

## **Just Like Pulling Teeth: How Dental Education's Crisis Shows the Way Forward for Law Schools**

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*Nearly all observers of the current law school crisis treat legal education as a unique discipline. In their view, legal education as a whole and individual law schools have nothing to learn from outsiders that would be useful in reacting to, or thriving in the face of, the radical changes in legal education that have resulted from the collapse of the admissions market. Further, many critics focus on legal education's shortcomings and suggest internal changes such as expanding programs, reducing faculty, and changing the curriculum, that, they believe, will ensure a law school's survival. Others focus on the closing of Whittier Law School, Indiana Tech Law School, Hamline University School of Law, and Charlotte School of Law, and the perilous situation of other law schools, such as Arizona Summit Law School and Valparaiso University School of Law, suggesting that large-scale consolidation is inevitable and close at hand.*

*I take an entirely different approach. I believe legal education is not sui generis. In fact, another profession faced a similar crisis. Its schools' admissions market collapsed because of a fundamental change in the profession itself. Many schools expanded their programs, reduced their faculty, and changed their curricula. And yet twelve percent of those schools were closed. That profession was dentistry, and the lessons from its crisis are the way forward for legal education and for law schools.*

*Law schools should continue to explore new revenue sources if they can do so consistently with their core mission of Juris Doctor (JD) education. And schools are right to seek to reduce their costs. Of course, a re-examination of curricula should be a constant, or at least frequent, focus at every law school.*

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*But schools should recognize that none of these changes is likely to stave off closure. That is a principal lesson from the crisis in dental education. To become less vulnerable to closure, and, in fact, to thrive, a law school needs to take an intentional approach to certain core external relationships. I identify those relationships and offer my observations on how schools can build them. I discuss separately the importance of relative prestige among schools and of a national ranking system such as U.S. News. During the dental education crisis, dental schools were disadvantaged by a lack of both a prestige system and a ranking system.*

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## I. INTRODUCTION

The causes of the legal education crisis can be traced to the tectonic changes in the economics of large law firms (“Big Law”) that, in turn, were caused by the 2008 Great Recession.<sup>1</sup> The financial crisis and the Great Recession resulted in less legal work for Big Law.<sup>2</sup> Further, corporate clients became increasingly cost-conscious, squeezing Big Law profits by, for example, refusing to pay for entry-level lawyers to work on their legal matters.<sup>3</sup> As a result, Big Law firms cut back their entry-level hiring of newly graduated law students beginning with the fall of 2009.<sup>4</sup>

This reduction in hiring particularly affected the placement efforts of the more elite law schools (perhaps the top 25 or 30 out of roughly 200), which tended to place a higher percentage of graduates in Big Law jobs than did the non-elite schools.<sup>5</sup> Soon though, students at virtually every law school found getting a law-related job more difficult. In essence, as the recession spread throughout the economy, the demand for legal work contracted throughout the profession, not just in Big Law. In a cascade effect that compounded the difficulty, students at elite law schools who could not get Big Law jobs applied for other legal jobs, making it more difficult for students at non-elite law schools to get jobs. By mid-2012, the statistics on law graduate placement were clear. The National Association for Law Placement ran headlines that said, “Class of 2011 Law School Grads Face Worst Job Market Yet” and “Class Faced Brutal Entry-Level Job Market.”<sup>6</sup>

At about the same time as the Great Recession hit hard at Big Law entry-level hiring, a number of blogs began sustained criticisms of legal

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<sup>1</sup> See Victor Gold, *Reducing the Cost of Legal Education: The Profession Hangs Together or Hangs Separately*, 66 SYRACUSE L. REV. 497 (2016).

<sup>2</sup> Jordan Weissmann, *The Death Spiral of America’s Big Law Firms*, ATLANTIC (Apr. 19, 2012), <http://www.theatlantic.com/business/archive/2012/04/the-death-spiral-of-americas-big-law-firms/256124/>.

<sup>3</sup> Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 28 (2011); Ashby Jones & Joseph Palazzolo, *What’s A First-Year Lawyer Worth?*, WALL ST. J. (Oct. 17, 2011), <http://www.wsj.com/articles/SB10001424052970204774604576631360989675324>; Jordan Weissmann, *Why Law Schools Are So Bad at Creating Lawyers (and How to Fix It)*, ATLANTIC (Nov. 22, 2011), <http://www.theatlantic.com/business/archive/2011/11/why-law-schools-are-so-bad-at-creating-lawyers-and-how-to-fix-it/248889/>.

<sup>4</sup> Burk & McGowan, *supra* note 3, at 31–32, 31 n.80.

<sup>5</sup> BENJAMIN H. BARTON, GLASS HALF FULL 143 (2015); Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 657 (2012); see also William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, ABA J. (July 1, 2012), [http://www.abajournal.com/magazine/article/the\\_pedigree\\_problem\\_are\\_law\\_school\\_ties\\_choking\\_the\\_profession](http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession).

<sup>6</sup> NALP, EMPLOYMENT FOR THE CLASS OF 2011—SELECTED FINDINGS (2012), <http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf>.

education.<sup>7</sup> These blog posts were frequently anonymously authored and featured sweeping indictments of the ethics of those in legal education. Many of the repeated arguments were based on the increasing difficulty of new law graduates to find what they considered to be suitable employment.<sup>8</sup> The influence of these blogs increased substantially in late 2010 when major news media began to report on them.<sup>9</sup> The next year, *The New York Times* ran a number of articles criticizing legal education<sup>10</sup> and other major media news outlets ran similar articles.<sup>11</sup>

Doubtless as a result of both the reality of the difficult employment market for new lawyers and the sustained critiques of legal education in both traditional and new media, law school applications fell. The number of people applying to law school peaked when about 100,000 people applied to begin studies in the fall of 2004.<sup>12</sup> Over the next six years, the number of applicants fell an average of about 2% a year to about 88,000 who applied for fall 2010.<sup>13</sup>

But then the bottom fell out of law school applications. The number of applicants for fall 2011 declined over 10% from the year before.<sup>14</sup> The next two cycles were worse, with declines of over 12% each. In three years, the number of law school applicants fell by a third.<sup>15</sup> In the five years after the job market for new lawyers collapsed, the number of law school applicants fell by 38%.<sup>16</sup> The number of *applicants* for fall 2015 was close to the number of *matriculants* five years earlier.<sup>17</sup>

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<sup>7</sup> Daniel D. Barnhizer, *Cultural Narratives of the Legal Profession: Law School, Scamblogs, Hopelessness, and the Rule of Law*, 2012 MICH. ST. L. REV. 663, 664 (2012) (dating the rise of such blogs to “at least 2010”).

<sup>8</sup> *Id.* at 676–85.

<sup>9</sup> See BARTON, *supra* note 5, at 157 n.33.

<sup>10</sup> David Segal, *Behind the Curve: How Law Students Lose the Grant Game, and How Their Schools Win*, N.Y. TIMES, May 1, 2011, at BU1; David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html>; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), [http://www.nytimes.com/2011/01/09/business/09law.html?\\_r=0](http://www.nytimes.com/2011/01/09/business/09law.html?_r=0).

<sup>11</sup> See, e.g., Weissmann, *supra* note 2.

<sup>12</sup> *Archive: ABA End of Year Summary*, LSAC, <http://www.lsac.org/lscresources/data/aba-eoy/archive> (last visited Sept. 27, 2017).

<sup>13</sup> *Id.* (reporting 87,900 people applied to start law school in the fall of 2010, a decline of about 13% from 2004). During those six admissions cycles, the year-on-year change ranged from 3.8% to 7.4%. *Id.*

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

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

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (reporting 54,500 applicants for fall 2015); ABA, *Enrollment and Degrees Awarded 1963-2012 Academic Years*, <https://www.americanbar.org/content/dam/aba/>

The toll these developments took on law schools and legal education is clear. The number of students matriculating at American law schools plummeted. Just over 52,000 people began legal studies in the fall of 2010.<sup>18</sup> The fall of 2015 saw only 37,000 new law students, a 29% decline in five years.<sup>19</sup> Total law school enrollment fell by comparable percentages as well, of course.<sup>20</sup> There were over 33,000 fewer law students in the fall of 2015 than there were in the fall of 2010. Those missing law students would have filled 46 law schools in 2010.<sup>21</sup>

Further, the ability of the entering classes, measured by LSAT score, declined as well. The percentage of matriculants with LSAT scores frequently considered high (160 and above) declined by over 22% in five years.<sup>22</sup> At the same time, the percentage of matriculants with relatively low scores (below 150) increased by 68%.<sup>23</sup> The students who entered law school in 2011, the first year of the decline, graduated and took the bar in 2014. In 2014, 2015, and 2016, the results were significantly less happy than in prior years.<sup>24</sup>

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administrative/legal\_education\_and\_admissions\_to\_the\_bar/statistics/enrollment\_degrees\_awarded.authcheckdam.pdf (last visited Sept. 27, 2017) (reporting 52,488 matriculants in fall 2010) [hereinafter ABA Enrollment].

<sup>18</sup> ABA Enrollment, *supra* note 17.

<sup>19</sup> ABA, *Change in 1L Matriculants by School—2015 vs 2014*, 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_2014\\_1l\\_matriculant\\_comparison.xlsx](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_2014_1l_matriculant_comparison.xlsx).

<sup>20</sup> Mike Sacks, *Law School Enrollment Slumps 5 Percent*, NAT'L L.J. (Dec. 17, 2015), <http://www.nationallawjournal.com/id=1202745205074/Law-School-Enrollment-Slumps-5-Percent?slreturn=20160414161727> (noting 113,900 total JD students in Fall 2015, a decline of 23%); ABA Enrollment, *supra* note 17 (reporting 52,488 matriculants and 147,525 total JD students in Fall 2010).

<sup>21</sup> See ABA Enrollment, *supra* note 17. In 2010, there were 200 ABA-approved law schools enrolling 147,525 students total, or an average of 738 students each. The decline in students of 33,625 was the equivalent of 46 law schools of average size.

<sup>22</sup> Jerry Organ, *Changes in Composition of the LSAT Profiles of Matriculants and Law Schools Between 2010 and 2015*, LEGAL WHITEBOARD BLOG (Jan. 18, 2016), <http://lawprofessors.typepad.com/legalwhiteboard/2016/01/in-late-december-2014-i-posted-a-blog-analyzing-how-the-distribution-of-matriculants-across-lsat-categories-had-changed-si.html?platform=hootsuite> (noting 40.8% of matriculants in fall 2010 to 32% of matriculants in fall 2015). The ability of applicants (rather than matriculants), measured by LSAT score also declined, and even more precipitously than the decline in matriculants. The percentage of applicants with LSAT scores 160 and above fell 14% while the percentage of applicants with LSAT scores below 150 increased a whopping 146% between fall 2010 and fall 2017. Paul Caron, *Proportion of Law School Applicants by LSAT Bands*, TAXPROF BLOG (June 12, 2017), [http://taxprof.typepad.com/taxprof\\_blog/2017/06/proportion-of-law-school-applicants-with-lsats-160-are-down-35-since-2010.html](http://taxprof.typepad.com/taxprof_blog/2017/06/proportion-of-law-school-applicants-with-lsats-160-are-down-35-since-2010.html).

<sup>23</sup> Organ, *supra* note 22 (comparing 14.2% of matriculants in fall 2010 to 23.8% in fall 2015).

<sup>24</sup> See, e.g., ACCESSLEX INST., LEGAL EDUCATION DATA DECK: KEY TRENDS ON ACCESS, AFFORDABILITY AND VALUE 9, 21 (2017); Derek T. Muller, *Visualizing the Overall Bar Pass Rate Declines in 2015 Across Jurisdictions*, EXCESS OF DEMOCRACY (Dec. 7, 2015),

The decline in the number and quality of law school applicants has taken a financial toll on law schools, as well. Both Moody's and Standard & Poor's recognize that legal education as an industry has become increasingly perilous financially since the Big Law implosion because of the deterioration in admissions.<sup>25</sup> The effects are most salient at the so-called stand-alone law schools, those that are unaffiliated with a college or university.<sup>26</sup> Vermont Law School, for example, a stand-alone school, saw its debt downgraded in 2014 by Moody's, even though it experienced only a 10% drop in tuition revenue.<sup>27</sup> The federal Department of Education put three law schools on its "heightened cash monitoring list," each of which has had well-publicized financial problems.<sup>28</sup>

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<http://excessofdemocracy.com/blog/2015/12/visualizing-the-overall-bar-pass-rate-declines-in-2015-across-jurisdictions>; Staci Zaretsky, *The Great Law School Brain Drain Is Why More People Are Failing The Bar Exam Than Ever Before*, ABOVE THE LAW (Jan. 20, 2016), <http://abovethelaw.com/2016/01/the-great-law-school-brain-drain-is-the-reason-why-more-people-are-failing-the-bar-exam-than-ever-before/?rf=1>.

<sup>25</sup> Standard & Poor's, *As Law School Demand Drops, Credit Quality Among U.S. Schools Diverges*, RATINGSDIRECT (Dec. 5, 2013), <http://online.wsj.com/public/resources/documents/lawschoolcredit.pdf>; MOODY'S INVESTORS SERVICE, *LAW SCHOOLS CHALLENGED TO ADAPT TO FUNDAMENTAL CHANGES IN THE LEGAL INDUSTRY* (May 5, 2014).

<sup>26</sup> See ABA, *ABA-approved law schools*, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) (last visited Sept. 27, 2017) (listing ABA-approved law schools) [hereinafter *ABA-approved law schools*]. There are 202 fully approved (not provisional) law schools that offer a JD (the JAG school only offers advanced law degrees). The following schools are stand-alone and non-profit: Albany Law School, Appalachian School of Law, Ave Maria School of Law, Brooklyn Law School, California Western School of Law, John Marshall Law School (Chicago), Michigan State University School of Law, Mitchell Hamline School of Law, New England Law, New York Law School, South Texas College of Law Houston, Southwestern Law School, Thomas Jefferson School of Law, Vermont Law School, and Thomas M. Cooley Law School. The following schools are for-profit: Arizona Summit Law School and Florida Coastal School of Law (both InfiLaw-owned schools; note the third InfiLaw school, Charlotte School of Law, just closed), Atlanta's John Marshall Law School, and Charleston School of Law. In addition, Western State College of Law is for-profit but not stand-alone. Thus, there are 19 stand-alone (i.e., unaffiliated with a university) law schools of which 4 are for-profit. In addition, 1 law school is owned by a for-profit university.

<sup>27</sup> See Vermont Law School, IRS Form 990: Return of Organization Exempt From Income Tax (OMB No. 1545-0047) (2013), <http://www.guidestar.org/FinDocuments/2014/237/251/2014-237251952-0bbd9645-9.pdf>. See also Press Release, Moody's Investors Service, *Moody's Downgrades Vermont Law School to Ba1; outlook negative* (Apr. 14, 2014), [https://www.moody's.com/research/Moodys-downgrades-Vermont-Law-School-to-Ba1-outlook-negative-PR\\_297223](https://www.moody's.com/research/Moodys-downgrades-Vermont-Law-School-to-Ba1-outlook-negative-PR_297223); Karen Sloan, *New Vermont Law School dean taking on \$3.3m budget shortfall*, NAT'L L.J. (Nov. 26, 2012), <http://www.nationallawjournal.com/id=1202579363738/New-Vermont-Law-School-dean-taking-on-33M-budget-shortfall->.

<sup>28</sup> See Karen Sloan, *Three Law Schools Face Government Scrutiny Over Finances*, NAT'L L.J. (Jan. 5, 2016), <http://www.nationallawjournal.com/id=1202746287517/Three-Law-Schools-Face-Government-Scrutiny-over-Finances>; see also, Diane Knich, *Charleston School of Law Founders Withdrew \$25 Million in Profits Leaving School on Shaky Financial Ground*, POST & COURIER (Charleston), (May 25, 2014), <http://www.postandcourier.com/article/20140525/PC16/140529595> [<http://archive.is/xhk5x>]; Gary Warth, *Jefferson Law*

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## JUST LIKE PULLING TEETH

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A great many law schools connected with universities clearly face similar problems but are able to conceal those problems from the public because the central university quietly covers the law school's revenue shortfall.<sup>29</sup> A particularly vivid and public example is the University of Minnesota. The law school has seen its student body fall by one-third since 2010, and despite internal cost-cutting measures, is being supported by an average of \$3 million per year in transfers from the central university.<sup>30</sup>

Other sophisticated participants in the legal education area also recognized that the fundamental economics of legal education were changing. In early 2012, Thomson Reuters, the multinational publishing conglomerate that owned West Publishing Company for over 15 years, put the casebook and law student study aid assets on the market.<sup>31</sup> Presumably, part of Thomson Reuters's calculus was that the decline in law students meant a decline in casebook and study aid sales that seemed likely to be more than a temporary dip.<sup>32</sup> A year later those assets were purchased by a private equity firm that specializes in "niche-market leaders at the lower end of the

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*School Lays Off 12 Workers to Save \$4.4M*, SAN DIEGO UNION-TRIB., Aug. 16, 2013); Staci Zaretsky, *Much Maligned Law School Cuts First-Year Class, Announces Layoffs*, ABOVE THE LAW (July 2, 2014), <http://abovethelaw.com/2014/07/breaking-much-maligned-law-school-cuts-entire-first-year-class-announces-layoffs/>.

<sup>29</sup> See Jennifer Gerarda Brown, *Sustaining the Canary in Toxic Times: Parables About Survival for Legal Education*, 66 SYRACUSE L. REV. 531, 532 (2016); David Yellen, *Post-Crisis Legal Education: Some Premature Thoughts*, 66 SYRACUSE L. REV. 523, 528 (2016); Gold, *supra* note 1; Richard A. Matasar, *The Canary in the Coal Mine: What the University Can Learn from Legal Education*, 45 MCGEORGE L. REV. 161, 168 (2013); David Barnhizer, *Looking at the Law School 'Crisis' from the Perspective of the University*, LAWNEXT (Nov. 6, 2014), <http://lawnext.org/looking-at-the-law-school-crisis-from-the-perspective-of-the-university/>; Standard & Poor's, *supra* note 25, at 9; Frank H. Wu, *For Legal Education, Adaption is the Only Option for a Better Future*, NAT'L L.J. (Jan. 16, 2017), <http://www.nationallawjournal.com/id=1202776867145/For-Legal-Education-Adaption-is-the-Only-Option-for-a-Better-Future?slreturn=20170217143550&LikelyCookieIssue=true>.

<sup>30</sup> Mila Koumpilova, *University of Minnesota law dean says enrollment, budget troubles should be ending*, STAR TRIB. (Feb. 12, 2016), <http://www.startribune.com/u-law-dean-says-worst-may-be-over/368490551/>; Josh Verges, *UMN law school losses expected to total \$16M by 2018*, TWINCITIESPIONEERPRESS.COM, (Feb. 11, 2016), <http://www.twincities.com/2016/02/11/umn-law-school-losses-expected-to-total-16m-by-2018/>.

<sup>31</sup> Letter from Chris Parton, General Manager, Thompson Reuters Law School Publishing, to author (2012) (on file with author); *Even West is Shedding West: Sounds like TR Legal's law school publishing business "may" end up being for sale*, PRO-SEBLOG.COM (Jan. 20, 2012), <http://pro-seblog.com/2012/01/20/even-west-is-shedding-west-sounds-like-tr-legals-law-school-publishing-business-may-end-up-being-for-sale-2/>; see also *About Us: Company History*, THOMSON REUTERS, <http://thomsonreuters.com/en/about-us/company-history.html> (last visited Sept. 27, 2017) (Thomson Reuters acquired West Publishing in the 1990s).

<sup>32</sup> Eric Chiappinelli, *Possible West/Foundation sale, fewer law students next fall, and why law education should look to dental education*, FAC. LOUNGE (Jan. 23, 2012, 1:26PM), <http://www.thefacultyounge.org/2012/01/possible-westfoundation-sale-fewer-law-students-next-fall-and-why-law-education-should-look-to-denta.html>.

middle market.”<sup>33</sup>

Law schools have reconfigured in the wake of changes in the demand for legal education. Thomas M. Cooley Law School, accredited as one law school with five campuses, closed one of its campuses because of the economic consequences of declining enrollment.<sup>34</sup> In the most clear-cut instances of structural change, Indiana Tech closed its law school, and InfiLaw, a private-equity portfolio company, closed Charlotte School of Law, one of its three for-profit law schools.<sup>35</sup> Hamline University closed its law school in substance, as well.<sup>36</sup> Ostensibly, Hamline combined its law school with William Mitchell College of Law, a stand-alone school. In fact, William Mitchell controlled the “combined” school. The school changed its name to Mitchell Hamline School of Law and retained some of Hamline’s faculty. In all other respects, Hamline University School of Law disappeared.<sup>37</sup> Several other law schools have changed their operating structure since the advent of the law school crisis, although how those changes, which include combining and splitting of campuses, are related to the crisis is more opaque.<sup>38</sup>

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<sup>33</sup> Eureka Growth Capital, *About Eureka Growth Capital*, <http://www.eurekagrowth.com/> (last visited Sept. 27, 2017); Paul Caron, *Thomson Reuters Sells Foundation Press, West to Eureka Growth Capital*, TAXPROF BLOG (Feb. 4, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/02/thomson-reuters.html](http://taxprof.typepad.com/taxprof_blog/2013/02/thomson-reuters.html); Jennifer Smith, *Thomson Reuters Bids Adieu To Law School Publishing*, WALL ST. J. (Feb. 4, 2013), <http://blogs.wsj.com/privateequity/2013/02/04/thomson-reuters-bids-adieu-to-law-school-publishing/>.

<sup>34</sup> Belinda Thurston, *Cooley ‘Right-Sizing’*, CITY PULSE, Aug. 15, 2014, <http://lansingcitypulse.com/article-10487-cooley-’right-sizing’.html>; Staci Zaretsky, *Troubled Law School To ‘Cease Operations’ At One Of Its Campuses*, ABOVE THE LAW (Oct. 3, 2014), <http://abovethelaw.com/2014/10/troubled-law-school-to-cease-operations-at-one-of-its-campuses/>.

<sup>35</sup> Staci Zaretsky, *Indiana Tech Law School To Close, Citing \$20 Million Losses*, ABOVE THE LAW (Oct. 31, 2016), <http://abovethelaw.com/2016/10/indiana-tech-law-school-to-close-citing-20-million-in-losses/>. Ashby Jones, *Private-Equity Group’s for-Profit Law School Plan Draws Critics*, WALL ST. J. (Oct. 20, 2013), <https://www.wsj.com/articles/privateequity-group8217s-forprofit-law-school-plan-draws-critics-1382312687> (on InfiLaw’s ownership by private equity firm); Press Release, Charlotte School of Law, Charlotte School of Law Statement regarding Closure (Aug. 24, 2017), [https://www.insidehighered.com/sites/default/server\\_files/files/Press%20Release\\_Closure.pdf](https://www.insidehighered.com/sites/default/server_files/files/Press%20Release_Closure.pdf).

<sup>36</sup> Zaretsky, *supra* note 35.

<sup>37</sup> Maura Lerner, *Hamline, William Mitchell law schools to merge*, STAR TRIB., Feb. 13, 2015, <http://www.startribune.com/hamline-william-mitchell-law-schools-to-merge/291856891/>; *see also* Complaint at 4–5, ¶ 20, *Moy v. William Mitchell Coll. of Law*, No. 62-CV-15-2009 (Minn. Dist. Ct. Apr. 1, 2015) (recombining faculty); Answer at 5, ¶ 20, *Moy v. William Mitchell College of Law*, No. 62-CV-15-2009 (Minn. Dist. Ct. Apr. 8, 2015) (not denying complaint’s allegation regarding combining faculty); Paul Campos, *Is Hamline Law School on its last legs?*, LAWYERS, GUNS & MONEY BLOG (July 16, 2013), <http://www.lawyersgunsandmoneyblog.com/2013/07/is-hamline-law-school-on-its-last-legs>.

<sup>38</sup> Rutgers combined its two law schools into one, although each retained its own campus,

The law schools also responded with intentional changes in their operations as well as to their structure. Law schools admitted a higher percentage of their applicants, even though those applicants' LSAT scores declined.<sup>39</sup> Schools accepted 67% of their applicants for fall 2009 but 78% for fall 2014.<sup>40</sup> Law schools also increased their financial aid awards, which simply means they agreed to discount their tuition in order to attract students.<sup>41</sup> The decrease in net tuition per student, coupled with the decline

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administration, and faculty. Letter from the Faculty of Rutgers School of Law to the Univ. of Med. and Dentistry of N.J. Advisory Comm. (Jan. 31, 2012); Leslie Brody & Patricia Alex, *Fewer Applying to Rutgers Law School*, RECORD, June 10, 2012, at A1; Nic Corbett, *Rowan merger plan complicates proposal to merge 2 Rutgers law schools*, NJ.COM (Feb. 8, 2012), [http://www.nj.com/news/index.ssf/2012/02/proposal\\_to\\_merge\\_2\\_rutgers\\_la.html](http://www.nj.com/news/index.ssf/2012/02/proposal_to_merge_2_rutgers_la.html); David Gialanella, *Rutgers Law Merger Gets Final Sign-off*, N.J.L.J., Aug. 3, 2015, <http://www.njljournal.com/id=1202733738448/Rutgers-Law-Merger-Gets-Final-Signoff>; Zack Needles, *Rutgers Approves Law School Merger*, N.J.L.J., Apr. 2, 2015, <http://www.njljournal.com/id=1202722479407/Rutgers-Approves-Law-School-Merger?sreturn=20160712104215>. See also Jonathan Lai, *Rutgers puzzles law enrollment in Camden: Why did twice as many students choose Newark?*, PHILLY.COM, Nov. 7, 2016, [http://www.philly.com/philly/education/20161106\\_Rutgers\\_puzzles\\_law\\_enrollment\\_in\\_Camden\\_Why\\_did\\_twice\\_as\\_many\\_students\\_chose\\_Newark\\_.html](http://www.philly.com/philly/education/20161106_Rutgers_puzzles_law_enrollment_in_Camden_Why_did_twice_as_many_students_chose_Newark_.html). Widener University had one accredited law school with two campuses and faculties, but one dean. Widener split them into two separately accredited law schools with a different dean running each one, but both law schools remained under Widener University's control. Jeff Mordock, *Widener Law Asks Marketing Firm to Assess Possible Name Change*, DEL. L. WKLY., Oct. 1, 2014, <http://www.delawarelawweekly.com/id=1202671820366/Widener-Law-Asks-Marketing-Firm-to-Assess-Possible-Name-Change?sreturn=20160712104649>. Penn State also had one accredited law school with two campuses and faculties, but one dean. It apparently intended to close one campus but then changed course and essentially spun off that campus to become a separately accredited law school under the aegis of Penn State but with nearly no emphasis on the Penn State name. Charles Thompson, *Dickinson School of Law wins American Bar accreditation for campuses in Carlisle and State College*, PENN LIVE BLOG (June 18, 2014), [http://www.pennlive.com/midstate/index.ssf/2014/06/dickinson\\_school\\_of\\_law\\_wins\\_a.html](http://www.pennlive.com/midstate/index.ssf/2014/06/dickinson_school_of_law_wins_a.html); Charles Thompson, *Penn State's Dickinson School of Law's proposed plan to end 1st-year classes touches off debate*, PENN LIVE BLOG (Sept. 16, 2012), [http://www.pennlive.com/midstate/index.ssf/2012/09/penn\\_states\\_dickinson\\_school\\_o.html](http://www.pennlive.com/midstate/index.ssf/2012/09/penn_states_dickinson_school_o.html).

<sup>39</sup> See Craig M. Boise & Andrew P. Morriss, *Boise & Morriss: The Shameful Truth Is That Many Law Schools Have Admitted Students With Low LSAT Scores To Prop Up Tuition Revenue And Now Seek To Avoid Accountability For The Ensuing Poor Bar Passage Results*, TAXPROF BLOG (Dec. 19, 2016), [http://taxprof.typepad.com/taxprof\\_blog/2016/12/boise-morrissthe-shameful-truth-is-that-many-law-schools-have-admitted-students-with-low-lsat-scores.html](http://taxprof.typepad.com/taxprof_blog/2016/12/boise-morrissthe-shameful-truth-is-that-many-law-schools-have-admitted-students-with-low-lsat-scores.html).

<sup>40</sup> Law School Admission Council, *Historic ABA End of Year Summary: Applicants, Admitted Applicants & Applications*, <https://www.lsac.org/lscresources/data/aba-eoy/archive> (last visited Sept. 27, 2017) (58,400 acceptances of 86,600 applicants for Fall 2009; 43,500 acceptances from 55,700 applicants for Fall 2014).

<sup>41</sup> Dan Rodriguez, *The exodus of high-band LSAT students*, PRAWFSBLAWG (June 23, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-exodus-of-high-band-lsat-students.html>; Derek T. Muller, *The percentage of law school enrollees receiving scholarships continues to climb*, EXCESS OF DEMOCRACY BLOG (Mar. 27, 2017), <http://excessofdemocracy.com/blog/2017/3/the-percentage-of-law-school-enrollees-receiving-scholarships-continues-to-climb>; Gold, *supra* note 1, at 504 n.19; Matt Leichter, *Which Law*

in matriculants, of course resulted in decreased total tuition revenues for schools.<sup>42</sup>

Law schools also reduced their full-time (whether tenure-track or long-term contract) faculty. Full-time faculty compensation is a typical law school's largest expense and given the many tenured faculty, it is difficult to reduce.<sup>43</sup> Full-time law faculty generally earn \$120,000 to \$175,000, although higher salaries for star academics, faculty at wealthy schools, or faculty at schools in cities with high costs of living might be much higher.<sup>44</sup> Benefits are typically one-third of base salary so the cost to a school for a full-time law faculty member is roughly between \$160,000 and \$235,000.<sup>45</sup> As early as 2013, it was reported that schools were reducing their faculties in response to the decline in enrollment.<sup>46</sup> Full-time faculty at American law schools declined 16% from the fall of 2010 to the fall of 2016. That

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*Schools Are Shedding Full-Time Faculty? (2016 Edition)*, LAST GEN X AM. BLOG (Jan. 17, 2017), <https://lawschooltuitionbubble.wordpress.com/2017/01/17/which-law-schools-are-shedding-full-time-faculty-2016-edition/>; Chelsea Phipps, *More Law Schools Haggle on Scholarships*, WALL ST. J. (July 29, 2012), <http://www.wsj.com/articles/SB10000872396390444130304577557182667927226>; Karen Sloan, *It's a buyers' market at law school*, NAT'L L.J., June 25, 2012, <http://www.nationallawjournal.com/id=1202560485444/Its-a-buyers-market-at-law-school-?slreturn=20160712105426>.

<sup>42</sup> See Brown, *supra* note 29; Yellen, *supra* note 29; Gold, *supra* note 1; Matasar, *supra* note 29; Wu, *supra* note 29; Barnhizer, *supra* note 29; Leichter, *supra* note 41; *As Law School Demand Drops, Credit Quality Among U.S. Schools Diverges*, *supra* note 25, at 1, 9; Paul Campos, *80% to 85% of ABA law schools are currently losing money*, LAWYERS, GUNS & MONEY BLOG (Nov. 12, 2013), <http://www.lawyersgunsmoneyblog.com/2013/11/80-to-85-of-aba-law-schools-are-currently-losing-money>.

<sup>43</sup> David Frakt, *Cost Cutting in an Age of Declining Law School Enrollment*, FACULTY LOUNGE (Jan 15, 2015, 10:35 AM), <http://www.thefacultylounge.org/2015/01/cost-cutting-in-an-age-of-declining-law-school-enrollment.html>; *University Budgets: Where Your Fees Go*, TOP UNIVERSITIES (July 25, 2012, 1:00 AM), <http://www.topuniversities.com/student-info/student-finance/university-budgets-where-your-fees-go>. See also Donna M. Desrochers & Rita Kirshstein, *Labor Intensive or Labor Expensive? Changing Staffing and Compensation Patterns in Higher Education*, at 15, DELTA COST PROJECT AT AM. INSTS. FOR RESEARCH (Feb. 2014), [http://www.deltacostproject.org/sites/default/files/products/Delta CostAIR\\_Staffing\\_Brief\\_2\\_3\\_14.pdf](http://www.deltacostproject.org/sites/default/files/products/Delta%20CostAIR_Staffing_Brief_2_3_14.pdf) (providing a breakdown of faculty expenditures at universities).

<sup>44</sup> See Paul L. Caron, *2014-15 SALT Survey Of Law Professor Salaries*, TAXPROFBLOG (June 17, 2015), [http://taxprof.typepad.com/taxprof\\_blog/2015/06/2014-15-salt-survey-of-law-professor-salaries.html](http://taxprof.typepad.com/taxprof_blog/2015/06/2014-15-salt-survey-of-law-professor-salaries.html) (listing reported salaries at 11 highly ranked law schools across the U.S. The median salary for assistant professors was \$121,800; for pre-tenured associate professors, it was \$131,028, and for tenured professors, it was \$175,002. The average of those medians is \$142,610.).

<sup>45</sup> See Am. Ass'n of Univ. Professors, *Appendix 1*, (2017), [https://www.aaup.org/file/ARES17\\_corrections\\_0.pdf](https://www.aaup.org/file/ARES17_corrections_0.pdf) (showing that benefits as a percent of salary vary but 30%-35% is typical.). My impression is that law faculty are better paid than other faculty and so their benefits are higher too.

<sup>46</sup> Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013), <http://www.wsj.com/articles/SB10001424127887323664204578607810292433272>.

represents over 1,400 fewer full-time faculty over the course of six years.<sup>47</sup>

While that number is relatively salient, the methods used to reduce faculty are generally opaque, as schools may be reluctant to announce that they are actively seeking to shrink their faculty.<sup>48</sup> Perhaps the most institutionally painless way to reduce faculty is simply to decide not to replace faculty who die, retire, or take jobs elsewhere. Annual hiring of entry-level faculty has fallen by about 60% since 2011, both in the number of people hired and in the number of schools that are hiring, with fewer than one-third of law schools doing any entry-level faculty hiring in recent years.<sup>49</sup>

Many law schools publicly announced buyout offers to considerable numbers of their law faculty, and surely many other law schools made such offers without publicity.<sup>50</sup> In fact, in a few instances, the offers were made to the entire tenured faculty.<sup>51</sup> Other schools, though usually more discreetly, threatened draconian increases in work load unless a sufficient number of faculty left and, in one case, the school gave notice that the entire untenured law school faculty could be terminated.<sup>52</sup>

Many law schools have also attempted to increase their revenue from ancillary sources. That is, revenue from sources other than JD tuition. Most particularly, schools initiated or expanded the size of their LLM programs, frequently marketing these programs to international students who already possessed law degrees in their home countries.<sup>53</sup>

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<sup>47</sup> Leichter, *supra* note 41.

<sup>48</sup> *Id.*

<sup>49</sup> Sarah Lawsky, *Spring Self-Reported Entry Level Hiring Report 2017*, PRAWFSBLAWG (June 1, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report/reporting-99-schools-hiring-155-entry-level-professors-for-fall-2011-and-42-schools-hiring-62-entry-level-professors-for-fall-2017>).

<sup>50</sup> Paul Caron, *List Of Law School Faculty Buyouts*, TAXPROF BLOG (Nov. 30, 2015), [http://taxprof.typepad.com/taxprof\\_blog/2015/11/list-of-law-school-faculty-buyouts.html](http://taxprof.typepad.com/taxprof_blog/2015/11/list-of-law-school-faculty-buyouts.html) (linking to details about individual schools).

<sup>51</sup> See, e.g., Mitch Ryals, *Why Gonzaga University School of Law offered buy-outs to its tenured professors*, BLOGLANDER (Nov. 21, 2015, 1:00 PM), <http://www.inlander.com/Bloglander/archives/2015/11/21/why-gonzaga-university-school-of-law-offered-buy-outs-to-its-tenured-professors>.

<sup>52</sup> Paul Caron, *New England Law Faculty Face 8-Course Teaching Loads, Mandatory Office Presence (M-F, 9-5) Unless 35% Accept Buyouts*, TAXPROF BLOG (Oct. 25, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/10/new-england-.html](http://taxprof.typepad.com/taxprof_blog/2013/10/new-england-.html); David Lat, *A Law School's Possible Purge of Its Junior Faculty Ranks*, ABOVE LAW (July 1, 2013, 4:05 PM), <http://abovethelaw.com/2013/07/a-law-schools-possible-purge-of-its-junior-faculty-ranks/>.

<sup>53</sup> See HANOVER RESEARCH, *ALTERNATIVE REVENUE GENERATION PRACTICES FOR LAW SCHOOLS* (2013), <http://www.hanoverresearch.com/media/Alternative-Revenue-Generation-Practices-for-Law-Schools.pdf>.

Tellingly, turnover among law school deans has greatly increased. Over one-third of all deans left their position between 2012 and 2014, a rate one knowledgeable observer terms “unprecedented.”<sup>54</sup> In 2014, more than one in five of the nation’s law schools had a new dean.<sup>55</sup> In addition to being strong evidence that the difficulty of managing a law school has increased greatly, high dean turnover means that law schools expend financial and psychic resources in identifying a new dean and transitioning from the old to the new. It also means that many schools are unable to formulate rational, consistent responses to the legal education crisis because of both the change in leadership and the lag time necessary for a new (usually inexperienced) dean to get up to speed.<sup>56</sup>

Many observers, often law school deans, proposed many programmatic and operational changes that law schools should adopt, either to help end the crisis in legal education or to take advantage of the radical change in the landscape, but as might be expected, absolutely no consensus emerged about what legal education as a whole, or law schools individually, should do.<sup>57</sup> One of the more frequent suggestions, however, was some form of curricular and structural change that would permit law schools to train graduates who would be “practice ready.” Perhaps the most thoughtful and elaborated description of this suggestion was by Bill Henderson.<sup>58</sup> While frequently suggested, a focus on practice-ready graduates was also frequently, and thoughtfully, attacked as either impractical or misguided.<sup>59</sup> A second theme for reform was to modify or eliminate tenure as a way to make law schools more nimble in responding to changes in legal education.<sup>60</sup> Yet another common theme was that law schools should embrace online teaching and

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<sup>54</sup> David Barnhizer, “*Deaning*” in the “*New Normal*,” LAWNEXT (July 2, 2015), <http://lawnext.org/deaning-in-the-new-normal/> [http://webcache.googleusercontent.com/search?q=cache:oBqvYmb4IYJ:lawnext.org/author/dbarnhizer/page/2/&num=1&hl=en&gl=us&strip=1&vwsrc=0].

<sup>55</sup> Jack Crittenden, *A Record Year for New Deans*, NAT’L JURIST, Mar. 2015, at 5.

<sup>56</sup> Barnhizer, *supra* note 54.

<sup>57</sup> See, e.g., Rick Bales, *Law School Innovations*, L. DEANS LEGAL EDUC. BLOG (Oct. 16, 2016), [http://lawprofessors.typepad.com/law\\_deans/2016/10/law-school-innovations.html](http://lawprofessors.typepad.com/law_deans/2016/10/law-school-innovations.html); Libby A. Nelson, *Crisis or Opportunity?* INSIDE HIGHER ED. (Jan. 6, 2012), <https://www.insidehighered.com/news/2012/01/06/law-school-leaders-discuss-issues-past-year-annual-meeting>; Rachel M. Zahorsky, *Law Deans and a Law Professor Respond to the ‘Law School Bubble’*, A.B.A. J. (Mar. 22, 2012, 4:10 PM), [http://www.abajournal.com/lawscribbler/article/podcast\\_episode\\_01](http://www.abajournal.com/lawscribbler/article/podcast_episode_01).

<sup>58</sup> William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013); see also Robert J. Condlin, “*Practice Ready Graduates: A Millennialist Fantasy*,” 31 TOURO L. REV. 75, 75 n.2 (2014) (referencing sources).

<sup>59</sup> E.g., Condlin, *supra* note 58; Nora V. Demleitner, *Circular Limitations, Cost Pressures, and Stratification in Legal Education: Are Bold Reforms in Short Supply?*, 44 SETON HALL L. REV. 1014 (2014).

<sup>60</sup> E.g., Jason Mazzone, *Tenure and the Law School*, BALKINIZATION (May 15, 2012), <http://balkin.blogspot.com/2012/05/tenure-and-law-school.html>.

learning and should structure their courses as competency modules rather than as traditional doctrine-based courses.<sup>61</sup>

Throughout the crisis, there has been a tacit assumption of legal education's exceptionalism. We have presumed that legal education is in no way like other disciplines or like higher education generally. To the extent that observers have suggested that legal education look to another discipline, it has almost always been medical education.<sup>62</sup> And nearly always they point to medical education as a paradisiacal paradigm.<sup>63</sup> Jennifer Bard has published perhaps the most cogent recent takedown of this view.<sup>64</sup>

But legal education is not a special snowflake. Law schools recruit entering classes, educate students, and help them get their first professional jobs. Law schools have external constituencies such as accreditors, licensure bodies, potential students, and alumni/ae. Ninety percent of law schools are in universities just like other professional schools.<sup>65</sup> Within those

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<sup>61</sup> See MICHELE R. PISTONE & MICHAEL B. HORN, *DISRUPTING LAW SCHOOL: HOW DISRUPTIVE INNOVATION WILL REVOLUTIONIZE THE LEGAL WORLD* (2016), <https://www.christenseninstitute.org/wp-content/uploads/2016/03/Disrupting-law-school.pdf>; Karen Sloan, *AALS Hears Words of Caution from Departing Dean*, NAT'L L.J. (Jan. 5, 2012), <http://www.nationallawjournal.com/id=1202537486631/AALS-hears-words-of-caution-from-departing-dean->.

<sup>62</sup> R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1517 n.10 (2012). *But cf.* Deborah Maranville et al., *Lessons for Legal Education from the Engineering Profession's Experience with Outcomes-Based Accreditation*, 38 WM. MITCHELL L. REV. 1017 (2012) (suggesting legal education should look to accreditation standards used in engineering schools); Steven Davidoff Solomon, *The Economics of Law School*, N.Y. TIMES, (Sept. 24, 2012, 3:01 PM), <http://dealbook.nytimes.com/2012/09/24/the-economics-of-law-school/> (implying that legal education and veterinary education are comparable, at least in their economic situations).

<sup>63</sup> *E.g.*, Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W.L. REV. 219 (2007); Neil Hamilton, *Professional-Identity/Professional-Formation/Professionalism Learning Outcomes: What Can We Learn About Assessment From Medical Education?*, 13 U. ST. THOMAS L.J. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2962461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962461); Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399 (2016); Brent E. Newton, *The Ninety-Five Theses: Systematic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55 (2012); Ethan Bronner, *To Place Graduates, Law Schools are Opening Firms*, N.Y. TIMES (Mar. 7, 2013), <http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html>.

<sup>64</sup> Jennifer F. Bard, *"Practicing Medicine and Studying Law": How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them*, 10 SEATTLE J. SOC. JUST. 135 (2011); *see also*, Kevin Kiley, *Med Schools Are a Target for Universities Seeking Prestige and New Revenues*, INSIDE HIGHER ED (Sept. 20, 2012), <https://www.insidehighered.com/news/2012/09/20/med-schools-are-target-universities-seeking-prestige-and-new-revenues>.

<sup>65</sup> *See generally* Association of American Medical Colleges, *AAMC Medical School Members*, (2017), <https://members.aamc.org/eweb/DynamicPage.aspx?webcode=AAMCOrgSearchResult&orgtype=Medical%20School> (listing all medical school members

universities, law school deans deal with provosts, CFOs, presidents, and boards. And law schools co-exist with other academic units such as undergraduate colleges, graduate schools, and professional schools. The insularity of law school crisis observers is striking in light of these salient similarities between law schools and other higher education entities.

In fact, the professional education of another discipline went through a crisis very similar to the legal crisis.<sup>66</sup> The trigger was a radical, permanent change in the profession. That change then caused a rapid contraction in the applicant pool accompanied by a decline in applicant credentials. Twelve percent of the schools were shuttered—the equivalent of twenty-four law schools closing their doors—including several extremely prestigious universities. That profession was dentistry, and the crisis took place in the 1980s and '90s. I describe that crisis in Parts II and III.

Most observers have, some would say in typical lawyer fashion, focused on the negative aspects of the legal education crisis. They have pointed fingers at the various actors as causes, amplifiers, or Neros of the crisis. They frequently have a fatalistic tone about both the crisis and the future of legal education. Several have focused on the possibility of many law schools closing.<sup>67</sup>

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of the Association of American Medical Colleges); Commission on Dental Accreditation, *Predoctoral (DDS/DMD) Dental Education Programs*, (2017), [http://www.ada.org/en/coda/find-a-program/search-dental-programs#t=us&sort=%40codastatecitysort%20ascending&f:programs=\[Predoctoral%20\(DDS%2FDMD\)%20Dental%20Education%20Programs\]](http://www.ada.org/en/coda/find-a-program/search-dental-programs#t=us&sort=%40codastatecitysort%20ascending&f:programs=[Predoctoral%20(DDS%2FDMD)%20Dental%20Education%20Programs]) (listing all CODA-accredited dental schools); Am. Veterinary Med. Found., *Accredited Colleges Of Veterinary Medicine*, [https://www.avma.org/ProfessionalDevelopment/Education/Accreditation/Colleges/Documents/colleges\\_accredited.pdf](https://www.avma.org/ProfessionalDevelopment/Education/Accreditation/Colleges/Documents/colleges_accredited.pdf) (last visited Sept. 27, 2017) (listing all accredited veterinary schools); Nat'l Architectural Accrediting Bd., *Architecture Programs: Search Results*, (2017), [http://www.naab.org/school-search-results/?fl\\_6472=&fl\\_6476=1](http://www.naab.org/school-search-results/?fl_6472=&fl_6476=1) (listing all accredited architecture schools).

<sup>66</sup> I first noted in 2012 the similarity between the legal education crisis and the dental education crisis. See Chiappinelli, *supra* note 32. Brian Leiter and Richard Gershon also commented on the vulnerability of some law schools and the possible parallels to dental schools. I. Richard Gershon, *A Lesson from a Different Profession*, L. DEANS ON LEGAL EDUC. BLOG (Nov. 18, 2013), [http://lawprofessors.typepad.com/law\\_deans/2013/11/a-lesson-from-a-different-profession.html](http://lawprofessors.typepad.com/law_deans/2013/11/a-lesson-from-a-different-profession.html); Brian Leiter, *The Dental School Analogy*, BRIAN LEITER'S L. SCH. REPS. (Nov. 18, 2013), <http://leiterlawschool.typepad.com/leiter/2013/11/the-dental-school-analogy.html>. See also Jerry Organ, *What Law Schools Can Learn from Dental Schools in the 1980s Regarding the Consequences of a Decline in Applicants*, LEGAL WHITEBOARD (Oct. 20, 2014), <http://lawprofessors.typepad.com/legalwhiteboard/2014/10/what-law-schools-can-learn-from-dental-schools-in-the-1980s-regarding-the-consequences-of-a-decline-.html>.

<sup>67</sup> E.g., Burk & McGowan, *supra* note 3; David Barnhizer, *Law Schools, Law Jobs and the "Second Wave" of Applicant Decline*, LAWNEXT (June 22, 2015), <http://lawnext.org/law-schools-law-jobs-and-the-second-wave-of-applicant-decline/>; David Barnhizer, *Looking at the Law School 'Crisis' from the Perspective of the University*, LAWNEXT (Nov. 6, 2014), <http://lawnext.org/looking-at-the-law-school-crisis-from-the-perspective-of-the-university/>; Brian Leiter, *Predictions About Closings of ABA-Accredited Law Schools Over the Next Decade*, BRIAN LEITER'S L. SCH. REPS. (Oct. 3, 2012), <http://leiterlawschool.typepad.com/>

2017]

*JUST LIKE PULLING TEETH*

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But my focus here is very different. In Part IV, I identify and describe the lessons law schools and legal education can learn from the crisis in dental education to avoid closure and, in fact, to thrive. The lessons of dental education are the way forward for legal education as a whole and even more so for law schools that want to gain an edge over other law schools. The way forward is understanding that internal changes to legal education, important as they may be on their own, are not likely to ensure a law school's survival. Rather, schools must explicitly focus on their missions and must engage with critical external constituencies, within the university as well as beyond it. The drivers of those efforts are the law school deans and faculties.

## II. THE STORY OF CHANGES IN THE PRACTICE OF DENTISTRY AND THE CRISIS IN DENTAL EDUCATION

### A. *Changes in the Practice of Dentistry*

The dental education crisis of the 1980s was precipitated by changes both in the practice of dentistry and in dental education. The change in the practice of dentistry can be told in one word: fluoride.<sup>68</sup> In the early twentieth century, dentists observed a newly recognized dental disorder. This disorder, then called mottled enamel, resulted in the teeth being permanently stained brown. In the 1930s, research established that mottled enamel (now known as fluorosis) was caused by high levels of fluoride in children's drinking water.<sup>69</sup> Earlier, scientists had found a correlation, which they considered merely interesting but unimportant, between mottled enamel and resistance to tooth decay.<sup>70</sup> After discovering the cause of fluorosis, they wondered whether fluoride in drinking water at levels too low to cause fluorosis could prevent cavities.<sup>71</sup>

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leiter/2012/10/predictions-about-closings-of-aba-accredited-law-schools-over-the-next-decade.html; Organ, *supra* note 66; Stephanie Francis Ward, *10 to 15 law schools could close if enrollment keeps shrinking, higher-ed market analyst says*, A.B.A. J. (Dec. 1, 2016), [http://www.abajournal.com/news/article/aba\\_should\\_help\\_law\\_schools\\_consolidate\\_says\\_higher\\_ed\\_market\\_analyst](http://www.abajournal.com/news/article/aba_should_help_law_schools_consolidate_says_higher_ed_market_analyst); Jordan Weissmann, *Get Ready for Some Law Schools to Close*, SLATE (Dec. 1, 2014, 5:06 PM), [http://www.slate.com/blogs/moneybox/2014/12/01/law\\_school\\_applications\\_collapse\\_get\\_ready\\_for\\_schools\\_to\\_start\\_closing.html](http://www.slate.com/blogs/moneybox/2014/12/01/law_school_applications_collapse_get_ready_for_schools_to_start_closing.html); Jordan Weissmann, *Why I Bet a Professor Money that At Least One Law School Will Close*, SLATE (Dec. 3, 2014), [http://www.slate.com/blogs/moneybox/2014/12/03/why\\_i\\_just\\_bet\\_a\\_professor\\_money\\_that\\_at\\_least\\_one\\_law\\_school\\_will\\_close.html](http://www.slate.com/blogs/moneybox/2014/12/03/why_i_just_bet_a_professor_money_that_at_least_one_law_school_will_close.html).

<sup>68</sup> See *The Story of Fluoridation*, NAT'L INST. OF DENTAL & CRANIOFACIAL RES., <https://www.nidcr.nih.gov/OralHealth/Topics/Fluoride/TheStoryofFluoridation.htm> (last updated Feb. 26, 2014). [hereinafter *Story of Fluoridation*]

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

In 1945, Grand Rapids, Michigan agreed to test drinking water fluoridation and to allow the federal government to monitor its 30,000 schoolchildren.<sup>72</sup> The results were spectacular and immediate, and in 1951, the Surgeon General and the National Academy of Sciences formally recommended fluoridation.<sup>73</sup> By the mid-1950s, the rate of cavities in Grand Rapids children had dropped more than 60%.<sup>74</sup> The Institute of Medicine has called the success of fluoridation “one of the major public health achievements” of the twentieth century.<sup>75</sup>

But that major achievement resulted in a major shift in the practice of dentistry. From a public health view, the state of American oral health through the end of World War II was, by today’s standards, abysmal. The first systematic report on dental education, in the mid-1920s, took for granted that most Americans had significant caries (cavities) and periodontal (gum) disease.<sup>76</sup> Dentistry, the report concluded, “has been triumphant in the art of repair, but has been baffled by the mysteries of prevention.”<sup>77</sup> In 1940, service in the armed forces required 6 opposing teeth in each jaw (i.e., 12 teeth in total),<sup>78</sup> but almost 9% of inductees were rejected for service because they did not meet this standard.<sup>79</sup> Once the United States entered World

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<sup>72</sup> *Id.*

<sup>73</sup> COMM. ON THE FUTURE OF DENTAL EDUC., *DENTAL EDUCATION AT THE CROSSROADS: CHALLENGES AND CHANGE* 37 (Marilyn J. Field ed., 1995), <https://www.nap.edu/catalog/4925/dental-education-at-the-crossroads-challenges-and-change> [hereinafter *DENTAL EDUCATION AT THE CROSSROADS*].

<sup>74</sup> *The Story of Fluoridation*, *supra* note 68.

<sup>75</sup> *DENTAL EDUCATION AT THE CROSSROADS*, *supra* note 73, at 62.

<sup>76</sup> WILLIAM J. GIES, *DENTAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 158, 226 (1926), [https://dalspace.library.dal.ca/bitstream/handle/10222/42804/Geis\\_Report\\_Reduced\\_All\\_OCR\\_150dpi\\_PDFA1b.pdf?sequence=1&isAllowed=y](https://dalspace.library.dal.ca/bitstream/handle/10222/42804/Geis_Report_Reduced_All_OCR_150dpi_PDFA1b.pdf?sequence=1&isAllowed=y) (“The tendency to irregular alignment in dentition appears to be growing; decay of teeth is rampant; loosening of teeth owing to disease of the closely investing tissues was never more common; conditions of disease at the roots of teeth are as numerous as ever; systemic sequelae of infection through dental channels have been noted in increasing incidence and variety; defective teeth are being extracted by the millions; and oral maladies involving both teeth and jaws, and requiring surgical attention, have not perceptibly decreased. . . . The boy or girl whose teeth are entirely free from caries is unusual; and the young man or woman without decayed teeth, or from whom teeth have not been extracted, or who has not had teeth filled, crowned, or replaced, is very hard to find. At middle age, disease of the tissues that surround the teeth is an accustomed experience; in old age, sound natural teeth are uncommon; and at all ages many persons suffer from infectious disorders that follow admission of germs through deficient dental tissues.”).

<sup>77</sup> *Id.* at 158.

<sup>78</sup> A sufficient number of opposing teeth was required so that a service person deployed in a theatre of operations could eat battle rations. Maxwell H. Anderson, *Dentistry and Dental Education in the Context of the Evolving Health Care System*, 71 *J. DENTAL EDUC.* 988, 989 (2007).

<sup>79</sup> GEORGE F. JEFFCOTT, *A HISTORY OF THE UNITED STATES ARMY DENTAL SERVICE IN WORLD WAR II 199–200* (Calvin H. Goddard & Rebecca L. Duberstein, eds., 1955).

War II, even this minimal requirement was relaxed because the government realized that it would otherwise not have sufficient recruits.<sup>80</sup> Throughout the war, more recruits were rejected for dental reasons than for any other physical cause.<sup>81</sup>

Through the 1970s, the bread-and-butter of the general dentist (and 80% of dentists were and are generalists) was filling cavities, especially in children; performing extractions; and fitting partial or complete dentures.<sup>82</sup> Adults typically went to the dentist to have teeth filled or extracted in response to pain, and replaced with artificial teeth, if they could afford it. They brought their children to the dentist for the same reasons, but also from a sense of parental duty so many childhood cavities were detected and repaired before the child experienced pain.

By the late 1970s, enough children had grown up with fluoridated water, especially children in large population areas, and were a significant enough percentage of the overall urban population that the decline in tooth decay was evident.<sup>83</sup> As fluoridation spread, the childhood periodic checkup revealed fewer and fewer cavities. Adults kept their teeth longer too, so they needed fewer extractions and bridge work.<sup>84</sup> General dentists shifted their focus from therapeutic and restorative work to preventative procedures. They also began to focus on elective procedures such as cosmetic whitening and orthodontics.<sup>85</sup> Further, basic science advances increased treatment options in periodontics and endodontics.<sup>86</sup> These advances coincided with an adult population that was retaining more of its teeth and thus was more susceptible to gum and root disease.<sup>87</sup>

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<sup>80</sup> *Id.* at 202.

<sup>81</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 24.

<sup>82</sup> AM. DENTAL ASS'N, FUTURE OF DENTISTRY TODAY'S VISION: TOMORROW'S REALITY 37, 52 (2001) [hereinafter 2001 FUTURE OF DENTISTRY]; AM. DENTAL ASS'N, REPORT OF THE AMERICAN DENTAL ASSOCIATION'S SPECIAL COMMITTEE ON THE FUTURE OF DENTISTRY: ISSUE PAPERS ON DENTAL RESEARCH, MANPOWER, EDUCATION, PRACTICE AND PUBLIC AND PROFESSIONAL CONCERNS AND RECOMMENDATIONS FOR ACTION 17, 24 (1983) [hereinafter 1983 FUTURE OF DENTISTRY]; William D. Hendricson & Peter A. Cohen, *Future Directions in Dental School Curriculum, Teaching, and Learning*, AM. ASS'N DENTAL SCHS., at 2 (1998).

<sup>83</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., ORAL HEALTH IN AMERICA: A REPORT OF THE SURGEON GENERAL 3 (2000), <https://www.nidcr.nih.gov/DataStatistics/SurgeonGeneral/Documents/hck1ocv.@www.surgeon.fullrpt.pdf> [hereinafter ORAL HEALTH IN AMERICA].

<sup>84</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 56; 1983 FUTURE OF DENTISTRY, *supra* note 82, at 5, 23.

<sup>85</sup> William Mullen, *The Disappearing Dentist: Researchers in a Once-Busy Profession Find Out They May Have Been Too Smart for Their Own Good*, CHI. TRIB. (July 27, 1986), [http://articles.chicagotribune.com/1986-07-27/features/8602230796\\_1\\_fluoridation-tooth-decay-dental-disease](http://articles.chicagotribune.com/1986-07-27/features/8602230796_1_fluoridation-tooth-decay-dental-disease).

<sup>86</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 17; ORAL HEALTH IN AMERICA, *supra* note 83, at 18.

<sup>87</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 32–33, 56; 1983 FUTURE OF DENTISTRY, *supra* note 76, at 18.

For most general dentists, this represented a significant change in the professional skills they used in their practice, changes that were not well received by dental specialists and which were also probably deleterious to the patients.<sup>88</sup> Notwithstanding a shift in services to meet the shift in demand, the overall amount spent on dental services flattened while spending on healthcare overall increased in the 1970s.<sup>89</sup> Clearly the practice of dentistry both changed and contracted in the 1970s.

### B. *Changes in Dental Education*

The change in dental education that led to its crisis can be told in two words: money and fluoride. In part because of the armed forces' experience, the federal government took steps in the post-war period to improve America's oral health.<sup>90</sup> The government's efforts took four forms.<sup>91</sup> First, as it did with students in higher education generally, it made low cost loans available to dental students.<sup>92</sup> Second, the government encouraged dental schools to increase their enrollment by making payments directly to the school based both on the number of students and on the increase in students' so-called capitation payments.<sup>93</sup>

Third, the government made a significant investment in the physical plant of many dental schools, through grants for capital improvements.<sup>94</sup> Medical students' clinical education takes place in hospitals, which are separate entities from medical schools and generate significant fees that cover the hospital's costs. By contrast, dental students' clinical training takes place in clinics that are owned and operated by the dental schools and which do not generate significant patient fees, meaning that the university must bear the cost of the clinics.<sup>95</sup> Many dental schools' clinics had not been updated since before World War II, and the schools were at risk of closing because of substandard clinical facilities.<sup>96</sup> The schools and their universities

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<sup>88</sup> Paul Duke Jr. & Albert R. Karr, *Dentists Step Up Services and Marketing as Competition Increases in Crowded Field*, WALL ST. J., Nov. 20, 1987, at 1.

<sup>89</sup> ORAL HEALTH IN AMERICA, *supra* note 83, at 240.

<sup>90</sup> Anderson, *supra* note 78, at 988–89.

<sup>91</sup> See generally INSTITUTE OF MEDICINE, COSTS OF EDUCATION IN THE HEALTH PROFESSIONS 1, 5 (1974) [hereinafter COSTS OF EDUCATION].

<sup>92</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 42; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 57; U.S. DEP'T OF HEALTH & HUMAN SERVS., FINANCING DENTAL EDUCATION: PUBLIC POLICY INTERESTS, ISSUES AND STRATEGIC CONSIDERATIONS 16–17 (2005) [hereinafter FINANCING DENTAL EDUCATION]; Jeanne C. Sinkford, *The Future of Dentistry: New Challenges, New Directions*, 82 J. NAT'L MED. ASS'N 353, 353 (1990).

<sup>93</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 22; COSTS OF EDUCATION, *supra* note 91, at iii; FINANCING DENTAL EDUCATION, *supra* note 92; Sinkford, *supra* note 92, at 353.

<sup>94</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 22.

<sup>95</sup> FINANCING DENTAL EDUCATION, *supra* note 92, at 14–15.

<sup>96</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 22.

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were understandably reluctant to invest in dental clinics that tended not to earn an economic return.

Finally, the federal government wanted to encourage research in basic oral health issues. Through the end of the 1940s, dental research in basic science had been extremely modest.<sup>97</sup> What innovations there were in dentistry tended to be in materials and techniques, which focused on repair, rather than in areas that were relevant to prevention of disease.<sup>98</sup> In 1948, Congress established the National Institute of Dental Research (NIDR), which funneled research funds to dental schools.<sup>99</sup>

The federal government's programs had a large, successful effect on dental education in the thirty-five years following the end of World War II. By 1981, over 70% of dental students took advantage of federal loans.<sup>100</sup> The number of dental schools and the number of dental students both increased dramatically thanks to federal capitation payments and enrollment incentives. In 1943, there were thirty-nine dental schools.<sup>101</sup> That number increased over 50% to sixty schools by 1980.<sup>102</sup> Most of that increase, thirteen of the twenty-one new schools, came after 1960 and was facilitated by federal grants.<sup>103</sup> Between 1960 and 1980, most dental school facilities were either built from scratch or renovated thanks to federal money,<sup>104</sup> and the number of full-time faculty more than doubled.<sup>105</sup>

The number of dental students increased even more dramatically, rising over 90% from just under 12,000 students in 1950 to almost 23,000 students in 1980.<sup>106</sup> Again, much of this increase was the result of federal capitation and enrollment incentive payments.<sup>107</sup> In the area of sponsored research, the federal government was for all practical purposes the only sponsor. The government's NIDR accounted for 80% of all research conducted at American dental schools.<sup>108</sup>

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<sup>97</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 51.

<sup>98</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 16; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 51.

<sup>99</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 16.

<sup>100</sup> *Id.* at 42.

<sup>101</sup> JEFFCOTT, *supra* note 79, at 138.

<sup>102</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 37.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> FINANCING DENTAL EDUCATION, *supra* note 92, at 9.

<sup>107</sup> *Id.* at 17.

<sup>108</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 16.

But by the late 1970s, the effects of fluoride on the practice of dentistry were clear and policy advisors began to suggest that the United States was at risk of having too many dentists.<sup>109</sup> Congress responded in 1981 by eliminating, or severely reducing, funding to dental education in every area except for NIDR research grants. Those grants continued at comparable, or even increased, levels of funding.<sup>110</sup> But, the continuation of NIDR funding probably had minimal or no effect on most schools. Research accounted for only about 10% of a typical dental school's revenues, but, of course, most of that money had to be spent on the research being supported and thus was unavailable to make up for reductions in other revenue sources.<sup>111</sup> Likewise the cutbacks to financing capital projects probably also had little effect on dental schools. By the time the federal government stopped supporting capital improvements, nearly all of the nation's dental schools had either new facilities or significantly refurbished space.<sup>112</sup>

However, the financial effects of reductions in the other two categories of funding were dire on dental schools and dental students. The federal government's elimination of capitation and enrollment increase payments coupled with the reduction in federal loan availability (and increase in interest rates) were significant challenges for dental schools and their students. Federal capitation and enrollment payments, which were unrestricted payments made directly to dental schools, were typically around one-third of a school's total revenue.<sup>113</sup> By 1981, these payments were completely eliminated.<sup>114</sup> Dental schools suddenly found themselves in a financial crisis with one-third less revenue but no decrease in costs. In fact, given the advances in basic and applied oral science, the costs to dental schools had actually increased in recent years rather than decreased, even with a shift to a higher percentage of part-time faculty.<sup>115</sup> To try to maintain their financial status quo, schools tried to increase revenues and decrease

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<sup>109</sup> *Id.* at 22; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 57–58; Mary P. Walker et al., *Dental Education Economics: Challenges and Innovative Strategies*, 72 J. DENTAL EDUC. 1440, 1440 (2008) (“[P]redictions for future dental need and demand were not realized due to the impact of fluoride.”).

<sup>110</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 160.

<sup>111</sup> The school recovered indirect costs, which the university and the federal government negotiated, and some of those costs doubtless are equivalent to profit, but that amount is difficult to calculate and is a relatively small percentage of the overall research money. Further, the research money would be paid directly to the university rather than to the dental school, so if it existed, the amount of research money that was available to the dental school for operating expenses would be speculative, unpredictable, and small. *See* DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 149–50, 159.

<sup>112</sup> *See* Walker et al., *supra* note 109, at 1440.

<sup>113</sup> *Id.* *See also* COSTS OF EDUCATION, *supra* note 91, at 46.

<sup>114</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 22, 38; Sinkford, *supra* note 92, at 353.

<sup>115</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 37.

costs. On the revenue side, they could increase revenues from the clinic, the university, the state, or the students. On the cost side, they could reduce costs of the clinic and basic science operations.<sup>116</sup>

Of course, most schools tried a combination of all these ways. On the revenue side, increasing clinical income was, for most schools, an unrealistic possibility. Clinics typically broke even or cost the schools money and very little income could be generated by trying to streamline costs or increase gross revenues.<sup>117</sup> Parent universities were understandably reluctant to increase support to their dental schools during a period of uncertain economics.<sup>118</sup>

As federal funds dried up, one natural response was to turn to state governments to make up the difference.<sup>119</sup> The states already provided support to dental schools, especially those at state universities.<sup>120</sup> Because most newly graduated dentists practiced in the state in which they were trained, the states had an interest in supporting the dental schools. However, by the early 1980s, state governments had their own financial difficulties and seemed unlikely to increase support to dental schools.<sup>121</sup> The 1990s were no better. In constant dollars, state support for dental schools declined 14% between 1991 and 2000.<sup>122</sup> That left increasing student tuition as the primary source for replacing federal funds.

Between 1979 and 1983, the proportion of schools' revenue provided by tuition increased over 20%.<sup>123</sup> From the student perspective, however, the increase in tuition was astronomical. Tuition increased over 50% between 1977 and 1986.<sup>124</sup> But, at the same time that capitation and enrollment funds were eliminated, the federal government cut back its loan program making it more difficult and expensive for students to finance their dental education. The consequence was that students financed their education through private loans (along with some federal and state loans) and schools effectively cut their tuition by offering scholarships. By the beginning of the 1980s, over 70% of dental students received federal student

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 39; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 180; FINANCING DENTAL EDUCATION, *supra* note 92, at 14–15; Walker et al., *supra* note 109.

<sup>118</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 38.

<sup>119</sup> *See* 2001 FUTURE OF DENTISTRY, *supra* note 82, at 112 (suggesting that dental school had been lobbying state legislatures for increased funding).

<sup>120</sup> COSTS OF EDUCATION, *supra* note 91, at 16, 147.

<sup>121</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 38.

<sup>122</sup> Howard L. Bailit & Tryfon J. Beazoglou, *State Financing of Dental Education: Impact on Supply of Dentists*, 67 J. DENTAL EDUC. 1278, 1280 (2003), <http://www.jdentaled.org/content/67/12/1278.long>.

<sup>123</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 205 (stating in 1979, tuition was 19.3% of revenues; in 1983, it was 23.5%, an increase of 21.7%).

<sup>124</sup> *Id.* at 206.

loans.<sup>125</sup> In the three years from 1978 to 1981, dental student debt increased by over 50% and doubled before 1990, essentially because of an increase in tuition.<sup>126</sup>

From the schools' point of view, tuition had been on a steady increase even before the crisis and continued afterward. More to the point, schools became more reliant upon it as a source of revenue. The proportion of revenue a typical school received from tuition increased from less than 20% in 1979, just before the federal government cut off capitation payments, to almost one-third by 1996.<sup>127</sup> In the five years between 1976 and 1980, mean tuition increased 63%.<sup>128</sup> But this increase masks a great variation: public schools increased their tuition 24% while private schools increased theirs by 82% over those five years.<sup>129</sup> Once the crisis hit, the increases accelerated. From 1980 to 1986, public schools increased tuition by an additional 68% and private schools by 53%.<sup>130</sup> These increases continued through the end of the 1980s.<sup>131</sup>

One result of the changed realities of the practice of dentistry and the changed economics of dental education was a rapid and severe reduction in the number of people applying to dental school. The high-water mark was in 1975 when almost 16,000 people applied to dental schools.<sup>132</sup> In 1980, the year before the federal cutbacks in funding, schools saw about 9,600 applicants.<sup>133</sup> Within a decade, that number fell by almost half. In 1988, and again in 1989, there were only 5,000 applicants.<sup>134</sup>

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<sup>125</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 42.

<sup>126</sup> *Id.* at 42, 49; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 137; FINANCING DENTAL EDUCATION, *supra* note 92, at 5.

<sup>127</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 205 (in 1979 tuition was 19.3% of revenues). JAMES E. HARDIGAN & MICHAEL J. REED, AM. ASS'N DENTAL SCHS., THE COST OF ACADEMIC DENTISTRY: HOW WILL WE PAY THE BILL? 3 (1998) (noting in 1996, tuition was 30.3% of revenues).

<sup>128</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 41.

<sup>129</sup> *Id.* (from 1976 to 1980, median public school tuition increased from \$1,812 to \$2,244 and median private tuition went from \$4,782 to \$8,702).

<sup>130</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 205 (from 1980 to 1986, public school tuition increased from \$2,244 to \$3,783 and private tuition went from \$8,702 to \$13,297).

<sup>131</sup> *Id.* (noting that in 1990, tuition at all schools was \$9,427; at public schools, it averaged \$5,106; and at private schools, it averaged \$16,990).

<sup>132</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 94; Huntly Collins, *A Rush for Local Dental Schools*, PHILA. INQUIRER (Mar. 25, 1987), [http://articles.philly.com/1987-03-25/news/26222069\\_1\\_dental-schools-dental-program-dental-students](http://articles.philly.com/1987-03-25/news/26222069_1_dental-schools-dental-program-dental-students).

<sup>133</sup> AM. DENTAL EDUC. ASS'N, DENTAL SCHOOL APPLICANTS AND FIRST-TIME ENROLLEES, 1980–2014 (2014) [hereinafter DENTAL SCHOOL APPLICANTS].

<sup>134</sup> *Id.* (data points appear when moused-over).

As one might imagine, the quality of the applicants, by traditional measures of UGPA and DAT was declining, as well.<sup>135</sup> That diminishing of entering credentials manifested itself several years later as new dental graduates failed the national boards and licensing exams in increased numbers. By 1992, the number of graduates failing the exams increased by 67% from ten years before.<sup>136</sup> One in six graduates failed in 1992; a decade earlier, fewer than one in ten failed.<sup>137</sup>

That this decline was a crisis can be seen by comparing the number of applicants to the number of first year students. There were fewer *applicants* in 1988 than there were first year *students* in 1980.<sup>138</sup> In 1975, the peak year for applications, the ratio of applicants to available seats in dental schools was 2.6:1.<sup>139</sup> In 1980, the ratio had fallen to 1.6.<sup>140</sup> 1988 was the worst year for dental schools, with about 5,000 applicants for around 4,200 seats, a ratio of 1.2.<sup>141</sup>

The dental schools responded to this crisis in relatively predictable ways. In the end, as we will see, none of these responses made a significant difference in determining whether a school survived. One thing many schools did was increase their focus on philanthropic fundraising.<sup>142</sup> The reality of fundraising for educational institutions is that, with the rare exception of a gift so large it can truly transform an institution, gifts help marginally with general operations. A major, but not transformative, gift can make a particular aspect of operations successful but is restricted to that area.<sup>143</sup> An additional challenge to the schools at that time is that, generally speaking, major donors do not give simply because an institution is in financial difficulty, but rather, they tend to give to healthy institutions to build on the institution's success.<sup>144</sup>

Dental schools' fundraising efforts in response to the crisis of the 1980s reflect these realities. Dental school fundraising was an "unexplored source" of funds in the mid-1980s, which generated "insignificant" revenue.<sup>145</sup> In

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<sup>135</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 42; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 131, 134.

<sup>136</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 134.

<sup>137</sup> *Id.*

<sup>138</sup> DENTAL SCHOOL APPLICANTS, *supra* note 133.

<sup>139</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 42.

<sup>140</sup> DENTAL SCHOOL APPLICANTS, *supra* note 133 (noting 9,601 people applied for 6,030 first year places).

<sup>141</sup> *Id.*

<sup>142</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 39; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 210.

<sup>143</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 221.

<sup>144</sup> *See, e.g.*, JEROLD PANAS, MEGA GIFTS, 29–30 (2d ed. 2005).

<sup>145</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 39.

1991, gifts to dental schools represented just over 3% of the schools' revenues. Although in the early 1990s development represented the fastest-growing of all revenue categories, by 1996, gifts accounted for only 4.3% of revenue.<sup>146</sup>

Many schools also undertook general cost-cutting measures, targeted at areas deemed to be less essential to the immediate well-being of the school.<sup>147</sup> These areas included physical plant improvement and maintenance, the school's library, and support staff.<sup>148</sup> The danger in making these cuts, of course, is that a school will at some point have to refurbish its facilities or build new ones. In the end, that may be more expensive than properly maintaining and incrementally improving its current physical plant. Likewise, valuable library resources and support staff are difficult to replace once they are cut.

Schools also tried to increase net revenues by focusing on activities related to, but separate from, their core educational mission. More specifically, they initiated or put more resources into landing research grants and into continuing dental education (CDE) programs. By the mid-1990s, research funding accounted for roughly 10% of schools' revenues. However, it is obvious that the vast majority of that money was spent on the research for which it was provided and was not available to the school to spend on other needs. Schools do profit from the recovery of indirect costs, but those are very difficult to calculate and most schools could not provide significant unrestricted revenue. Telling evidence of this is provided by the observation that dental school deans were split as to whether research grants were a potential source of significant resources.<sup>149</sup>

CDE programs began to be offered in significant numbers in the early 1970s, when continuing education became a prerequisite for relicensing of dentists.<sup>150</sup> From the beginning, however, school-sponsored CDE programs typically broke even or actually lost money.<sup>151</sup> In the turmoil of the 1980s, schools increased their emphasis on CDE programs, in part to increase net revenues.<sup>152</sup>

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<sup>146</sup> HARDIGAN & REED, *supra* note 127, at 3, 5.

<sup>147</sup> Howard L. Bailit, *The Fundamental Financial Problems of Dental Education and Their Impact on Education, Operations, Scholarship, and Patient Care*, 72 J. DENTAL EDUC. 14, 15 (2008), [http://www.jdentaled.org/content/72/2\\_suppl/14.full](http://www.jdentaled.org/content/72/2_suppl/14.full).

<sup>148</sup> *Id.*

<sup>149</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 159 n.5.

<sup>150</sup> David W. Chambers, *Dental Education's Involvement with Dentists' Learning in Practice: Data and Theory*, 76 J. DENTAL EDUC. 107, 109 (2012).

<sup>151</sup> 1983 FUTURE OF DENTISTRY, *supra* note 76, at 39. However, some schools managed to run very successful CDE programs. *Id.*

<sup>152</sup> *Id.* at 39; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 210. *See also* 2001 FUTURE OF DENTISTRY, *supra* note 82, at 107 (noting schools also sponsored CDE programs to improve their relations with local practicing dentists and to help remediate

However, school-sponsored CDE programs were not generally successful and, more to the point, they were not sources of significant revenue for the schools. Market factors and quality factors each played a part. The barriers to entry in the CDE market were minimal and the schools quickly faced competition from both for-profit continuing education corporations and the organized dentistry groups, which added CDE programs at little or no cost to their regular gatherings.<sup>153</sup> As one observer put it, “[s]chools’ financial structures are not suited to competition based on lowest cost.”<sup>154</sup> Thus the school-sponsored CDE programs could not attract significant numbers of students. Second, the quality of school-sponsored CDE programs was seen by practicing dentists to be lower than programs by other providers.<sup>155</sup> By 1992, CDE programs contributed a miniscule 1.3% to dental schools’ revenues.<sup>156</sup>

The schools also focused on making their core educational functions more economically viable. The second two years of dental education are clinical, with students serving in clinics operated by the school itself.<sup>157</sup> When the major changes came to dental education, many schools looked to their clinics as potential sources of increased profits.<sup>158</sup> In one sense, they succeeded. In total dollars, clinic revenues increased 35% in the 1990s.<sup>159</sup> Clinic revenues as a percentage of school revenues increased from 12.2% in 1983, to 16.6% in 1992, and to 18% in 1998.<sup>160</sup> But the financial fact of dental clinics is that they cost more than they bring in.<sup>161</sup> Dental students provide the bulk of patient care and typically can only see two or three

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practitioners referred to the school by licensing authorities).

<sup>153</sup> Chambers, *supra* note 150, at 109–10.

<sup>154</sup> *Id.* at 110.

<sup>155</sup> *Id.* at 110; Kathleen Roth, *Dental Education: A Leadership Challenge for Dental Educators and Practitioners*, 71 J. DENTAL ED. 983, 985 (2007), <http://www.jdentaled.org/content/71/8/983.long>.

<sup>156</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 92.

<sup>157</sup> By contrast, medical students’ clinical education takes place largely in teaching hospitals in which the cost is borne primarily by the hospital. FINANCING DENTAL EDUCATION, *supra* note 92, at 14–15.

<sup>158</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 39 (The schools also looked to increase their clinic’s profitability by reducing costs through such measures as “streamlining” their procedures, having the clinical faculty member perform some procedures, and controlling inventory costs and accounting.). See DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 213; Jeanne C. Sinkford, *Effect of Economic Pressures on Dental Education at Howard University*, 76 J. NAT’L MED. ASS’N 15, 17 (1984) (noting inventory control, bulk purchasing and competitive bidding among the measures implemented by Howard University). Whether the schools succeeded in reducing costs is not known, but as documented below, costs continued to outstrip revenues by a considerable margin.

<sup>159</sup> Walker et al., *supra* note 109, at 1442.

<sup>160</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 39.

<sup>161</sup> *Id.*; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 180.

patients per day.<sup>162</sup> Students are expected to perform a wide array of procedures, with which they have had little to no experience. The overarching attitude is that the clinic's primary mission is to educate students rather than to provide patient care.<sup>163</sup>

Unlike medical education, in which a broad section of the public typically uses medical services in a teaching hospital, dental clinics tend to serve patients who cannot afford private dentists. Many patients are covered by Medicare, which pays very little for dental services.<sup>164</sup> The consequence of the patient mix and the general quality of the dental services rendered by students who have not received the DDS is that clinics tend to charge about half of the local market rate.<sup>165</sup> In the typical dental school clinic, costs are three times the revenues.<sup>166</sup> Thus, although the schools succeeded in bringing in more revenue, they did so in a dynamic that increasingly cost them money rather than generating net revenue.

Dental education as a whole worked to change its curriculum during the crisis. Of course because of the crisis, schools strove to change their curriculum in hopes of reducing costs.<sup>167</sup> It seems unlikely, however, that any curriculum changes actually resulted in an ultimate net reduction in costs. To the extent that any savings in costs were achieved, it seems to have been largely from outsourcing instruction in some of the first two years' courses to the medical school, which saved little in cost but hampered the dental schools' control over content.<sup>168</sup>

One popular curricular change was to attempt to make its graduates more practice-ready in an environment in which dental care was shifting to preventative care.<sup>169</sup> But schools did not move away from their focus on training general practitioners rather than dental specialists, a focus that had been in place since the 1920s.<sup>170</sup> In truth, though, much of the impetus for curricular reform was of the evergreen variety and did not stem from the crisis in dental education.<sup>171</sup> Although dental schools implemented various

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<sup>162</sup> Walker et al., *supra* note 109, at 1442.

<sup>163</sup> FINANCING DENTAL EDUCATION, *supra* note 92, at 14.

<sup>164</sup> *Id.* at 15.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 14; Walker et al., *supra* note 109.

<sup>167</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 210, 214.

<sup>168</sup> *Id.* at 97.

<sup>169</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 45.

<sup>170</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 106; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 47, 94. The first systematic study of American dental education recommended that dental schools focus on training generalists rather than specialists. GIES, *supra* note 76, at 190–92.

<sup>171</sup> Hendricson & Cohen, *supra* note 82, at 5.

curricular reforms,<sup>172</sup> the end result of the dental education crisis was “some growth and little change.”<sup>173</sup> As with much of higher education, curriculum reform in dental schools, even in the face of an existential crisis, was thwarted in predictable ways. Most saliently, faculty recalcitrance, financial limitations, and a perceived disconnect between a reformed curriculum and licensure tests prevented widespread change.<sup>174</sup> As Derek Bok is said to have said, changing the curriculum “is like trying to move a graveyard.”<sup>175</sup>

Dental schools reduced the size of their entering classes. Doubtless the vast majority of this reduction was simply a reflection that there were insufficient qualified applicants to fill the number of seats available.<sup>176</sup> As noted, because dental clinics are owned and operated by the schools, a reduction in class size does little to reduce costs. Rather, the high percentage of fixed costs must be spread over fewer students, resulting in a need to increase tuition even more.<sup>177</sup>

The high-water mark for dental school enrollment was in 1980 when over 6,000 first year students began their studies. The number of first-year students declined steadily in each of the next nine admissions cycles. At the bottom, in 1989, fewer than 4,000 people began dental studies.<sup>178</sup> First-year enrollment fell by 34% in less than ten years. By the early 1990s, total dental school enrollment fell the equivalent of 20 average-sized dental schools.<sup>179</sup> Of course, not every school’s enrollment declined in the same proportion. In fact, some schools increased their enrollment.<sup>180</sup> Of those that saw declines, the reductions ranged from negligible to 50%.<sup>181</sup>

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<sup>172</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 97, 210; Hendricson & Cohen, *supra* note 82, at 5; Denise K. Kassebaum et al., *The Dental Curriculum at North American Dental Institutions in 2002–03: A Survey of Current Structure, Recent Innovations, and Planned Changes*, 68 J. DENTAL EDUC. 914, 914–15 (2004), <http://www.jdentaled.org/content/68/9/914.full.pdf+html>.

<sup>173</sup> Kassebaum et al., *supra* note 172, at 915 (quoting L.A. Tedesco, *Issues in Dental Curriculum and Change*, 59 J. DENTAL EDUC. 97 (1995)).

<sup>174</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 100; Kenneth L. Kalkwarf et al., *ADEA Commission on Change and Innovation in Dental Education*, 69 J. DENTAL EDUC. 1085, 1085 (2005), <http://www.jdentaled.org/content/69/10/1085.full>.

<sup>175</sup> See Stacy JoIna, *Harvard Education: A Matter of Coping, Not Facts*, WASH. POST (Sept. 21, 1979), <https://www.washingtonpost.com/archive/politics/1979/09/21/harvard-education-a-matter-of-coping-not-facts/43d82428-f93f-4e92-b48f-1b5e90298d45/>.

<sup>176</sup> See *supra* note 135.

<sup>177</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 40.

<sup>178</sup> DENTAL SCHOOL APPLICANTS, *supra* note 133 (noting 6,030 first year students begin in 1980; 3,979 began in 1989).

<sup>179</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 26. (noting total enrollment was 22,235 in 1982, and 15,980 in 1992, a decline of 6,255 students). Sixty dental schools existed in 1982, with average enrollment of 371. Hence, 6,255 was the equivalent of 20 average-sized schools. *Id.* at 132.

<sup>180</sup> *Id.* at 132.

<sup>181</sup> *Id.* at 26.

But the reduction in class size did not keep pace with the decline in applicants. On the cusp of the crisis, in 1980, dental schools enrolled 63% of applicants.<sup>182</sup> Eight years later, the schools enrolled 84% of those who applied.<sup>183</sup>

Finally, dental schools cut costs by reducing and changing the composition of their faculty. In the heyday of the 1970s, schools increased the number of full-time faculty by 75% and full-time faculty became a larger percentage of the total faculty.<sup>184</sup> As the crisis took hold, faculties became smaller. In the eight years between 1986 and 1994, dental faculties shrank by 14%.<sup>185</sup> This reduction was not evenly felt on faculties. Basic science faculty, those who teach in the first two years of the program, fell by 27%, while clinical faculty fell by only 10%.<sup>186</sup> At the same time, schools began a strategy of hiring full-time faculty in non-tenure track positions. In 1980, when dental schools were thriving, almost all full-time faculty were tenured or tenure-track. By the mid-1990s, when the effects of the crisis were in full force, tenured or tenure-track full-time faculty were less than three-quarters of the total.<sup>187</sup>

### III. UNIVERSITIES CLOSE 12% OF THE NATION'S DENTAL SCHOOLS

Emory University's board of trustees was the first to act. In the spring of 1985, they voted to admit no dental students in 1986, teach out the current students, and close the school of dentistry when the last class graduated in 1988.<sup>188</sup> Presumably because the university was stuck with a purpose-built dental school facility, the university focused on its one-year post-DDS residency program, but closed that in 1990.<sup>189</sup> The dean of the dental school

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<sup>182</sup> DENTAL SCHOOL APPLICANTS, *supra* note 133 (9,601 people applied to dental schools and 6,030 began studies).

<sup>183</sup> *Id.* (5,019 people applied to dental schools and 4,196 began studies).

<sup>184</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 40–41 (full-time faculty went from 34% to 44% of the entire faculty during the 1970s).

<sup>185</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 99 (Table 6.6).

<sup>186</sup> James E. Kennedy & Ronald J. Hunt, *Meeting the Demand for Future Dental Faculty*, AM. DENTAL EDUC. ASS'N 1–2 (Oct. 1998), <http://www.adca.org/publications/Pages/75thAnniversarySummitReport.aspx>.

<sup>187</sup> *Id.* at 2 (stating 92% of full-time faculty were tenured or tenure-track in 1980, but it declined to 72% in 1995).

<sup>188</sup> *Trustees of Emory University To Eliminate Dental School*, N.Y. TIMES (Feb. 13, 1985), <http://www.nytimes.com/1985/02/13/us/trustees-of-emory-university-to-eliminate-dental-school.html>.

<sup>189</sup> See Betsy A. Lehman, *The '80s Are Going to Hurt Just a Little; Profession on Downswing After Surge in the '70s*, BOS. GLOBE, Apr. 29, 1985, at 37; *Emory School of Dentistry Records, 1944-1991*, EMORY UNIV. SCH. OF DENTISTRY, <https://findingaids.library.emory.edu/documents/HS-S012/> (last visited Sept. 27, 2017) (noting last record of 1991 reflecting the closure of the program).

resigned, apparently more out of despair than anger.<sup>190</sup> The university said the board's decision was based on a dearth of qualified students.<sup>191</sup> The dean said that the dental school had been losing money year after year.<sup>192</sup> The school had seen a 67% decline in applicants, suggesting that enrolling students at all, "qualified" or not, was an increasing challenge.<sup>193</sup> The dean, rather candidly, suggested that it was the lack of applicants, rather than their quality, that was the final factor in the board's decision.<sup>194</sup> There is some suggestion, as well, that Emory's dental school tuition was too high compared to that of other regional dental schools.<sup>195</sup> Two years later, the university spun its decision as one based primarily on quality. "[T]he university decided it would be better to spend money for a program that would be on the cutting edge of training and research," said Steven Budnick, an associate dean at Emory's School of Dentistry[.]"<sup>196</sup>

Four months later, another university administration decided to close a dental school. In June, Oral Roberts University (ORU) announced that its dental school would close after the next academic year.<sup>197</sup> Unlike at Emory, ORU did not provide for a teach-out of its current students. It admitted no class in 1985 and graduated its seniors, but only provided assistance in transferring to its sophomores and juniors.<sup>198</sup> At the time of the announcement, ORU blamed its own dental graduates for the closing. The graduates had not, the university said, gone into foreign missions upon graduation. ORU claimed that such mission work was the premise upon which it had solicited donations to the dental school, and the graduates' decisions to enter private practice undermined support for the dental school.<sup>199</sup> Even at the time of the announcement, others claimed that the real reason for the closure was that the school itself was not generating net revenues.<sup>200</sup> In reality, serious financial trouble at the university level, not

<sup>190</sup> Lehman, *supra* note 189 (quoting the dean as saying he could not bear telling his colleagues that their jobs were gone).

<sup>191</sup> *Trustees of Emory University*, *supra* note 188.

<sup>192</sup> Lehman, *supra* note 189.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*; Jamie Talan, *Your Health Focus on Dentistry The Changing Face of Dentistry in the 'Look, Ma, No Cavities' World, Schools Are Closing, Patients Are Older*, NEWSDAY, Feb. 27, 1990, at 14.

<sup>196</sup> Larry Gordon, *Declining Rolls: U.S. Dental Schools Feel the Crunch*, L.A. TIMES (Oct. 26, 1987), [http://articles.latimes.com/1987-10-26/news/mn-10931\\_1\\_private-dental-school/2](http://articles.latimes.com/1987-10-26/news/mn-10931_1_private-dental-school/2).

<sup>197</sup> *ORU Phasing Out School of Dentistry*, TULSA WORLD (June 22, 1985), [http://www.tulsaworld.com/archives/oru-phasing-out-school-of-dentistry/article\\_227695b4-402b-5d24-95db-0f26ba8c9f07.html](http://www.tulsaworld.com/archives/oru-phasing-out-school-of-dentistry/article_227695b4-402b-5d24-95db-0f26ba8c9f07.html).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

simply at the dental school, led to the decision to close the dental school.<sup>201</sup>

Georgetown University, the largest private dental school, was the next to close. Georgetown hired a major accounting firm to audit the dental school at the beginning of the 1986 academic year.<sup>202</sup> By the end of the fall semester, the report was finished.<sup>203</sup> It predicted a \$3.5 million loss for the school within the next five years.<sup>204</sup> In December 1986, the Georgetown board asked the dental school to prepare a plan to cut costs and raise revenue.<sup>205</sup> The school responded with a plan to reduce the size of the school by one-third.<sup>206</sup> In March 1987, the Georgetown board voted to close the school anyway.<sup>207</sup> As Emory did, Georgetown provided a teach-out of current students, with the final class being graduated in 1990.<sup>208</sup>

Georgetown explained its decision as a concern over tightening dental school finances in the near future.<sup>209</sup> The university said it needed 150 first-year students to support the school financially, but that the school was below that target in the fall of 1986, and projections indicated an increasingly small first-year class over the next few years.<sup>210</sup> However, admissions were less than 10% below the target number, surely not a dire situation.<sup>211</sup>

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<sup>201</sup> Kiera Feldman, *This Is My Beloved Son*, THIS LAND (Oct. 2, 2014), <http://thislandpress.com/2014/10/02/this-is-my-beloved-son/>; Cathy Milam, *Roberts to Close Hospital, Medical School*, TULSA WORLD (Sept. 14, 1989), [http://www.tulsaworld.com/archives/roberts-to-close-hospital-medical-school/article\\_c3f5b934-9e73-5ca2-89ef-db0962b5162a.html](http://www.tulsaworld.com/archives/roberts-to-close-hospital-medical-school/article_c3f5b934-9e73-5ca2-89ef-db0962b5162a.html).

<sup>202</sup> Lawrence Feinberg, *Dental School Closing's Bitter Taste*, WASH. POST (Mar. 29, 1987), [https://www.washingtonpost.com/archive/local/1987/03/29/dental-school-closings-bitter-taste/f8871c26-a865-497b-9057-66c532d89946/?utm\\_term=.829e9d305949](https://www.washingtonpost.com/archive/local/1987/03/29/dental-school-closings-bitter-taste/f8871c26-a865-497b-9057-66c532d89946/?utm_term=.829e9d305949).

<sup>203</sup> Lawrence Feinberg, *GU Defends Dental School Closure*, WASH. POST (Mar. 24, 1987), [https://www.washingtonpost.com/archive/local/1987/03/24/gu-defends-dental-school-closure/697c6b90-5bb1-43c8-9db3-4b3e1460bed6/?utm\\_term=.1d7c40a7c5db](https://www.washingtonpost.com/archive/local/1987/03/24/gu-defends-dental-school-closure/697c6b90-5bb1-43c8-9db3-4b3e1460bed6/?utm_term=.1d7c40a7c5db).

<sup>204</sup> *Id.*

<sup>205</sup> Lawrence Feinberg, *Plea to Save Dental School Rebuffed*, WASH. POST (Oct. 23, 1987), [https://www.washingtonpost.com/archive/local/1987/10/23/plea-to-save-dental-school-rebuffed/dbf9f03a-8f91-4c1a-a827-2262f94ab7f2/?utm\\_term=.122ba5ed1e92](https://www.washingtonpost.com/archive/local/1987/10/23/plea-to-save-dental-school-rebuffed/dbf9f03a-8f91-4c1a-a827-2262f94ab7f2/?utm_term=.122ba5ed1e92).

<sup>206</sup> Feinberg, *supra* note 202.

<sup>207</sup> Marcia Slacum Greene, *Georgetown University to Shut Down Dental School*, WASH. POST (Mar. 21, 1987), [https://www.washingtonpost.com/archive/local/1987/03/21/georgetown-university-to-shut-down-dental-school/30e8c158-d9b6-4adc-abb9-d15277b0881a/?utm\\_term=.69ac7a2a8755](https://www.washingtonpost.com/archive/local/1987/03/21/georgetown-university-to-shut-down-dental-school/30e8c158-d9b6-4adc-abb9-d15277b0881a/?utm_term=.69ac7a2a8755).

<sup>208</sup> *Id.*

<sup>209</sup> Paul Page, *Country's Largest Private Dental School to Close*, ASSOCIATED PRESS, Mar. 23, 1987.

<sup>210</sup> Feinberg, *supra* note 203 (noting the school had 137 first-year students in the 1986-1987 year, and the university had projected 120 in the 1987 entering class and classes below 100 soon after that).

<sup>211</sup> *Id.* (stating the school had 137 first-year students in the 1986-1987 year, 8.7% under its target).

The finances disclosed by Georgetown seem in line with the general state of dental schools in that era and are suggestive of the financial pressures faced by many other dental schools. The university admitted that the school was in the black in 1986-1987, with 570 total students, including 120-first years.<sup>212</sup> Assuming a total of 570 students was at or close to the break-even point, total enrollment in 1987-1988 was projected to have been about 545, or 25 students below break-even.<sup>213</sup> At \$15,900 tuition, the school would be about \$400,000 short of the roughly \$9 million in tuition that 570 students would have produced.<sup>214</sup> At a steady state of 400 total students (i.e., 100 first-year students) with no tuition increase, the school would generate about \$3.2 million less than with 570 students.<sup>215</sup> However, tuition constituted only about 62% of the school's total revenues, suggesting that the school took in about \$14.5 million per year with 570 students.<sup>216</sup> Reducing the student body by one-third (i.e., entering classes of 100 instead of 150), would result in a decline in total revenues of about 22%.<sup>217</sup>

Fairleigh Dickinson's dental school was the fourth to announce a closing. Like Oral Roberts, Fairleigh Dickinson's precipitating cause was financial trouble outside the school. In the 1980s, the university faced declining enrollment in its programs and rising costs. It also had several campuses and a wide range of programs that compounded its financial problems. It sold land, converted dormitories to condos, and ended numerous small-enrollment programs. Nonetheless, in the 1988-1989 year, it found itself with a \$17 million deficit on a \$95 million operating budget.<sup>218</sup>

The dental school, like many schools at private universities, received significant funds from the state, essentially to subvene the dental education of residents who were likely to remain in-state. New Jersey provided \$4.8 million of the dental school's \$12.4 million budget. Even with that money, the school had run a deficit of \$1.6 million in 1988.<sup>219</sup> The school apparently also had some deferred maintenance costs to bring its clinical facilities up to contemporary standards.<sup>220</sup> By early 1989, New Jersey decided that it would no longer both subvene Fairleigh Dickinson's dental school and fund the wholly public New Jersey Dental School, then part of the University of

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<sup>212</sup> Feinberg, *supra* note 202.

<sup>213</sup> Feinberg, *supra* note 210.

<sup>214</sup> Page, *supra* note 209 (noting tuition would be \$15,900).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Anthony DePalma, *Its Boom Years Over, a School Regroups*, N.Y. TIMES (Apr. 8, 1989), <http://www.nytimes.com/1989/04/08/nyregion/its-boom-years-over-a-school-regroup.html> (describing the university's financial plight).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

Medicine and Dentistry of New Jersey.<sup>221</sup> The university was informed that the state's contribution to the dental school would be cut by 25% for the next academic year and eliminated entirely the year after that. The loss of state money, coupled with the dental school's on-going operational deficit, meant that the university would be facing a \$6.2 million deficit from the dental school alone.<sup>222</sup> Given the university's financial circumstances, it decided in the spring of 1989 to close the dental school at the end of the 1989-1990 year.<sup>223</sup> The school enrolled no first-year students in the fall of 1989 and spent the 1989-1990 year working with its sophomores and juniors to transfer them to other schools.<sup>224</sup>

Three other universities closed their dental schools as well. Washington University made the decision to close its school in June 1989.<sup>225</sup> Rumors had been circulating in the press that the university might close the school because it was running a \$240,000 deficit; however, the deficit was hardly a financial disaster at only about 4%.<sup>226</sup> Until the 1988-1989 year, the school had been profitable or broke even.<sup>227</sup> The deficit was caused by the loss of twelve students who transferred or dropped out. An internal report suggested that the school needed an infusion of \$6 million per year to stay afloat.<sup>228</sup> As with Fairleigh Dickinson, the state's higher education officials were not interested in supporting a portion of the private school's budget because the state was already supporting the entire cost of another dental school at the University of Missouri, Kansas City.<sup>229</sup> The school predicted four to five years of deficits, \$240,000 in the current year, increasing to \$450,000 the next year.<sup>230</sup> The school took no first-year dental students in 1989, taught out the rising third- and fourth-year students, helped the rising second-year students to transfer, and closed in 1991.<sup>231</sup> Although the university framed the decision as financial and not quality-driven, it is clear

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<sup>221</sup> *Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ.*, 605 A.2d 776, 778 (N.J. Super. Ct. Law Div. 1991); DePalma, *supra* note 218.

<sup>222</sup> *Beukas*, 605 A.2d at 778.

<sup>223</sup> *Id.* at 778; DePalma, *supra* note 218.

<sup>224</sup> *Id.* at 779; DePalma, *supra* note 218.

<sup>225</sup> Robert Manor, *WU Dental School to Close By 1992*, ST. LOUIS POST-DISPATCH, June 3, 1989.

<sup>226</sup> Louis J. Rose, *WU May Close School of Dentistry*, ST. LOUIS POST-DISPATCH, May 13, 1989 (noting a \$240,000 deficit on a \$6 million budget).

<sup>227</sup> Jo Mannies, *Down in the Mouth U.S. Dental Schools Facing New Crunches*, ST. LOUIS POST-DISPATCH, May 19, 1989.

<sup>228</sup> Mark Schlinkmann, *State Aid Is Sought for Dental School*, ST. LOUIS POST-DISPATCH, May 14, 1989.

<sup>229</sup> Lorraine Kee Montre, *Washington U. Dental Students Not Surprised By Closure Talk*, ST. LOUIS POST-DISPATCH, May 15, 1989.

<sup>230</sup> Jo Mannies, *Slack Demand Helped to Seal Fate of Dental School*, ST. LOUIS POST-DISPATCH, June 4, 1989; Manor, *supra* note 225.

<sup>231</sup> Manor, *supra* note 225.

that the dental school's perceived lack of prestige and quality in comparison to other Washington University units played a large part in the university's decision.<sup>232</sup>

Two Chicago-area dental schools closed within a few years of one another. The president of Loyola University of Chicago said the dental school had been operating at a loss for eleven years before the decision to close it was made.<sup>233</sup> Loyola allowed the school to remain open for only one more year, leaving two classes of students scrambling to transfer.<sup>234</sup> Finally, Northwestern University effectively decided in 1997 to close its dental school after a full teach-out of its students.<sup>235</sup> Financial considerations surely played a part in this decision, but it seems apparent that the primary factor was the perceived lack of prestige and quality of the dental school compared to the rest of the university.

Northwestern's decision to close came five years after Loyola's decision. More importantly, in terms of university motivation and lessons for legal education, by the time Northwestern decided to close its dental school, the economics of dental education had rebounded. In fact, applications to Northwestern's dental school had increased by 300% since the bottom of the trough and the dental school was the most selective university program after the medical school.<sup>236</sup>

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<sup>232</sup> Jo Mannies, *Washington University: Sellint [sic] Out Scholarship?*, ST. LOUIS POST-DISPATCH, June 4, 1989 (quoting the chair of the university's board of trustees as saying that academic quality played a part, the dental school would need significant additional resources to become excellent and that, "We don't want to operate anything that's mediocre"); Manor, *supra* note 225.

<sup>233</sup> Lou Ortiz, *Loyola Dental School to Close: Judge Rejects Suit by Students*, CHI. SUN TIMES, Aug. 8, 1992.

<sup>234</sup> Monique Parsons, *Loyola Closing Dental School*, CHI. TRIB. (June 9, 1992), [http://articles.chicagotribune.com/1992-06-09/news/9202210216\\_1\\_dentists-students-faculty-and-staff](http://articles.chicagotribune.com/1992-06-09/news/9202210216_1_dentists-students-faculty-and-staff).

<sup>235</sup> Stephanie Banchemo & Sheryl Kennedy, *NU's Image Lurke Behind Dental Plan*, CHI. TRIB. (Dec. 17, 1997), [http://articles.chicagotribune.com/1997-12-17/news/9712170048\\_1\\_dental-school-dental-education-professional-schools](http://articles.chicagotribune.com/1997-12-17/news/9712170048_1_dental-school-dental-education-professional-schools) (noting that Northwestern decided to admit no first-year dental students for the Fall of 1998); Patrice M. Jones, *Nu Board to Close Up Its School of Dentistry: Trustees Decide Class Of 2001 To Be The Last* CHI. TRIB. (Mar. 3, 1998), [http://articles.chicagotribune.com/1998-03-03/news/9803030253\\_1\\_dental-students-dental-schools-nu](http://articles.chicagotribune.com/1998-03-03/news/9803030253_1_dental-students-dental-schools-nu) (noting a full teach-out through Spring 2001).

<sup>236</sup> Matt Dunn, *A Monumental Gaffe*, CHI. TRIB. (Feb. 2, 1998), [http://articles.chicagotribune.com/1998-02-02/news/9802020027\\_1\\_dental-care-dental-aptitude-test-national-dental-examinations](http://articles.chicagotribune.com/1998-02-02/news/9802020027_1_dental-care-dental-aptitude-test-national-dental-examinations).

## IV. JUST LIKE PULLING TEETH—LESSONS FROM THE DENTAL EDUCATION CRISIS

It would be natural to try to synthesize lessons for law schools from these dental school closings. Certainly the schools that closed had several common elements. In almost every case, the dental school was operating at a loss. Entering classes had gotten smaller, a reflection of the declining number and quality of the national applicant pool. All were a part of private universities, although the dental school at Fairleigh Dickinson received considerable state subvention. At schools that competed with nearby public schools, the challenge may have been particularly difficult because the private schools were unable to charge tuition anywhere close to that charged by the public schools.<sup>237</sup> In some instances, the university's financial pressures precipitated the dental school's demise.<sup>238</sup> At the more elite universities, the dental school was said, overtly, not to be of sufficiently high quality to keep afloat.<sup>239</sup>

But at least eleven other dental schools were publicly reported to have been in danger of closing, yet were not closed.<sup>240</sup> These schools shared many

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<sup>237</sup> Edie Lau, *When dental schools closed: lessons for veterinary profession?*, VIN NEWS SERV. (June 10, 2013), <http://news.vin.com/VINNews.aspx?articleId=27460> (noting that Washington University's dental tuition was three times that of the nearest public dental school); Lehman, *supra* note 188; Talan, *supra* note 194 (noting that Emory University's tuition was also much higher than competing public school tuition).

<sup>238</sup> See *supra* notes 196–201, 217–23 and accompanying text.

<sup>239</sup> See *supra* notes 202–16, 224–35 and accompanying text.

<sup>240</sup> Karen Farkas, *Professors Sue to Retain Jobs CWRU's Cutbacks Crossed Tenure Line*, CLEV. PLAIN DEALER, Aug. 25, 1991 (discussing Case Western Reserve University); John Funk, *CWRU Teacher Asks for Probe of Tenure Policy*, CLEV. PLAIN DEALER, Sept. 9, 1991 (discussing Case Western Reserve University); David Bauder, *State Considers Closing Some Suny Campuses*, ALBANY TIMES UNION, Jan. 25, 1991 (discussing SUNY-Stony Brook); Mitchell Freedman, *End to Dental School Discussed*, NEWSDAY, Mar. 7, 1989 (discussing SUNY-Stony Brook); Geoff Davidian, *Dental schools bite the bullet/Applicants and their GPAs fall to bad economy, AIDS fears*, HOUS. CHRON., Jan. 19, 1992, at A7 (discussing Marquette University); *Dental School Gets Guarantee, For Now*, CAP. TIMES, May 9, 1991 (discussing Marquette University); Bill Schackner, *Dental School Filled with Debate*, PITT. POST-GAZETTE, Dec. 25, 1994 (discussing University of Pittsburgh); Janelle Carter, *Black College Students Oppose Merging, Closing Their Schools*, NEW ORLEANS TIMES-PICAYUNE, Dec. 3, 1993 (discussing University of Mississippi); Gordon, *supra* note 195 (discussing University of Mississippi); Gordon, *supra* note 195 (discussing University of Minnesota); Gregor W. Pinney, *University Fails to Focus Despite Attempts, It Hasn't Pared Down*, STAR TRIB., May 30, 1995 (discussing University of Minnesota); *Dental Debate Resumes*, CIN. POST, Dec. 17, 1992 (discussing both public dental schools in Kentucky (University of Kentucky and University of Louisville)); *Dental-School Closing Proposal Under Fire at UK and U of L*, COURIER & PRESS (Evansville, IN), Nov. 4, 1993 at A4 ((discussing both public dental schools in Kentucky (University of Kentucky and University of Louisville)); *Education Task Force Quarreling*, KY. POST, Nov. 2, 1993 (discussing both public dental schools in Kentucky (University of Kentucky and University of Louisville)); Lehman, *supra* note 189 (discussing both public dental schools in Kentucky (University of Kentucky and University of Louisville)); Cheryl Truman, *Emotions Entangle Debate Over Dental Schools*,

of the same elements as the schools that did close. For example, many of the schools were reported to have been facing operating losses.<sup>241</sup> As knowledgeable observers have remarked, nearly every dental school lost money from continuing operations, if for no other reason than the clinical aspects of dental education cost more than they produced in revenue.<sup>242</sup> It is likely, then, that not only did the closed schools and those at risk of closure run at a loss, but the vast majority of other dental schools did, and do, too.<sup>243</sup>

Other challenges faced by the schools that closed, the schools at risk,<sup>244</sup> and dental schools generally during this period, were declining applications, declining quality of applicants, and consequently smaller entering classes.<sup>245</sup> One theme that was shared by the schools that closed and the schools at risk of closure—but not necessarily by other dental schools—was that the university itself was in financial straits, especially those at-risk schools at public universities, which saw cuts at the state level.<sup>246</sup>

Ultimately it will be the boards of universities, boards of stand-alone law schools, and occasionally state legislatures that decide whether to close their law schools. Typically, boards will make those decisions based upon recommendations from the president or provost; seldom, if ever, would a

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LEXINGTON HERALD-LEADER, July 15, 1985 (discussing both public dental schools in Kentucky (University of Kentucky and University of Louisville)); Todd Ackerman, *Dental Students Fear State Disregard/Protesters See Stepchildren Status*, HOUS. CHRON., Aug. 15, 1992 (discussing both public dental schools in Texas (Houston and San Antonio)); Albert R. Karr, *A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., May 19, 1987 (discussing The University of Colorado); Gordon, *supra* note 195 (discussing the University of Colorado); Karr *supra* note 240 (discussing the University of Colorado); Samuel Weiss, *Education; Cost of Dental Training Hits a Crisis Point*, N.Y. TIMES, Aug. 17, 1982 (discussing New York University).

<sup>241</sup> See, e.g., Funk, *supra* note 240 (reporting a \$562,000 deficit for 1987-1988 and a \$479,000 deficit for 1988-1989); *Dental School Gets Guarantee, For Now*, *supra* note 240 (noting that Marquette reportedly needed an infusion of \$4.7 million to stay afloat); Schackner, *supra* note 240 (noting that Pittsburgh reportedly was running a deficit of \$3.4 million per year, the largest of Pitt's 16 academic units.); Weiss, *supra* note 240 (noting that NYU reportedly was running a \$2.6 million deficit).

<sup>242</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 39; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 180; ROBERT L. WILLIAMS, FROM DEPARTMENTAL MERGERS TO SCHOOL CLOSINGS: LESSONS IN ORGANIZATIONAL CHANGE IN DENTAL EDUCATION 4 (1998), <http://www.adea.org/publications/Documents/7williams.pdf>; Schackner, *supra* note 240.

<sup>243</sup> HARDIGAN & REED, *supra* note 127, at 7.

<sup>244</sup> See, e.g., Farkas, *supra* note 240 (discussing Case Western University); Schackner, *supra* note 240 (discussing Pittsburgh); Weiss, *supra* note 240 (discussing NYU).

<sup>245</sup> See generally, Lau, *supra* note 237 (the most significant factor was declining admissions).

<sup>246</sup> See, e.g., Bauder, *supra* note 240; Freedman, *supra* note 240; Gordon, *supra* note 196 (discussing the University of Mississippi); Ackerman, *supra* note 240 (noting that the Houston branch of the University of Texas's dean and associate dean resigned over budget cuts imposed on the school); Karr, *supra* note 240 (discussing the University of Oklahoma).

university board close a school over the president's strong objection.<sup>247</sup> In general, university presidents' reputations and legacies are not enhanced by closing academic programs.<sup>248</sup>

Although boards are not immune from the pressures of the market, their actions are not exclusively, or perhaps even primarily, market-driven. While every law school is unhappy in its own way, so to speak, the criteria that boards will use to decide which law schools are closed are likely to be similar across institutions. At bottom, the board will ask whether the law school is providing benefits to the university and whether those benefits outweigh the costs. Perhaps most critically, boards will consider the law school's vibrancy. This is another way of saying that, in the end, decision makers will have to assess whether law schools have the resources and the motivation to bring sufficient benefits *in the future*. The crisis in dental education revealed the criteria and dynamics that likely inform boards' decisions about law schools today. One set of considerations is financial. Another is operational. In light of the dental education crisis, we can identify the way forward for law schools to increase the likelihood that they will remain in good standing with their boards. An important, but indirect, lesson of the dental education crisis is the system of prestige and rankings within legal education. Although many if not most observers of legal education decry rankings, dental schools suffered during the crisis from a lack of a prestige system and from the absence of rankings.

#### A. Financial

##### 1. Decreased Revenues and Increased Costs

As we saw with dental schools, operating losses standing alone do not put a school in danger of being closed. Conversely, a stable economic position does not make a school immune from closure. For example, Georgetown closed its dental school although the school was generating more revenues than costs.<sup>249</sup> Washington University's dental school was closed with a deficit of only 4%.<sup>250</sup> It seems likely that boards will treat law schools in the same way. Lack of profitability can be a factor in the decision, but it is likely not determinative. Rather, lack of profitability is likely to be used externally to justify a decision made primarily based on other factors. If failing to generate excess revenues were sufficient to close a law school,

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<sup>247</sup> See Rick Bales, *What Would an Efficient Market for Law Schools Look Like?*, L. DEANS ON LEGAL EDUC. BLOG (Oct. 7, 2016), [http://lawprofessors.typepad.com/law\\_deans/2016/10/what-would-an-efficient-market-for-law-schools-look-like.html](http://lawprofessors.typepad.com/law_deans/2016/10/what-would-an-efficient-market-for-law-schools-look-like.html).

<sup>248</sup> *Id.*

<sup>249</sup> Feinberg, *supra* note 202.

<sup>250</sup> Rose, *supra* note 226 (noting a \$240,000 deficit on a \$6 million budget).

the boards at dozens and dozens of institutions would have done so.<sup>251</sup> In the dental school crisis, Loyola University closed its dental school but admitted that the school had run at a loss for the eleven years before the decision. Obviously the school's finances were not the primary cause of the decision to close the dental school.<sup>252</sup>

One study of the dental school crisis observed that financial losses alone cannot explain school closures,

In all of the closings, the one common denominator has been the cost of educating dental students. . . . On average, the dental schools that closed had budgets of around \$5 million and deficits of around \$400,000. Most had gone through attempts to reduce costs. While not all universities involved went so far as to say that cost was the only factor, none denied that it was a major consideration. But why only dental schools? Medical education costs were also rising in the late 1980s and early 1990s at the same time that medical reimbursements were falling. . . . The response to the Pew commission's recommendations for closing 10 percent of the medical education programs has not led to one closing.<sup>253</sup>

Further, even if a law school is running in the black, the board will assess the law school's finances in light of the other academic units in the university, such as the general undergraduate units,<sup>254</sup> specialized undergraduate units such as the business school or education school, a graduate school, and other professional schools such as a nursing school or architecture school.<sup>255</sup> In some instances these assessments are comparative, and in other instances they involve assessing the degree to which or the success in which one school's efforts involve synergies and collaboration with other academic units.

Moreover, a university's own financial issues might spur the university to close a school, even when the school itself is not running in the red. Both Oral Roberts University and Fairleigh Dickinson University decided to close their dental schools primarily because of financial problems at the university rather than at the dental school. The dental schools at several other

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<sup>251</sup> Brown, *supra* note 29; Yellen, *supra* note 29; Gold, *supra* note 1; Matasar, *supra* note 29; Wu, *supra* note 29; Barnhizer, *supra* note 29; Leichter, *supra* note 41; Standard & Poor's, *supra* note 25, at 1, 9; Campos, *supra* note 42 (estimating that only 15% to 20% of law schools currently generate revenues in excess of costs).

<sup>252</sup> Ortiz, *supra* note 233.

<sup>253</sup> WILLIAMS, *supra* note 242, at 2.

<sup>254</sup> Often referred to as the school of arts and sciences, although at some institutions the sciences are in a separate unit from the other undergraduate units.

<sup>255</sup> Some professional schools have both undergraduate and graduate curricula. For example, a school of nursing may offer a B.S.N. as well as a M.S.N. Further, some specialized undergraduate units such as the business school may offer some graduate degrees (e.g., an executive M.B.A.) while focusing on undergraduate education.

universities were in serious jeopardy of being closed because of the university's money troubles.<sup>256</sup>

Typically, a law school's financial health worsens primarily because its revenues decrease. Less typically, rising costs can be the primary cause of a decline in a law school's finances. A decrease in law school revenues might not be directly related to the law school's operations. In public schools, funding is sometimes allocated by the state legislature directly to the school or to residents studying in that discipline.<sup>257</sup> That funding may be reduced or eliminated for reasons that are not related to the school's operations.<sup>258</sup> For example, the legislature or the state's higher education board may decide that the state has enough practitioners in a particular profession for the foreseeable future and thus may decide to no longer subsidize that education.<sup>259</sup> Occasionally, a legislature or state higher education board may cut targeted funding for essentially political reasons.<sup>260</sup> Thus, funds to the school may be reduced or eliminated even though the school itself is otherwise thriving. If replacement funds cannot be found to cover the deficit, the governing board may decide to close the school. Obviously, the most realistic source of such funds would be to increase student tuition.<sup>261</sup>

Although many people might assume that a law school automatically has complete control over the tuition its students pay, in fact, tuition from all students belongs to the university, which generally can allocate those funds as it sees fit. The ABA only requires the university to explain to the law

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<sup>256</sup> Freedman, *supra* note 240, at 21 (stating that the decline in state budget funding lead to discussions of closing the two SUNY dental schools).

<sup>257</sup> Connie Lenz, *The Public Mission of the Public Law School Library*, 105 L. LIBR. J. 31, 40 n.67 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2101234](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101234); LSU Louisiana State University, *Statement of Revenues, Expenses and Changes in Net Assets As of June 30, 2012 and 2011*, (June 30, 2012), [https://www.lsu.edu/administration/ofa/oas/far/supplement-financial-reports/fy2012/br/SRECNA\\_BR\\_FY12.pdf](https://www.lsu.edu/administration/ofa/oas/far/supplement-financial-reports/fy2012/br/SRECNA_BR_FY12.pdf); Texas Tech University Institutional Research, *Formula Funding Codes and Rates for FY 2014 and FY 2015 Biennium—SBI*, TEX. TECH UNIV. (Feb. 28, 2015), <https://www.depts.ttu.edu/irim/FormulaFunding/FormulaFundingFY2014-15.pdf>.

<sup>258</sup> *E.g.*, Matthew Watkins, *Texas colleges fret about \$1 billion in expected funding missing from budget plan*, TEXAS TRIBUNE, Jan. 24, 2017, <https://www.texastribune.org/2017/01/24/universities-worry-about-1-billion-worth-funds-exc/>.

<sup>259</sup> *Dental-School Closing Proposal Under Fire at UK and U of L*, *supra* note 240.

<sup>260</sup> Rob Christensen, *The GOP crafts a message to UNC, with a chain saw*, THE NEWS & OBSERVER, May 19, 2017, <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/rob-christensen/article151560512.html>; Richard Fausset, *University of North Carolina Board Closes 3 Centers*, N.Y. TIMES, Feb. 28, 2015, at A11; Gabriel Nelson, *Law Students' Role in Farm Pollution Suit Angers Md. Lawmakers, Sparks Nat'l Debate*, N.Y. TIMES, Apr. 8, 2010, <http://www.nytimes.com/gwire/2010/04/08/08greenwire-law-students-role-in-farm-pollution-suit-anger-96381.html?pagewanted=all>; Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES, Apr. 3, 2010, [http://www.nytimes.com/2010/04/04/us/04lawschool.html?\\_r=0](http://www.nytimes.com/2010/04/04/us/04lawschool.html?_r=0).

<sup>261</sup> Lenz, *supra* note 257.

school how law school-generated funds are used for non-law school purposes.<sup>262</sup> The 2014 revision of the ABA's Standards for Approval of Law Schools eliminated a presumption that law school-generated revenues would be used for law school purposes.<sup>263</sup> A school might see a decrease in its net allocation from the university because the university desires to re-direct those funds elsewhere either because the university central functions are in need of more funds or because the university believes that those funds are better allocated to other units.<sup>264</sup>

Financially, the traditional rule of thumb for measuring a law school was whether its operating costs could be kept to 80% of its tuition revenues net of financial aid. The remaining 20% could then be re-allocated by the university to other academic units or for central administration costs.<sup>265</sup> Many, perhaps most, law schools now run at a break-even level or consume funds from the university.<sup>266</sup> The question for university board members then will be whether and for how long the university can tolerate this reduction of law school financial contribution or how long and to what extent the university can and will subsidize the law school financially. Overarching this is whether the law school and university believe that the current setting is the new normal or whether they will take actions designed to restore the law school to being a net producer of revenues.<sup>267</sup>

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<sup>262</sup> ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 202(b) (2017-2018) [hereinafter ABA STANDARDS].

<sup>263</sup> *Id.*; cf. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 210(c) (2013-2014) ("The resources generated by a law school that is part of a university should be made available to the law school to maintain and enhance its program of legal education.").

<sup>264</sup> While virtually every university identifies academic units that it believes are underperforming compared to other units, three-quarters of universities intend to increase their emphasis on cutting such underperforming units. See 2017 SURVEY OF COLLEGE AND UNIVERSITY CHIEF ACADEMIC OFFICERS 35 (Scott Jasckik & Doug Lederman eds 2017).

<sup>265</sup> Jeremy Paul, *Saving the Canary*, 66 SYRACUSE L. REV. 479, 482 (2016); Jay Sterling Silver, *The Case Against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISCOURSE 50, 53 (2012). Many academic units that are part of the university's core mission tend not to generate net tuition sufficient to sustain their operations and are cross-subsidized by other academic units. Units such as most professional schools do generate excess funds, although dental schools traditionally were net consumers rather than net producers of revenues. See William F. Massy, *Productivity Issues in Higher Education*, in RESOURCE ALLOCATION IN HIGHER EDUCATION 49, 74 (William F. Massy ed., 1996); Frakt, *supra* note 43; 1983 FUTURE OF DENTISTRY, *supra* note 82, at 39; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 180; WILLIAMS, *supra* note 242, at 4; Schackner, *supra* note 240; HARDIGAN & REED, *supra* note 127, at 7. Cf. Sharif Durhams, *New Marquette school will reshape education in dentistry*, MILWAUKEE J. SENTINEL (Apr. 29, 2000).

<sup>266</sup> Brown, *supra* note 29; Yellen, *supra* note 29; Gold, *supra* note 1; Matasar, *supra* note 29; Wu, *supra* note 29; Barnhizer, *supra* note 29; Leichter, *supra* note 41; Standard & Poor's, *supra* note 25, at 1, 9; Campos, *supra* note 42; Koumpilova, *supra* note 30; Verges, *supra* note 30.

<sup>267</sup> See, e.g., Kenneth P. Ruscio, *Washington and Lee School of Law Strategic Transition Plan*, WASH. & LEE UNIV. (Feb. 9, 2015), <http://www.wlu.edu/presidents-office/messages-to>

Most paradigmatically in the legal education crisis, the school may find itself short of revenues for operational reasons. For example, the number of matriculants may decrease either because the school seems less desirable to applicants or because the pool of possible applicants has declined. Further, a decline in applicants will typically lead schools to increase their financial aid awards, which reduces the net tuition attributable to the school.<sup>268</sup> As the dental school crisis illustrated, a private school that competes with a strongly supported state school may not be able to lower its net tuition charges to attract matriculants admitted to both schools and thus may see its revenues decline.<sup>269</sup> Less commonly, to the extent a school derives significant revenues from gifts, endowment income, or sponsored research, a decline in any of those sources could have a deleterious effect on the school.

A law school's costs will typically be relatively stable, but they can increase in troublesome ways. For example, schools might see their costs increase if they have added or refurbished their physical plant. Those costs of construction are frequently financed such that the school is obligated to pay for the construction long after the construction work is completed, and regardless of whether the school actually benefits from the new construction. In addition, new construction typically means higher maintenance costs, which may be difficult to contain.<sup>270</sup>

Of course, a school with stable costs is not the same as a school that can decrease costs significantly. A major part of any school's costs is salaries and benefits for faculty and staff.<sup>271</sup> Tenured faculty costs cannot realistically be cut without significant disruption in the school and danger to the program. As a school's financial situation erodes, of course, a school may have little choice but to incur the fall-out from such reduction.<sup>272</sup>

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the-community/message-to-the-law-school-community/strategic-transition-plan.

<sup>268</sup> Leichter, *supra* note 41; Elizabeth G. Olsen, *The Financial Aid Arms Race at Law Schools*, FORTUNE, Aug. 15, 2013, <http://fortune.com/2013/08/15/the-financial-aid-arms-race-at-law-schools/>.

<sup>269</sup> Manor, *supra* note 225.

<sup>270</sup> Standard & Poor's, *supra* note 25. (noting the finances of Brooklyn Law School were seriously and negatively affected by ownership of student housing buildings); Steven Davidoff Solomon, *Creditors Keep Troubled Law Schools on Life Support*, N.Y. TIMES (Nov. 4, 2014), [http://dealbook.nytimes.com/2014/11/04/worth-nothing-failing-law-schools-are-kept-on-life-support/?\\_r=0](http://dealbook.nytimes.com/2014/11/04/worth-nothing-failing-law-schools-are-kept-on-life-support/?_r=0) (noting the finances of Thomas Jefferson School of Law were seriously and negatively affected by a new building completed just before the legal education crisis).

<sup>271</sup> *University Budgets: Where Your Fees Go*, *supra* note 43; see also Desrochers & Kirshstein, *supra* note 43, at 15 (providing a breakdown of faculty expenditures at universities).

<sup>272</sup> Jones & Smith, *supra* note 46; cf. Jones *supra* note 235.

For example, Valparaiso's law school recently offered buyouts to twenty-six tenured and long-term contract faculty, and ten accepted, while an additional four chose to retire.<sup>273</sup> The law school reduced its costs by one-third, but these actions did not result in particularly positive public relations, nor were all the faculty overjoyed with this result.<sup>274</sup> Their teaching loads increased considerably.<sup>275</sup> Reducing untenured faculty has less institutional cost, but may still severely affect the school's operations.<sup>276</sup> Valparaiso terminated three of its untenured full-time faculty.<sup>277</sup> Although reducing staff can often be done with less negative publicity and less institutional damage,<sup>278</sup> the reality is that most schools are not significantly overstaffed. Thus the number of staff positions that can be cut without a significant impairment of the school's operation is relatively small. Further, of course, staff members tend to earn relatively modest salaries such that even if a large number of staff could be cut, the ultimate financial savings are likely to be fairly small.

## 2. Attempts to Increase Revenue

Law schools have naturally attempted to increase their revenues from non-JD-tuition sources. Frequently these approaches are ancillary to the school's core activities. Some methods that schools use may be successful in the sense that they generate revenues in excess of direct costs, but overall, they do not generate significant net revenues. Further, and more perniciously, they are likely to distract key law school personnel, especially the dean and principal staff members, from other more central tasks.

As the dental schools discovered, and as all fundraising professionals know, law schools cannot fundraise their way to economic viability except in rare instances of truly transformative gifts.<sup>279</sup> Fundraising can help at the

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<sup>273</sup> Marilyn Odendahl, *Valparaiso Law School Reduces Faculty, Class Size to Prepare for a Different Future*, IND. L., June 29, 2016; Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, N.Y. TIMES, June 17, 2016, [http://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html?\\_r=0](http://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html?_r=0); Dave Stafford, *Valpo Law Announces Faculty Buyouts, Smaller Future Classes*, IND. L., Feb. 26, 2016.

<sup>274</sup> Odendahl, *supra* note 273; Scheiber, *supra* note 273; Stafford, *supra* note 273.

<sup>275</sup> Stafford, *supra* note 273.

<sup>276</sup> Lat, *supra* note 52; Stafford, *supra* note 273 (noting that three untenured faculty members had been given termination notices).

<sup>277</sup> Odendahl, *supra* note 273.

<sup>278</sup> See Paul Caron, *UC-Hastings Reduces Incoming Class by 20%, Cuts 27 Staff Positions*, TAXPROF BLOG (Apr. 27, 2012), [http://taxprof.typepad.com/taxprof\\_blog/2012/04/uc-hastings.html](http://taxprof.typepad.com/taxprof_blog/2012/04/uc-hastings.html); Odendahl, *supra* note 273 (noting that seven staff members had been terminated); Dave Gram, *Vt. law school cutting jobs, preparing for changes*, NEWSOK (Nov. 25, 2012), <http://newsok.com/vt.-law-school-cutting-jobs-preparing-for-changes/article/feed/466988>.

<sup>279</sup> Hilary Hurt Anyaso, *Pritzker family makes unprecedented gift to Northwestern Law*,

margins, of course, through unrestricted annual fund gifts, and such giving helps cement the school's relationships with its alumni/ae. It can also help with targeted projects, although there is always the danger that the project supported is not really important to the school's overall mission. At the end of the day, such fundraising efforts, even if relatively successful, serve to enhance an already viable program, not to rescue or fix a program in trouble.

Increasing school revenue from collateral academic activities is also unlikely to increase a school's economic health.<sup>280</sup> Unlike dental schools, most law schools have not fallen for the argument that significant net revenues can be generated by continuing education programs. Rather, for most law schools, such programs, when well-run and vibrant, serve partly to enhance alumni/ae relations and to provide service to the local bar.<sup>281</sup>

Law schools seem more typically to have attempted one of two revenue-generating activities: online education and LLM programs. For many schools, online or distance education is a seductive siren song.<sup>282</sup> The ABA defines distance courses as those that have at least one-third of their time components as non-classroom time. Practically, law students are permitted to take (and thus law schools are permitted to offer) up to one semester's worth of distance education to students after the first year.<sup>283</sup> At least two law schools have received waivers from this limitation and offer a JD program with a significant distance education component.<sup>284</sup>

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NORTHWESTERN (Oct. 22, 2015), <http://www.northwestern.edu/newscenter/stories/2015/10/pritzker-family-makes-unprecedented-gift-to-northwestern-law-.html> (noting \$100 million gift to Northwestern University School of Law); *Mason Receives \$30 Million in Gifts, Renames Law School After Justice Antonin Scalia*, GEORGE MASON UNIV. NEWS, [http://www.law.gmu.edu/news/2016/scalia\\_school\\_of\\_law\\_announcement](http://www.law.gmu.edu/news/2016/scalia_school_of_law_announcement) (last visited Sept. 27, 2017) (noting \$30 million gift to George Mason University Foundation to support the Law School); Chris Mondics, *Trial lawyer Kline gives \$50m to Drexel law school*, PHILA. INQUIRER (Sept. 19, 2014), [http://articles.philly.com/2014-09-19/news/54073725\\_1\\_law-school-kline-school-law-firms](http://articles.philly.com/2014-09-19/news/54073725_1_law-school-kline-school-law-firms) (listing transformative gifts to the University of Arizona College of Law, Ave Maria School of Law, Chapman University School of Law and Drexel University School of Law).

<sup>280</sup> For a description of the kinds of programs at least some law schools are engaging in, see HANOVER RESEARCH, *supra* note 53 (But note that the listing makes no attempt to assess whether these programs generate any (let alone significant) net revenues).

<sup>281</sup> See Jason Yackee, Comment to Jose Gabilondo, *Business model changes at law schools*, PRAWFSBLAWG (Mar. 20, 2016, 5:38 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/03/business-model-changes-at-law-schools.html> (indicating a low likelihood that CLE programs generate significant net revenue for any but the most elite law schools).

<sup>282</sup> PISTONE & HORN, *supra* note 61, at X.

<sup>283</sup> ABA STANDARDS, *supra* note 262, Standard 306.

<sup>284</sup> Stephanie Landsman, *Digital cracks the final frontier: Law school*, CNBC (Apr. 5, 2015), <http://www.cnbc.com/2015/04/02/digital-cracks-the-final-frontier-law-school.html>; Sara Randazzo, *Syracuse Law School Exploring Online Degree Program*, WALL ST. J. L. BLOG (Apr. 20, 2016), <http://blogs.wsj.com/law/2016/04/20/syracuse-law-school-exploring-online-degree-program/>.

At the undergraduate level, distance education has the potential to reduce tuition; gross revenues would be increased by having more students.<sup>285</sup> But neither of the law schools with an online JD program provides a tuition discount.<sup>286</sup> If distance JD programs proliferate, or if individual online law courses become popular, schools would likely be forced to discount tuition. Law students, and others who take those courses, would tend to consider such education relatively generic. As a result, law schools providing such courses would find themselves discounting their prices.<sup>287</sup> This could be problematic for law schools because unlike at the undergraduate or even many graduate levels, the substance of online law courses would have a much more circumscribed audience. Therefore, there would be a downward limit to the amount by which tuition could be cut, and yet schools could still generate the necessary revenue.

Moreover, distance education as a solution to legal education's problem may be less attractive than appears at first blush. While distance education may, for some institutions, increase revenues, it may also increase costs.<sup>288</sup> Given the seemingly limited potential for legal education courses to increase revenue, an increase in costs could be particularly problematic for schools. As one knowledgeable higher education individual put it in the context of distance education generally, "Have you changed anything other than adding technology to the course? If you do everything exactly the same, and you add in the cost of technology, the cost of instructional designers, all you've done is add cost. . . . The bulk of the cost is people."<sup>289</sup>

The second popular method of increasing net revenues is running LLM programs. LLM and other non-JD degree and certificate programs have proliferated and the number of students in such programs has increased accordingly.<sup>290</sup> In the fall of 2010, the high-water mark for first-year law school enrollment and for total JD enrollment, there were 9,773 non-JD

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<sup>285</sup> Carl Straumsheim, *Bending the Cost Curve*, INSIDE HIGHER ED (Jan. 27, 2015), <https://www.insidehighered.com/news/2015/01/27/working-paper-suggests-online-education-can-lower-tuition-costs>; David J. Deming et al., *Can Online Learning Bend the Higher Education Cost Curve?*, 105 AM. ECON. REV. 496 (2015), <https://ai2-s2-pdfs.s3.amazonaws.com/628b/6bb11028f643443df8cb24742393ab43259e.pdf>.

<sup>286</sup> Landsman, *supra* note 284.

<sup>287</sup> Straumsheim, *supra* note 285.

<sup>288</sup> Corinne Ruff, *Does Technology Ever Reduce the Costs of Teaching?*, CHRON. OF HIGHER EDUC. (Jan. 26, 2016), <http://chronicle.com/article/Does-Technology-Ever-Reduce/235046>.

<sup>289</sup> Straumsheim, *supra* note 285.

<sup>290</sup> E.g., Avi Wolfman-Arent, *New paper chase: law school for non-lawyers*, MARKETPLACE (Aug. 15, 2016), <http://www.marketplace.org/2016/07/15/education/law-schools-offering-programs-non-lawyers>. For convenience, I will refer to these programs and students as "LLM" programs and students except where I differentiate among programs.

students.<sup>291</sup> Six years later, first-year law school enrollment had fallen by 31% and total JD enrollment was down by 25%. LLM enrollment, however, was *up* by 40% to 13,677.<sup>292</sup> The allure of LLM programs was succinctly stated:

[T]he expansion of LLM and other non-JD offerings appeals to law schools because students typically take classes which are already offered for JD students, and merely fill what would otherwise be empty seats. In other words, non-JD students typically pose no additional administrative burden for an institution. Additionally, many LLM programs draw in international tuition fee rates [i.e., little or no tuition discounting]—a fact that only strengthens the case for expanding non-JD offerings.<sup>293</sup>

Furthermore, the credentials of LLM students are not generally made public and certainly do not factor into a school's U.S. News ranking so that schools can enroll LLM students without regard to possible reputational damage.<sup>294</sup>

Even more telling than the absolute number is that the proportion of LLM students has gone up 75% in only six years. In 2010, LLM students were 6.2% of total law school enrollment and were 11% in 2016.<sup>295</sup>

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<sup>291</sup> ABA Enrollment, *supra* note 17. That number represented an increase of 2,106 (27%) from 7,667 in 2006, the most recent low-point for LLM students. *Id.*

<sup>292</sup> ABA, 2016 STANDARD 509 INFORMATION REPORT DATA OVERVIEW (2016), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2016\\_standard\\_509\\_data\\_overview.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_standard_509_data_overview.pdf) (noting first-year enrollment in fall 2010 was 52,488 and total JD enrollment was 147,525, and first-year enrollment in fall 2016 was 37,107 and total JD enrollment was 110,951); ABA Enrollment, *supra* note 17.

<sup>293</sup> HANOVER RESEARCH, ALTERNATIVE NON-JD PROGRAMMING FOR LAW SCHOOLS 3 (2013).

<sup>294</sup> Adam Scales, Comment to Jose Gabilondo, *Business Model Changes at Law Schools*, PRAWFSBLAWG (Mar. 20, 2016), <http://prawfsblawg.blogs.com/prawfsblawg/2016/03/business-model-changes-at-law-schools.html>.

<sup>295</sup> 2016 Standard 509 Information Report Data Overview, *supra* note 280; ABA Enrollment, *supra* note 17. I am indebted to Professor Derek T. Muller of Pepperdine for first surfacing this change and for preparing vivid and useful graphics. See, Derek T. Muller, *As 1L class sizes stabilize, one in nine law school enrollees are not a part of a JD program*, EXCESS OF DEMOCRACY BLOG (Dec. 15, 2016), <http://excessofdemocracy.com/blog/2016/12/as-11-class-sizes-stabilize-one-in-nine-law-school-enrollees-are-not-a-part-of-a-jd-program>.

But the costs of LLM programs are frequently higher than schools realize or admit.<sup>296</sup> As with any new program, one-time start-up costs such as obtaining ABA acquiescence, are not insignificant. Once operational, student recruiting costs may be higher than for the JD program, especially if the school is focusing on attracting international students, who now make up roughly half of all LLM students.<sup>297</sup> In addition, many programs will struggle to attract any, let alone many, students at first.<sup>298</sup> Competition for LLM students is likely strong, because 85% of law schools offer a non-JD program.<sup>299</sup>

Finally, depending upon the university's policies, the law school may not be allowed to keep any of the revenues that the LLM program generates. Knowledgeable observers suggest that a law school might typically keep 60% of its gross tuition from LLM programs.<sup>300</sup> With so many law schools now losing money from their JD programs, an LLM program's revenues might reasonably be entirely allocated to the university to offset, at least in part, university subvention of the JD program.

### B. Operational

As with a law school's financial situation, a law school's operational choices may affect its board's decision whether to close the school.<sup>301</sup> But the dental education crisis suggests that those operational choices are seldom determinative. Thus, schools are likely misguided if they make operational choices primarily in an effort to stave off closure or to increase the likelihood of the board's deciding to keep a school going. An important caveat, though, is that those changes might very well be desirable on other grounds, principally a belief that the changes are in the best interest of its students.

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<sup>296</sup> For critiques of non-JD programs, see Blake Edwards, *The Juris Masters Program: Natural Evolution or Stop-Gap for Struggling Law Schools?*, BLOOMBERG L. BIG L. BUS. (Aug. 17, 2016), <https://bol.bna.com/the-juris-masters-program-natural-evolution-or-stop-gap-for-struggling-law-schools/>; Derek Muller, *The Coming Reckoning for Non-JD Legal Education*, EXCESS OF DEMOCRACY (Nov. 14, 2016), <http://excessofdemocracy.com/blog/2016/11/the-coming-reckoning-for-non-jd-legal-education>.

<sup>297</sup> ABA, *Post J.D. Programs by Category*, [http://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d/programs\\_by\\_category.html](http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html) (last visited Sept. 27, 2017).

<sup>298</sup> Scales, *supra* note 294 (suggesting a realistic first class of five).

<sup>299</sup> ABA-Approved Law Schools, *supra* note 26 (listing 202 fully accredited law schools); ABA, *Post-J.D./Non-J.D. Programs by School*, [http://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d/programs\\_by\\_school.html](http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school.html) (last visited Sept. 27, 2017) (listing 172 schools with post-JD/non-JD programs).

<sup>300</sup> Scales, *supra* note 294 (suggesting a realistic first class of 5).

<sup>301</sup> Of course, depending upon the school and the choice being made, a law school may have complete autonomy to make a particular choice, may make the final decision after consulting with the university, or may have little or no input on the decision, which will be made by the university.

The operational choices that perhaps resonate most strongly with the university and its board are decisions about admissions, faculty credentials (i.e., the hiring, promoting, and tenuring of faculty), faculty research, and pedagogy and curriculum.

Among these operational changes, pedagogy and curriculum seem least likely to affect the board's view of the school, yet many schools seem to focus on such areas. None of the shuttered dental schools were faulted for having an inappropriate curriculum or for having an outdated or inappropriate focus.<sup>302</sup> Further, among the schools that were publically identified as being at risk for closing, none were saved by a cutting-edge curriculum or by touting other avant-garde approaches or features.

### 1. Admissions

Just as in the dental education crisis, law schools saw the decline in the number of applicants matched by a decline in the quality, using traditional measures, of the applicant pool.<sup>303</sup> A school in either discipline faced several interrelated decisions about admissions: should it keep its pre-crisis admissions criteria in place? If so, then the school needed to decide whether to adjust its recruitment efforts, and financial aid policy, to maximize its yield (i.e., the percentage of accepted applicants who matriculate). If it kept its criteria and recruitment efforts in place, then for most schools, both the number of acceptances would go down and its yield would decline. If instead a school decided to change its admissions criteria, then it needed to decide what changes were necessary to achieve what was probably a blend of lower enrollment (and its attendant financial implications) and lower traditional quality (and its attendant pedagogical and reputational implications). In that case, a school would almost certainly change its recruitment efforts, as well.

Although these questions were, and are, central to law school administrators today, the experience of the dental school crisis suggests that those decisions were not likely to affect the board decision whether to close the school, although it might be used to justify a decision made principally on other grounds. For example, nearly every dental school saw a decline in the number and quality of applicants, but only seven out of sixty were closed. Georgetown's dental school was closed although its admissions were down less than 10%.<sup>304</sup> Northwestern closed its dental school even though its admissions had rebounded by 300%.<sup>305</sup>

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<sup>302</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 45; DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 97, 210, 214.

<sup>303</sup> See *supra* notes 22–23 and accompanying text.

<sup>304</sup> Feinberg, *supra* note 202 (noting the school had 137 first-year students in the 1986–1987 year, 8.7% under its target).

<sup>305</sup> Dunn, *supra* note 236.

Leaving aside the financial component of the admissions decisions, which were covered above, boards may, in fact, care about the quality of the applicants and matriculants more than the absolute numbers. The assessment that the quality of the school's applicants is not high enough might be made in an absolute sense, but is more likely to be made comparatively. That is, the university believes that the school's applicants are of lower quality—either than in the past or in comparison to the applicants in the university's other schools, or both.<sup>306</sup> An applicant pool of insufficient quality suggests that the matriculants will also have less quality, unless the school changes its admissions criteria or recruitment efforts significantly. Northwestern was relatively candid in admitting that the quality of the dental school applicants was not on a par with the applicants to its other professional schools and that that disparity was a factor in the decision to close the dental school.<sup>307</sup>

This lack of quality may be of concern to the university in several dimensions. The university may be concerned that less capable students will not be able to take advantage of the school's opportunities and so the students' education will be shortchanged. Also, the university may be concerned that less capable students will have more difficulty finding jobs, which is deleterious both to the students, of course, but also to the institution in that placement rates are important in attracting new students and, in the professional school context, may affect rankings and institutional prestige. On the other hand, keeping student quality high enough to assuage the board may result in entering class sizes that are unacceptable to the board, either financially or because the school would have too few students to justify the school's physical and staffing (including faculty) capacity.

## 2. Faculty Credentials

A second operational concern is that the law school's faculty may have insufficient stature in terms of their credentials.<sup>308</sup> The vast majority of faculty in a university hold the Ph.D. or its equivalent, and their entire post-undergraduate education has essentially been geared toward becoming academics. Law faculty are not produced by a traditional Ph.D. program with the intention of producing academics. The law professoriate typically holds the first professional degree in law, the JD.<sup>309</sup> Their legal education

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<sup>306</sup> Rose, *supra* note 226; *Trustees of Emory University To Eliminate Dental School*, *supra* note 180.

<sup>307</sup> Banchemo & Kennedy *supra* note 235.

<sup>308</sup> See Jon Sall, *Donor Backs Closing School: But NU's Dental Alumni Fight to Keep Institution*, CHI. SUN TIMES, Dec. 28, 1997.

<sup>309</sup> See Philip L. Merkel, *Scholar or Practitioner? Rethinking Qualifications for Entry-Level Tenure-Track Professors at Fourth-Tier Law Schools*, 44 CAP. U. L. REV. 507, 508 (2016). Some law faculty hold advanced degrees either at the Master's or Doctorate level in other disciplines. Further, some law faculty have earned the LLM or S.J.D., mostly either

was not focused on entering the professoriate at all. Rather, law faculty are essentially byproducts, offal really, from the process of producing practicing lawyers. This distinction in credentials is sometimes keenly marked within universities. It is not uncommon to see internal communications listing, for example, university-wide committees that refer to faculty with the Ph.D. as “Doctor” while law faculty are “Professor” or even “Mr.” or “Ms.” Dental school faculties are like law faculties in that the vast majority of faculty have the first professional degree, the DDS or DMD. The dental faculty at Georgetown seemed to feel that their credentials as professionals rather than as academics contributed to a perception within the university that the dental faculty had less prestigious or appropriate credentials than faculty in other parts of the university.<sup>310</sup>

### 3. Research

Relatedly, a law school’s stature with the board can be decreased if the university perceives that the school’s faculty is not engaging in sufficient research or research of sufficient rigor. Dental schools historically fell afoul of their universities in this regard and that perceived deficit made a difference in the decision to close the schools at Emory, Washington University, and Northwestern.<sup>311</sup>

At most universities, faculty performance is primarily measured by scholarly productivity, which is to say research and published writing. Although institutions recognize that teaching is crucial, and many institutions claim to value teaching and scholarship equally, the reality is that scholarly output rather than teaching ability is the primary measure of faculty productivity.

The research and scholarship that law faculty produce are frequently not understood by central university administrators and academics in other disciplines and are frequently discounted, as well. In a nutshell, legal scholarship is different from scholarship in other disciplines in that the paradigm form is the 20,000- to 40,000-word article rather than either a book

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because they are teaching in the area of taxation (and therefore earned an LLM in tax) or because their JD was from a less prestigious school and, to be competitive in the hiring market for legal academics, they earned an LLM from one of the handful of elite, feeder law schools.

<sup>310</sup> Feinberg, *supra* note 201 (quoting dental faculty member who said that dentistry is not “a particularly glamorous part of education. I think some people look upon it as a trade school. They don’t realize all that we do.”).

<sup>311</sup> See Gordon, *supra* note 196 (noting that Emory University decided to focus its resources in disciplines undertaking significant research, rather than in dentistry); Mannies, *supra* note 222 (noting that Washington University’s decision made in part because research funds had fallen considerably and faculty was undertaking insufficient research); Manor, *supra* note 224; Rose, *supra* note 216; Sall, *supra* note 307 (noting that one factor in Northwestern’s decision was the university’s perception that the dental faculty did not undertake sufficient research).

or a shorter article. Articles are selected for publication and edited by students with little or no faculty input rather than the peer review process, which is the *sine qua non* in other disciplines. Further, co-authorship is not as common as it is in other disciplines. Finally, a standard trope in the legal profession is to denigrate current legal scholarship as being nearly completely irrelevant to judges and the practicing bar.<sup>312</sup>

The dental schools faced a similar dynamic. The faculty's lack of research, or at least of research the university deemed valuable to it, was a factor in the closing of the schools at Emory, Washington University and Northwestern.<sup>313</sup> Dental academics were well aware of their shortcomings in research and scholarship.<sup>314</sup> Even as late as the early 2000s, one of the important impediments to recruiting qualified dental faculty was their lack of interest in, or ability to conduct, research.<sup>315</sup>

#### 4. Pedagogy and Curriculum

Finally, as the dental education crisis showed, a law school's viability can be decreased if the university perceives that the school's pedagogical approach is insufficiently rigorous or theoretical. Dental education's practical, theoretical approach hurt at least some dental schools in their relationship with their university, although it was not a factor in schools' closings.<sup>316</sup> The final two years of dental school are spent in the dental clinic, which was, and often still is, seen as primarily intended to teach physical, technician-oriented trade skills rather than intellectually-rooted, but practical skills suitable for a profession.<sup>317</sup>

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<sup>312</sup> Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth Century Bulgaria*, 18 GREEN BAG 2D 251 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2586464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586464); John Roberts, Address at the 4th Circuit Annual Conference, June 25, 2011, <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>.

<sup>313</sup> See Gordon, *supra* note 196 (noting Emory University decided to focus its resources in disciplines undertaking significant research, rather than in dentistry); Mannies, *supra* note 226 (noting Washington University's decision made in part because research funds had fallen considerably and faculty was undertaking insufficient research); Sall, *supra* note 308 (one factor in Northwestern's decision was the university's perception that the dental faculty did not undertake sufficient research); Rose, *supra* note 226.

<sup>314</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 7–8; RICHARD W. VALACHOVIC ET AL., THE VALUE OF THE DENTAL SCHOOL TO THE UNIVERSITY 5–6 (1998).

<sup>315</sup> N. Karl Haden et. al, *Meeting the Demand for Future Dental School Faculty: Trends, Challenges, and Responses*, 66 J. DENTAL EDUC. 1102, 1106, 1109 (2002).

<sup>316</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 7 (“[R]esearch builds a knowledge base for improving the effectiveness and efficiency of oral health services; enriches the educational experience for students; reinforces the school's role as a disseminator of validated practice advice to dental practitioners; and strengthens the stature of dentistry within the university and the broader community.”).

<sup>317</sup> *Id.* at 8, 12, 100 (stating that there is too much emphasis on lab work that in practice is actually done by technicians rather than by dentists). ADEA Comm'n on Change &

But, it is clear from the dental schools' experience that curricular change, however desirable, is not essential to survival.<sup>318</sup> All dental schools had essentially the same curriculum and no significant differences existed between the curricula of those schools that closed and those that did not. Nonetheless, the perception of dental education pedagogy surely contributed to the dental school's alienation from other academic units and to central administrators' belief that dental education was not as rigorous or academic in nature as other disciplines.

Legal education suffers from some of the same perceptions. Ironically, those within the university and those within the legal profession seem to criticize legal education for reasons that are diametrically opposed to each other. Within the university, legal education is often derided as a trade school, offering essentially practical skills training rather than the intellectually strong, theoretical education that is supposedly the hallmark of a traditional university education. The profession, however, derides legal education as three years of ivory tower philosophizing that leaves graduates almost completely unprepared to practice law, even with the support of a large firm, let alone in sole or small firm practice.<sup>319</sup>

### C. *The Way Forward*

As we learn from the crisis in dental education, schools with comparatively solid finances and stable operations were not immune from being closed. Contrarily, schools that ran at a loss and that had somewhat haphazard operations often survived. The lesson is not that finances and operations are irrelevant to a school's survival, it is that those facets are not determinative. More important, in the end, than either finances or a school's current approach to operations is the school's intentional focus on mission and engagement. Attention to mission and to engagement implicate the school's and the university's values, standards, and purpose. These qualitative, non-financial, and non-operational aspects can be particularly important in institutions such as universities, which, like other nonprofit entities, focus on non-economic as well as economic qualities.<sup>320</sup> A school's focus on these connections, the skills and attitudes of its dean and faculty, and an understanding (note that I do not say embracing) of the importance of prestige and rankings in legal education are the ways forward.

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Innovation in Dental Educ., *The Case for Change in Dental Education*, 70 J. DENTAL EDUC. 921, 922 (2006).

<sup>318</sup> Kalkwarf et al., *supra* note 174, at 1085–86; Kassebaum et al., *supra* note 174, at 915.

<sup>319</sup> See, e.g., Bourne, *supra* note 5, at 661, 661 n.36; Segal, *supra* note 10.

<sup>320</sup> Debra C. Minkoff & Walter W. Powell, *Nonprofit Mission: Constancy, Responsiveness, or Deflection?*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 591 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

The overarching lesson of the crisis in dental education is that those schools that do not pay appropriate attention to mission and engagement will be at much higher risk of closure. Accordingly, schools must align their principal activities, especially their external activities, with the university's perception of its mission and the university's expectations for the school in achieving that mission. Schools must also deliberately engage with constituencies outside the school itself, including, critically, others within the university. Equally vital, to engage effectively and align the school's actions with the university, a school needs a dean with a particular sort of mind-set and a faculty attitude conducive to moving forward. Finally, a school's dean and faculty must consider the importance of prestige and rankings to its ability to achieve its goals. I discuss prestige and rankings in the next section and the other processes here.

#### 1. Align with the University's Mission

Schools should ensure that their actions are aligned with the university's mission. They should also try to address their actions to the needs of the relevant professional and lay communities. This is essentially a question of strategy. While nearly all higher education institutions strive to educate their students well, to increase knowledge through research, and to generate sufficient revenue to continue or expand those functions, they vary tremendously in the emphasis they put on each function and in their definition of those functions.

For example, one institution could decide that the best way to educate students well is to admit students with the highest traditional credentials that it can attract and to gear the teaching toward providing as sophisticated and advanced a classroom experience as possible. At the same time, another institution could decide that the best way to educate students well is to admit students with extremely modest credentials and to focus its teaching toward providing as much value-added as possible. Both approaches are valid. However, a school that is focused on one approach yet situated in a university that is focused on the other is likely to be perceived by the university as less valuable to the university than other units more aligned with the university's mission and goals. More concretely, 90% of provosts said they planned to increase their emphasis on funding academic programs based on whether the program aligned with the university's mission.<sup>321</sup>

In the same way, for some universities, service to the geographically local communities is an important part of its mission. At those institutions, a school that emphasizes local service, usually via clinical services, can align

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<sup>321</sup> 2017 SURVEY OF COLLEGE AND UNIVERSITY CHIEF ACADEMIC OFFICERS, *supra* note 264, at 31.

itself with the university's mission and consolidate much goodwill in the school's location. However, even if the university does not focus on its own community, a school can increase its viability by providing concrete service to the local community. Northwestern was explicit that a major reason for closing its dental school was the school's failure to align its mission with that of the university.<sup>322</sup> Likewise, the Chancellor at the University of Pittsburgh, which considered closing its dental school, noted that a primary criterion would be whether the school was "central to the University's mission. . . ."<sup>323</sup>

## 2. Engage Outside the School

A related lesson schools should learn is that schools should engage with their university and their relevant professional and lay communities. Schools should work to garner political support for the school from within their university. Dental schools were frequently seen to be relatively isolated from other schools and also from the relevant practice communities.<sup>324</sup> At least one source suggests a connection between this isolation and the decisions to close the schools.<sup>325</sup> As early as 1983, some dental educators realized that schools would need to be actively seeking political support within their institutions if they were to continue in existence.<sup>326</sup>

One of the most vital constituencies with which to connect, the importance of which is generally underappreciated by those who are not deans, are other administrators within the university. The provost, president, chief financial officer, and chief advancement officer are naturally key players in the school's success. The deans of other academic units are also key to a school's success, because they too can be "evangelists" for the school (after their own school, of course).

## 3. Clinics as an Example of Alignment with Mission and Engagement

The dental schools' clinics can be an instructive lesson for law schools in terms of the importance both of alignment with the university's mission and of engagement. Engagement, the sense of a school's service, usually means a school's faculty resources are expended to assist people or entities outside the university, typically (but not necessarily) those located near the university. The amount, kind, quality, economic cost, and perceived benefits to the university of a school's service efforts are certainly assessed by the board and senior university leadership. Agricultural extension activities are

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<sup>322</sup> Stephanie Banchemo, *NU May Close Its Dental School*, CHI. TRIB., Dec. 16, 1997.

<sup>323</sup> Schackner, *supra* note 240.

<sup>324</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 122–23.

<sup>325</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 89–90.

<sup>326</sup> 1983 FUTURE OF DENTISTRY, *supra* note 82, at 41.

one example of this kind of activity. Many professional schools, including law schools and dental schools, operate low-cost or free clinics for local residents.<sup>327</sup>

Clinics are an important part of dental education. Half of a student's dental education, the final two years, is spent primarily in clinical settings.<sup>328</sup> The average dental school clinic handles tens of thousands of patient visits annually.<sup>329</sup> Some schools average even more. For example, the clinic at Georgetown's dental school had over 200,000 patient visits per year.<sup>330</sup> Typically, the patients at a dental school clinic are low income people from the community in which the university is located.<sup>331</sup> Although many people with above-the-median wealth and income are unaware of this, having good teeth is an extraordinarily important aspect of a person's ability to get and hold a job and to be upwardly mobile in contemporary American society.<sup>332</sup> An active dental school clinic is a nearly paradigmatic example of a professional school, and hence a university, engaging with an external community.

And yet, the experience of dental clinics during the dental education crisis vividly shows the perils of engagement without alignment with the university's mission. Both Georgetown and Washington University had very active dental clinics located near the main university. But when the board of each university closed the dental school, the fact that the school had a deep and strong engagement with the local community was unavailing. In the end, the board cared about the university's (and hence each school's) national academic reputation. Although each board doubtlessly was pleased at the dental school's engagement with the local community, the school's resources were not being used in alignment with the university's mission and so that engagement could not forestall the school's closing.

Clinical education in dentistry is perhaps the most expensive education in a university.<sup>333</sup> The dental school must pay for the entire physical plant of its clinic, unlike in medicine where those costs are cross-subsidized by the

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<sup>327</sup> ABA STANDARDS, *supra* note 262, Standard 303(b) (discussing that law schools should provide pro bono and clinic opportunities).

<sup>328</sup> AM. DENTAL ASS'N, DENTAL SCHOOL CURRICULUM (2015).

<sup>329</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 180; Allan J. Formicola et al., *Evolution of Dental School Clinics as Patient Care Delivery Centers*, 70 J. DENTAL EDUC. 1271, 1279 (2006), <http://www.jdentaled.org/content/70/12/1271.full.pdf+html> (Columbia University's dental school averages over 30K patient visits per year).

<sup>330</sup> Feinberg, *supra* note 202.

<sup>331</sup> FINANCING DENTAL EDUCATION, *supra* note 92, at 15.

<sup>332</sup> Sarah Smarsh, *Poor Teeth*, AEON (Oct. 23, 2014), <https://aeon.co/essays/there-is-no-shame-worse-than-poor-teeth-in-a-rich-world>.

<sup>333</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 90–91.

hospitals in which the medical students train.<sup>334</sup> Although dental clinics typically charge fees for their services and accept government health program payments, clinic operating expenses exceed clinic revenue by as much as 300%.<sup>335</sup>

Legal clinics are much less expensive to run than dental clinics, of course, because there are no large physical plant expenses. From a strictly financial angle, legal clinics should be more palatable to university boards than dental clinics. However, compared to so-called doctrinal courses, clinical legal education is significantly more expensive.<sup>336</sup> Thus, at least within the law school budget process, clinical courses are problematic.<sup>337</sup> Operationally, law school clinics can engage with many fewer clients than dental schools' clinics do. In terms of value to the university, then, legal clinics directly affect fewer community members than dental or medical schools do, but nevertheless can engage meaningfully.

However, legal clinics are probably more vulnerable to misalignment with the university's mission than are dental clinics. Legal clinics are subject to the same misalignment in the sense experienced by Georgetown or Washington University (i.e., the school engaged with a local community while the university valued engagement on a national scale). Moreover, unlike dentistry (or medicine) in which the provision of services to the community is universally considered a social good, law clinics, with surprising frequency, undertake projects that alienate constituencies that are important to the university. For example, clinics at LSU and the University of Maryland law schools took actions that offended powerful interests within the state. While each university may have rightly believed that, on the whole, its legal clinic was providing service to its community, other constituencies clearly disagreed.<sup>338</sup>

#### 4. The Dean and Faculty

Perhaps the most important quality a school can possess that will increase its viability is a dean who recognizes the importance of being able to articulate the school's purpose, how the school benefits the university, the school's recent successes and current challenges, and the school's plan (spearheaded by the dean but jointly crafted by the dean and faculty) for

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<sup>334</sup> *Id.*

<sup>335</sup> FINANCING DENTAL EDUCATION, *supra* note 92, at 14; Formicola et al., *supra* note 329; Walker et al., *supra* note 109.

<sup>336</sup> Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENVER U.L. REV. 1, 19–25 (2014).

<sup>337</sup> *Id.*

<sup>338</sup> Nelson *supra* note 260; Urbina, *supra* note 260.

building on those successes and meeting those challenges.<sup>339</sup> In that connection, the dean is the lynchpin to ensure that the school's plans both embrace the school's own distinctiveness, effect the faculty's vision for progress, and align with the university's mission and the university's own plans for the school.

The dean needs to be able to engage with, and work well with, his or her faculty, of course, but also with external constituencies, such as alumni/ae, practitioners in the school's locale, deans at other law schools, and accreditors. As noted, one of the most underrated skills a dean can possess is the ability to engage with the deans within the university, the university's provost, CFO, president, and board.<sup>340</sup> In most such interactions, the dean is the public face of the law school. Many external constituents will essentially equate the school with the dean's persona; the dean, in important ways, embodies the school.<sup>341</sup>

In the dental school crisis, one widespread impediment to moving forward was the dean's and the faculty's narrowness of knowledge and experience with other models of higher education and professional education.<sup>342</sup> The lesson for legal education is to seek out deans who have an appreciation, whether gained from study or experience, of other professions and of higher education generally. A second lesson is that a dean needs to have a capacity for strategic thought. In any academic field, when resources are plentiful for a school, a dean can be "successful" in the sense of remaining in place, by simply bestowing resources on as many faculty as possible. In the current crisis, and, in truth, at any time, schools will be more successful when the dean has the strategic vision to align resources with the school's (and university's) mission. As we saw with clinics at the dental schools at Georgetown and elsewhere, a major investment of resources in activities that are not aligned with what is (one hopes) a vision for the school shared by the school and university, is likely to hurt the school when a crisis develops. Finally, as noted above, a crisis such as the one in legal education can result in higher turnover of deans. Even a fabulous dean will take time, at least an academic year, to get up to speed on the school and to start to move the school forward.

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<sup>339</sup> See Donald J. Polden, *Leading Institutional Change: Law Schools and Legal Education in a Time of Crisis*, 83 TENN. L. REV. 949,977 (2016); DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 222; WILLIAMS, *supra* note 242, at 6–8.

<sup>340</sup> See WILLIAMS, *supra* note 242, at 6–8.

<sup>341</sup> Cf. DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 222

<sup>342</sup> WILLIAMS, *supra* note 242, at 5.

A crucial role for the dean is to show the university that the school's activities are consonant with the university's goals and that the school is adding value to the university in important ways.<sup>343</sup> That is, it is not enough for a school to be aligned with the university's mission and to be engaged with important external constituencies if the university's central administrators are unaware of those facts. For example, as noted above, law faculty credentials and research are areas in which universities are often critical of legal education. A dean can have a strong positive effect on the university by demonstrating the appropriateness of law faculty credentials, even though they are different from other disciplines.<sup>344</sup> Those faculty members, who teach in the law clinic and the legal research and writing program, not only have the JD, but nearly always have practice experience in the areas in which they teach.

Quite importantly, a law faculty's contingent faculty (i.e., its adjuncts) teach only part-time while practicing in the area in which they are teaching. In the university generally, contingent faculty have advanced, and frequently have terminal, degrees in their discipline but are not permanent faculty members. Thus, contingent faculty in other fields bring less in the way of distinctive education than law contingent faculty do.<sup>345</sup> For example, many law school adjuncts have comprehensive practical substantive knowledge of the course they are teaching, which may far surpass the knowledge that a tenure-track faculty member might have in that area. That sort of expertise is usually lacking in contingent faculty in other fields. Law school adjuncts can also give students more current and useful practice-skill instruction than doctrinal tenure-track faculty can. Finally, law school contingent faculty can provide valuable employment networking opportunities.<sup>346</sup> These advantages make law school adjuncts more valuable to legal education than adjuncts in other fields. Likewise, the dean can show how legal scholarship is both theoretical and practical. Legal scholarship both creates knowledge and disseminates it. Further, it pushes for progress in ways that scholarship in other disciplines seldom can.<sup>347</sup>

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<sup>343</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 222.

<sup>344</sup> *Cf.* dental education, in which both the basic science and clinical faculty tend to hold the D.D.S. ADEA, *Dental School Faculty by Primary Appointment, Percentage of All Faculty, 2012-2013 Academic Year* (2012-2013); ADEA, *Number of Faculty Positions by Appointment, 2012-2013 Academic Year* (2012-2013).

<sup>345</sup> *Cf.* dental education, in which many of the basic science and clinical faculty are, or have been, practicing dentists. VALACHOVIC ET AL., *supra* note 314, at 5-6.

<sup>346</sup> See David Lander, *Motivations For Law Schools To Use Adjuncts To Fill Gaps in the Curriculum or to Reduce Expenses*, PRAWFSBLAWG (Dec. 14, 2016), <http://prawfsblawg.blogs.com/prawfsblawg/2016/12/motivations-for-law-schools-to-use-adjuncts-to-fill-gaps-in-the-curriculum-or-to-reduce-expenses.html>.

<sup>347</sup> See Robin West & Danielle Citron, *On Legal Scholarship*, ASS'N OF AM. L. SCHS. (2014), <http://www.aals.org/wp-content/uploads/2014/08/OnLegalScholarship-West-Citron>.

Similarly, the dean should be the principal advocate with the university in support of legal education's pedagogy. A law school can distinguish itself from other units, and thereby add value to the university, through its educational approach. One way in which law schools can do so is to emphasize the experiential basis of their pedagogy.<sup>348</sup> Law schools are well placed to emphasize this aspect of their pedagogy. The ABA requires law schools to establish learning outcomes that include competency in such professional skills frequently taught through experiential education including: "interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation."<sup>349</sup> Currently, law schools must require every law student to take at least six credit hours of experiential courses, defined as a simulation course, a clinic, or a field placement (i.e., externship).<sup>350</sup> Note as well that the ABA is concerned with the possibility that, in legal education, skills training frequently lacks the requisite normative, theoretical basis that is necessary to keep skills training from becoming wholly technician-oriented. The ABA Standards explicitly require that skills training include theory and doctrine.<sup>351</sup> In that aspect, legal education seems to be avoiding a pitfall that dental education did not.

The dean must marshal resources (financial and otherwise) needed to implement the school's plans.<sup>352</sup> The dean and faculty together set the agenda for continual improvement and modernization within the school. And the faculty's collective attitude toward the institution is crucial to the school's vibrancy. At certain schools during the dental education crisis, faculty resistance to change and the faculty's isolation from other scholars impeded the school's relationship with the university and made those schools more likely to be closed.<sup>353</sup> But note that it was the dental faculty's morale and attitude that was being criticized, not faculty shared governance or the faculty's passion about the school. Faculty who were in what one commenter called a "weakened condition" (by which he meant a disengaged, cynical, fatalistic faculty) were unhelpful to the school.<sup>354</sup> That lack of faculty morale and the faculty cynicism were directly responsible, in at least one instance, for loss of board support for the school, which was eventually

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pdf; Cass R. Sunstein, *In Praise of Law Books and Law Reviews (And Jargon-Filled Academic Writing)*, 114 MICH. L. REV. 833 (2016).

<sup>348</sup> Cf. VALACHOVIC ET AL., *supra* note 314, at 5–6.

<sup>349</sup> ABA STANDARDS, *supra* note 262, Standard 302(d); *id.* INTERPRETATION 302-1.

<sup>350</sup> ABA STANDARDS, *supra* note 262, Standard 303(a)(3).

<sup>351</sup> *Id.* at 303(a)(3)(i).

<sup>352</sup> *Id.*

<sup>353</sup> DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 100, 122, 203.

<sup>354</sup> WILLIAMS, *supra* note 242, at 7.

closed.<sup>355</sup>

Some law schools have stabilized financially, in the sense that their admissions quantity and quality seem likely to remain relatively predictable, the faculty has been reduced in size, and other costs seem under control. Others are still moving toward stabilization. But every law school will be faced with making critical decisions about what can be described as strategic spending, that is, spending on the law school that is in some sense discretionary or programmatic. This kind of spending is in distinction to ongoing law school budgeting decisions for admissions/financial aid, career services, and other aspects of the school's operations. Every school will eventually have the opportunity to add faculty members,<sup>356</sup> and each year, in reality, every distinctive academic initiative at the school is subject to reassessment.

These strategic decisions involve two areas: faculty hiring and academic programming emphasis. In a law school with rising economics, deans could facilitate faculty hiring and could allocate money for academic projects that were largely *sui generis* and largely disconnected from the university's or law school's mission. Still, even in that luxurious environment, schools at which the dean and faculty made thoughtful faculty hires, related not only to curricular needs but to school mission, and deans who allocated resources for academic ventures that aligned the school with the university and outside communities, found themselves in better comparative situations than those schools that took a more ad hoc, let 1,000 flowers bloom, approach.

Now, in the new normal, it is even more important for schools to make critical decisions in those two areas with a sense of strategy. To do that, the dean must know, and one hopes help shape, the university's view of the law school and the university's expectations for how the law school's efforts fit with the university's mission. That knowledge, and the faculty's understanding and support of that vision, will allow schools to make strategic hiring and academic program decisions that will quickly inure to the school's benefit.

Schools with a dean and faculty that can accomplish these tasks will find that the school's position with the university is more secure, there are more synergy gains among the faculty and among the programs within the law school, and that all law school constituencies have a greater sense of purpose and institutional satisfaction. Schools that fail to accomplish these

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<sup>355</sup> *Id.*

<sup>356</sup> The classic example is a school that loses its only tax professor. While surely the basic income tax course could be covered well enough by a non-tax professor (or an adjunct), core advanced courses such as partnership tax, can really only be taught adequately by a faculty member who specializes in tax.

tasks will find that, in the end, they have let 1,000 flowers wilt.

#### D. *Of Prestige and Rankings*

One lesson, a central lesson, for law schools involves a dynamic that was largely unaddressed in the dental education crisis. That dynamic is the school's prestige. At the time of the dental school crisis, prestige was not a factor that concerned most schools.<sup>357</sup> Most schools received relatively modest research grants and, therefore, did little research, which is the primary basis for prestige in the sciences.<sup>358</sup> That is not to say that questions of prestige did not affect the dental schools. They did. A perceived lack of prestige at the dental school, either absolutely or in relation to the university, was cited as a reason for closing the dental school at Emory, Georgetown, Washington University, and Northwestern.<sup>359</sup>

Rankings, however, did not affect dental school closings because there were no rankings.<sup>360</sup> Because rankings and, to some extent prestige, were not endogenous to the dental school crisis, I treat them here separately. The importance of having prestige and high rankings is a clear lesson for law schools, but one that is gleaned from dental schools by their absence rather than by the way in which dental schools dealt with prestige and rankings. By contrast, of course, legal education values prestige as expressed by faculty scholarship and ranking in U.S. News.<sup>361</sup>

Universities in general seek to have prestigious programs, especially in the professional schools. For example, several universities have sought to increase their prestige by opening medical schools in recent years.<sup>362</sup> One lament from the dean of Harvard's dental school is that the dental schools that have opened since the crisis have not been located at prestigious (measured by AAU membership) universities. This suggests that, still today, universities do not view a dental school as adding to the university's

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<sup>357</sup> Cf. DENTAL EDUCATION AT THE CROSSROADS, *supra* note 73, at 202–03 (noting that the decline in number and quality of applicants might affect university prestige). The 370-page report used the word “prestige” twice. *Id.*

<sup>358</sup> *Id.* at 150, 159 & n.5.

<sup>359</sup> Haden et al., *supra* note 314, at 1109 (admonishing dental schools to increase their universities' prestige); Lau, *supra* note 236 (noting the most significant factor was declining admissions); Sall, *supra* note 295.

<sup>360</sup> Truman *supra* note 240 (re no DDS rankings). Intriguingly, or perhaps ironically, one source reports that the deans of the dental schools agreed to collectively boycott U.S. News' attempt to rank dental schools in the late 1990s and that their efforts successfully thwarted U.S. News' plans. WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 190–91 (2016).

<sup>361</sup> Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941 (2014); Brian Z. Tamanaha, *Failing Law Schools*, 33 J. LEGAL MED. 417, 420 (2012).

<sup>362</sup> Kiley, *supra* note 64.

prestige.<sup>363</sup>

“Prestige” in most university settings usually means grants, measured by the total dollars awarded to university researchers.<sup>364</sup> Legal education, by that traditional measure, actually is a special snowflake. Rather than grant money, prestige in legal education is measured by the annual spring ranking in U.S. News & World Report.<sup>365</sup> The U.S. News rankings are vital to law schools, as is prestige.<sup>366</sup> This is true even though there is a widespread belief that the rankings are not accurate or helpful to law schools or legal education more broadly.<sup>367</sup> Even if a school itself believes that the rankings are inaccurate and unhelpful, important external constituencies, principally prospective students, prospective faculty, prospective employers, and alumni/ae view the rankings as important when making decisions about the school.<sup>368</sup> Many operational decisions that law schools make are made in the shadow of those decisions’ effect on the school’s U.S. News ranking.<sup>369</sup> For example, schools change their marketing approaches in light of rankings.<sup>370</sup> Schools also consider U.S. News in almost every facet of their operations including strategic planning, admissions and financial aid, career services, faculty recruiting, and programmatic choices.<sup>371</sup> More concretely, a change in U.S. News’ methodology that discounted law school-funded jobs for graduates resulted in a dramatic decline in those types of jobs.<sup>372</sup>

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<sup>363</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 90; R. Bruce Donoff, *It Is Time for a New Gies Report*, 70 J. DENTAL EDUC. 809, 817 (2006).

<sup>364</sup> AAU Membership Policy, ASS’N OF AM. UNIVS., <https://www.aau.edu/who-we-are/membership-policy> (last visited Sept. 27, 2017); *see also*, HARDIGAN & REED, *supra* note 127, at 8, 11.

<sup>365</sup> MICHAEL SAUDER & WENDY ESPELAND, FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS 5 (2007); Arewa et al., *supra* note 368, at 944; Michael Sauder, *Interlopers and Field Change: The Entry of U.S. News into the Field of Legal Education*, 53 ADMIN. SCI. Q. 109 (2008). Although U.S. News rankings are only a generation or so old, a definite hierarchy of law schools has been in place from early in the twentieth century. *See* Arewa et al., *supra* note 368, at 942.

<sup>366</sup> SAUDER & ESPELAND, *supra* note 365, at 5 (“[g]iven the hyperimportance of status in the legal field”).

<sup>367</sup> Arewa et al., *supra* note 368, at 942, 1005.

<sup>368</sup> MICHAEL SAUDER & WENDY ESPELAND, FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS 2 (2007); Henderson & Zahorsky, *supra* note 5.

<sup>369</sup> SAUDER & ESPELAND, *supra* note 365, at 2; Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effect of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 L. & SOC’Y REV. 105 (2006).

<sup>370</sup> SAUDER & ESPELAND, *supra* note 365, at 1.

<sup>371</sup> *Id.* at 27.

<sup>372</sup> Paul Caron, *After U.S. News Stopped Giving Full Weight to Law School-Funded Jobs, 52% of Those Jobs Disappeared*, TAXPROF BLOG (May 3, 2016), [http://taxprof.typepad.com/taxprof\\_blog/2016/05/after-us-news-stopped-giving-full-weight-to-law-school-funded-jobs-52-of-those-jobs-disappeared.html](http://taxprof.typepad.com/taxprof_blog/2016/05/after-us-news-stopped-giving-full-weight-to-law-school-funded-jobs-52-of-those-jobs-disappeared.html).

Aligning a school's values, including the degree to which it pursues prestige, with that of the university is one aspect of U.S. News's effect. Another, though, is that a school's costs are likely to increase if it falls in U.S. News. Further, such a school may find that its faculty and staff may become less productive because they become increasingly demoralized if the school falls in the rankings.<sup>373</sup> Schools that fall in the rankings are likely to find that their yield (i.e., the percentage of accepted students who matriculate) worsens. That possibility tends to lead to schools lowering their net tuition revenue by increasing their financial aid awards in an effort to keep their yield up.<sup>374</sup> Not every law school will be identically affected, of course, and those at the top of the rankings hierarchy may not be affected much at all.<sup>375</sup>

Further, it seems likely that the cost to the university and law school of increased law school prestige is likely less than increasing the prestige in some other units, notably in the STEM fields or healthcare. In those other settings, attracting grants may require significant faculty recruitment costs and physical plant enhancements, the costs of which are only partially offset by the grant money received. In law schools, prestige is more a function of re-allocating resources rather than necessarily adding resources exclusively dedicated to prestige-enhancement. Moreover, law school prestige, because it is not grant-based, can act as a distinctive measure of university prestige, rather than contributing by being yet another grant-based prestige system. All of these qualities doubtlessly make a higher ranked law school more viable than a lower ranked one. At bottom, a major component of U.S. News's rankings is peer evaluation, which, in turn, is correlated with faculty scholarship.<sup>376</sup> More broadly, law school prestige beyond U.S. News's rankings is a function of faculty scholarship.<sup>377</sup>

Prestige is a game worth winning, but at least for some schools, it may not be a game worth playing. It is worth winning in that schools with relatively more prestige attract better (by traditional measures) students and garner higher net tuition (net of financial aid). Such school's students have more employment options. The school's university also benefits in the reflected glory of increased prestige of one of its academic units.

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<sup>373</sup> SAUDER & ESPELAND, *supra* note 365, at 1, 127–28.

<sup>374</sup> *Id.* at 2, 76–79; James Monks & Ronald G. Ehrenberg, *The Impact of U.S. News & World Report College Rankings on Admissions Outcomes and Pricing Policies at Selective Private Institutions* (Nat'l Bureau of Econ. Research, Working Paper No. 7227, 1999); cf. Sauder & Lancaster, *supra* note 369; see also Arewa et al., *supra* note 368, at 944.

<sup>375</sup> Barnhizer, *supra* note 54.

<sup>376</sup> SAUDER & ESPELAND, *supra* note 365, at 218 (noting peer reputation counts for 25% of overall ranking, the highest single input).

<sup>377</sup> Tamanaha, *supra* note 361, at 420.

But at least some law schools may choose not to compete for higher rankings. There may be a variety of reasons for this. One may be an institutional belief that the ranking inputs are inappropriate measures of law school quality. Relatedly, a school might believe that its mission requires that the school devote resources in ways that do not maximize its ranking. One intriguing recent suggestion is that schools that focus on rankings will be less able to compete in the future because they will be oblivious to the coming disruption in the provision of legal education.<sup>378</sup>

Schools that have low rankings<sup>379</sup> or that do not compete for prestige must bear in mind two costs. First, axiomatic from the benefits of increased prestige, it will likely be more expensive to operate a school with less prestige. Its net tuition per student will likely be lower than a school with more prestige because it will have to award more financial aid to attract sufficient students. Further, other costs associated with admissions and student retention may increase, as well. The school's yield is likely to be lower than a comparable, but higher-ranked, school so it will have to expend more resources to expand the pool of suitable applicants to generate enough accepted students to yield an appropriate entering class.

Second, schools that have a low ranking or that do not compete for prestige should take a hard look at the dental schools' crisis. Because of the lack of a ranking system or, indeed, any widespread measure of relative prestige among dental schools, the schools were unable to distinguish themselves to prospective students. Unlike law, 80% or more of dental school graduates enter solo practice (often in space-sharing arrangements with one or two other dentists).<sup>380</sup> Thus, unlike law, lack of prestige did not harm dental schools in terms of graduate employment.

However, in admissions, the lack of prestige certainly hobbled dental schools.<sup>381</sup> The admissions consequence of lack of prestige among schools was that prospective students matriculated based on net tuition and on the convenience of the school's location.<sup>382</sup> For schools in sparsely populated areas, recruitment could be challenging. And for private schools, especially, competing on net tuition with better-subsidized public schools was difficult or impossible. As we saw, inability to compete for students with lower-priced public schools was a factor in the decisions to close Emory, Northwestern, and especially Washington University.<sup>383</sup>

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<sup>378</sup> PISTONE & HORN, *supra* note 61, at 2.

<sup>379</sup> Most pointedly, schools listed in U.S. News's bottom quartile, which it calls "second tier" and touts as "other schools to consider."

<sup>380</sup> 2001 FUTURE OF DENTISTRY, *supra* note 82, at 42.

<sup>381</sup> Lau, *supra* note 237.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

Most law schools, public and private, charge relatively similar tuition at comparable rankings levels, so private schools are capable of competing against public schools on tuition, as a general principle. As, perhaps most famously, Michael Porter pointed out, competition on price is extremely difficult to sustain because competitors can easily match the lowered price.<sup>384</sup> A school with a low ranking may have more trouble attracting sufficient matriculants without serious net tuition cuts, especially if the school is located either in an area with low college-age population (because people are unlikely to move to the area to attend a law school with low rank unless the net tuition is distinctly less than at comparable schools nearer to home) or in areas with other law schools where the number of law school seats per capita in the area is relatively high. As dental schools learned, without school prestige to bring to the university, a school may be hard pressed to point to other university benefits from continuing the school.

In any event, law schools should understand that they need to make the case to their university that they can bring prestige to the institution. They also need to ensure that the university understands that law school prestige is differently measured than in other disciplines and that the costs and benefits are manifested in different ways.<sup>385</sup>

#### E. Observations from Closed Law Schools

Two universities to date, Hamline University and Whittier College,<sup>386</sup> have announced the closing of their law schools.<sup>387</sup> Of course, perfect transparency in either case is impossible to come by, so analysis of these closings needs to rely on inferences from publicly available information.

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<sup>384</sup> MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRY AND COMPETITORS* 17 (1980).

<sup>385</sup> VALACHOVIC ET AL., *supra* note 314, at 5–7.

<sup>386</sup> The formal name of the institution is Whittier College, although I refer to it as a university for simplicity.

<sup>387</sup> InfiLaw closed Charlotte School of Law, one of its three for-profit law schools. See Press Release, Charlotte School of Law, Charlotte School of Law Statement regarding Closure (Aug. 24, 2017), [https://www.insidehighered.com/sites/default/server\\_files/files/Press%20Release\\_Closure.pdf](https://www.insidehighered.com/sites/default/server_files/files/Press%20Release_Closure.pdf). In addition, another of InfiLaw's schools, Arizona Summit Law School, is currently on ABA probation. Council of Section of L. Educ., ABA, *Notice of Probation and Specific Remedial Action Arizona Summit Law School* (Mar. 2017), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/March2017CouncilOpenSessionMaterials/2017\\_march\\_arizona\\_summit\\_probation\\_remedial\\_action\\_notice.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/March2017CouncilOpenSessionMaterials/2017_march_arizona_summit_probation_remedial_action_notice.authcheckdam.pdf). In addition, Thomas M. Cooley School of Law closed one of its five campuses at the end of 2014 but the other campuses remained in operation. See *supra* note 34. Finally, in October 2016 Indiana Tech University announced the closing of its law school. However, that law school never received full accreditation from the ABA and in fact had been provisionally accredited only seven months before the closure decision was made. Indiana Tech's law school was in operation for only four academic years. See *supra* note 35.

Nonetheless, both closings are consistent with my claims that the schools most in danger of being closed are not those that simply have deteriorating financial metrics. Rather, factors such as the university's own financial position, a university perception that law school quality is too low compared to other academic units, a school's lack of mission fit with the university, and the availability of a solution that seems likely to generate minimal negative public opinion for the university and little dislocation for law school faculty, staff, and students play a larger role in the decision to close a school.

Like many other law schools, both Hamline and Whittier had declining first-year enrollment. Hamline's entering class declined by over 60% between the fall of 2011 and 2014.<sup>388</sup> Its 2014 entering class was among the smallest in the country.<sup>389</sup> Whittier's entering class declined by over 50% between the fall of 2011 and 2016.<sup>390</sup> Hamline's LSAT scores remained essentially constant though its median financial aid award increased, suggesting that Hamline chose to maintain the quality of its entering classes, by traditional measures, while sacrificing tuition revenues.<sup>391</sup> It seems likely that Hamline's tuition revenue, net of financial aid, fell perhaps by half between 2011 and 2014.<sup>392</sup> At Whittier, however, unlike at Hamline, LSAT scores declined precipitously and its median financial aid award doubled.<sup>393</sup> This suggests that Whittier's tuition revenues declined considerably and that the student quality, by traditional measures, fell, as well. Still, as noted above, many law schools have run—and probably are currently running—with significantly reduced net tuition revenues, and the LSAT scores of

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<sup>388</sup> The merger of Hamline and William Mitchell was announced in February 2015. Maura Lerner, *Hamline, William Mitchell law schools to merge*, STAR TRIB. (Feb. 13, 2015), <http://www.startribune.com/printarticle/?id=291856891>.

<sup>389</sup> In the fall of 2014, Hamline was in the bottom 12% of all law schools for number of entering students. Adam Wahlberg, *Why William Mitchell and Hamline Law had to merge*, MINNPOST, Feb. 18, 2015, <https://www.minnpost.com/education/2015/02/why-william-mitchell-and-hamline-law-had-merge>.

<sup>390</sup> ABA, *Whittier Law School 2011 Standard 509 Information Report*, <http://www.abarequireddisclosures.org/>; ABA, *Whittier Law School 2016 Standard 509 Information Report*, <http://www.abarequireddisclosures.org/>. The fall 2016 statistics are relevant because Whittier College announced the closure of its law school in the Spring of 2017.

<sup>391</sup> ABA, *Hamline University School of Law 2011 Standard 509 Information Report*, <http://www.abarequireddisclosures.org/>; ABA, *Hamline University School of Law 2015 Standard 509 Information Report*, <http://www.abarequireddisclosures.org/>.

<sup>392</sup> Cf. *Hamline University School of Law 2011 Standard 509 Information Report*, *supra* note 391; ABA, *Hamline University School of Law 2014 Standard 509 Information Report*, <http://www.abarequireddisclosures.org/>; ABA, *Hamline University School of Law 2015 Standard 509 Information Report*, <http://www.abarequireddisclosures.org/>.

<sup>393</sup> Whittier Law School 2011 Standard 509 Information Report, *supra* note 390; Whittier Law School 2016 Standard 509 Information Report, *supra* note 390. Whittier's 75th/50th/25th percentile LSAT scores declined from 154/152/149 in 2011 to 149/146/144 in 2016. Its median financial aid award for full time students went from \$9,000 to \$18,000.

matriculants have declined nationwide.<sup>394</sup>

Hamline had been rumored for years to be in talks with William Mitchell before an agreement was reached in February 2015.<sup>395</sup> Serious discussions began as the fall 2014 semester began.<sup>396</sup> More than a year before that, however, Hamline had taken steps to lower its costs by reducing its faculty size. Between the fall of 2011 and the fall of 2014, Hamline reduced its full-time faculty by roughly half, in part by offering early retirement buy-outs.<sup>397</sup> In terms of the law school's operational and financial importance to the university, law students accounted for less than 10% of the university's total student body and net law school tuition was just over 10% of the university's total net tuition.<sup>398</sup> In terms of a presence on campus and a financial impact on the university as a whole, a decline in the number of law students and a significant decline in the law school's net revenues need not have had a major effect on the university's health.

Further, Hamline was comparably situated with the other two private schools in Minnesota, all of which were located in the Minneapolis/St. Paul area. Advertised tuition at all three schools was within \$2,500 of each other. Moreover, for the two academic years before the closing of Hamline was announced, the three law schools were in the same U.S. News cohort, tightly bunched in the third quartile. So far nothing suggests why Hamline was closed rather than its competitors William Mitchell or St. Thomas, or any number of other law schools in other cities. More pertinently, Hamline seemed quite capable of competing successfully with William Mitchell and with St. Thomas.

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<sup>394</sup> See *supra* note 22 and accompanying text.

<sup>395</sup> Hamline University, *Hamline School of Law and William Mitchell College of Law to Combine* (Feb. 13, 2015), <https://www.hamline.edu/news/2015/hamline-law-william-mitchell-combine/>; Adam Wahlberg, *supra* note 389.

<sup>396</sup> Wahlberg, *supra* note 389.

<sup>397</sup> Compare *Hamline University School of Law 2011 Standard 509 Information Report*, *supra* note 391 (noting 34 fall/35 spring) with *Hamline University School of Law 2014 Standard 509 Information Report*, *supra* note 392 (noting 14 fall/18 spring). See Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL. ST. J., July 15, 2013, <https://www.wsj.com/articles/SB10001424127887323664204578607810292433272> (noting early retirement offers) and Hamline University, *Hamline University of Minnesota Financial Statements Years Ended June 30, 2014 and 2013*, at 22 <https://www.hamline.edu/offices/finance/>. Note that William Mitchell had also engaged in an aggressive downsizing of its faculty. William Mitchell College of Law 2011 Standard 509 Information Report and William Mitchell College of Law 2015 Standard 509 Information Report, <http://www.abarequireddisclosures.org/>.

<sup>398</sup> Hamline University, *Fall Census Day Enrollment, 1997 to Present*, [https://www.hamline.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147500001&li bID=2147500134;\\_Hamline University, Hamline University of Minnesota Financial Statements: Years Ended June 30, 2016 and 2015](https://www.hamline.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147500001&li bID=2147500134;_Hamline University, Hamline University of Minnesota Financial Statements: Years Ended June 30, 2016 and 2015), at 5, 34, <https://www.hamline.edu/offices/finance/> (last visited Sept. 27, 2017).

Curiously, and perhaps tellingly, officials at Hamline and William Mitchell were completely silent about their motivations. The joint press release extolls the virtues of a combined law school but says nothing about why Hamline wanted to divest itself of its law school, nor why William Mitchell was eager to absorb its cross-town rival. My surmise is that the decision to close the law school came about from a combination of financial issues at the university level, a lack of mission fit between the law school and the university, a motivated acquiring law school, and a solution that seemed likely both to generate little ill will for Hamline and little dislocation for the law school's faculty, staff, and students.

Two years before the transaction, Hamline University showed an operating surplus of \$2.8 million dollars. The next year the surplus was only \$995,000. In the 2014-2015 year, in which the transaction was negotiated and announced, Hamline ran an operating deficit of \$1.5 million, of which only 10% was attributable to the law school's operations. The university's operating losses continued after the law school was disposed of, with the university running another \$1.5 million operating deficit in 2015-2016.<sup>399</sup> This suggests that the university was motivated to dispose of the law school to help stanch its own operating deficits.

In terms of mission, the law school was the only academic unit at Hamline that did not educate undergraduates. Hamline's median ACT score for entering undergrads was roughly in the 75th percentile; the law school's median LSAT score was just above the 50th percentile.<sup>400</sup> The university's mission focused on distinctly more able students (by traditional measures) than the law school did. It is entirely plausible, though I am aware of no public information, that the disconnect between the university's mission and that of the law school played an important part in the university's decision to discontinue the law school.

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<sup>399</sup> Hamline University, *Hamline University of Minnesota Financial Statements Years Ended June 30, 2014 and 2013*, at 4, 5 <https://www.hamline.edu/offices/finance/>. Hamline University, *Hamline University of Minnesota Financial Statements Years Ended June 30, 2015 and 2014*, at 4, <https://www.hamline.edu/offices/finance/>; Hamline University, *Hamline University of Minnesota Financial Statements Years Ended June 30, 2016 and 2015*, at 4, 5, 34, <https://www.hamline.edu/offices/finance/> (noting 2015-2016 deficit, 2014-2015 university deficit without law school, and law school deficit).

<sup>400</sup> Hamline University, *Undergraduate Admission: High School Counselor's Guide*, <https://www.hamline.edu/undergraduate/admission/highschool-counselors-guide.html> (last visited Sept. 27, 2017); ACT, Inc., *National Distributions of Cumulative Percents for ACT Test Scores: ACT-Tested High School Graduates from 2013, 2014, and 2015*, <https://www.act.org/content/dam/act/unsecured/documents/NormsChartMCandComposite-Web2015-16.pdf> (last visited Sept. 27, 2017); *Hamline University School of Law 2015 Standard 509 Information Report*, *supra* note 392; LSAC, IRR ADDITIONAL INFORMATION DOCUMENT (2015).

Perhaps an added, possibly determinative, incentive for Hamline was William Mitchell's motivation to acquire Hamline's law school. In many respects, William Mitchell's position was similar to Hamline's in that William Mitchell's entering class declined 45% from 2011 to 2014, its median LSAT declined a few points, and its median financial aid grant stayed relatively constant.<sup>401</sup> Like Hamline, William Mitchell had shed faculty, as well.<sup>402</sup> But William Mitchell's operating results were fluctuating wildly. In the three academic years before the transaction, William Mitchell reported a surplus of \$2.9 million, a deficit of \$1.6 million, and a surplus of \$1.3 million.<sup>403</sup> But in the year in which the transaction was negotiated, Mitchell's tuition revenue declined by \$3 million dollars and its financial aid cost increased by \$1 million.<sup>404</sup> In the end, the school reported an operating deficit of \$3.2 million.<sup>405</sup> Perhaps William Mitchell's administration believed that its finances were likely to erode further in the coming years. If so, this belief may have spurred William Mitchell to offer Hamline terms generous enough that Hamline agreed to divest itself of its law school.<sup>406</sup>

Finally, Hamline's and William Mitchell's reticence to be explicit about the reasons for the acquisition and to even acknowledge that Hamline was effectively closing, may have helped the transaction to take place. Hamline, and the law school, could simply elide over the fact that the law school was closing. Since William Mitchell was located about three miles away from Hamline, there was essentially no dislocation involved for the remaining Hamline faculty, staff, or students. It is possible that Hamline's president was keenly aware of the attractiveness of structuring the acquisition as a combination with a near-by institution. She had been a senior administrator at Seattle University when it acquired the University of Puget Sound School of Law, then located about 30 miles away.<sup>407</sup>

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<sup>401</sup> *Whittier Law School 2011 Standard 509 Information Report*; *supra* note 390; ABA, *Whittier Law School 2014 Standard 509 Information Report*; <http://www.abarequireddisclosures.org/>.

<sup>402</sup> Leichter, *supra* note 41.

<sup>403</sup> William Mitchell College of Law, IRS Form 990 (2013); William Mitchell College of Law, IRS Form 990 (2014).

<sup>404</sup> *Compare* William Mitchell College of Law, IRS Form 990, at 9–10 (2014) *with* William Mitchell College of Law, IRS Form 990, at 9–10 (2015).

<sup>405</sup> William Mitchell College of Law, IRS Form 990, at 1 (2015). Note that the total deficit reported, \$4.8 million, includes \$1.6 million in expenses incurred in acquiring Hamline. *Id.* at 10.

<sup>406</sup> Some of the arrangement between Hamline and William Mitchell is described in *Hamline University of Minnesota Financial Statements: Years Ended June 30, 2016 and 2015*, *supra* note 398, at 27, 32–34.

<sup>407</sup> Keith Ervin & Lee Moriwaki, *Seattle U Acquires UPS Law School—News Of Deal Shocks And Angers Students On Tacoma Campus*, SEATTLE TIMES (Nov. 9, 1993), <http://community.seattletimes.nwsources.com/archive/?date=19931109&slug=1730804>.

At Whittier, the university had been considering significant changes in the law school since at least 2015 when the board appointed a subcommittee to explore “options for the future” of the law school.<sup>408</sup> By January 2017, the university made known to the law school faculty that an agreement to transfer the law school was being negotiated.<sup>409</sup> Those negotiations fell through and the university was unable to identify another entity that could plausibly buy or take the law school. In mid-April 2017, the university announced that it would not admit new law students in the fall.<sup>410</sup> The official announcement said the board had long been concerned by “the challenges affecting our law program” and had taken devoted resources to “improve student outcomes” and “achieve enhanced academic viability.”<sup>411</sup> A few weeks later, a spokesperson for Whittier said that the decision was based on “educational considerations” and not because of “financial exigency.” The spokesperson also said that the university closed the law school because enrollment had declined and because of “students’ poor academic achievement,” which presumably means poor bar passage results.<sup>412</sup>

In line with many schools, Whittier’s net tuition revenue had declined as a result of both fewer entering students and increased financial aid.<sup>413</sup> But unlike some other schools, Whittier had been able to cut its costs and, at least through the 2014-2015 year, it ran an operating surplus.<sup>414</sup> However, Whittier’s bar passage rates compared to those of other ABA accredited schools in California were abysmal. Whittier placed dead last out of 21 ABA accredited California law schools, and far below the median, in the July bar

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<sup>408</sup> Whittier Law School, *A Message from the Whittier College Board of Trustees*, (Apr. 19, 2017), <https://www.law.whittier.edu/index/news/article/a-message-from-the-whittier-college-board-of-trustees>.

<sup>409</sup> Plaintiffs’ Ex Parte Application for a TRO, *Cohen v. Whittier College*, 5-6 (Apr. 18, 2017).

<sup>410</sup> Whittier Law School, *supra* note 408.

<sup>411</sup> *Id.*

<sup>412</sup> Adolfo Guzman-Lopez, *Questions linger over closure of Whittier Law School*, (May 3, 2017), <http://www.scpr.org/news/2017/05/03/71427/questions-linger-over-closure-of-whittier-law-scho/>.

<sup>413</sup> Whittier College, *Audited Financial Statements For The Year Ended June 30, 2016*, at v, [https://www.whittier.edu/sites/default/files/media/businessoffice/WhittierCollege\\_Issued\\_FS\\_6\\_30\\_16.pdf](https://www.whittier.edu/sites/default/files/media/businessoffice/WhittierCollege_Issued_FS_6_30_16.pdf) (last visited Sept. 27, 2017); Whittier College, *Audited Financial Statements For The Year Ended June 30, 2015*, at v, <https://www.whittier.edu/sites/default/files/media/businessoffice/FS%2014-15%20Final.pdf> (last visited Sept. 27, 2017).

<sup>414</sup> *Audited Financial Statements For The Year Ended June 30, 2015*, *supra* note 420, at vi; Rick Selzer, *Whittier Law School shutdown raises prospect of future closures and access for underrepresented students*, INSIDE HIGHER ED. (Apr. 25, 2017), <https://www.insidehighered.com/news/2017/04/25/whittier-law-school-shutdown-raises-prospect-future-closures-and-access>.

exams in 2014, 2015, and 2016.<sup>415</sup>

While those results doubtless had an effect on the law school's recruiting efforts and thus its finances, they are also inconsistent with the university's image. As with Hamline, Whittier is essentially focused on undergraduate education rather than graduate or professional education. More prosaically, the law school is located 30 miles away from the university, roughly an hour's drive. That physical separation doubtless impeded collaboration between law and university faculties and doubtless meant that the personal relationships between the faculties and staffs of the law school and university were weak. The university's president admitted that the physical separation of the law school from the university was a factor in the university's decision to close the law school.<sup>416</sup>

Finally, a conjecture on the role of the presidents of Hamline and of Whittier in the decision to close each law school. As I noted above, a university's board would rarely, if ever, close an academic unit over the objection of the president, and a president's reputation would seldom be enhanced by shutting down a part of the university.<sup>417</sup> This dynamic may help to explain why more law schools have not been closed. But this dynamic might not have applied to either Hamline or Whittier.<sup>418</sup> In both cases, the president intended to retire within a year of closing the law school.<sup>419</sup> At such a career stage, it is possible that a president is less concerned about the effect on her reputation of cutting an academic program because she is not intending to leverage her current job into another one. Such a president might then feel more free to effect, and advocate to the board, changes in the university that otherwise might hamper the president in her career. A retiring president might push for these changes in part because they seem best for the university and in part because she, or the board (or both), might believe that dealing with such a contentious decision before retiring would allow the new president to begin with greater political

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<sup>415</sup> Staci Zaretsky, *California Bar Exam Results By Law School (2016)*, ABOVE THE LAW (Dec. 13, 2016), <http://abovethelaw.com/2016/12/california-bar-exam-results-by-law-school-2016/?rf=1>; Joe Patrice, *Who's To Blame For School's 'Horrific' Bar Results? Maybe The California Bar Examiners.*, ABOVE THE LAW Dec. 6, 2016, <http://abovethelaw.com/2016/12/whos-to-blame-for-schools-horrific-bar-results-maybe-the-california-bar-examiners/?rf=1>.

<sup>416</sup> Selzer, *supra* note 414.

<sup>417</sup> See *supra* note 240 and accompanying text.

<sup>418</sup> I emphasize that my assertions here are strictly conjectural, as no public information supports or refutes them.

<sup>419</sup> Joe Kimball, *Hamline University President Linda Hanson to retire in 2015*, MINNPOST (May 12, 2014), <https://www.minnpost.com/political-agenda/2014/05/hamline-university-president-linda-hanson-retire-2015>; *President Herzberger to Retire as President After Twelve-Year Tenure*, (June 5, 2017), <https://www.whittier.edu/news/mon-06052017-901-am/president-herzberger-retire-president-after-twelve-year-tenure>.

capital.

#### V. CONCLUSION

Most observers of the current legal education crisis seem to view law schools as *sui generis*; no other academic discipline's experience can have relevance to the current legal education issues. They also are generally negative in their outlook for law schools or focus on internal changes in legal education as the solution to the current problems. In fact, though, the crisis in dental education has much congruence to the current crisis in legal education. The lessons should be viewed as ones of optimism, not pessimism. Most centrally, the lesson is that schools will not solve their problems by looking within themselves. Rather, they, and especially their deans and faculties, must be intentional in their focus on mission and engagement. The dean, in particular, has a heightened responsibility to ensure that the school is engaged with the university and other external constituencies. In all of this, law school faculties and deans must understand the importance of prestige and rankings. The lack of prestige measure and rankings was an important drawback to dental schools.