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How the World of Legal Education Changed and I Got to Build My Root Cellar

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As I approach July 1, 2015, the date that I will step down as dean of Capitalist First Law School, I thought it might be useful to summarize for those who follow me all the changes in the broader field of legal education that have occurred since I was appointed dean in 2010. It has been a roller coaster ride without precedent, and legal education has been permanently transformed. While the seeds of change were in place at the turn of the century, it took a while for actual change to begin. Once change began, the power of the market swiftly destroyed almost all the pillars of legal education.

Some say the quiet issue of multidisciplinary practice was the crack in the door. Beginning as early as 1999, there was considerable heat and little light in the ABA debate about how to package legal services or, if you'd rather, how the marketplace for legal services was demanding that traditional legal service be bundled with other services more cost-effectively.[1] The catalyst event that put us on the slippery slope occurred in 2004 in New York. The accounting firms won a lawsuit obtaining declaratory relief, in which the court agreed that the giving of tax advice and the closing of a business purchase did not constitute the practice of law.[2] But even after the opinion was published, the bar associations and state supreme courts across the country were in denial and kept trying to write detailed descriptions of what was the practice of law. Unfortunately, these efforts to protect their market share were successfully challenged in a number of courts whenever the protective circle drawn by a bar association or state supreme court was expanded beyond the core of

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During the past decade Favre served as interim dean of the Detroit College of Law for five years, which included dealing with two ABA/AALS inspections and considerable followup, as well as the transformation of the college from free standing in Detroit to its close affiliation with Michigan State University on its campus in East Lansing. It was shortly after the college's arrival on campus that MSU's basketball team moved into the national spotlight, and during Favre's last year in office it won the national championship.

1. For materials on this debate, see ABA Commission on Multidisciplinary Practice at <www.abanet.org/cpr/mdp/multicom.html>. See also John Gibeaut, MDP in SEC Crosshairs, A.B.A. J., Apr. 2000, at 16; Debra Baker, Go West, Young Lawyer, A.B.A. J., May 2000, at 34.
2. Really Big Firm v. N.Y. Court of Appeals, <www.cases.us/nyca/2004/#302>.

litigation-related activities. These rulings, plus the ABA rule change which allowed the sharing of profits with nonlawyers, have resulted in a new world of employment for graduating students. By the time of this article, less than half of new law graduates are hired by entities controlled by a majority of practicing lawyers.

During this period of debate and change in the practice of law, the law schools were fairly oblivious to these forces and outcomes; so long as their graduates could get a job, they did not care who wrote the paycheck. They continued the traditional three-year degree programs, increased tuition every year,[3] and continued to focus on skill development and bar passage.[4] More delivery of advanced electives over the Web was occurring at some law schools, and some students began watching lectures over the Web.[5] LL.M. programs for foreign lawyers and various legal specialities were becoming more popular at law schools around the United States, with Web delivery being a key component. But the beginning of the transformation for law schools can be marked at 2008, when Joe Paxton agreed to be simultaneously chairperson of the ABA Section of Legal Education and president of the AALS.[6] His challenge to the legal community was to find a more cost-efficient organization for the delivery of legal education while protecting the civil priesthood.[7]

The year 2008 was also the date of the filing of The Case by LGIF (Law Graduates Indebted Forever) against the ABA Section of Legal Education. The 1,000 plaintiffs sought $33,000 each in damages—one-third of their graduating debt. They based their claim on antitrust law, stating that there was a conspiracy by the section and the law schools to require three years of law school when there was no educational justification for the third year. Further, as a result of the ABA's anticompetitive rules, the plaintiffs claimed they had been forced to go into debt to pay for their third year of law school. Within thirty days another 10,000 law graduates had sought to join the suit. As treble damages loomed larger and larger, the president of the ABA resigned, the law schools refused to join the defendant for fear of the possible damages, and the U.S. Department of Education joined the plaintiffs, also arguing that the third

3. Even though they held the increases to 4 percent per year, by 2008 the average private tuition was $25,000 per year. This resulted in an average debt for law graduates of more than $100,000, with some approaching $150,000.

4. An interesting countercurrent was that various state bar examiners, with the profession under attack and the practice of law being defined in smaller and smaller circles, began raising the standards for bar passage, hoping to reduce the number of lawyers and protect their individual market share of a decreasing pie. It was in 2009 that the Supreme Court held that California's requirement of birth in the state as a prerequisite for a license was a violation of the U.S. Constitution. Smith v. Jones, 634 U.S. 1122 (2009), <www.ussc.gov.us/2009/334/#14>.

5. Remember that in 2005 the availability of broad-band delivery over the Web reached critical mass, resulting in the ability to have two-way video conversations with a high degree of predictably good quality.

6. Paxton also caused a different kind of transformation in the fashion world of deans, if such a thing can be said to exist. Two years after he assumed leadership, the annual ABA deans meeting reflected a new trend with 45 percent of the male deans wearing sweaters, rather than coats and ties. His impact on female dean fashion trends was not discernible.

7. The core of the civil priesthood is the duty to society.

year of law school could not be justified. There was such chaos that the section declared a year off from giving sabbatical inspections and refused to deal with the twenty pending applications for new law schools.[8]

August 2009 saw the fateful meeting that President Paxton arranged for state bar presidents, deans, the AALS leadership, state supreme court representatives, and the bar examiners. The resolution adopted at that meeting would change everything (see Appendix). Given the increasing market consequences of national rankings, the editors of *U.S. News and World Report* were also present at the meeting. Adding spice to the face-to-face meeting was the fact that thirty days earlier the ABA Section of Legal Education had sued the bar examiners of every state as necessary party defendants to the students' lawsuit, as well as twenty of the big states' supreme courts and all the accredited law schools.[9]

Again there was a period of quiet as each of the various administrative machines had to initiate the process of change within its own area. By spring 2010 it was clear that the resolution adopted the prior summer would be carried out. Ten law schools announced a two-year J.D. program and saw their applications double. Some schools decided not to change anything, assuming that brand-name identification would sustain their market share of students. During the academic year 2010–11, there was much wailing in the law schools across the country as fear of the unknown future disrupted the normally rational, reflective process of law faculties.

In 2010 the international free trade movement (with the European Economic Commission as primary lobbyist) pushed for and obtained a change in the rules for allocating U.S. federal support of education through student grants and loans. Under the new regulations, U.S. students attending foreign higher education institutions, including those that offered law programs approved by the U.S. Department of Education, could receive federal grants and loans. In the following year the New York Bar noted a steep increase in applications to take the bar exam from persons who had taken a law degree (undergraduate) in Europe and an LL.M. in New York.[10] The decreased funding by England and France for higher education forced several name-brand European universities to begin marketing in the U.S. Ten law schools in New England saw undergraduates from the area begin migrating across the

8. The loss of income forced the next two meetings of the ABA Section of Legal Education to be relocated to big tents outside a Motel 6 in Nashville and then in Charlotte. It should be noted that the section doubled the fees for foreign study inspections and carried out that onerous obligation with a stiff upper lip.

9. It was only a unsubstantiated rumor that this suit triggered a hiring war at firms, increasing salary levels and in turn fee levels for the lawyers. This was thought to require law school tuition to increase as the law schools sought to pay the lawyers to defend them in the lawsuit, which in turn produced more plaintiffs with greater damages. Equally unsubstantiated was the remark attributed to the trial judge ruling on the motion to add the law schools as party defendants: "We got 'em now."

10. This was considerably cheaper for the student, since the tuition level of the European schools was half that of U.S. schools. Even if the tuition for the one year of a U.S. LL.M. was high, the cumulative cost of four years in Europe and one in New York was only one-third that of seven years in the U.S.

Big Pond, encouraged by parents urging them to go experience Europe, and by declining international airfares and video e-mail. When *U.S. News and World Report* started ranking European and Australian colleges in its law school edition, it was the beginning of the end for about sixty U.S. private law schools.[11]

The year 2012 saw upheaval at most law schools. By the fall it was clear that only 20 percent of the student pool wanted a three-year program. Under the reality of financial integrity, the faculties grappled with issues of reduction in program and staff. One-third of the faculties accepted across-the-board pay cuts of 35 percent, five-year contracts, and eight-hour teaching loads. At another third of the schools, the faculties refused any adjustment to their contracts and 25 to 35 percent of the younger faculty were eliminated. (A number of these schools had to close two years later because their "old fogies" rating on <www.studentsrule.com> was so high that applications plummeted.) One-sixth of the schools reallocated endowment spending and went on as usual. Another adaptation had faculty accepting a 60 percent pay cut, three-year contracts, fifteen-hour teaching loads, and a 10 percent interest in the net profits of the institution.

Six law schools, going even further down the capitalist road, went public as for-profit corporations and gave the faculty stock options.[12] Luckily, this is where I found myself. When we went public in 2014, our projected cash flow from J.D. and LL.M. programs, CLE, Web courses, and college merchandise was so strong that within a year my 10,000 shares produced a market value high enough to allow me to retire to my farm. While I still do an occasional Web course from home, and some consulting for law colleges seeking to join the profit world, a new root cellar is at the top of my list of things to accomplish so that I may store the fall crop of carrots and beets.

It has been quite a ride, this past decade in legal education, and I feel sorry for all the law teachers who ignored the reality of this new century: the consumer is king, and the consumer is the most ruthless of forces in the marketplace. While consumers were certainly willing to buy name brands, they still expected value, and there was a large disconnect between what the consumers considered valuable and what the professors thought was valuable. The consumers won.

11. This was not a technical violation of the *U.S. News* promise not to publish U.S. law school rankings, but it certainly was an unintended if not unforeseeable consequence of the promise made that summer. See Appendix.

12. Three were independent law schools and three were spinoffs from universities, with the university keeping a 20 percent minority interest.

Appendix

Resolution on the Transformation of Legal Education

Adopted August 2009

Whereas the prayers to the Almighty remain unanswered, and
Whereas the sacrifice of animals is no longer acceptable,

In light of the unimaginable financial and political pressure upon us all,
Notwithstanding the fame of interviews on the talking heads shows,

While fearing loss of income, but
Acknowledging decades of extortion of tuition income from students,

Realizing that the dreams of job protection for life are as
The rising mist of the morning,

Hopeful that service to the public and concepts of professionalism
Do not get lost in the coming new era,

We the undersigned powers of the legal universe do in exhaustion and fear
Adopt the following as the ground rules of a new era.

The *ABA Section of Legal Education* will amend the Standards of Legal Education to the following ends:

- Only two years of full-time legal education shall be required for the J.D. degree.
- Standards for one-year programs of specializations or concentrations shall be developed.
- The student/faculty ratio shall be 30:1. It shall be calculated by noting the number of full-time persons (or equivalents) employed by an institution for the purpose of instruction of students for the J.D. degree. The normal working load for full-time faculty shall be 10 credits per year. All first-year classes shall be taught by full-time employees of the institution.
- Faculty and deans may have a financial interest in the institution but can not be paid on the basis of number of students taught or number of students enrolled at the institution.
- Protection for the expression of ideas in teaching and research shall be reemphasized.
- No institution may offer employment contracts for instructors, clinic directors, professors, librarians, or deans in excess of seven years.

The *National Association of Bar Examiners* agrees to construct a basic law examination covering not more than seven subjects and also a series of specialization tests. The supreme courts of these United States agree that subject matter coverage for the basic bar examination in their respective states shall not exceed the seven topics identified by the National Association of Bar

Examiners. They also agree to use the national examinations for speciality areas if they are available. It is acknowledged, however, that each supreme court reserves unto itself the development of criteria to be used to determine when a person is qualified to represent clients before the courts of law in its own state.

The *National Association of Bar Associations* agrees to support new legislation and court rules which will more narrowly define the practice of law and allow for specialization through national and state examinations and to accept a two-year program for the granting of a J.D., but shall preserve the option of requiring additional education and experience before a person may represent a client before any level of court.

The *Association of American Law Schools* agrees to change its guidelines to assure that law teachers are subject to the pressures of the marketplace and acknowledges that institutions must have the power to change as fortune and vision may require.

U.S. News and World Report agrees to stop publishing U.S. law school rankings for a ten-year period.