J.D. degree.³ The higher the school's rank, the more likely one is to obtain a high-paying job; graduates of lower-ranked schools will be more challenged in their career paths.⁴ As Professor Tamanaha points out, it did not help matters that law schools obfuscated the employment statistics they publicly presented, counting any kind of job, legal or non-legal, full-time or part-time, as employment and hiring their own graduates in order to count those graduates as employed.⁵ Amid the massive critical outcry⁶ (and some class action lawsuits against law schools) concerning the sketchy data presentation, law schools are now reforming how they present this data.⁷

Graduates who come out of lower ranked law schools carry an immense amount of debt (often well over \$100,000) that, when coupled

1. BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 139 (2012).

2. TAMANAHA, *supra* note 1, at 170-171.

3. *Id.* at 112.

4. *Id.* (explaining that the percentage of law school graduates obtaining jobs at large law firms decreases as the school's *U.S. News and World Report* rank decreases).

5. *Id.* at 71-74.

6. See Lucille A. Jewel, *You're Doing It Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession*, 12 MINN. J. L. SCI. & TECH. 239 (2011); Lucille A. Jewel, *I Can Has Lawyer? The Conflict Between the Participatory Culture of the Internet and the Legal Profession*, 33 HASTINGS COMM. & ENT. L.J. 341 (2011) (both arguing that the anti-law school scam-blogging movement has had an appreciable impact on the debate concerning legal education reform issues).

7. Kyle McEntee, *The Problem with Law School*, THE HUFFINGTON POST (Dec. 6, 2012, 12:09 PM), http://www.huffingtonpost.com/kyle-mcentee/law-school-enrollment_b_2250889.html.

with the stagnant job market, makes it nearly impossible to achieve a comfortable standard of living.⁸ There are options for managing these debt loads, in the form of Income-Based Repayment plans and extended repayment periods (up to thirty years), but a \$100,000 plus price tag for a legal education is much too high in this economy.

Another problem concerns the fact that law schools often bypass the students who are most in need of tuition assistance and instead distribute scholarship funds to those with the best merit indicators (usually the most socially advantaged students).⁹ Because *U.S. News & World Report* rewards schools for their “selectivity” (measured in terms of GPA and LSAT score), schools are incentivized to offer scholarships to those students with the best merit metrics.¹⁰ Students who fall on the lower side of a school’s median merit scores pay full price for their law degree, effectively subsidizing the education of the higher-performing students. Because we know, statistically, that students with higher merit indicators come from higher socioeconomic realms than students with lower scores, we have a counterintuitive system whereby less wealthy students are subsidizing the education of the more affluent.¹¹ This is a severe institutional problem. A shift to a pure need-based system for scholarships would, of course, remedy this problem.

And finally, Professor Tamanaha reports on the continuing perceived failure of law schools to adequately prepare lawyers for the practice of law. For many years, members of the bench and bar have commented negatively on the overly theoretical focus on legal education, calling for more skills training and more law teachers who can provide a practical focus on legal education.

I wholeheartedly agree with Professor Tamanaha that law professors must take on these crisis points in order to solve the deep structural problems negatively impacting the legal profession and the legal system as a whole. If one takes Professor Tamanaha’s book to heart, the takeaway is that law professors have an ethical and moral obligation to reduce the cost of legal education. However, I disagree with several of Professor Tamanaha’s specific ideas for reforming the system.

In this paper, I write from the perspective of a tenured professor teaching legal skills at a for-profit fourth-tier school¹²—the type of school

8. TAMANAHA, *supra* note 1, at 109-11.

9. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 660-661 (2011) (explaining that individuals with lower merit indicators (who are more likely to come from lower socio-economic backgrounds) receive less tuition assistance than those students with higher indicators (who are more likely to come from wealthier backgrounds)).

10. TAMANAHA, *supra* note 1, at 97-99.

11. *Id.* at 96-99.

12. From 2004 until 2013, I taught legal writing and legal skills courses at Atlanta’s John Marshall Law School. I was awarded tenure in 2012. In 2013, I accepted a lateral teaching position at the

that Professor Tamanaha repeatedly implies is the problem and not the solution for the legal education crisis.¹³ Several premises that underlie Professor Tamanaha's arguments need to be unpacked. Part One addresses the idea, which dates back to 1921,¹⁴ that students at lower-tier schools should be able to receive a different education (impliedly lower quality) than those students matriculating at higher-ranked schools. Part Two counters Professor Tamanaha's dichotomous view of legal scholarship and law teaching, arguing that scholarship and legal theory carry a unique practical value for students, particularly in the context of a non-elite legal education. Part Three considers Professor Tamanaha's puzzling claim that clinical faculty and legal writing faculty must accept less job security and unequal pay in order to help save legal education.

Part Four of this paper presents an alternative explanation as to why students might choose to attend law school, even with the deep economic hardships involved. In terms of the continuing value of the J.D. degree, Professor Tamanaha's narrow economic analysis and the predominant counterarguments (e.g., you can do anything with a law degree!¹⁵) both miss the point that, for many, a law degree carries a cultural value that operates apart from (though sometimes in tandem with) economic capital. The idea that we should impose restraints on the ability of students to obtain a law degree, if they so choose, is somewhat paternalistic and at odds with the other free market aspects of his analysis.

I. THE ARGUMENT AGAINST TWO-TIER LEGAL EDUCATION

Professor Tamanaha resurrects the concept of a two-tiered legal education model with non-elite students, bound for a career representing ordinary people, attending two-year "Holiday-Inn" law school programs, and more elite students, bound for a career serving corporate clients, attending a three-year "Ritz-Carleton [sic]" law school.¹⁶ The basic law

University of Tennessee College of Law, which places all law faculty members on a unitary tenure track, regardless of what subject matter (writing, clinical skills, or doctrine) is taught.

13. TAMANAHA, *supra* note 1, at 122. Professor Tamanaha's contempt for non-elite legal education is difficult to miss: "A sizable segment of law schools—low-ranked schools with a high percentage of graduates bearing high debt—produce highly questionable results year in and year out." *Id.*

14. ALFRED REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 382-385, 418-419 (Carnegie Found. 1921); *see also* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 113 (Univ. of N.C. Press 1983); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 110-11 (Oxford Univ. Press 1976).

15. TAMANAHA, *supra* note 1, at 135-139. On this point, I agree with Paul Campos, who anecdotally explains that a J.D. might hurt, rather than help, one's chances of obtaining a non-law-related job. *See* Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 198 (2012).

16. TAMANAHA, *supra* note 1, at 172-174.

schools would focus on teaching and practical skills with the more elite schools retaining a scholarly and theoretical emphasis.¹⁷ While Professor Tamanaha's hotel metaphor is unique, the idea of a two-tiered model of legal education is not new. The two-tier idea itself dates back to 1921, when Alfred Reed recommended two different types of law schools after studying legal education for the Carnegie Foundation.¹⁸ Other commentators have made the two-tier argument using automobile metaphors: (Toyota Camry vs. Mercedes)¹⁹ and (Volkswagen vs. Mercedes).²⁰ Apparently, ordinary clients only need the bare minimum in horsepower, responsiveness, and handling, but wealthier corporate clients need a luxury lawyer replete with all the bells and whistles that stem from a "deluxe"²¹ legal education.

In the 1920s, the American Bar Association and the American Association of Law Schools rejected Reed's two-tier idea.²² As Professor Tamanaha points out, at the time, an ugly cloud of xenophobia, anti-Semitism, and racism propelled opposition to cheaper legal education models, which were perceived as producing too many ethnic and foreign-born lawyers.²³ But two wrongs do not make a right. The distasteful history behind the rejection of the two-tier model for legal education in the 1920s has nothing to do with the merits of an educational system that would produce a *de jure*²⁴ hierarchy in the legal profession. As Professor Susan Carle points out, during this time period, elite lawyers were awash with anti-egalitarian sentiment, but there was also a genuine concern for the profession and for the public.²⁵ The unattractive history of American legal education is there, and it speaks for itself, but we should not discount the fact that law is a profession designed to serve the American public. And what is best for the public should be what drives reform, not an implicit

17. *Id.* at 174.

18. REED, *supra* note 14, at 418-419.

19. George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637, 658 (2003).

20. PAUL CARRINGTON, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW (Ass'n of Am. Law Schs. ed., 1971), reprinted in NEW DIRECTIONS IN LEGAL EDUCATION 152-153, 157 (Herbert L. Packer & Thomas Ehrlich eds., 1973) [hereinafter THE CARRINGTON REPORT].

21. *Id.* at 152-153.

22. TAMANAHA, *supra* note 1, at 21-22.

23. *Id.*; see also STEVENS, *supra* note 14, at 92-93; AUERBACH, *supra* note 14, at 96-100. Professor Tamanaha argues that "[l]iberal law professors today would doubtless condemn the elite-dominated ABA at the turn of the twentieth century for raising the cost of legal education in a way that restricted access by the poorer classes to the profession." TAMANAHA, *supra* note 1, at 35.

24. REED, *supra* note 14, at 385. Reed's suggestion was to create a differentiated system of law practice analogous to the British division between solicitors and barristers. *Id.*

25. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999).

emotional response generated by revisiting why the two-tier legal education model failed in the 1920s.

Back in the 1970s, Preble Stoltz expressed the two-tier idea a bit more crudely. Clients of “Wall Street” firms require lawyers with three years of education, but clients residing in the “urban ghetto” could do with lawyers trained for only two years.²⁶ Although the rhetoric has now been cleaned up, with commentators arguing that a two-year law degree will encourage more lawyers to pursue public interest work,²⁷ the two-tier model encapsulates a certain amount of disdain for ordinary, poor, and disadvantaged clients. That lawyers working for “real people with real problems”²⁸ can make do with a lesser legal education in comparison to those lawyers who serve corporate interests does a great disservice to the individual client. Imagine you have hired a lawyer to defend you on a misdemeanor charge, and you have the choice of a lawyer. Choice one is the lawyer who has slept in luxury on 400 thread-count sheets on a premium mattress and enjoyed every other aspect of the hotel’s legendary turn down service. Choice two is a lawyer who tossed and turned all night long, kept awake by a clanking HVAC system and rambunctious hotel guests who could easily be heard through the room’s razor-thin walls. Which lawyer would you choose? Only if we can say that two years of legal education provides a standard of excellence for all clients should we consider it an option for reform.

Professor Tamanaha’s resurrected two-tier legal education model also relies on the questionable premise that law graduates from elite schools enter law practices that require a higher caliber of legal thought than lawyers (mostly from non-elite schools) who enter a smaller-scale practices focused on individual clients. The idea is that representing individual clients is more routine and less complex than working in a large law firm, which requires higher-level functions. Professor Randolph N. Jonakait argues that the skills and abilities that lawyers need in order to represent individual clients are “strikingly different” than those needed by corporate, large law firm attorneys.²⁹ Jonakait posits:

26. Preble Stoltz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37, 45 (1973).

27. See, e.g., Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES, Jan. 17, 2013, available at <http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html> (“[A] two-year option would allow many newly minted lawyers to pursue careers in the public interest or to work at smaller firms that serve lower- or average-income Americans . . .”).

28. Lawrence Lessig, *A Message to Law Grads: Instead of Corporations, Help Ordinary People*, THE ATLANTIC (May 31, 2012, 5:20 PM), available at <http://www.theatlantic.com/national/archive/2012/05/a-message-to-law-grads-instead-of-corporations-help-ordinary-people/257945/>.

29. Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 874 (2007). On this point, Professor Elizabeth

Small-firm or solo practice calls on few of the legal skills and knowledge that law schools pride themselves on teaching. The lawyers in these settings seldom analyze appellate opinions or parse statutes. Their practices infrequently require memos or briefs. Legal research hardly ever enters what they do. While the assumption might be that various written products are usually the requirement for courtroom work, often that is not the case.³⁰

On the other hand, Jonakait argues, lawyers working for individual clients, unlike corporate attorneys, “must be able to deal with difficult human problems and relations.”³¹ Professor Jonakait relies on Carol Seron’s qualitative ethnography of sole practitioners and small firm attorneys in and around New York City³² to make the distinction between large law firm and small-scale law practice. While Seron’s well-researched book supports the contention that some lawyers in the early- to mid- 1990s found individual client representation to be routine, simple, and form-based,³³ personal injury and criminal defense trial lawyers were not part of Seron’s sample. We know that trial work for individual clients often requires facility with sophisticated scientific theories (forensic and medical) and the cognitively challenging mine fields presented by evidentiary and civil procedure rules. Clearly there are aspects of individual practice that require facility with complex concepts.

I am also uncertain that attorneys who represent corporate clients do not also need to embrace the human side of legal problems.³⁴ One of the things that feeds into an attorney’s practical wisdom is the attorney’s ability to advise the client on non-legal issues, including ethical and moral issues that relate to the client’s representation.³⁵ To say that corporate attorneys must only focus on the legal aspects of the problem and forego all of the

Chambliss has called Jonakait’s conclusions into question. Elizabeth Chambliss, *Two Questions For Law Schools About the Future Boundaries of the Legal Profession*, 36 J. LEGAL PROF. 329, 338 (2011).

30. Jonakait, *supra* note 29, at 887.

31. *Id.* at 864; *see also* Shepherd, *supra* note 19, at 658 (contrasting attorneys working on “sophisticated legal matters at elite law firms” with lawyers “working with individuals on simpler matters”); Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 273-275 (2006) (presenting corporate lawyers and lawyers representing individual clients as dichotomous practices).

32. Jonakait, *supra* note 29, at 887 n.108 (citing CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 67 (1996)).

33. *See* SERON, *supra* note 32, at 67-68 (describing the tasks of these sample lawyers as “pretty routine” and not entailing “very much legal research”).

34. *See supra* note 33 and surrounding text.

35. ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 7-9 (Lexis 2d Ed. 2006) (The concept of “[a] collaborative client counseling model” assumes a relationship in which an attorney and a client consider together the “effects of their decisions on other people[;]” from their “collaborative deliberation” comes “practical wisdom,” described as “the ability to make wise judgments.”).

“human” aspects of an issue limits the attorney’s role, weakens the quality of the legal services provided, and likely impoverishes legal outcomes.

It is true that the profession is de facto divided and stratified between lawyers representing wealthy and corporate clients and lawyers representing ordinary people,³⁶ but I am not certain that the two styles of practice are markedly different. One might also view large firm work as encompassing routine and simple tasks, but on a larger scale. Corporate work often relies heavily on routinized use of forms, and sophisticated legal research is not often needed, particularly in transactional settings. The need for differentiated skills training for different styles of practice does not hold up to rigorous logical scrutiny.

Moreover, elite legal education’s smug conclusion that its law graduates require a luxury legal education (and all other graduates do not) conserves status and privilege for those who already reside at the top of law’s hierarchy.³⁷ In other words, the idea that large law firm practice necessarily involves more complexity—requiring more years of education—than a practice representing individual clients qualifies as a legitimizing myth³⁸ that protects the status of the elite law school (and the professors who teach within its walls).

It is also unclear, when we think deeply about this, how an elite educational model built upon abstract theory³⁹ will actually help lawyers thrive in corporate and big-law positions. Indeed, one of the complaints about elite law school education is that the elevation of abstract theory over practice caused law students to gravitate toward the big law firms where they could receive on-the-job practical training and mentoring.⁴⁰ Now that

36. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 48-51 (2005).

37. See generally *infra* note 46.

38. “Legitimizing myths are values, attitudes, beliefs, causal attributions, and ideologies that provide moral and intellectual justification for social practices that increase, maintain, or decrease levels of social inequality among social groups.” Bella L. Galperin et al., *Status Differentiation and the Protean Self: A Social-Cognitive Model of Unethical Behavior in Organizations*, 98 J. BUS. ETHICS 407, 415 (2011).

39. See *infra* notes 85-87 and surrounding text (explaining that the elite conception of legal “theory” is abstract and disconnected from practice). Under Professor Tamanaha’s model, elite law schools retaining a scholarly focus on generating theories “about law” will continue to exist, serving students who will go into elite (big-law) practice. TAMANAHA, *supra* note 1, at 57, 174. Teachers at practice-oriented schools, in Professor Tamanaha’s view, should not devote much time to theoretical approaches to the law. See Brian Tamanaha, *Why the Interdisciplinary Movement in Legal Academia Might be a Bad Idea (For Most Law Schools)*, BALKINIZATION (January 16, 2008, 9:44 AM), <http://balkin.blogspot.com/2008/01/why-interdisciplinary-movement-in-legal.html> (arguing that interdisciplinary approaches to law have little value in a non-elite school where the primary focus should be practice).

40. Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 732 (1996) (citing Karl E. Klare, *The Law-School Curriculum in the 1980s: What’s Left?*, 32 J. LEGAL EDUC. 336, 336 (1982)).

the large law firms have shelved on-the-job training for junior associates,⁴¹ it remains uncertain how the elite law school's intellectual identity (emphasizing abstract theory) will match up with its traditional role as a feeder school for big-law practice.

The two-tier model might also be understood as a response to the reality that the legal profession is made up of two hemispheres: one group of lawyers serving corporate clients and another group serving mostly individual clients.⁴² In terms of legal education, graduates of the highest ranked law schools end up in high-paying positions representing large organizations, with graduates from the non-elite schools representing individual clients.⁴³

Hierarchy in the legal profession, in existence at the time of the Reed report in 1921,⁴⁴ prompted some to argue that legal education should split into two tiers that would simply mirror the pre-existing structure of the legal profession.⁴⁵ However, a de jure two-track system would further entrench social and economic divides within the legal profession,⁴⁶ divides that we should be working to ameliorate, not exacerbate. The class and status distinctions that would be codified by a de jure two-track system are visible in Alfred Reed's 1921 prediction of what would happen if America's de facto two-track system became de jure. In 1921, American law schools were divided into two different types: the elite schools employed Langdell's new case-method and the non-elite schools (many serving working class and immigrant students) used the older textbook teaching method.⁴⁷ In his report, Reed explained that graduates from the top-tier case-method schools are "the leaven, but they can never be the lump, in our slowly rising American democracy."⁴⁸ Reed described the lower-tier graduate as "well informed and expert, but not necessarily profound,"⁴⁹ lawyers who will "constitute in a sense. . . an inferior grade,

41. See Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN. ST. L. REV. 1119, 1130 (2012) (explaining the inability of law firms to continue to train novice lawyers).

42. Chambliss, *supra* note 29, at 335-36 (citing JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982)); see also JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 7 (2005).

43. Chambliss, *supra* note 29, at 336.

44. REED, *supra* note 14, at 418-19 (noting that Reed saw the division as being between Lincoln style lawyers and those lawyers bound for the Judiciary).

45. Chambliss, *supra* note 29, at 336.

46. See generally Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008).

47. REED, *supra* note 14, at 381-85. This was before American legal education came to be more or less uniform, which occurred when states adopted consistent legal education accreditation standards.

48. *Id.* at 384.

49. *Id.*

to whom the highest professional honors will not be paid.”⁵⁰ Eventually, Reed predicted that bar admission rules would evolve into de jure distinctions between these groups, with “each group being given special privileges that the other may not invade.”⁵¹ But these distinctions would be undeniably hierarchical. If lower-tier graduates came to resent their “subordinate position . . . in the private practice of the law,” the well-intentioned Reed suggested that these graduates might enter politics and campaign to become legislators.⁵²

That de facto hierarchy exists does not justify further segmentation in the profession. The democratic ideals that underlie our profession demand a unitary profession that adheres to a collective standard of excellence in representing all clients, regardless of their position in society. At this point in time, we should seize existing opportunities to reform the structure of legal education, making it more inclusive and removing the extreme social distance⁵³ existing at its highest levels.

The possibility of making the J.D. a two-year graduate degree instead of requiring a three-year course of study would certainly do much to reduce the cost of legal education. Indeed, it might be possible to produce high-quality lawyers in two years.⁵⁴ The Carrington Report’s 1971 recommendation to “achieve economies by abandoning the doctrinal organization” of the law school curriculum⁵⁵ was a prescient one, mirroring the Carnegie Report’s suggestion that law schools integrate the curriculum so that each course touches upon substantive legal knowledge, professional lawyer identity, and practice skills.⁵⁶ The Carrington Report’s concept of bringing “the hidden curriculum” to the forefront and using substantive law as the context for lessons on legal process, advocacy, and critical approaches to the law could result in a significantly more efficient and less costly legal education.⁵⁷ Such a drastic re-ordering of the traditional law school curriculum also contains opportunities for law schools to draw upon the expertise of non-casebook faculty, particularly those professors who

50. *Id.* at 385.

51. *Id.*

52. REED, *supra* note 14, at 385.

53. “The vast majority of American law students come from relatively elite backgrounds; this is especially true at the most prestigious law schools, where only five percent of all students come from families whose SES is in the bottom half of the national distribution.”

Sander, *supra* note 9, at 632.

54. TAMANAHA, *supra* note 1, at 20-21 (citing THE CARRINGTON REPORT, *supra* note 20, at 97-162, 139).

55. THE CARRINGTON REPORT, *supra* note 20, at 98.

56. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 186, 194-200 (2009) [hereinafter THE CARNEGIE REPORT].

57. THE CARRINGTON REPORT, *supra* note 20, at 129.

specialize in teaching legal skills and legal writing.⁵⁸ Legal educators should pursue this kind of collaboration, putting aside competing professional identities and hierarchical turf wars, with twin goals in mind—improving the quality and reducing the cost of law school.

If the two-year J.D. becomes the model for the legal profession in America, it might very well be that elite employers will require more than the two-year J.D. Recently, the two track educational model resurfaced in the discussion of reducing the number of legal education years required to practice law. NYU's Professor Estreicher brought the idea to the table with the New York State Bar administrators as a way to reduce the cost of legal education.⁵⁹ In response, Northwestern Law School Dean Daniel Rodriguez stated that two years might be acceptable for those going into "nonlaw firm jobs,"⁶⁰ but NYU Law Dean Richard Revesz argued that "law firms, judges and federal agencies" may not be willing to hire individuals with only two years of education.⁶¹ That corporate law firms will refuse to hire graduates with only two years of law school is undercut by the large corporate partnerships in England, which do fine with solicitors with six total years of legal education.⁶² If we decide that two years is sufficient for entry into the profession (and it very well may be), then two years should be sufficient for all styles of law practice. We might see, however, different law schools maintaining different focuses within their two-year programs.

Nonetheless, if elite legal employers do decide that a more expensive education is necessary for their hiring needs, the way to think about this decision is not an ineluctable splitting of American legal education into a two-tier model that mirrors its pre-existing social structure. Rather, we might view this trend as the "skyboxification" of legal education.⁶³

58. For instance, the integration of writing skills within the first-year doctrinal classes would be one possibility to achieve a more efficient first year legal education. See, e.g., Eric B. Easton, *LRW Program Design: A Manifesto for the Future*, 16 J. LEGAL WRITING INST. 591, 598 (2010) (explaining that the University of Baltimore Law School integrates writing into its first year doctrinal courses).

59. Karen Sloan, *FDR Did Fine Without a 3L Year*, THE NATIONAL LAW JOURNAL (January 14, 2013),

http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202584156317&FDR_did_fine_without_a_3L_year_&slreturn=20130121165754; Samuel Estreicher, *The Roosevelt Cardozo Way: The Case for Bar Eligibility after Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599 (2012) (noting that NYU's Professor Estreicher has brought the idea to the table with New York State bar administrators, arguing that it will make legal education less expensive).

60. Sloan, *supra* note 59 (describing a comment from Northwestern Law School Dean Daniel Rodriguez).

61. *Id.* (explaining a comment from NYU Law School Dean Richard Revesz).

62. Nigel Duncan, *Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911, 913 (2004).

63. "At a time of rising inequality, the marketization of everything means that people of affluence and people of modest means lead increasingly separate lives. We live and work and shop and play in different places. Our children go to different schools. You might call it the skyboxification of American life. It's not good for democracy, nor is it a satisfying way to live." Michael Sandel, *What*

Skyboxification refers to the phenomenon of Americans using their market power to buy position and status, setting themselves apart from the rest of society. By thinking of extra “deluxe” legal education as analogous to paying for a skybox seat, the rhetoric becomes not one where representing individuals requires lesser training, but one where elite status in the law profession requires an additional, and arguably unnecessary, expenditure of funds. That elite status will come most easily to those with pre-existing wealth may not change, but we can control the rhetoric and call a spade a spade.

As a potential remedy for the high cost of legal education, the two-year idea should be pursued. But there is no justification for the idea that the two-year degree would be good for some students and some clients, but not others. If we are going to move to a two-year degree, then the move should only be done if the two-year degree is sufficient to educate all lawyers, not just the ones slated for the middle and lower tiers of the profession.

II. THE FALSE DICHOTOMY BETWEEN TEACHING AND SCHOLARSHIP

Professor Tamanaha argues that professors who engage in scholarship, particularly at non-elite schools, are unnecessarily raising the cost of legal education for students.⁶⁴ For Professor Tamanaha, scholarship is a luxury that non-elite schools (which must focus on teaching practical skills) cannot afford.⁶⁵ Professor Tamanaha’s argument leans on the premise that legal scholarship has little to do with the practice of law. Referencing well-known critiques presenting legal scholarship as disconnected to the law as it is experienced by lawyers and judges,⁶⁶ Tamanaha questions the continuing value of scholarship by law professors, especially law professors at non-elite schools, where “students should not be made to bear a costly burden for faculty research.”⁶⁷ I would like to raise several points here in response to the suggestion that non-elite schools give up on faculty scholarship.

Citing a 1968 law review article by Thomas Bergin, Professor Tamanaha accepts the premise that a law teacher can be either a practice-oriented teacher (the pure-Hessian trainer who prepares lawyers to function

Money Can't Buy, The Skyboxification of American Life, THE HUFFINGTON POST (April 20, 2012, 8:20 PM), http://www.huffingtonpost.com/michael-sandel/what-money-cant-buy_b_1442128.html.

64. TAMANAHA, *supra* note 1, at 61.

65. *Id.*

66. *Id.* at 55-56 (citing Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES, March 19, 2007, available at http://www.nytimes.com/2007/03/19/us/19bar.html?_r=0; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992)).

67. TAMANAHA, *supra* note 1, at 61.

as hired guns) or an academic scholar, but cannot be both.⁶⁸ Like bell-bottoms and macramé wall hangings, this dichotomy between the law teacher and the law scholar is a bit outdated, reflective of a pre-Watergate, *Paper Chase*⁶⁹ era where law teaching could only be visualized as training ruthless mercenaries, an antimony hopelessly opposed to scholarly pursuits of the mind.⁷⁰

Bergin's pure-Hessian trainer vs. teacher schizophrenia metaphor no longer makes sense in light of the fact that both law teaching and law scholarship have evolved since 1968. It is no longer acceptable to describe law teaching as training mercenary hired guns. After the Watergate scandal,⁷¹ we began to teach students how to use their knowledge of the law to manipulate legal processes in an ethical and professional manner.⁷² This more holistic approach to law teaching requires engagement with legal texts as well as interdisciplinary and non-legal approaches to legal problem-solving.⁷³ Most would agree that the best practices for law teaching should supplement the classic case method pedagogy and incorporate contextual approaches to learning the law.⁷⁴ Contextual approaches to legal problems often generate well-suited topics for critical legal scholarship.⁷⁵ In this way, law teaching and law scholarship are mutually beneficial.

It is also not necessarily the case that theoretical scholarship lacks practical value. Professor Tamanaha argues that “[theoretical scholarship] is not immediately relevant to the daily tasks of judges and lawyers, although it may have direct and indirect benefits for the legal system more

68. *Id.* at 55 (citing Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968)).

69. THE PAPER CHASE (Twentieth Century Fox 1973).

70. Bergin, *supra* note 68, at 638.

71. With the Watergate scandal and the resultant public disgust for the lawyers involved in it, there was a push for more ethics training in law schools; the result was that most schools made legal ethics a required part of the curriculum. See AUERBACH, *supra* note 14, at 41; STEVENS, *supra* note 14, at 237.

72. THE CARNEGIE REPORT, *supra* note 56, at 57-58.

73. Rapoport, *supra* note 41, at 1145 (“Good lawyers use an understanding of psychology, sociology, economics, history, and business in their work”); Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH U. J.L. & POL’Y 11, 13-14 (“[S]uccessful legal problem-solving sometimes means that lawyers need to be able to collaborate with other professionals in order to address a client’s problems” and “most of today’s lawyers live in a more complex world that would benefit from interdisciplinary training.”).

74. THE CARNEGIE REPORT, *supra* note 56, at 57-58; Gerald P. Lopez, *Training Future Lawyers To Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 307 (1989).

75. See Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353, 370 (2012) (explaining that clinical faculty, because of their experience representing disenfranchised individuals, are particularly suited to produce critical scholarship that investigates “legal processes below the radar of appellate case study [the traditional province of doctrinal scholarship]”).

generally.”⁷⁶ Although law review articles that speak to “the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria”⁷⁷ present easy targets in the ongoing critique of legal education, effective scholarly writing does not have to be disconnected from the practice of law at the ground level.⁷⁸ Professor John Henry Schlegel, in grappling with the value of theoretical scholarship to students, believes that the theory works in a small-sense when it helps students understand the inner workings of the law from a bureaucratic and institutional perspective.⁷⁹ In speaking about the value of theoretical scholarship in *Failing Law Schools*, Professor Tamanaha seems to rely on a fairly abstract⁸⁰ definition of legal theory. Although an abstract notion of legal theory is favored in elite legal education settings,⁸¹ there is a broader definition of legal theory that embraces a deeper connection to praxis.⁸² Given our mission to produce practice-ready lawyers, scholars teaching at lower-tier schools are not as beholden to the elite notion of “theory” in the abstract. Thus, our institutional culture often encourages the production of theoretical scholarship that connects to the practice of law at the ground level.

Rather than a disconnect between scholarship and law practice and scholarship and teaching, we often see a tripartite symbiotic relationship develop between scholarship, teaching, and law practice. For instance, Professor Jonathan Rapping, a colleague of mine, studies the criminal justice system, uncovering the institutional and cultural forces that can obstruct justice.⁸³ He tries to identify ways to fix a broken culture that has both criminal defense attorneys and prosecutors shuffling clients through the system with little regard for the principle of zealous advocacy.⁸⁴

76. TAMANAHA, *supra* note 1, at 57.

77. *Law Prof Ifill Challenges Chief Justice Roberts' Description of Legal Scholarship*, ACS BLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship> (explaining Chief Justice Roberts's description of the type of topic one is likely to see in a standard law journal).

78. See Sternlight, *supra* note 40 (explaining how legal theory, even seemingly abstract legal theory such as critical legal studies and feminist legal theory, can be connected to the practice of law); see also LINDA H. EDWARDS, LEGAL THEORY IN READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 181-202 (2012) (explaining how various strands of legal theory can practically be used to support written legal arguments).

79. John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We To Do?*, 57 U. MIAMI L. REV. 955, 964-65 (2003).

80. See Sternlight, *supra* note 40, at 715 (explaining that the elite conception of legal theory has it disconnected from law practice).

81. See *id.*

82. See *id.* at 713 (explaining a common sense jurisprudence that seeks to connect critical legal theory to practice).

83. Jonathan Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training and Mentoring*, 3 HARV. L. & POLICY REV. 161, 162-63 (2009); Jonathan Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 555-68 (2012).

84. See Rapping, *supra* note 83.

Professor Rapping then brings his critical perspective into his criminal law and criminal procedure classes. Recently, Professor Rapping circulated an email from a recent graduate who thanked him for his classroom teaching:

I don't know if you remember me. But I took Criminal Procedure with you in 2009. I graduated 2010. . . . I am contacting you today because I had a horrible day in court today. I'm attempting to suppress custodial statements obtained in violation of Miranda. The judge is hearing the motion during the bench trial. It's a felony burglary charge, but still in juvenile court. I'm feeling discouraged because everyone is acting like I'm wasting their time and it is possible that the State could make the case absent the confession. But I feel like it's my duty to hold the state to the fire. I've gotta [sic] stand up for this juvenile and the Constitution. I now ask for help in making me feel good about fighting a fight I know that oftentimes I will lose and be treated like a jerk for fighting.

And then, later on in the day, Professor Rapping received this update:

I won the motion and trial!!!! My client went home to his parents today!

The above exchange exemplifies the symmetry between scholarship, teaching, and ground-level law practice; further, it explains the enduring value of legal scholarship in non-elite schools where the core mission is to prepare lawyers to represent individuals in an imperfect legal system. Professor Rapping brought his research on the harmful ecologies in our criminal justice system into the classroom and attempted to provide his students with a kind of professional armor, something that would allow them to resist the deep-seated cultural and institutional influences that impede zealous advocacy. Professor Rapping's work on the troubled culture of the criminal justice system informed his teaching, which in turn factored into this alumnus's decision to "hold the state to the fire." In this way, the fourth-tier scholar is the best kind of academic. The teachers, scholars, and practitioners at my institution produce lawyers who can challenge the system on the ground level rather than cookie-cutter attorneys content to exist in a culture of mediocrity.

Also puzzling is Professor Tamanaha's apparent surprise that, at some schools, clinicians and legal writing teachers are engaging in scholarship. Professor Tamanaha writes, with somewhat of an indignant tone, that "the designated and avowed Hessian trainers on law faculties are themselves morphing into scholars."⁸⁵ Professor Tamanaha's own professional

85. TAMANAHA, *supra* note 1, at 60.

identity⁸⁶ seems to be founded on the practical teacher/scholar dichotomy. While the idea that a clinician or legal writing faculty member could—and would—engage in scholarship presents a challenge to the traditional law teacher’s professional identity, in our current legal education crisis, those faculty members who can both effectively teach practical skills and engage in useful scholarship might very well be the future of the legal academy.⁸⁷

Finally, I must respond to Professor Tamanaha’s point that scholarship is just too costly for non-elite schools to engage in. Here, it is worth mentioning that some schools (such as Atlanta’s John Marshall Law School) require their faculty to engage in scholarship as part of the job description but do not adopt the incentive structures used at elite schools. At this institution, all full-time faculty are expected to write scholarship as well as teach six credits a semester.⁸⁸ Professors do not receive summer research stipends, sabbaticals, or lightened course loads in order to do so.

It bears mentioning here that Professor Tamanaha’s description of the typical law professor’s easy and comfortable work-life⁸⁹ does not accurately describe the experience of all professors.⁹⁰ Given the portrait of the lazy law professor⁹¹ that has dominated the literature on legal education reform, perhaps a lesson on how the other half lives⁹² is in order. For each

86. See John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 321-22 (1985) (explaining how the acolytes of Langdell cooperated to produce accreditation standards that enshrined the case method professor as the dominant model of law professor).

87. See generally Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake*, 10 SEATTLE J. SOC. JUST. 49 (2011).

88. The median salary at Atlanta’s John Marshall Law School is approximately one-third less than the \$147,000 average median law professor salary Professor Tamanaha estimates in his book. TAMANAHA, *supra* note 1, at 49.

89. *Id.* at 4.

90. The common perception that law professors are “lazy” has recently been challenged by concrete descriptions of the “vigorous work ethic” of the best law teachers in the United States. See Colleen Flaherty, *What The Best Law Teachers Do*, INSIDE HIGHER ED (August 7, 2013), <http://www.insidehighered.com/news/2013/08/07/new-book-emphasizes-role-pedagogy-law-schools> (reporting on MICHAEL HUNTER SCHWARTZ ET AL., *WHAT THE BEST LAW TEACHERS DO* (Harvard Univ. Press 2013)).

91. Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, February 10, 2013, available at <http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html> (“One group that came under frequent attack at the meeting here [The ABA Task Force on Legal Education] was tenured law school professors, who were criticized as having high pay, low productivity and a remote relationship with the practice of law.”); Arthur D. Austin, *The Wasteland of Law School Fiction*, 1989 DUKE L.J. 495, 503 (“[Law faculty s]hirkers exploit the casebook and instruction manual to minimize class preparation and reserve time to read the *Village Voice* or play squash.”).

92. JACOB A. RIIS, *HOW THE OTHER HALF LIVES* (2010) (presenting a photo-documentary of individuals living in the New York City tenements in the Nineteenth Century).

of the six hours of class that I teach⁹³ in a given week, I also spend at least twelve hours on class preparation, carefully constructing practice exercises and contextualized lessons for my students. Because I am a legal writing teacher, I routinely devote twenty to thirty hours a week commenting on and assessing my students' written work.⁹⁴ Any given week also has me spending several hours working with students in a service capacity, coaching both moot court and mock trial teams. And then there are a few hours of writing reports for the committees that I serve on. I routinely work fifty- and sixty-hour weeks. And when the weekend comes, I respond to emails and texts from my students seeking guidance on their assignments. I rarely have time to research and write scholarship during the semester when I am teaching; I work on my writing during the summer and winter breaks. But I would not want to give up my scholarly agenda, because, as explicated above, my research makes me a much more effective teacher. My teaching job is not exactly "The Big Rock Candy Mountain,"⁹⁵ but it is nonetheless extremely rewarding.

This section has sought to show that (1) research at non-elite institutions has deep value and (2) legal skills professors who engage in scholarship are not some unnatural combination of yin and yang, but rather capitalize on unique synergies integral to the production of well-rounded, practice-oriented, and professionally-minded attorneys. These points bleed into my next section, which addresses Professor Tamanaha's puzzling exhortation that clinicians and legal writing teachers—the law teachers most responsible for teaching law students practical skills—take one for the team and halt our campaign for the same level of job security, faculty governance rights, and pay scales that our casebook colleagues have enjoyed for years. At this point in the history of legal education, we are at a juncture where we can seriously consider fixing structural issues such as the exorbitant cost of legal education *and* the longstanding disparities between practical skills teachers and casebook law faculty. There is no reason we cannot tackle both of these issues in an effort to reform the entire system, not just a piece of it.

93. Although I write in the present tense, this description is based on my experience at Atlanta's John Marshall Law School. Given the intensive nature of what I teach (legal writing), the temporal aspects of my job have not changed upon my move to a different institution.

94. My casebook colleagues work just as hard as I do. Where my workload tilts heavily on the assessment side, our culture of teaching excellence requires our casebook faculty to devote most of their time to class preparation.

95. Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, CORNELL UNIVERSITY, <http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm> (last visited February 21, 2013).

III. EQUITY FOR SKILLS FACULTY

In Chapter Three of his book, Professor Tamanaha documents the opposition to proposed ABA Accreditation standards “that would end the legal academy’s commitment to the system of tenure and security of position for law school deans, traditional faculty, clinical faculty, legal writing faculty, and librarians.”⁹⁶ In Professor Tamanaha’s view, the opposition to this proposal is motivated purely by law professor self-interest; the argument that there is a connection between tenure and better educational outcomes is purely pretextual.⁹⁷ Professor Tamanaha then singles out clinical law faculty for arguing against removal of an accreditation standard that guaranteed a minimum of job security (“at least a five year contract that is presumptively renewable”).⁹⁸ Professor Tamanaha writes that “clinicians, along with everyone else in law schools, must consider the economic implications of clinical programs and separate more sharply those work conditions they would like for themselves from what is necessary to best educate law students at an affordable cost.”⁹⁹

While the proposed standards that Professor Tamanaha discusses will not abolish tenure but will allow law schools to choose whether or not to create tenure stream faculty positions,¹⁰⁰ the proposal would have enabled law schools to more easily place its non-casebook faculty—clinicians, legal writing teachers, and adjuncts—in at-will and contingent employment situations, while retaining tenure status for the casebook research professors already at the top of the hierarchy.¹⁰¹ When we look more closely at the potential costs and benefits of eradicating these security of position standards, Professor Tamanaha’s arguments become tenuous.

First, Professor Tamanaha’s functionalist response to the caste-system among law professors is to shrug it off as a product of “[t]he market for law professors and governance within law schools.”¹⁰² Let’s be clear here, the current hierarchy among law professors is not the product of a pure free

96. TAMANAHA, *supra* note 1, at 28.

97. *Id.* at 29-30 (“AALS president Michael Olivas would have none of it.”).

98. *Id.* at 32. Rather than engage with the argument that job security for clinicians produces the pedagogical benefit of having a clinical faculty fully engaged with and committed to the law school as an institution, Professor Tamanaha frames the arguments as self-interested attempts to use accreditation standards “for the benefit of its own interest group.” *Id.* (applying in the context of the Justice Department/ABA anti-trust consent decree, which clinical professors criticized as not going far enough to provide job security and status equality).

99. TAMANAHA, *supra* note 1, at 34-35.

100. *Id.* at 29.

101. *See id.* at 31. Professor Tamanaha implicitly concedes as much when he argues that leaner accreditation standards would allow research institutions to continue to commit to “research faculty” and allow other schools to rely more heavily on “adjuncts and . . . full-time professors with practice experience.” *Id.*

102. TAMANAHA, *supra* note 1, at 33.

market. The same set of elites who rejected the two-tier legal education system in the 1920s also used the burgeoning accreditation regulations to enshrine their notion of the professional law teacher.¹⁰³ This new professional identity (which came with tenure protections) encompassed the elite Langdellian podium professor and excluded all other models, including adjuncts and other professors who used the intellectually substandard lecture method.¹⁰⁴

Moreover, even if we could explain the inequitable hierarchy among law professors as a natural product of “the market,” legal education is currently engaged with a severe market failure.¹⁰⁵ Specifically, we are trying to figure out ways to bring down the cost of legal education, which has spiraled out of control, fueled by free access to federal loan funds. If we are engaging with a market failure here, then why not fix all that ails legal education, rather than just tackling one aspect of it?

Professor Tamanaha is not alone in singling out skills faculty¹⁰⁶ as being partially responsible for driving up the cost of legal education. Paul Campos, legal education’s other high profile prophet, points to clinical legal education as the problem rather than the solution.¹⁰⁷ The scapegoating of skills professors reflects a longstanding hostility between traditional law professors and professors who assume more of a practice-oriented professional identity.¹⁰⁸ Some commentators have argued that traditional (research-oriented) law professors exhibit hostility toward legal skills professors because legal skills professors pose a serious challenge to the professor’s self-esteem and professional identity.¹⁰⁹

103. Schlegel, *supra* note 86, at 321-22.

104. *See id.*

105. HOWARD J. SHERMAN ET AL., ECONOMICS: AN INTRODUCTION TO TRADITIONAL AND PROGRESSIVE VIEWS 428 (2008) (describing a market failure as “a situation in which market outcomes are not socially optimal or desirable”).

106. *See, e.g.*, Campos, *supra* note 15, at 191, 195. At this point, I am using “skills faculty” to designate clinical faculty, as well as faculty who primarily teach legal writing. Professor Tamanaha singles out the clinicians for standing in the way of lowering the cost of legal education. Professor Campos has aimed the cost argument more broadly, at both clinical programs and legal writing programs. *Id.*

107. *See id.*

108. *See generally* Douglas D. McFarland, *Self-Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232, 242 (1985) (describing the practice-oriented teacher as being “engaged in a hard-fought, continuing, bitter struggle with the traditional [sic] legal scholar”); Norman Redlich, *Clinical Education: Stranger in an Elitist Club*, 31 J. LEGAL EDUC. 201, 207 (1981-1982) (noting that traditional law faculty insist that practice oriented skills are not important); Robert E. Oliphant, *When Will Clinicians Be Allowed to Join the Club*, 3 LEARNING & LAW 35, 36 (1976) (stating that traditional law faculty view clinical teaching as falling outside the core mission of legal education, which is to graduate persons “learned in the law”).

109. Redlich, *supra* note 108, at 207 (“Viewed in this context, clinical teachers strike a very sensitive nerve because they emphasize the very things that traditional teachers have downgraded in the course of developing their own self-esteem.”). For a discussion of how the traditional law professor’s professional identity was formed in opposition to the lecturer/teacher common in many law schools

Today's legal reform ideas are likely influenced, at least implicitly, by the bald-faced elitism appearing in the law reform literature in the 1970s, when clinical and skills-based education first gained a "toehold"¹¹⁰ in legal education. Within this literature, there is a heavy disdain for anything involving the representation of ordinary, individual clients. For instance, in a 1971 report funded by the Ford Foundation, Paul Carrington viewed clinical education as a threat to a rigorous legal education because students might use an experience in a clinic "as an escape from the intellectual rigors of sound professional training."¹¹¹ The 1972 report written by Professors Parker and Ehrlich, funded by the Carnegie Foundation, similarly states a concern that students and teachers might use legal clinics to bypass the entrenched merit structure to obtain status in an arguably illicit way.¹¹² "We are . . . concerned that an anti-intellectual tendency of clinical education will offer an allure to students and to some faculty members who seek 'relevance' at any price."¹¹³

For Professor Carrington, law clinics also represented a suspect instructional model because they necessarily involved the distraction of individual clients:

Liberated from the needs of clients, simulated clinical experiences can more easily fit academic schedules and calendars. A clinical method which introduces real clients into the teaching activity distracts both teacher and student from one another and from the learning process to the pressing needs of clients.¹¹⁴

Carrington further opined that simulations would solve another problem with experiential learning—interactions with live legal clients are boring and unintellectual. Instead of engaging with live clients, which "necessarily feature[s] much legal mechanics," simulation offered a better model for law learning because it "avoids the deadening routine of the standardized task."¹¹⁵ The 1972 Packer and Ehrlich Report similarly argued that representation of "poverty-stricken clients . . . involve[s] much repetitious, intellectually low-level work and . . . few law students gain

before Landgell's revolution, *see* Schlegel, *supra* note 86. Schlegel argues that the new Langellian casebook professor disparaged the older style of professor as lacking in intellectual ability as a way of cementing their own elevated status in a new profession, the professional law teacher. *See id.* at 320-21.

110. Oliphant, *supra* note 108, at 36.

111. THE CARRINGTON REPORT, *supra* note 20, at 134.

112. HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 46 (Report Prepared by the Carnegie Foundation) (McGraw Hill 1972) [hereinafter THE PACKER & EHRLICH REPORT].

113. *Id.*

114. THE CARRINGTON REPORT, *supra* note 20, at 134.

115. *Id.* at 134.

from it a commitment to professional responsibility.”¹¹⁶ The thinking at the time was that real client needs are just too inconvenient and uninteresting to place at the forefront of legal education.

This is a rehash of the view documented above that the work of individual client representation is more routine and less complex than more “intellectual” and “interesting” legal problems presumably involving corporate issues. Yes, representing individual clients necessarily involves some low-level legwork (as does representing high status clients), and sometimes the work is not interesting. The critique of clinical education as not being intellectual enough completely misses the point as to what law practice should be about. The profession of law does not exist to entertain lawyers with complex brainteasers that only engage a person’s higher-level cognitive functions. Rather, the profession exists to serve clients; we cannot expect the work to always be fun and interesting.

Clinical education critics also argue that clinics fail to offer enough critique, neglecting the “intellectually interesting means/ends problems of changing the structural characteristics of society.”¹¹⁷ In a 1986 article entitled “*Tastes Great, Less Filling*”: *The Law School Clinic and Political Critique*, Robert J. Condlin suggests a rather cumbersome model for clinical education that would involve both a clinical professor and a lawyer supervising the law student in an externship setting.¹¹⁸ The lawyer would supervise and guide the student in the performance of the legal tasks and the clinical professor would meet with the student to “discuss the policy questions implicit in the student’s practice.”¹¹⁹ Such a cumbersome approach is necessary, according to Professor Condlin, because “critique should be given priority over skills training.”¹²⁰

Faulting clinical education because it does not critique reflects what Gerald Lopez has identified as “legal education’s romance with formal law and with the technocratic role of lawyers.”¹²¹ For some time, elite legal educators have held fast to the belief that legal education is meant to prepare lawyers to function as powerful top-down policymakers. In their seminal article, Professors Lasswell and McDougal posited that law school

116. THE PACKER & EHRLICH REPORT, *supra* note 112 at 45.

117. *Id.* at 43.

118. Robert J. Condlin, “*Tastes Great, Less Filling*”: *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 63 (1986). Despite his apparent predilection for proletariat beer and radical critical theory, Condlin does not hide his offensive elitism when he asserts, without any kind of support, that clinical professors are not the best persons to teach legal skills because “as a group clinical teachers (1) were not the best performers in law school, (2) are young and inexperienced in comparison with the bar as a whole, (3) do not work in elite law firms or with anything approximating such firms’ facilities and resources, and (4) because they work with novices on relatively simple cases (usually by pedagogical choice) are not likely to be on the frontiers of new skill developments.” *Id.* at 60-61 n.45.

119. *Id.* at 63.

120. *Id.* at 74.

121. Lopez, *supra* note 74, at 323.

should “contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.”¹²² Others have criticized this model of legal education and lawyering, arguing that it is too grandiose and authoritarian.¹²³

Besides the fact that an emphasis on top-down policy-making might push attorneys towards authoritarian modes of practice, the reality is that very few individuals actually make their way into high-level policy-making positions in this day and age. This is particularly true when we know that only 55%¹²⁴ of all law graduates are getting a job, any job, much less a job in the “power elite.”¹²⁵ The lawyer as a grand policy-maker model may have worked during the progressive era, but now, there is a deep distrust for broad collective governmental solutions to social problems.

Moreover, we also might say that our general culture is moving away from a top-down approach at all levels and is instead embracing more emergent, fluid, and even small-scale solutions.¹²⁶ And, if we want to use the law as a means for creating more egalitarian outcomes, top-down approaches are not the only means available. As Michel Foucault has written, power is not necessarily enacted in top-down fashion, but is often produced at the micro level through a “myriad of micro rules, regimentations, and time tables imposed on our everyday life, ensuring the retention of social order and the status quo.”¹²⁷ Instead of a single sovereign controlling power and meting out punishment, in modern Western society,

122. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 206 (1943).

123. Roger C. Cramton, *The Trouble With Lawyers (and Law Schools)*, 35 J. LEGAL EDUC. 359, 369 (1985). “A lawyer who knows best what is in the client’s and the public’s interest, who is empirically oriented, and who uses social data to formulate broad solutions for social problems. This is an image of the lawyer not as serving, but as dominating, clients.” *Id.* This article was a response to a critique of the legal system offered by Harvard Law School Dean Derek Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

124. Campos, *supra* note 15, at 199.

125. See generally C. WRIGHT MILLS, *THE POWER ELITE* 4 (Oxford 2000) (defining members of the power elite as individuals in positions “to make decisions having major consequences”).

126. See generally Gillian Hadfield, *Law for a Flat World: Legal Infrastructure and the New Economy*, 8 I/S: J.L. & POL’Y FOR INFO. SOC’Y 1, 8 (2011) (arguing that a craftsman and firm-based approach to legal services is “outdated and ill-suited” to today’s “[f]ast-paced, global, niche-driven, and increasingly network- rather than firm-based” economy). For a view on how micro and community-driven approaches to law will become the norm in a future where oil is no longer as plentiful, see Richardson R. Lynn, *It’s Not the End of the World, But You Can See It From There: Legal Education in “The Long Emergency,”* 40 U. TOL. L. REV. 377, 380 (2009). If we accept James Howard Kunstler’s predictions of what our society will look like as the world’s oil reserves become depleted (economies will move from the global and national to the local), large law firms will disappear and community-based law firms and sole practitioners will become the main form of law practice.

127. Jewel, *supra* note 6, at 374 n.173 (citing MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 205, 216, 220 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977)).

power is created within a bureaucratic system, “an infinitesimal distribution of the power relations.”¹²⁸

If one is interested in pursuing actions that change the balance of power, this can be done in everyday settings in minor and subtle ways.¹²⁹ In the context of critique, clinical experiences provide students with an understanding of how the micro processes of law work and offer them a chance to manipulate these processes to produce more just outcomes. Unlike Professor Condlin’s view of clinical education, clinical experiences do not exist in opposition to structural critique. There is ample room for both action on behalf of the powerless and inquiry into the best practices for lawyers “to operate in order that fair and just states of affairs be produced.”¹³⁰

Privileging thought exercises that lend themselves to policy-making and structural critique (because they are interesting and important) and denigrating those skills necessary for individual client representation (because they are routine and unimportant) might actually limit the amount of good that lawyers can do in society. We are beyond the 1970s now, and it is somewhat unfair to ascribe these views to current participants in the law school reform debate (such as Professor Tamanaha) when their views may have evolved since then. But one must wonder, in evaluating the value of clinical and skills education, whether the elitist tail is wagging the fiscal dog.

Professor Tamanaha’s position is that clinical education¹³¹ and parity for clinical professors is too costly. The low student/teacher ratio in clinical settings is heralded as the reason that skills faculty cannot be afforded equal status to their traditional law professor colleagues. However, as others have argued,

These arguments are usually mounted on the assumptions that traditional tenure-track professors exclusively teach large-

128. FOUCAULT, *supra* note 127, at 216.

129. See generally William L.F. Felstiner and Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Relations*, 77 CORNELL L. REV. 1447, 1449 (1992).

130. Condlin, *supra* note 118, at 49.

131. This is a particularly “sticky” argument when it comes to equity for skills teachers; it has been around a long time. THE PACKER & EHRLICH REPORT, *supra* note 112, at 45-46 (arguing that the cost of clinical education is too great to justify it); THE CARRINGTON REPORT, *supra* note 20, at 134 (explaining that clinical education was not included in the suggested curricular reform for legal education because “it cannot withstand a cost-benefit analysis as a dominant method of instruction”); Bayless Manning, *Law Schools and Lawyer Schools – Two Tier Legal Education*, 26 J. LEGAL EDUC. 379, 384 (1973-1974) (arguing that state bar “lawyer schools” should take on the cost of teaching legal skills because it would cost too much for traditional law schools to take on the task); Oliphant, *supra* note 108, at 37 (“Law schools which have traditionally ‘made money’ will be extremely reluctant to adopt a teaching model requiring the addition of expensive experienced faculty and an enormous reduction in the student/teacher ratio.”); Campos, *supra* note 15, at 191 (noting that because of its low student/teacher ratio, clinical education has contributed to the increased costs of law school).

enrollment courses that are more cost-effective and that clinical professors teach only small-enrollment courses. These assumptions, however, do not always hold. The early law school model of a few full-time faculty members with large teaching loads, high student/faculty ratios, and high adjunct utilization is no longer in effect at most law schools. However, the costs and benefits of upper-level small enrollment courses or small seminars developed around the research interests of tenured and tenure-track faculty are rarely placed under cost-benefit scrutiny by those making such arguments in reference to clinical legal education.¹³²

Moreover, if law schools wanted to emphasize a client ready approach by valuing those teachers who are most responsible for developing these traits in law students, development offices could be tapped to fundraise for this purpose.¹³³

Further, some law schools (mostly land-grant law schools) have bucked the high tuition trend, emphasizing clinical education while maintaining affordable in-state tuition rates. A look at the country's top clinical programs, as ranked by *U.S. News & World Report*, reveals several inexpensive schools.¹³⁴ We have data that among these top twenty clinical schools, most provide tenure or similar security of position for their clinical faculty.¹³⁵ It is safe to extrapolate that several of the inexpensive schools with top notch clinical programs (CUNY, the University of Tennessee, the University of New Mexico, and the University of the District of Columbia) treat their clinical professors well. Thus, it is possible to produce affordable law schools that value their skills teachers.

Finally, when we study the faculty structure at undergraduate institutions, which do not have security of position regulations, we see that there is no guarantee that a de-emphasis on tenure will in fact inure to the benefit of students and reduce tuition costs. Thirty-five years ago, 75% of all undergraduate positions were tenure-track positions, with 25% of the teaching performed by contingent or adjunct teachers.¹³⁶ Now, the percentages have been reversed; only 25% of all undergraduate teachers are in the tenure stream, whereas the remaining 75% of undergraduate teachers

132. Adamson et al., *supra* note 75, at 397.

133. Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake*, 10 SEATTLE J. SOC. JUST. 49, 82-83 (2011).

134. *See Best Law Schools, Clinical Training*, U.S. NEWS & WORLD REPORT (2012), <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/clinical-training-rankings>.

135. *See* Adamson et al., *supra* note 75, at 126 n.21.

136. MARC BOUSQUET, *HOW THE UNIVERSITY WORKS – HIGHER EDUCATION AND THE LOW-WAGE NATION 2* (NYU Press 2008).

are employed on a contingent and temporary basis.¹³⁷ A typical humanities adjunct teacher with a Ph.D. is likely to teach four classes a semester (eight a year) for \$16,000 and no benefits.¹³⁸ The trend toward contingent labor in undergraduate education has inflicted collateral damage by “diminishing the influence of the faculty by reducing the number of tenure-track jobs, the role of faculty in governance, and the general prestige of the academy.”¹³⁹

Despite the money saved on faculty wages by casualizing the teaching workforce, the money that undergraduate institutions saved by creating an underclass of contingent teachers did not flow to the students and did not result in lower tuition costs. As schools gradually replaced tenure-stream teaching jobs with cheap adjunct labor, undergraduate tuition continued to skyrocket well beyond the rate of inflation.¹⁴⁰ Professor Tamanaha himself presents statistics showing that in the past twenty-five years, tuition at private universities has increased by 327%.¹⁴¹ Moreover, the cost savings and benefits of “flexibility” have not been channeled into educational programming or student support.¹⁴² “Full-time faculty are finding themselves with heavier course loads, larger class sizes, diminishing ranks, and, of course, constricted salaries.”¹⁴³

One theory is that these cost savings are flowing to university administrators and administrations in the form of “administrative bloat.”¹⁴⁴ Universities appear to be “expanding the resources devoted to administration significantly faster than spending on instruction, research and service.”¹⁴⁵ If American legal education were to become more deregulated with tenure-track faculty becoming the minority and adjuncts the norm, we could not guarantee that students rather than law school administrators would be the beneficiaries. Without any clear guarantee that this conservation of labor costs will benefit students, we should be hesitant to introduce this oppressive work structure into legal education.

137. *Id.* at 3.

138. *Id.*

139. Linda Ray Pratt, *Disposable Faculty: Part-time Exploitation as Management Strategy*, in *WILL TEACH FOR FOOD: ACADEMIC LABOR IN CRISIS* 266 (Cary Nelson ed., 1997).

140. BOUSQUET, *supra* note 136, at 4.

141. TAMANAHA, *supra* note 1, at 128-29. Statistics for tuition increases at public undergraduate institutions are not available because of the difficulty in separating in-state from out-of-state tuition.

142. Karen Thompson, *Alchemy in the Academy: Moving Part-time Faculty from Piecework to Parity*, in *WILL TEACH FOR FOOD: ACADEMIC LABOR IN CRISIS* 288 (Cary Nelson ed., 1997).

143. *Id.*

144. BOUSQUET, *supra* note 136, at 6.

145. Jay P. Greene, *Administrative Bloat at American Universities: The Real Reason for High Costs in Higher Education* (Goldwater Institute Research Paper, August 2010), <http://goldwaterinstitute.org/article/administrative-bloat-american-universities-real-reason-high-costs-higher-education>; see also Barbara R. Bergmann, *Bloated Administration, Blighted Campuses*, 77 *ACADEME* (Nov.-Dec. 1991) available at <http://mtprof.msun.edu/Win1992/berg.html>.

Inexplicably, Professor Tamanaha holds up the community college adjunct professor teaching ten courses a year as a possible model for the future of law teaching.¹⁴⁶ The work life of a non-tenurable community college teacher is not a pleasant one; we are talking about a harried teaching load of eight to ten classes a year at \$2,000 per class and no benefits.¹⁴⁷ Like Wal-Mart employees, contingent academic workers must often rely on other sources of income to make it, including “such forms of public assistance as food stamps and unemployment compensation.”¹⁴⁸ This system of cheap teaching does not “sort for the best teachers; it sorts for persons who are in a financial position to accept compensation below the living wage.”¹⁴⁹ At the wealthier colleges, graduate students with minimal pedagogical skills perform most of the teaching.¹⁵⁰ When the graduate students obtain their Ph.D., they often lose their authorization to teach there, so as to make room for a new cohort of graduate student teachers. The newly minted Ph.D.s then, if they are lucky, land a tenure-stream job, but more likely than not end up teaching for near poverty wages at community and junior colleges.¹⁵¹

Any policy aimed to effectuate a deeper casualization of the law professoriate also raises the specter of gender discrimination. In the undergraduate context, the mass casualization of undergraduate teaching has closed the profession to people who rely on waged work to live.¹⁵² Often, the only persons who are able to take adjunct undergraduate teaching jobs are those who do not need to work for a living, such as individuals (usually women) with male spouses in the role of primary breadwinner.¹⁵³ Similarly, in the context of law school legal writing courses, at least one law school has publicly disclosed its efforts to create a “mommy-track” of female legal writing teachers with male spouse breadwinners.¹⁵⁴ The Dean celebrated the concept because the school would only have to pay these women “a few thousand dollars per school year.”¹⁵⁵

146. TAMANAHA, *supra* note 1, at 45.

147. BOUSQUET, *supra* note 136, at 3.

148. *Id.*

149. *Id.*

150. *Id.* at 25.

151. *Id.*

152. BOUSQUET, *supra* note 136, at 43.

153. *Id.* at 43-44.

154. Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 U.M.K.C.L. REV. 467, 489-490 (2008) (citing Larry Smith, *Tulane Taps ‘Mommy-Track’ for Legal Writing and Research Instructors*, 8 LAWYER HIRING AND TRAINING REPORT 13 (August 1991)).

155. Stanchi, *supra* note 154, at 489-90.

In legal education, as with undergraduate education, the division between the tenurable and non-tenurable teachers is a line of gender segmentation. In the undergraduate professoriate, 40% of doctorates are women, but women make up 58% of non-tenurable college instructors and only 25% of senior professors.¹⁵⁶ Although there are more tenure-track jobs within legal education, we see similar gender segmentation in the law professoriate. Relatively recent statistics show that only 23% of full law professors are women, while women make up 67% of legal education's non-tenurable faculty¹⁵⁷ and 70% of legal writing faculty.¹⁵⁸ In writing about the tenuous at-will position of most American legal writing faculty, Professor Kathryn Stanchi points out that female professors have been “channeled into work of low social reward, and whatever work women find themselves doing is presumptively categorized as unimportant and unskilled, and therefore appropriately unrewarded.”¹⁵⁹ The same has happened at the undergraduate level— “[t]he sectors in which women outnumber men in the academy are uniformly the worst paid, frequently involving lessened autonomy—as in writing instruction, where the largely female staff is generally not rewarded for research, [and] usually excluded from governance. . . .”¹⁶⁰ Those who would remove tenure from law school accreditation requirements and weaken the already weak protections in place for non-tenure track clinical and legal writing faculty (those faculty most aligned with preparing law students for the practice of law) should engage with these equity issues.

Professor Tamanaha's proposed burden of proof for evaluating a legal education accreditation standard is off point. His perspective is that an accreditation standard (such as job security for clinicians) can only be justified if “law schools would not be able to produce competent lawyers” without the standard.¹⁶¹ If this were the appropriate burden of proof for an accreditation standard, then the entire ABA accreditation scheme could be dispensed with (maybe this is what Professor Tamanaha desires) because any single standard, standing alone, cannot be proven as necessary to produce competent lawyers. A more appropriate inquiry is whether the standard promotes “the goals of a sound program of legal education, academic freedom, and a well-qualified faculty.”¹⁶² There is no question

156. BOUSQUET, *supra* note 136, at 43.

157. Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419, 428 (2004).

158. Stanchi, *supra* note 154, at 467.

159. *Id.* at 474.

160. BOUSQUET, *supra* note 136, at 44.

161. TAMANAHA, *supra* note 1, at 33.

162. Peter R. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 228 (referencing SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE ACCREDITATION POLICY TASK FORCE 1, 17 (May 29, 2007)).

that job security, faculty governance rights, and pay equity for skills faculty will benefit students by incentivizing excellence in the teaching of practical skills and sending the message that this aspect of their legal education is valuable.

Moreover, as discussed above, teaching and scholarship are not mutually exclusive pursuits, even for teachers who teach practical skills courses. Rather, immersion in research and scholarship improves one's teaching, which in turn produces valuable pedagogical benefits for students. Thus, a work structure system that rewards both teaching and scholarship for all full-time faculty—no matter what they teach—creates educational value. If there is a legitimate concern about deadweight and incentivizing performance post-tenure, then there is an easy solution to consider—rigorous post-tenure review for all faculty. A post-tenure review process (every five years) for all professors would incentivize productivity after tenure and make it easier to remove expensive deadwood from the payrolls.

As discussed above, Professor Tamanaha's proposed two-tier model reinforces hierarchy within the legal profession by creating even more rigid divisions between elite and non-elite lawyers. The argument against an egalitarian standard for the law professoriate reproduces another arbitrary hierarchy, this time within legal education, by protecting the status and privilege (tenure, pay, and a say in faculty governance) of the traditional casebook professor at the expense of skills professors. This hierarchy exists "without reasonable and adequate justification."¹⁶³ When tenured law professors argue against granting tenure to non-traditional law faculty, such as clinical and legal writing professors, cost and deadweight could be pretexts for what is really going on—status closure, a sociological phenomenon where privileged members of a group exclude others from entry into the group.¹⁶⁴

That the law professors most invested in the teaching of valuable practical skills are treated as second- and third-class citizens has not received nearly enough attention in the legal education reformist literature. When skills teaching is mentioned in the same breath as the crisis in legal education, the argument is that a greater emphasis on skills training costs too much money and is of limited pedagogical value because "[t]he best way to learn how to practice law is to actually do it,"¹⁶⁵ or in a different

163. Adamson et al., *supra* note 75, at 384.

164. See, e.g., Stanchi, *supra* note 154, at 467-68 (describing the marginalization of legal writing faculty as a status closure mechanism); see also Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1169 (2008) (describing educational credentials as a status closure mechanism).

165. TAMANAHA, *supra* note 1, at 172. Professor Tamanaha then argues that clinical programs, as costly "artificial practice settings" are inferior to actual practice settings. See *id.* at 173.

variation, by the time one gets to law school, “you can write well or you can’t.”¹⁶⁶ But those of us who have labored in the trenches teaching skills know this view is fallacious. Becoming an expert practitioner is a process, and while students come through the law school door with differing abilities, no one is an expert legal practitioner from day one. Skills can and should be taught in a safe environment without the threat of a malpractice lawsuit or an ethics complaint.

We are at a point in time where we can generate collective responses to the crisis in the legal profession and in legal education—responses that recognize that legal education is a public good. We should take this opportunity to make the structure of our professoriate more egalitarian, recognizing that the different roles we play in the education of our students have equal value. A commitment to equal protection for law professors reflects the aspirational ideals that we would impose on the rest of the profession and the rest of society. There is no good reason to avoid this route.

IV. NON-ECONOMIC RATIONALES FOR ATTENDING LAW SCHOOLS

Professor Tamanaha’s criticism of legal education’s value is relentlessly economic—the cost of law school is too high in light of law graduates’ actual job prospects.¹⁶⁷ And, any person who “irrationally” chooses to attend an expensive low-tier law school must be the victim of the optimism bias heuristic.¹⁶⁸

With law school admissions numbers on a steep decline,¹⁶⁹ it appears that we are now in the midst of a much-needed market correction, with many would-be law students, evaluating the costs and risks, choosing to forego law school. But the question remains as to why some, even with better information about expected outcomes in legal education, still choose to attend law school? And, in thinking about reforms, such as limiting the amount of debt a student can borrow¹⁷⁰ or capping the amount of federal

166. Paul Campos, *What Law Schools Accomplish, We’re Talking About Practice*, INSIDE THE LAW SCHOOL SCAM (Aug. 29, 2011; 7:13 AM),

<http://insidethelawschoolscam.blogspot.com/2011/08/what-law-schools-accomplish-were.html>.

167. See generally, TAMANAHA, *supra* note 1, at 138. Professor Tamanaha’s perspective is not out of line with that of most attorneys, who tend to recognize financial implications but fail to recognize other competing values that impact a decision to do one thing or another. See, e.g., COCHRAN, *supra* note 35, at 176.

168. TAMANAHA, *supra* note 1, at 143-44.

169. Karen Sloan, *Avoiding Law School in Doves*, THE NATIONAL LAW JOURNAL (Jan. 28, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202585810784&Avoiding_law_school_in_doves_-

170. TAMANAHA, *supra* note 1, at 179-80.

debt on a per-school basis,¹⁷¹ should we, as elite gatekeepers of the profession, paternalistically impose our economically oriented risk-aversion scales on those who would try to join our profession?

What is the value of the J.D., given troubling tuition costs, employment numbers, and starting salaries? For purposes of this argument, let's consider a J.D. from a low-tier school, which can be expected to have the worst rate of return for its graduates. These decisions cannot be explained away by behavioral economics theories (such as optimism bias). I am also concerned with the strains of elitism running through the legal education reform debate (get ready to close your doors, lowly fourth-tier law schools) and the idea that elite law professors, accumulating their own cultural capital as they write and blog their way to more prominence, are the expert arbiters on whether law school is a good investment. None of this is meant to discount the deeply compelling economic arguments as to why one should not attend law school. Nor is this inquiry meant to dismiss the reprehensible way that law schools have obfuscated their job statistics in order to market the value of their programs of education.¹⁷² But I am curious to explore the non-economic rationales for why someone would choose to attend law school, with the costs and risks fully disclosed.

One thing to consider is cultural capital,¹⁷³ i.e., the non-economic value that a law degree affords. Social mobility has long been associated with obtaining a law degree, and obviously, the argument that a law degree will help one move up in society's structure is a difficult one to make, given the financial hole one must dig in order to obtain the degree. But there is more to the story of social mobility than just economics. Some law students, as the first in their family to obtain a J.D., may see the opportunity to practice law as an important cultural marker in their community. The cultural cache of a law degree might mean something, even if the newly minted J.D. can only find full-time work in a non-legal job and must enter the profession via a part-time solo practice.

I only have anecdotal evidence to support this theory; it derives mostly from listening to my former students who are struggling to make their way economically in the profession but who are nonetheless ecstatic to have the J.D. and the power that it signifies within their communities and families. These are students with relatively low merit indicators (LSAT

171. *Id.* at 180. This will hurt the non-elite schools, which do not have extensive endowments to provide scholarships and grant-based tuition assistance to their students.

172. *See* TAMANAHA, *supra* note 1, at 71-74.

173. *See, e.g.*, DAVID SWARTZ, CULTURE AND POWER THE SOCIOLOGY OF PIERRE BOURDIEU 52 (Univ. of Chicago 1997); *see also* ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 361-62 (2d ed. 2011) [hereinafter UNEQUAL CHILDHOODS]. Cultural capital refers to the possession and use of things like verbal ability, cultural awareness, institutional knowledge, and credentials to maneuver through institutions in the social world.

scores/undergraduate GPAs), and but for the opportunity afforded by lower-tier law schools, these students would not get the chance to enter the legal profession. Every graduation, when I see the beaming smiles from my students' family members, I do not think about the fact that they are getting a degree from a so-called fourth-tier toilet¹⁷⁴ law school; I see people who have achieved a dream (albeit at great financial expense) and obtained a credential that signifies membership in a powerful profession. Even for low-status members of the profession, there is still power, because all attorneys are vested with the ability to bring the power of the state to bear (even if this means filing a small claims lawsuit or negotiating a personal injury claim with an insurance company). That the symbolic value of the credential does not convert to a purely economic value is irrelevant in this equation.

Cultural capital also has to do with accumulation of helpful knowledge of how institutions work and how power moves on a micro-level.¹⁷⁵ I do not think the argument that a law degree provides one with an "intrinsic value of education in personal, intellectual, spiritual, and emotional growth"¹⁷⁶ is the best way to evaluate the non-economic benefits of a law degree. Rather, a law degree provides the recipient with value in knowing a little bit more about how the world works and how to obtain benefits in an institutional setting (such as a courtroom, business negotiation, or school). This type of cultural capital creates small-scale benefits that add up and can also be transmitted to one's children.¹⁷⁷ Therefore, the cultural capital encapsulated in a law degree can and does connect with social mobility, even though it may not directly connect with economic wealth.

Meaningful autonomy is another reason I can think of as to why someone would take a huge risk to obtain a J.D. with little guarantee of job security in return. Practicing law, even if it is only part-time and includes tasks that have long been designated as unchallenging and low-level (e.g., drafting wills, preparing bankruptcy petitions, family law, and criminal

174. See Lucille A. Jewel, *You're Doing It Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession*, 12 MINN. J. L. SCI. & TECH. 239, 266 (2011).

175. See, e.g., Annette Lareau & Erin McNamara Horvat, *Moments of Social Inclusion and Exclusion: Race, Class, and Cultural Capital in Family-School Relationships*, 72 SOC. OF EDUC. 37, 42 (1999); Annette Lareau & Elliot B. Weininger, *Cultural Capital in Educational Research: A Critical Assessment*, 32 THEORY AND SOCIETY, 567, 569 (2003) (defining cultural capital); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 216 (Vintage Books 2d ed. 1995) (Instead of a single sovereign controlling power in a top-down fashion, in modern Western society, power is created on a micro-level through "an infinitesimal distribution of power relations.").

176. TAMANAHA, *supra* note 1, at 137 (quoting Paul Berman, *Thinking about Law School Tuition*, CONVERSATIONS WITH THE DEAN OF THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, August 30, 2011, <http://web.archive.org/web/20120426233539/http://20thandh.org/2011/08/30/thinking-about-law-school-tuition/>).

177. For instance, children reared by parents possessing cultural capital are skilled at deploying their cultural capital and signaling a specific kind of interpersonal moxie that works in professional and business settings. See, e.g., UNEQUAL CHILDHOODS, *supra* note 173, at 1-7.

defense), still requires the outlay of substantive knowledge, rhetorical skill, and counseling ability as the attorney seeks to help others maneuver through the legal system.

As professors, we should not impose our hyper-snobbery on the rest of the world. For all the professional elitism about rank of law school and type of law practice, most lay people, especially in underserved communities, view being a lawyer as being a lawyer. It doesn't matter what school one graduated from or what type of law one practices. Professors Dinovitzer and Garth have reported career satisfaction rates among lawyers who graduate from the least elite schools (who are more likely to represent individual clients) remain higher than those legal professionals that graduate from elite schools (who are more likely to land a corporate law firm job).¹⁷⁸ The authors then posit that these differential outcomes in lawyer satisfaction are structurally deterministic manifestations of how our professional hierarchy replicates itself.¹⁷⁹ As much as I respect the sociological theory of Pierre Bourdieu,¹⁸⁰ denying that these young lawyers have agency in constructing their work expectations and attitudes causes me some concern. Regardless of the theoretical reasons for why graduates of fourth-tier law schools report the highest satisfaction rates, the data on lawyer satisfaction should give law professors pause before we project our own values and risk-aversion scales on everyone else who contemplates a career in law.

Why do people make seemingly irrational economic choices? Why, for instance, do throngs of people move to New York City to be musicians, writers, or actors when NYC is hardly an incubator of financial security or success in these endeavors? Yes, we must accept that job security is no longer a reason for obtaining a law degree. In addition, the argument that "one can do anything with a law degree" does not work these days (if it ever did). Law schools will not likely continue to draw 40,000-plus new law students into their classrooms each year, but my predication is that the J.D. will continue to retain some cultural value that defies pure economic reason.

178. Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 *LAW & SOC'Y REV.* 1, 12, 30-43 (2007).

179. *See id.* at 41-43.

180. *See* SWARTZ, *supra* note 173.

CONCLUSION

Professor Tamanaha's book is laudable for its coverage of the systemic problems that face legal education today. But I do think that this analysis misses the point in a few places, particularly where he accepts dichotomies that do not necessarily make sense (the binary opposition between practical teaching and scholarship) and promotes policy choices (a two-tier system of legal education and erosion of job security protections) that will further entrench harmful hierarchies in our profession with no proven benefit to the students.

The crisis within legal education affords us an opportunity to improve legal education and make it less hierarchical, less elite, and more egalitarian. Some of Professor Tamanaha's suggestions would unfortunately make our profession even more hierarchical than it already is. Hierarchy and elitism in the legal profession should not be shrugged off as the product of the natural order of things; rather, hierarchy and elitism should be targets of legal education reform because they produce negative outcomes. For instance, an elitist hierarchy has negatively impacted the production of law in the federal circuit courts of appeals.¹⁸¹ In this system, civil rights cases, employee discrimination cases, pro se cases, and prisoner appeals are given low priority and shunted down to staff attorneys who dispense with justice in short unpublished opinions.¹⁸² Circuit court judges then give the more "interesting" civil cases (usually involving corporate and commercial disputes) the full "Learned Hand" treatment, listening to oral arguments, reading the briefs, and writing lengthy deliberative opinions on the merits.¹⁸³ We have in this system a very different type of justice being offered to citizens based on the type of case they present to the court.

Elite hierarchies also breed status differentiation, which in turn has the potential to incentivize unethical behavior.¹⁸⁴ The status differentiation explanation for unethical behavior posits that:

[S]tatus differentiation in organizations creates social isolation. As a result, . . . [a] high status group identity dominates, and . . . [a] moral identity is suppressed. The high status group identity results in insensitivity to the needs of out-group members . . . ,

181. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275-76 (1996); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 13-14 (2007).

182. Pether, *supra* note 181, at 11-12.

183. *Id.* at 24.

184. Galperin et al., *supra* note 38, at 407-08.

consequently resulting in decreased motivation to self-regulate ethical decision making.¹⁸⁵

Too much social isolation within the legal profession could strengthen a class of elite lawyers who are simply too caught up in their high-status social identity to trifle with the concerns of anyone else. If these attorneys are (and they likely will be) in positions to make decisions that impact ordinary folks, we will continue to see self-interested decisions that privilege the needs of the powerful at the expense of the weak.¹⁸⁶ The social isolation of elite law professors might also cause them to teach and theorize with blinders on, and their intellectual weight could influence the law in negative ways.¹⁸⁷ We really should not have to argue why elitist hierarchies are bad; they are, after all, profoundly undemocratic.

Legal education must be reformed. But my suggestion is that we look for ways to make it better as well as cheaper.

185. *Id.* at 408.

186. *Id.* at 407. The authors formulated their theory to explain why corporate executives engaged in the practice of “cutting jobs, pay, or pensions for rank and file employees with one hand, while accepting bonuses and fantastic perquisites for themselves with the other” *Id.*

187. See Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76, 77 (2011) (arguing that elite law professors have contributed to “the spread and/or survival of historically questionable legal narratives”).