

1-1-2018

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### Recommended Citation

Monica Teixeira de Sousa, *Class Houses: Fragility and Disunity in the Ranks of Academe or Democratizing the Future of Legal Education According to the Vision of Ivan Illich*, 15 HASTINGS RACE & POVERTY L. J. 1 (2018).

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Hastings Race & Poverty L. J.

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# Class Houses: Fragility and Disunity in the Ranks of Academe or Democratizing the Future of Legal Education According to the Vision of Ivan Illich

MONICA TEIXEIRA DE SOUSA\*

*For generations we have tried to make the world a better place by providing more schooling, but so far the endeavor has failed. What we have learned is that forcing all children to climb an open-ended education ladder does not enhance equality but, instead, favors individuals who start out earlier, healthier, or better prepared; that enforced instruction deadens the will for independent learning for most people; and that knowledge that is treated as a commodity, delivered in packages, and accepted as private property once it is acquired must always be scarce.<sup>1</sup>*

## Introduction

Generations of law school students, *and some faculty*, have personally experienced law school's teaching, curriculum, and ever-present patterns of stratification as a crisis. However, the economic impact of successive years of declining student enrollment, coupled with intense criticism both within and outside the academy, has created a narrow window of opportunity for genuine democratization of legal education and the profession. The critical and immediate question is whether the American Bar Association ("ABA"), as sole accreditor of national import, will seize upon what remains of this

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\* Professor of Law, New England Law | Boston. Thank you to Matthew Lawrence for his skillful editing and attention to detail.

1. IVAN ILLICH, TOWARD A HISTORY OF NEEDS 81 (1980).

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opportunity and pursue a course of action designed to facilitate access and decrease costs for individuals of lower socioeconomic status (“SES”). The current political reality, replete with unqualified individuals profiting from the voting public’s distrust of American institutions, reveals an urgent need to redesign the pathways to the Nation’s seats of power, and expand the range of voices in the body politic to include those from working-class backgrounds. At the very least, a unified voice of lawyers, jurists, and legal educators could prove instrumental in lifting the veil on what is currently sold as a meritocratic system of legal education, confirming instead its structural bias in favor of the affluent and privileged. Only through such *class* transparency might the stage be set for increasing socioeconomic heterogeneity in the legal profession.

The unsettling alternative would be for the ABA to advance the proposals of law professors dubbed “crisis scholars”<sup>2</sup> whose primary and oftentimes exclusive targets are the very law schools most likely to be attended by low-SES students. Such an endeavor, without more, is likely to result only in further diminishing the currency of working- and lower-middle-class students’ law degrees in the labor market, while simultaneously closing off scarce avenues to the legal profession.

The primary response from those who wish for an increased working-class consciousness in the legal field must be to imbue any proposals for reform of legal education with socioeconomic context. Utilizing data on current rates of access throughout the legal education hierarchy along with comments from law professors, jurists, and practitioners, this article seeks to highlight the disquieting and enduring blind spot in the academy with regard to class, including the unwillingness even to recognize the need for greater socioeconomic diversity in legal education. To that end, I call for the ABA to allow its work around legal education reform to be guided by a theoretical framework that acknowledges both the challenges faced by students due to their socioeconomic status, and the myriad assets this under-represented group can bring to the profession. My proposal is to draw from the writings of the brilliant and rather

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2. Professor Donnelly refers to “the burgeoning body of so-called ‘crisis literature.’” Lawrence Donnelly, *Tamanaha and His Critics: Transatlantic Reflections on the “Crisis” in Legal Education*, 16 *GERMAN L.J.* 821, 837 (2015).

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idiosyncratic intellectual Ivan Illich, and utilize his uncloaked contempt for credentialing institutions to capture an outsider's perspective on what is required to democratize the American legal education establishment in a way that preserves and expands access for the *striver* class.<sup>3</sup>

The writings of Ivan Illich can help modern legal scholars make sense of perceived seismic shifts in the educational landscape. The conventional wisdom touted in much of the crisis literature is that law degrees were once regarded by most college graduates as a reliable investment, a path worth considering even if uncertain about professional ambitions. Another recurring theme is the idea that possession of a law school diploma operated in an earlier era as a form of insurance against unemployment and underemployment, emblematic of the gilded social capital much derided by Illich in his writings. The reality is that there has never been a golden age for lower-middle and working-class students seeking to gain entry into the legal profession. As a group, their law degrees have disproportionately heralded from less-prestigious law schools and they have always had to work harder than their more affluent counterparts to gain admission to those most rarefied corners of the legal community. Whether or not reforms likely to aid these students will be pursued by the ABA ultimately depends upon a collective willingness to elevate the issue of class to the forefront of any discussion on the future of legal education. It is also important to call attention to the issue while a critical mass of scholars, jurists, and practitioners remain engaged in the work of legal education reform. Some in the academic community have already questioned the likelihood of a sustained and long-term interest in the topic.<sup>4</sup>

Such reports of waning interest may not be welcomed by a current generation of prospective law students considering whether to

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3. Experts in the field of higher education utilize the term *striver* to refer to low-income and potential first-generation college students who overcome great odds to achieve educational and professional success. Nancy Leopold, *Colleges Can Do More to Find 'Strivers,'* CHRONICLE OF HIGHER EDUCATION, 00095982, Sept. 24, 2010, Vol. 57, Issue 5.

4. Professor Gerald P. López argues that the impetus for significantly reforming legal education is likely of an ephemeral nature. Gerald P. López, *Transform—Don't Just Tinker With—Legal Education*, 23 CLINICAL L. REV. 471 (2017).

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invest significant amounts of time and money in pursuit of a J.D. This is particularly true when lower-middle and working-class students are statistically most likely to be weighing offers from lower-tier law schools, the same schools subject to the brunt of criticism from the aforementioned crisis scholars. Yet these are the same schools that have historically provided access to the sons and daughters of immigrants, the children of the working classes, older students, and working parents.<sup>5</sup> And while some critics may put forth seemingly persuasive arguments that these institutions are not worth preserving, the legal academy and its accreditation body, the ABA, should leverage this moment to ensure that whatever form legal education takes in the future, it will contain ample space for the children of those on the lower end of the socioeconomic distribution. Thus, the decisions made by the ABA in the short term will either bring greater and more equitable access to the profession of law, or diminished representation from those hailing from the bottom rungs of the socioeconomic ladder.

This article analyzes the writings of Ivan Illich and applies them to the challenges faced by today's law schools. Part II discusses the oft-cited crisis in legal education, and hypothesizes that the larger problem facing the academy is its socioeconomic exclusivity and the remarkably insular community it has chosen to promote. Part III introduces the writings of Ivan Illich, his views on education, and his unalloyed contempt for credentialing institutions, utilizing this harsh light to inform a path forward for the academy. Part IV applies the teachings of Illich to the current challenges faced by legal education, and offers concrete solutions to be embraced by an ABA committed to moving legal education toward genuine democratization and inclusivity.

### **I. The Challenges of Legal Education**

Utilizing the critical lens through which visionary thinker Ivan Illich viewed the credentialing function of educational institutions, one discerns that law students, the schools they attend, and the larger society, have not been served well by a system that “favor[s] the

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5. Richard Sander & Jane Yakowitz, *The Secret of My Success: How Status, Prestige and School Performance Shape Legal Careers*, 14 (Draft: Dec. 6, 2011).

individual who starts out earlier, healthier, or better prepared...”<sup>6</sup> As counterintuitive as it may appear when speaking of preparing students for careers that ostensibly involve principles of fairness and justice, access to a legal education generally, and the pursuit of a credential from an elite law school specifically, are not grounded in principles of equity. Instead, law school status and prestige, and the resulting earning power and political relevance bestowed on graduates of elite educational institutions, bears a strikingly imperfect relationship to both the competence of the individual graduate and the quality of an institution’s educational programs. And yet, the way that law schools predominately serve to reproduce rather than challenge the prevailing social hierarchy has been largely met with tacit acceptance in the legal community, albeit with some notable exceptions.<sup>7</sup> In this arena, we are confronted with a vivid illustration of Ivan Illich’s view of education credentials as shiny gold tokens of the privileged class, often incorrectly interpreted as earned rather than inherited capital.<sup>8</sup>

The ABA in recent years convened a task force “to examine the current problems and conditions in American legal education,” and, at last year’s Board of Governors Meeting, approved a request to create a Commission on the Future of Legal Education.<sup>9</sup> Although some in the academy remain profoundly skeptical of any concrete changes resulting from these efforts, one must note that the report issued by the Task Force explicitly conceded that “a strategy for long-term continuous improvement,” has been lacking and that its recommendations sought to “fill that need.”<sup>10</sup> The report was striking, not for its attempted embrace of pedagogical innovation, but for its admission of fault with regard to helping shape the current

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6. ILLICH, *supra*, note 1, at 81.

7. A few classic examples include Duncan Kennedy’s 1982 *Legal Education and the Reproduction of Hierarchy* (1982) as well as Lani Guinier’s *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals* (2003).

8. ILLICH, *supra*, note 1, at 84; *see, e.g.*, LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA*, Introduction (2015). Professor Guinier writes “[t]he testocracy teaches the cocky boy to internalize success and to take personal credit for the trappings of privilege, including the educational resources and networks of his college-educated parents.”

9. ABA, Board of Governors Meeting, Summary of Action (Feb. 2-3, 2017).

10. ABA, Task Force on the Future of Legal Education, Report and Recommendations, January 2014, at 23.

“crisis” by forcing all law schools to conform to a uniform, *and expensive*, model of legal education.<sup>11</sup>

#### A. The Crisis

The school system, in fact, may soon face a problem which churches have faced before: what to do with surplus space emptied by the defection of the faithful.<sup>12</sup>

The above Illich statement from 1971 could have been made by any of the modern era critics of American legal education in response to a fluctuating legal employment market, the high cost of a legal education, and the commensurate decline in law school applications.<sup>13</sup> The oft described “crisis” threatening to upend today’s legal academy is often discussed in absolute terms, as a problem resulting from an overabundance of lawyers, an excess of law schools, and soaring levels of student debt.<sup>14</sup> Prior to the recent

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11. *Id.* at 23. The fact that the ABA, legal education’s sole accreditor and outsized player in the modern era law school hierarchy’s origin story, now recognizes the importance of “differentiation” in legal education and accepts responsibility for “bringing about [the current] uniformity” signals an opening for a genuine democratization of the profession. *Id.*

12. Ivan Illich, *Education Without School: How It Can Be Done*, NEW YORK REVIEW OF BOOKS, Jan. 7, 1971, Special Supplement.

13. The American Bar Association’s Section of Legal Education and Admissions to the Bar reports that the total number of students who enrolled in the first year of law school in 2015 was 37,907, a significant decrease from the 52,448 students who enrolled in the first year of law school in 2010. ABA Section of Legal Education and Admissions to the Bar, 2015-2016 Annual Report, at 14. In addition, the total J.D. enrollment for 2015 was 113,900, compared to 147,525 in 2010. *Id.* See <http://www.lsac.org/lsacresources/data/lsac-volume-summary>. It was also reported that “[a]s of 7/3/15, there [were] 333,848 fall 2015 applications submitted by 52,056 applicants. Applicants [were] down 2.0% and applications [were] down 4.2% from 2014. *Why Law Schools are Losing Relevance – and How They’re Trying to Win It Back*, WASH. POST. See also <http://www.lsac.org/lsacresources/data/three-year-volume>.

14. Professor Campos decries the rapid increase of law school tuition, pointing out that it has quadrupled over the last four decades. Paul Campos, *The Crisis of the American Law School*, in THE SELECTED WORKS OF PAUL CAMPOS 1-2 (2012), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=paul\\_campos](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=paul_campos); David Segal described the problem as “the glut of diplomas.” David Segal, *Is Law*

accounts of law schools closing their doors due to low enrollment, high-profile members of the media, along with scores of academics, had begun to routinely lambaste institutions for the employment prospects of their graduates.<sup>15</sup> Many of these calls were made in the time-honored muckraking tradition, with an eye toward exposing injustice and curbing abuses. Law professors, who manage to occupy two distinct and equally loathed segments of the populace as both lawyers and academics, were nonetheless seemingly blindsided by the torrent of rage that spilled out from keyboards across the country.<sup>16</sup> As the resulting firestorm was unleashed within the academy, an attempt was made to identify the culprits of a public relations disaster that had left some feeling as though their social stock had unexpectedly plummeted. It no longer felt entirely comfortable to view one's professional identity as intertwined with the maligned legal education machine.

A monsoon of "crisis literature"<sup>17</sup> soon emerged in response, and a variety of proposals for reform were made, most notably to solve the "J.D. overabundance problem" by closing "a bunch of lower-tier law schools."<sup>18</sup> But while a populist assault enabled by modern

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*School a Losing Game*, N.Y. TIMES, Jan. 8, 2011.

15. Stephanie Francis Ward, *Whittier Law to Close: Profs Fighting to Keep It Open*, ABA JOURNAL, April 20, 2017, available at [http://www.abajournal.com/news/article/despite\\_recent\\_bar\\_passage\\_rate\\_of\\_23\\_percent\\_whittier\\_law\\_profs\\_fight\\_to\\_k](http://www.abajournal.com/news/article/despite_recent_bar_passage_rate_of_23_percent_whittier_law_profs_fight_to_k) (last visited Aug. 15, 2017); Marilyn Odendahl, *Indiana Tech's Closing of Law School Leaves Unanswered Questions*, THE INDIANA LAWYER, May 31, 2017, available at <http://www.theindianalawyer.com/articles/print/43828-indiana-techs-closing-of-law-school-leaves-unanswered-questions> (last visited Aug. 15, 2017); WSOCTV.com, *Charlotte School of Law Closing Immediately*, <http://www.wsocvtv.com/news/local/charlotte-school-of-law-closing-effective-immediately-alumni-association-says/592287262> (last visited on August 15, 2017)

16. Daniel D. Barnhizer, *Cultural Narratives of the Legal Profession: Law School, Scamblogs, Hopelessness, and the Rule of Law*, 2012 MICH. ST. L. REV. 663; Lucille A. Jewel, *You're Doing it Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession*, 12 MINN. J.L. SCI. & TECH. 239 (2011).

17. Professor Donnelly refers to "the burgeoning body of so-called 'crisis literature.'" Lawrence Donnelly, *Tamanaha and His Critics: Transatlantic Reflections on the "Crisis" in Legal Education*, 16 GERMAN L.J. 821, 837 (2015).

18. William Henderson, Law Professor at Indiana University, was paraphrased in *The New York Times* by writer David Segal. "Solving the J.D. overabundance

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technology was primarily occupied with tarring and feathering schools situated on the lower rungs of the legal academy's hierarchy, far too little attention was being paid to the insidious socioeconomic tracking that is so pervasive in legal education.<sup>19</sup> The seeming ease with which so many accepted that "some [law schools] will have to shut down or merge," showcased a level of callousness for the fact that what little socioeconomic diversity exists in the legal academy is currently disproportionately concentrated in the lower tiers of the law school hierarchy.<sup>20</sup> The next section of this article demonstrates that the call to close "a bunch of lower-tier law schools," *without more*, in order to help students who might otherwise strike a bad bargain, will

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problem, according to Professor Henderson, will have to involve one very drastic measure: a bunch of lower-tier law schools will need to close." David Segal, *Is Law School a Losing Game*, N.Y. TIMES, Jan. 8, 2011; Professor Garth comments on the pattern of critics of legal education pointing to lower-tier schools as the problem. "According to the prevailing logic of the crisis advocates, the problem is above all with the lower-ranked law schools. Tamanaha states: 'A sizable segment of law schools—low-ranked schools with a high percentage of graduates bearing high debt—produce highly questionable results year in and year out. A significant percent of their graduates do not obtain lawyer jobs, and those that do tend to land low paid lawyer jobs that do not produce an income commensurate to the level of debt.'" Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503, 513 (2013).

19. Professor Jewel describes the "Law School Scam Blogging Movement ('Scam Blog Movement' or 'Scam Bloggers')" as "a populist online community calling for reform of the way that law schools market themselves to potential law students." Lucille A. Jewel, *You're Doing it Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession*, 12 MINN. J.L. SCI. & TECH. 239, 241 (2011).

20. Alfred Brophy, Professor at the University of North Carolina School of Law, was quoted as follows: "But I think there's still probably too many law schools for this many students. My guess is some places will have to shut down or merge." Tyler Roberts, NATIONAL LAW JOURNAL, *available at* <http://www.nationaljurist.com/prelaw/why-flat-enrollment-great-news-law-schools>. Professor Garth points out that "[t]he institution key to the upward mobility project is the urban law school accessible originally to those who were not welcome in the elite schools or the corporate law firms. The urban law school is a product of the boom in law schools late in the nineteenth and early in the twentieth century—despite the hostility of the institutions of the organized bar." Bryant G. Garth, *Notes on the Future of the Legal Profession in the United States: The Key Roles of Corporate Law Firms and Urban Law Schools*, 65 BUFF. L. REV. 287, 292 (2017).

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have the perverse effect of closing off the legal profession to all but the sons and daughters of the elite.

### B. The Socioeconomic Status of Students at Elite Law Schools

Although it has become quite fashionable to call for redressing the crisis in legal education by eliminating a number of law schools and law students, such proposals must be challenged for their failure to acknowledge the negative impact such a narrow strategy might have on students hailing from the lower tiers of the socioeconomic distribution.<sup>21</sup> Data collected and analyzed by Professor Richard Sander shows that, while only *five percent* of students from the bottom half of the income distribution attend the most prestigious law schools, those institutions of legal education situated in the bottom fourth and fifth tiers of the hierarchy have approximately *twenty percent* of their student bodies from the bottom half of the income distribution.<sup>22</sup> In light of this data, it is problematic that the leading

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21. In his response to the report issued by the ABA Task Force on the Future of Legal Education, Professor Laurence J. Fox states it would be “[better, far better, to see the number of law schools and law students decline than compromise that which is required to accomplish the primary goals [assur[ing] that both the courts and our clients are served by lawyers who are able to fulfill their roles as representatives of clients, officers of the court and public citizens committed to our system of justice, learned in substantive law and procedure, obedient to their fiduciary duties, dedicated to the rule of law and participants in the bar and its activities].”

22. Richard Sander and Jane Yakowitz, *The Secret of My Success: How Status, Eliteness and School Performance Shape Legal Careers*, Draft: Dec. 6, 2011, at 14; Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 639 (2012). It is important to note that while Professor Sander refers to the bottom fourth and fifth tiers of law schools as those ranked 51st-100, and 101st and lower, respectively, the “fourth tier” discussed in the “crisis literature” refers more specifically to those schools not ranked, and thus outside of the 150 ranked U.S. law schools. Note the following analysis: “U.S. News [& World Report] divides law schools into two groups. *Id.* The first has 150 numerically-ranked schools; the second consists of “rank not published” schools. *Id.* This Article refers to rank not published or unranked schools as the fourth tier. An alternative way of identifying the groups is referring to numerically-ranked schools as the first tier and unranked schools as the second tier. Whether one uses fourth tier or second tier, the reference is to the same schools in the lowest quartile.” 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, FN 1 (2016). This

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actors in the legal education reform debate tend to structure their arguments within a framework that is accepting of the meritocratic myth surrounding elite law school admissions. Their discussion of an impending market correction is framed by an overarching world view that attrition ought to occur solely according to student and institutional academic prestige. Whether consciously or not, these reformers have displayed little sensitivity to the realities impeding many of the “best and brightest” from securing a place in an elite law school’s entering class. And with a broad brush, the quality of students and educational programs in the lower tiers of legal education has been tarnished and maligned. Externalities, such as the potential to depress employment prospects for graduates from law schools spoken of as “toilets” in blogs and the media, has been greatly discounted.<sup>23</sup>

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is very significant because it highlights the need for additional data pertaining to the socioeconomic status of students at exclusively “fourth tier” schools as referred to in the legal education literature. In one analysis, Ronit Dinovitzer and Bryant G. Garth uncovered that law school rankings as determined by U.S. News and World Report “correlate well with the measures of lawyers’ social background,” and that while “more than two-thirds of top 10 school graduates had fathers who had completed some graduate education,” only one-third of fourth-tier graduates had fathers with similar levels of education. Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC’Y REV. 1, 11 (2007).

23. Lucille A Jewel, *You’re Doing it Wrong: How the Anti-Law School Scam Blogging Movement can Shape the Legal Profession*, MINN. J.L. SCI. & TECH. As with other online communities, members of the Scam Blogging movement employ a unique jargon to refer to their subject matter. Though its origin is unknown, “Toilet” refers to a low-tier (as ranked in the *U.S. News and World Report*) law school that provides a poor investment value for its graduates; “TTT” refers to third-tier law schools (as ranked in the *U.S. News and World Report*); and “TTTT” refers to fourth-tier law schools. Anna Stolley Persky, *Law School? Bag It, Bloggers Say, More Disgruntled Grads Are ‘Scamblogging’ Their Frustration*, 97 FEB A.B.A. J. 16, February, 2011; Daniel D. Barnhizer, *Cultural Narratives of the Legal Profession: Law School, Scamblogs, Hopelessness, and the Rule of Law*, 2012 MICH. ST. L. REV. 663, 677; Kathryn R. L. Rand, Steven Andrew Light, *Welcome to Administration*, 46 U. TOL. L. REV. 363, FN 12. A 2012 post on *Above the Law* offered this observation: “Maybe all you need to know about the difference between top law schools and not-so-hot law schools really does come down to toilets. At Harvard, they name them after rich alumni. At North Dakota Law School, they barely have them.” Elie Mystal, *Adventures at Low-Ranked Law Schools: Don’t Call It a ‘Toilet,’ They Don’t Even Have Toilets*, ABOVE THE LAW

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As a professor at a school that has not done well in the various rankings, I am particularly aware of the negative effect they can have on the self-confidence of some of our students. Surely this is inconsistent with the belief that higher education should be a vehicle of opportunity. If an important purpose of higher education is to serve as a ladder for upward mobility, then we undercut that goal by rank-ordering institutions in a way that reminds students, such as in the case of those at Suffolk, that they are at a “fourth-tier” school.<sup>24</sup>

And conversely, the students, and legal institutions, at the top of the hierarchy receive the added benefit of remaining largely unassailable and beyond reproach by both the ABA and the scambloggers. After all, it is largely accepted that the top tier schools are the models against which all others must be measured, and with all critical eyes focused on the lower tiers, there is precious little energy left for taking on the victors in the legal education establishment.<sup>25</sup>

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(Feb. 6, 2012, 11:17 AM), <http://abovethelaw.com/2012/02/adventures-at-low-ranked-law-schools-dont-call-it-a-toilet-they-dont-even-have-toilets/>.

24. David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249 (1997).

25. Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL’Y REV. 503, 503-504 (2013). “The lawyer or law professor today who denounces the law degree and the current structure of legal education typically aims mainly at less prestigious law schools and law graduates.” *Id.* “... the critics today promote a position that would harden professional hierarchies and reduce access to the advantages of a legal education and law degree.” *Id.* at 504. “Unfortunately, the recipes for reform that these advocates posit have all too much in common with the recipes from the 1930s.” *Id.* at 505. “This debate so far is relatively one-sided. Today’s New Legal Realists and empirical legal scholars have not yet taken up the challenge of exposing problems with the current rhetoric of crisis.” *Id.* at 505. “According to the prevailing logic of the crisis advocates, the problem is above all with the lower-ranked law schools. Tamanaha states: ‘A sizable segment of law schools—low ranked schools with a high percentage of graduates bearing high debt—produce highly questionable results year in and year out. A significant percent of their graduates do not obtain lawyer jobs, and those that do tend to land low paid lawyer jobs that do not produce an income commensurate to the level of debt.’” *Id.* at 513. “The overwhelming theme of this crisis rhetoric is that those who attend the non-

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But the current “crisis,” and the scramble for accurate accounting it has prompted, has highlighted for many (yet again) the troubling hierarchy and social stratification that law schools help to reproduce rather than combat.<sup>26</sup> And while calls for law school transparency have become quite common, *and rightly so*, the data that it is incumbent on law schools to share with prospective students should also include a detailed accounting of the student body’s socioeconomic diversity along with the efforts made at the admissions level to ensure far greater representation of Americans from the bottom half of the income distribution. Ultimately, the fact that the legal academy has largely remained deaf to the cries of classism by scholars such as Lani Guinier and Duncan Kennedy, among many others, when the data on the matter is unequivocal, points to a much more insidious and disquieting lack of transparency within the American law school establishment. Sunshine *is* desperately needed, not solely as a disinfectant of institutions branded by the critics as parasitic, but rather as a tool for cleaning house in a

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elite law schools are probably making a mistake, especially if they have to borrow substantially to pay for their education.” *Id.* at 514. “The Depression-era proposals were, at best, thinly veiled attacks on the law schools that provided access to minorities and immigrants. Proposed remedies included closing down the schools, preventing ostensibly unqualified and immoral individuals—typically from immigrant groups and lower socio-economic backgrounds—from becoming lawyers. Today, the argument is couched in favor of access to law school for the relatively disadvantaged, but the result looks quite similar—an effective denial of access in the name of saving lower classes from ‘bad decisions,’” *Id.* at 516. “... Tamanaha would join with Campos in strongly discouraging less privileged students from attending law school at all. The practical result, not surprisingly, would likely be quite similar to what the critics of law schools advocated in the 1930s—limit law school to those who can get into the more elite schools, meaning as a practical matter mainly those from relatively privileged backgrounds.” *Id.* at 517. “... I would like to sketch some elements for what today’s New Legal Realists might bring to the debate.” *Id.* at 519. “As in the past, critics take the opportunity to reinforce their own position as superior to the schools lower in the hierarchy.” *Id.* at 530. “Yet, as in the 1930s, the crisis rhetoric has a tilt with serious implications. In the Depression era, the crisis was seen by the elite members of the profession as a reason to crack down on the law schools that provided access to less privileged groups such as immigrants and their children. They were the ones creating too many lawyers, and such lawyers did not bring the proper demeanor and ethics to the profession.” *Id.* at 529.

26. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

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profession that has grown out of touch with the people it is intended to serve.

### 1. *The Veritas Will Set You Free*

The truth rarely acknowledged is that a paltry two percent of students at the top twenty law schools come from the bottom socioeconomic quarter of the population, while more than three quarters come from the richest socioeconomic quartile.<sup>27</sup> In order to help illustrate who we are discussing, please consider that in 2016, a household making \$27,400 annually was in the bottom quartile.<sup>28</sup> A

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27. Richard Sander and Jane Yakowitz, *The Secret of My Success: How Status, Eliteness and School Performance Shape Legal Careers*, Draft: Dec. 6, 2011, at 14; Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 639 (2012).

28. It is important to note that the methodology utilized by Professor Richard Sander did not specifically compare and contrast students' household incomes, but instead relied on the accepted proxy indicators of parental occupation and level of education. Sander, *supra* note 21, at 633. Professor Sander explains that "class—or at least socioeconomic status, which is the prosaic stand-in for class when statistics are involved—can be reasonably well-captured with three types of information about individuals: their income, their level of education, and their occupation. Because these three characteristics are highly correlated with one another, researchers will often use one or two of the three measures as indices of SES. In research involving students, SES is measured by the characteristics of the student's parents. When data is collected through surveys of students, researchers often ask only about the education and occupation of parents—on the grounds that students are likely to have good information about their parents' educational levels, and certainly about their occupations—while their knowledge about their parents' income or assets may be largely speculative (or, if known, might be information the student feels she should not reveal without the parents' permission." Sander, *supra* note 21, at 634; *see also* <https://dqydj.com/household-income-percentile-calculator/>. It should be noted that students might be asked, and would be very likely to recollect, whether they had at any point qualified for free or reduced lunch in the public school setting. The Brookings Institution points out that "eligibility for free lunch is often the only way for states, school districts, and education researchers to identify low-income students." Dick Startz, *Making Better Use of Data on Free School Lunches*, BROOKINGS, Aug. 31, 2016, available at <https://www.brookings.edu/blog/brown-center-chalkboard/2016/08/31/making-better-use-of-data-on-free-school-lunches/> (last visited Aug. 16, 2017); "The term "socioeconomic status" can be defined broadly as one's access to financial, social, cultural, and human capital resources. SES has been correlated with an

young person who has one sibling and a single parent working *full time* earning \$13 an hour would be in this bracket.<sup>29</sup> It is important to provide the example because many people would not necessarily view growing up in a household with a hardworking parent who earns wages well above the statutory minimum a disadvantage. Yet, such a child would be between one-eighth and one-twentieth as likely to attend law school as [her] wealthier counterparts. In fact, the probability that such a child will attend law school decreases significantly as the level of law school “eliteness” increases. The chasm becomes so pronounced that if we focus specifically on the top ten law schools, a child whose upbringing has been in the top tenth of the socioeconomic distribution is more than twenty times more likely to attend than the student who has experienced a working-class life.

Perhaps even more unsettling is the additional data presenting that only five percent of all students, this time at the top twenty law schools, come from families whose socioeconomic status places them in the bottom half of the country’s socioeconomic distribution.<sup>30</sup> This means that 95%, or virtually all of the students who attend elite law schools, from which large corporate firms, federal judges, including United States Supreme Court Justices, disproportionately, and sometimes exclusively, select their hires, have little to no personal knowledge of the economic realities experienced by households earning less than \$56,516 per year.<sup>31</sup> And in fact, the *vast*

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individual’s skill development, academic achievement, work and life outcomes, and overall psychological and behavioral well-being.” FORUM GUIDE TO ALTERNATIVE MEASURES OF SOCIOECONOMIC STATUS IN EDUCATION DATA SYSTEMS, IV; ““The term “socioeconomic status” has been described as groups of people with similar occupational, educational, and economic characteristics;11 a person’s relative standing in society based on income, power, background, and prestige;12 the social standing or class of an individual or group;13 the placement of persons, families, households, census tracts, or other aggregates with respect to the capacity to create or consume goods that are valued in our society;14 and the hierarchical rank of an individual or family in a particular community or society.15 In 2012, an expert panel convened by the National Center for Education Statistics (NCES) reported: SES can be defined broadly as one’s access to financial, social, cultural, and human capital resources.”

29. It is important to note that a wage of \$13 an hour is higher than the current minimum wage in every state. <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#1>.

30. Sander, *supra* note 21, at 632.

31. The US Census Bureau reports median household income in 2015 to be

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*majority* of students attending elite law schools have grown up in upper middle class households situated at the top quartile of the income distribution, which in 2016 signified a starting annual household income ranging from \$102,348 to \$102,654.<sup>32</sup> Please note these are the household incomes just barely making it into the top quartile. Professor Richard Sander's research demonstrates that over half the students at the top twenty law schools come from the top *tenth* of the socioeconomic status distribution.<sup>33</sup> This glaring disparity on the basis of household wealth, rather than pure academic merit, is greatly out of step with the conclusions drawn by prospective employers about the relative merits of graduates from schools across the legal education distribution.

Ultimately, the fascinating aspect of the data uncovered by Professor Sander is not that legal education, *as a whole*, favors the socioeconomic elite, but rather that the degree of socioeconomic eliteness of a given student body can be so inextricably linked to the educational eliteness of the institution. After all, some may choose to point out that only a fraction of students in the United States will have the educational and life opportunities enabling them to pursue a postgraduate degree.<sup>34</sup> And these same scholars might argue that the persistent patterns of inequality in the law school setting are mere extensions, albeit more pronounced, of the socioeconomic makeup of college and university students.<sup>35</sup> However, one would expect that

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\$56,516.

32. See <https://dqydj.com/household-income-percentile-calculator/>.

33. Sander, *supra* note 21, at 637.

34. "Children from upper-income families may reach school age better prepared because their parents may be able to make greater investments in early childhood enrichment activities. Over time, the chances of rich and poor getting a higher education have widened. Compared with children born in 1961 through 1964, children born in 1979 through 1982 were 18 percent more likely to complete college if they were born to wealthier parents (highest income quartile) but only 4 percent more likely if their parents were in the lowest income quartile. Children born to the highest-income families are now 69.2 percent more likely to attend college than those from the lowest-income families." URBAN INSTITUTE, *How are Income and Wealth Linked to Health and Longevity?* April 2015, at 9. In addition, "[p]eople with low incomes are more likely to live in poorer neighborhoods with a weaker tax base, thus reducing local resources that support public schools and social services." *Id.* And "[c]ash-strapped schools in low-income neighborhoods may have inferior resources and deteriorated buildings." *Id.* at 6.

35. A recent study showed that "[o]nly 3.8% of students come from the bottom

within a pool of comparatively socioeconomically advantaged students, it would be academic merit, rather than socioeconomic status, which would predict their placement in the law school hierarchy. Yet Sander's data demonstrates quite clearly that the best predictor of one's eventual acceptance into an elite law school, among the top twenty, is class, or socioeconomic status, and *not* academic merit.<sup>36</sup>

## 2. Tipping the Scales

Professor Sander's work persuasively demonstrates that inequities along the educational pathways of students from the bottom quarter, and bottom half, of the socioeconomic distribution are alone insufficient to explain their uncomfortable degree of underrepresentation in America's law schools.<sup>37</sup> In other words, it is

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quintile of the income distribution at Ivy-Plus colleges. As a result, children from families in the top 1% are 77 times more likely to attend an Ivy-Plus college compared to the children from families in the bottom quintile." Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility*, July 2017, at 1. The report also revealed that Ivy League colleges have more students from the top 1% than the bottom 50% of the income distribution. *Id.* It is significant that the researchers found that while "15.4% of students at Harvard come from families in the top 1% of the income distribution—about the same number [come] from the bottom three quintiles combined." *Id.* An earlier study had reported that at "the 193 most selective colleges and universities in the United States, students from the richest quartile of the population outnumber students from the poorest quartile by a ratio of fourteen to one." Carnevale, *infra* note, at 5; *see also* <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html>; David Orentlicher, *Economic Inequality and College Admissions Policies*, 26 CORNELL J.L. & PUB. POL'Y 101, 105 (2016).

36. Sander, *supra* note 22, at 637.

37. *Id.* "Americans in the bottom quarter of the SES distribution" are "between one-eighth and one-twentieth as likely to attend law school as their more affluent peers," and "for the entire bottom half, the chances range from one-twelfth to less than one-fifth." And at the top ten law schools, "someone with an SES in the top tenth is more than twenty times more likely to attend an elite law school as a graduate from the bottom quarter of the SES distribution... Or, to put it differently: among young people in the United States, a person whose family SES placed them in the top decile was twenty-four times as likely to grow up and attend an elite law school as was a person whose family SES placed them in the bottom half of the

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not sufficient to point to a limited pool of low-socioeconomic status potential law school applicants as the reason for the disturbing levels of underrepresentation. His data confirms that among those eligible to apply to law school, low-and-middle socioeconomic college graduates are far less likely to attend law school than high-socioeconomic status graduates.<sup>38</sup> Additionally, his research dispels the myth that their under-representation in elite law schools is a mere manifestation of limited aspirations. Instead, the data shows that the most elite law schools prefer high socioeconomic status students, even if their acceptance means passing on a higher-credentialed low-socioeconomic status student. He thus successfully strips admissions officers of the pretense of helplessness in the face of too few qualified applicants from the lower socioeconomic classes and instead exposes their active promotion of policies that result in prioritizing wealth and status over academic merit.

And just how are these low-socioeconomic status students penalized for their comparative lack of wealth in the admissions process? Professor Sander highlights that in direct opposition to what many might believe about elite law school admissions, which is that students from lower-income households might at present enjoy a preference from admissions officers for the “distance traveled”<sup>39</sup> in their educational trajectory, the truth is that no such preference can be detected. In fact, contrary to what any objective and reasonable observer might expect, it is not the working-class background student, but rather the most elite, as measured by parental levels of education, who receive acceptance letters despite possessing credentials that are significantly lower than those of the other

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national distribution...Depending on the control group we choose, Americans in the bottom quarter of the SES distribution are between one-eighth and one-twentieth as likely to attend law school as their more affluent peers. For the entire bottom half, the chances range from one-twelfth to less than one-fifth...”

38. *Id.* at 634.

39. Jane M. Goddard, *Building the Cathedral: Sculpting a Part-Time Legal Education in a Double-Time World*, 8 BARRY L. REV. 117, 129 (2007); Goddard references a quote from Faye Deal, Associate Dean for Admissions and Financial Aid, Stanford Law School, who refers to those aspects of a student’s background that reveal perseverance and commitment in the face of adversity as “distance traveled.” *Id.* See RICHARD MONTAUK, HOW TO GET INTO THE TOP LAW SCHOOLS, 178 (2004).

students.<sup>40</sup> Sander explains that this is accomplished in a variety of ways including admissions officers' use of legacy preferences, failure to account for grade inflation at elite colleges, which disproportionately enroll high-socioeconomic status students, and a preference for the so-called "interesting" resumes featuring opportunities out of reach for most working-class and lower-middle-class young people.<sup>41</sup> Professor Eli Wald agrees and writes that "law schools rely on the possession of social and cultural capital in making admission decisions, for example, by valuing letters of recommendation, statements of interests, and 'interesting' extracurricular activities, commitments and hobbies..."<sup>42</sup> And these findings are further supported by the evidence that exists regarding the minimal representation of low-socioeconomic status students in undergraduate elite colleges and universities.<sup>43</sup>

It is also important to address the fact that the hard metrics utilized by law schools, primarily a student's score on the LSAT, operate to the disadvantage of students from lower-income households. This is not only because socioeconomic disadvantage has been shown to depress a student's standardized test scores,<sup>44</sup> for

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40. Sander, *supra* note 22, at 658.

41. *Id.* at 659-60. Sander highlights the fact that because "low-SES students are more likely to attend public universities rather than private colleges, they will be disproportionately disadvantaged by law school policies that ignore grade inflation." *Id.* In addition, an admissions preference for "interesting" records is more likely to benefit the "resume of a child of privilege."

42. Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1088-1089 (2011); Wald points out that "seemingly objective and meritocratic, admission...standards may turn out to be culturally manufactured, subjective and biased." *Id.*

43. Richard D. Kahlenberg, *Reflections on Richard Sander's Class in American Legal Education*, 719 DENV. U. L. REV. 719, (2011); "This comports with Carnevale and Rose's finding that at the most selective 146 colleges and universities, only 3% came from the poorest socioeconomic quartile and 74% from the richest. In other words, one is 25 times as likely to run into a wealthy student as a low-income student at the nation's selective campuses, and the tilt is slightly greater at the top twenty law schools." Kahlenberg draws support from Anthony Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN AMERICAN HIGHER EDUCATION 101, 106-07 (Richard D. Kahlenberg ed., 2004).

44. Kahlenberg, *supra* note 43, at 724. "In 2010, for example, Carnevale and

instance resulting in the loss of as many as 399 points on the SAT, but for other reasons as well. For instance, admissions policies and practices that count only the top LSAT score of an applicant serve to provide “incentives to game the system”<sup>45</sup> by encouraging students to sit for the test multiple times. While enabling law schools to select students who ultimately attain the *right* score may help advance the institutional pursuit of higher rankings in the legal education hierarchy,<sup>46</sup> there are externalities. These admissions practices can prove prohibitively expensive for students from working-class and lower-middle-class backgrounds. It has led some in the legal education community to state that “the legal profession will inevitably become an elitist institution only accessible by those with the financial means to apply [to law school.]”<sup>47</sup> Law students point to the high cost of LSAT preparatory courses and persuasively argue that this test thus “itself filters students from broad socioeconomic backgrounds at the beginning of the [law school] application process.”<sup>48</sup>

Ultimately, the cost of law school itself serves as an entry barrier to many students from lower-income households. The yearly cost of tuition at the vast majority of the top twenty schools is in the fifty-to-sixty thousand dollar range.<sup>49</sup> Despite the possibility of subsequent scholarships and other forms of tuition aid, these sticker prices are successful in painting a picture of an unrealistic and unattainable corner of legal education to the young person from a family with household earnings of \$27,400, and thus in the bottom quarter of the

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coauthor Jeff Strohl found that most of the predictors of low SAT scores are socioeconomic in nature. Being socioeconomically disadvantaged (as opposed to highly disadvantaged) cost a student 399 SAT points on the math and verbal assessments...”

45. Sander & Yakowitz, *supra* note 22, FN 10.

46. *U.S. News & World Report* rankings “focus on median LSAT and median UGPA” of first-year students. “[T]he magazine’s printed and online tables report 25th/75th percentiles for LSAT and UGPA ...” Andrew P. Morriss, «*Foreign Language*» *Legal Education Through the Blurry Lens of US News Law School Rankings*, 20 GREEN BAG 2d 253, 259 (2017).

47. Sheena Goldsborough, comments submitted to American Bar Association’s Art Garwin, Oct. 23, 2013.

48. *Id.*

49. See <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings>.

income distribution. Again, only those *in the know* will be in a position to take advantage of the lack of transparency common to the law school financing process, one that allows admissions officers to deviate significantly from the stated costs in order to attract students with top credentials. First-generation advanced degree students will be those least likely to have mentors who can help them navigate this process to their advantage. For instance, they are not likely to know that they are permitted to contact individual admissions officers, provide details about financial packages offered to them by other law schools, and thus negotiate a better offer from their school of choice. The current lack of transparency in the law school financial aid process serves to harm those who can least afford it and signals the magnitude of the problem legal education faces if it ever becomes serious about tackling the lack of socioeconomic heterogeneity in its ranks.

Although many might be tempted to dismiss these issues as matters best handled by the various admissions offices, administrative staffs, and faculties at the mostly private institutions making up the top tier of legal education, the problem with that position lies in the fact that graduating from an elite law school operates as such an important signal to prospective employers in choice markets. Because low socioeconomic status law school graduates will ultimately compete for employment with graduates from upper tier schools, it is critical that we devote a significant portion of our attention to understanding whether the signals communicated by an elite law school diploma are warranted. Plainly stated, are elite law schools merely schools for the socioeconomic elite, *the children of the wealthy and privileged*, or can it be argued that they are at the pinnacle of a meritocratic pathway inhabited by the intellectually and academically superior? If the answer is the former, then we have a problem that extends far beyond law school acceptance and graduation. This problem reaches high into the most exclusive halls of government, corporate America, and the judiciary.

### C. Embarrassment of “Richies”: The Real Crisis in Legal Education

And so castles made of sand

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Fall in the sea...Eventually.<sup>50</sup>

The crisis this article seeks to address is best encapsulated by the unabashedly honest comments made by the late Justice Antonin Scalia. In 2009, Justice Scalia gave a talk at American University Washington College of Law and answered a student's question about acquiring a Supreme Court clerkship as follows:

By and large, I'm going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can't make a sow's ear out of a silk purse. If they come in the best and the brightest, they're probably going to leave the best and the brightest, OK?<sup>51</sup>

Justice Scalia's unwavering faith in the ability of our system of higher education to separate the wheat from the chaff is shared by most. Historical hiring trends in the most desired sectors for law school graduates support the notion that elite diplomas confer an advantage for graduates in possession of such credentials.<sup>52</sup> That is in fact the reason why lawsuits challenging the admissions processes of elite schools are brought by those who fear their life prospects will be diminished by not having gained admission to elite schools such as Harvard.<sup>53</sup> But what if the premise is wrong? What if a diploma

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50. Jimi Hendrix, *Castles Made of Sand* (Track Records, 1967).

51. Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES, May 11, 2009.

52. William Henderson, a law professor at Indiana University's Maurer School of Law, agrees that law firms are "'stuck in a prestige hierarchy' where they primarily hire graduates based on diplomas from traditional, big-name, brick-and-mortar universities." Lorna Collier, *New Partially Online Law Degree May Open Door to Similar Programs*, U.S. NEWS & WORLD REPORT, June 25, 2014, available at <https://www.usnews.com/education/online-education/articles/2014/06/25/new-partially-online-law-degree-may-open-door-to-similar-programs>.

53. On November 17, 2014, Students for Fair Admissions, Inc. filed a lawsuit against Harvard University alleging that it systematically discriminates against Asian-American applicants in its admissions process. *Complaint Against Harvard University and the President and Fellows of Harvard College for Discriminating Against Asian-American Applicants in the College Admissions Process*, May 15, 2015; In the complaint, an account is provided of a young man with stellar academic credentials who nonetheless is denied admission to Harvard. The

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bearing a Harvard or Yale imprimatur does not necessarily signify the best or the brightest, but rather the most *privileged and affluent*? Fascinating is the fact that even the proponents of the “best and brightest” myth adhere to their faith in the face of evidence to the contrary. Note the manner in which Justice Scalia’s talk proceeded when he began to comment on some of the law clerks he had worked with over the years.

One of my former clerks whom I am the most proud of now sits on the Sixth Circuit Court of Appeals... I wouldn’t have hired Jeff Sutton. For God’s sake, he went to Ohio State! And he’s one of the very best law clerks I ever had.<sup>54</sup>

Justice Scalia’s subsequent musings had eviscerated the central premise of his initial statement, but did not seem to alter his, or the Court’s, hiring practices. In fact, a 2014 list published in *Above the Law* showed that 22 of the 34 clerks then working at the U.S. Supreme Court had graduated from Harvard or Yale.<sup>55</sup> This snapshot captured the historical hiring trends at the Court, and the very strong preference for graduates from top-tier law schools as ranked by *US News & World Report*.<sup>56</sup> And although there have been calls for increased diversity among clerks, this is a body dominated by

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complaint states his is a “bootstraps American saga” because his immigrant “middle-class” family had to “scrimp” to pay for his tuition at an elite boarding school in Massachusetts. The website of the boarding school lists yearly tuition in the forty thousand-to-fifty thousand dollar range. See <https://www.groton.org/page/admission/tuitionfinancial-aid>. The complaint also describes the impact that being denied admission to Harvard, Yale, Brown, and Columbia has had on his family. The young man’s mother is quoted as saying “I have thought many, many times why Henry failed. It was just devastating. He just failed like a falling leaf ...” *Id.*

54. Liptak, *supra* note 49.

55. David Lat, *Supreme Court Clerk Hiring Watch: The Official List for OT 2014, Plus More OT 2015 Hires*, ABOVE THE LAW (July 8, 2014), <http://abovethelaw.com/2014/07/supreme-court-clerk-hiring-watch-the-official-list-for-ot-2014-plus-more-ot-2015-hires/>.

56. “Today it is virtually impossible to gain a clerkship if the applicant did not attend a top law school ... Indeed, over the Court’s history, eighty percent of clerks have come from ten elite schools.” Benson, *infra* note 56, 12; TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 20 (2006).

graduates of elite law schools.<sup>57</sup> And because of the data showing that students of elite law schools are disproportionately of socioeconomically privileged backgrounds, this hiring pattern is one that promotes the viewpoints of a particularly elite class of Americans.<sup>58</sup> The value of a U.S. Supreme Court clerkship, and of federal court clerkships generally, cannot be overstated, as these opportunities represent a premier entrée into the “pipeline for our nation’s leadership.”<sup>59</sup> Many of the current members of the Court themselves began their legal careers as law clerks for other U.S. Supreme Court Justices, including Chief Justice John G. Roberts, Jr., Justices Elena Kagan, Stephen G. Breyer, and Neil M. Gorsuch.<sup>60</sup> And it can come as no surprise that the members of the current Court graduated from only three law schools; Harvard (five), Yale (three), and Columbia (one).<sup>61</sup>

The odds are ever in your favor if you graduate from elite colleges and law schools and data shows that “49 percent of corporate industry leaders and 50 percent of government leaders graduated from only 12 selective colleges and universities.”<sup>62</sup> In fact, scholars writing about the legal profession have even provided insight into the hiring preferences of elite law firms. In one case,

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57. Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution*, 23 HARV. BLACKLETTER L.J. 23 (2007).

58. One interesting proposal for diversifying the composition of hires came from Thomas Brennan, a former Chief Justice of the Michigan Supreme Court. Christopher Benson describes his proposal as calling for the creation of a national “Deans’ List,” which would enable the Dean of each accredited law school to nominate one student per year, from which the Justices would then select their clerks. Benson, *supra* note 56, at 28.

59. Lisa R. Pruitt, *The False Choice Between Race and Class and Other Affirmative Action Myths*, 63 BUFF. L. REV. 981, 983 (2015).

60. Michael McGough, *How to Diversity the Ivy League Club that is the Supreme Court*, L.A. TIMES (Oct. 28, 2014), <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-diversity-ivy-league-20141028-story.html>.

61. It is important to note that Justice Ruth Bader Ginsburg was admitted to Harvard Law School and began her legal education there, but later transferred to Columbia Law School.

62. JENNIFER GIANCOLA & RICHARD D. KAHLENBERG, TRUE MERIT: ENSURING OUR BRIGHTEST STUDENTS HAVE ACCESS TO OUR BEST COLLEGES AND UNIVERSITIES 9 (Jack Kent Cooke Foundation, 2016).

they remarked that “elite law firms such as Milbank Tweed recruit almost all of their associates from a handful of renowned law schools,” and that “Milbank Tweed’s hiring partners preferred associates who had been on the elite track since their prep school days at exclusive institutions such as Choate, St. Andrew’s or Westminster.”<sup>63</sup>

The graduates of the most prestigious law schools continue to thrive in a relatively charmed legal environment in which many lucrative opportunities materialize, even for those students who are not selected for law review. In contrast, ambitious young attorneys from the ‘other legal world’ compete for a limited number of top-level positions in a work environment more analogous to a Hobbesian struggle of war of all against all.<sup>64</sup>

Unfortunately, the legal academy suffers from the same bias. Tracey George and Albert Yoon studied the labor market for entry-level, tenure-track law professors and found that the single most predictive factor of a candidate’s likelihood of receiving call-backs for interviews and job offers was where the candidate attended school. And while it is not very surprising that schools situated at the top of the hierarchy were shown to hire almost exclusively those candidates possessing educational credentials from similarly situated institutions, the behavior on the part of law-faculties at the lower end of the spectrum is perhaps even more telling. In fact, one may even infer a bit of self-loathing, or more accurately, loathing directed at their students, on the part of those law professors at lower-tier schools who persist in hiring faculty who graduated from schools ranked higher than the institutions where they work.<sup>65</sup> George & Yoon’s recent study documented this pattern and the striking preference for elite educational pedigrees at top- and lower-tier schools alike. Their findings are highly consistent with earlier research, including one analysis showing that more than half of full-time law professors across all law schools graduated from the top

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63. Rustad & Koenig, *Review Essay: Competing Visions of Angst Among Elite Lawyers*, 2006 U. ILL. L. REV. 475, 480-481 (2006).

64. Rustad & Koenig, *supra* note 63, at 497-498.

65. Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1 (2014).

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twenty law schools.<sup>66</sup>

If there were merit to Justice Scalia’s “best and brightest” premise, there would certainly be no concern with these exclusive groups of employers selecting only from a pool of candidates that had met the exacting admissions standards of top-tier schools. And it would be equally unremarkable to accept that “graduates of lower-ranked law schools were always less likely to secure desirable high-paying legal jobs.”<sup>67</sup> However, reality and facts have a pesky way of shattering long-held beliefs and the arduous task of “building the cathedral”<sup>68</sup> of meritocracy is undermined when the numbers reveal shocking and persistent levels of inequity and discrimination blocking the conduits of legal education. The reality in 2017 is that a young person on the bottom rungs of the socioeconomic ladder in America faces lower odds of climbing up a few tiers than if she had been born in other Western developed countries.<sup>69</sup> Despite this, the legal education establishment mostly continues its conspiracy of silence by refusing to challenge the myths of meritocracy surrounding the law school admissions process.

#### D. Finding Our Way

A constructive critique of the elitism in legal education, and the profession, requires us to take stock of the *habitus*<sup>70</sup> of our friends

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66. *Id.* at 15 n.64.

67. Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269, 280 (2016); see Giancola & Kahlenberg, *supra* note 61, at 9.

68. Goddard, *supra* note 38.

69. David Orentlicher, *Economic Inequality and College Admissions Policies*, 26 CORNELL J.L. & PUB. POL’Y 101, 103-104 (2016); Professors Michael L. Rustad and Thomas H. Koenig write that historically “working class lawyers ... faced a caste-like legal aristocracy that reserved the greatest rewards for white men of good families who had attended prestigious law schools.” *A Hard Day’s Night: Hierarchy, History & Happiness in Legal Education*, 58 SYRACUSE L. REV. 261, 264-265 (2008).

70. I am deliberate in my use of the term *habitus* due to the manner in which it was applied in a critique of Professor Richard Sander’s study on the socioeconomic eliteness of the student body at top tier law schools. Professor Deborah C. Malamud wrote an essay in response to Professor Sander’s *Class in American Legal Education* and stated that “[s]tudents from middling-SES backgrounds might not have the ‘habitus’ towards pursuit of admission to an elite law school—at least

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and colleagues. This is no easy feat given the sensibilities and good intentions of so many involved in the vibrant discussion regarding the future of legal education. And yet, class remains a blind spot for many in our profession, in no small part because the vast majority of those who rise to its highest ranks have also attended the same elite law schools and undergraduate institutions.<sup>71</sup> As lofty as some might appear perched high above on a podium or bench, there is a very real

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not to the extent of being willing to do everything within their power to demonstrate the kinds of distinction necessary to achieve it.” Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729, at 737 (2011). Professor Malamud’s interpretation of the term struck me as inappropriate because it suggests that it is the beliefs and actions of those students situated at the bottom of the socioeconomic ladder that alone determine their lack of “success,” insofar as success can be measured through acceptance into an elite educational institution. There appears to be no recognition of the possibility that there exists a corresponding *habitus* exhibited and believed by those at the top of the socioeconomic ladder that is responsible for impeding these students’ academic and professional aspirations. It is possible to understand the term *habitus* in a manner that critiques, rather than accepts, the set of structures that thwart the potential of the “best and brightest” situated at the bottom of the socioeconomic status distribution. Omar Lizardo points to Claude Lévi-Strauss and Jean Piaget as the intellectual originators of the idea of *habitus*. Omar Lizardo, *The Cognitive Origins of Bourdieu’s Habitus*, J. FOR THE THEORY OF SOC. BEHAV. at 378. Lizardo also highlights Pierre Bourdieu’s multiple definitions of *habitus*, the most relevant describing “[s]ystems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them. Objectively ‘regulated’ and ‘regular’ without being in any way the product of obedience to rules, they can be collectively orchestrated without being the product of the organizing action of a conductor.” *Id.* Lizardo reclaims the intellectual antecedents of Bourdieu’s work to suggest that *habitus* might be understood less “as the docile clay where society leaves its stamp,” and more as “an active generative matrix of action.” *Id.* at 380. Lizardo thus recommends that *habitus* be more fully understood as a *structured structure* in line with the view that “there are always two different temporal orders in any sociological explanation: one pertaining to the ‘structural history’ of objective structures (fields) and one pertaining to the biography of certain individuals or populations as they are socialized into specific fields at certain points in their structural development.” *Id.* Thus the goal should be to determine the extent to which *objective structures* involving elite legal education can be modified so as to benefit students at the bottom of the socioeconomic ladder. *Id.* at 394.

71. George & Yoon, *supra* note 64.

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fragility that lurks behind the robes and power suits of the legal profession. Ours is a “cathedral” built on flimsy pieces of paper accepted as evidence of academic and intellectual superiority. But collectively, we must find a way forward, one which seeks to include, rather than alienate, and understand, rather than belittle. It is important that we transcend the artificial barriers we have erected via diplomas, LSAT scores, and “interesting” resumes, and remind ourselves that there are far more important attributes worthy of recognition.

One thought-provoking and high-profile example of legal education’s common affliction was provided by President Obama, a former law professor, during an address he gave at a fundraiser. What President Obama failed to voice, whilst he critiqued the working classes for clinging to their “guns or religion,” was that the milieu in which he then found himself (in large part because he possessed the right piece of paper – a diploma from Harvard Law School) is equally replete with reflexive clinging to emblems and symbols of individual and collective strength and significance.

You go into these small towns in Pennsylvania and, like a lot of small towns in the Midwest, the jobs have been gone now for 25 years and nothing's replaced them. And they fell through the Clinton administration, and the Bush administration, and each successive administration has said that somehow these communities are gonna' regenerate and they have not. And it's not surprising then they get bitter, they cling to guns or religion or antipathy toward people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.<sup>72</sup>

Instead, President Obama could have pointed out that a fear of backsliding into a lower socioeconomic tier might be at the heart of the upper middle class’ ferocious battle for educational and professional laurels. And he might have added that the upper classes have come to “cling” to their elite school diplomas in much the same way he perceived the working classes to be clinging to their “guns or religion.” He might have concluded by asking both constituencies to work together to enhance the economic security of both classes. He

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72. Barack Obama, San Francisco Fundraiser, November 2008.

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did not do this, and instead made it very easy for his political opponents to paint him as out-of-touch; the quintessential liberal elite.

The uncomfortable reality is that the pronounced levels of concentrated wealth and prestige at our nation's elite law schools have devastating ripple effects throughout our legal and democratic institutions, as well as all of civil society. Young Americans are waking up to the rules of the game, and the adults in their midst are being called upon to play catch-up. Many well-intentioned law professors have determined that the best way of protecting lower-SES students is by eliminating their ability to attend lower-tier law schools. Their message has resonated with a generation subjected to round-the-clock news accounts of wealthy elites "buying" education credentials for their children as if they were nothing but shiny baubles with which to adorn their homes and persons.<sup>73</sup> A cursory glance at the comments posted to the popular blog "Outside the Law School Scam" reveals the extent to which this is true.<sup>74</sup>

Learn a trade. Skip college. Go to work after HS. At 21, you'll be a journeyman with 3 years of experience under your belt. You'll have no debt. You'll have a needed skill. You'll be able to get work and make money. Forget the bull[] of "hard work" and dreams of making it big in law or some other white-collar field. Those people, nearly universally, came to the table with multiple edges and connections and a lot of money behind them and backing. It's the complete opposite of a meritocracy out there, despite the propaganda.<sup>75</sup>

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73. Daniel Golden, *The Story Behind Jared Kushner's Curious Acceptance into Harvard*, PRO PUBLICA (Nov. 16, 2017), <https://www.propublica.org/article/the-story-behind-jared-kushners-curious-acceptance-into-harvard>.

74. It is clear to these students that the rules of the game in legal education and the profession have not been "chosen behind a veil of ignorance," but are instead designed to "favor particular condition[s]." JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard University Press, 1971).

75. Anonymous, Comment to *Alternative Summer Readings to Pre-Law Students*, OUTSIDE THE LAW SCHOOL SCAM (July 7, 2015, 8:16 AM), <https://outsidethelawschoolsca m.blogspot.com/2015/07/alternative-summer-reading-for-pre-law.html#comment-form>.

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Beyond HYS, there's nothing to consider right now in the vein of going to law school. "SHY" is all you need to know. And they are ranked, I believe, in that order. Even at that, there's a huge difference between the connected and unconnected at these schools. The connected people in life never lift a finger for anything. If you remember one thing, remember that. They also view strivers with disdain. In other words, you're born into it, or you're nothing. You're actually competition for these people and their friends getting jobs. They look out for one another. If it wasn't law, they could choose literally anything else and come up roses. It doesn't matter. They have the financial backing and connections to where they don't have to ever worry no matter what they do or often fail to do. Hard work is truly for Proles.<sup>76</sup>

Even those who might wish to challenge the conclusions reached by the various posters to these blogs must acknowledge that to a very large extent, perception is reality in the minds of most prospective law students. It is clear that those at the top of the legal education hierarchy are not exactly going out of their way to alter the perception that success in the legal profession is "the complete opposite of a meritocracy."<sup>77</sup> Instead of making room for lower-strata students, they appear to *cling* ever more fiercely to those markers of a caste system that have no rightful place in a democratic society. Some scholars have posited that those at the top of legal education's hierarchy may not be able to deviate from their ingrained beliefs in meritocracy.

It is precisely my impression that many beneficiaries of standardized tests and examination procedures believe in the value and objectivity of such tests with a conviction that is 'constitutive' of their vocational and personal identities, a conviction 'that is not amenable to the ordinary techniques of political and intellectual persuasion. Failing to recognize that relative winners in the current so-called merit system have a thoroughly established stake in the rules that reward them for their

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76. Anonymous, Comment to *Alternative Summer Readings to Pre-Law Students*, OUTSIDE THE LAW SCHOOL SCAM (July 7, 2015, 8:15 AM), <https://outsidethelawschoolscam.blogspot.com/2015/07/alternative-summer-reading-for-pre-law.html#comment-form>.

77. Anonymous, *supra* note 75.

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combined effort and unearned privilege will hardly lead to a clear understanding of these issues.<sup>78</sup>

The following provides some anecdotal evidence of the internalized meritocracy mythology that often drives decision-making in the legal academy.

The equitable argument in favor of grade inflation at elite undergraduate institutions, after all, was that students should get a ‘boost’ because of the (greater) academic excellence of the students against whom they are competing and the (more) advanced nature of the curriculum, when compared to lesser institutions of higher learning.<sup>79</sup>

It illustrates how even in light of the data uncovered by Professor Sander, academics demonstrate some difficulty in processing the fact that an elite diploma does not necessarily connote (greater) academic excellence. Much like Justice Scalia, and his initial willingness to dismiss the potential competence of a former law clerk simply because he had attended the *wrong* law school, many other very bright people choose to ignore the observable and instead *cling* to their faith as symbolized by the elite school diploma.

In addition, some members of the legal academy have reacted with profound skepticism about whether it is even possible to increase the number of students from lower-socioeconomic status backgrounds at the most elite law schools. The following excerpts provide glimpses of how these academics view the issue.

I think that elite law schools can and should do more of what I suspect they are already doing to find those rare low-[socioeconomic] candidates who they predict can and will thrive at their institutions.<sup>80</sup>

I suspect that it would be far too difficult for them to tease apart the class-linked and the purely individual explanations for lack of

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78. Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001, 1006 (1997).

79. Malamud, *supra* note 69, at 739.

80. *Id.* at 737.

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distinction.<sup>81</sup>

Students from middling-[socioeconomic] backgrounds might not have the *'habitus'* towards pursuit of admission to an elite law school—at least not to the extent of being willing to do everything within their power to demonstrate the kinds of distinction necessary to achieve it.<sup>82</sup>

Sander's work connects the dots in the law school admissions game to demonstrate how these insidious and deeply-held beliefs about what types of work experience, leisure pursuits, and education credentials signify "distinction" to admissions officers, almost fatalistically determine that a newly minted class will look quite a bit like the recently graduated class at an elite law school. In fact, instead of looking for those "rare" low-SES candidates, elite schools who take up Professor Malamud's suggestion to "do more of what [she suspects] they are already doing," will actually reject larger numbers of applicants from the bottom half of the income distribution. Because what they *are doing* is routinely refusing to place value on the differentiated curricula vitae of students from the lower tiers of the socioeconomic distribution. If you began your pursuit of higher education at a community college for financial reasons, and worked at Wendy's on the weekends to help your struggling family, and found yourself unable to accept unpaid internships, you might also find that your hard work, financial savvy, and loyalty to loved ones will be viewed as "lack of distinction," by those who are "structuring structures."<sup>83</sup> In other words, if you really *belonged* at a top twenty law school, you would have demonstrated the requisite *habitus* by being "willing to do everything within [your] power to demonstrate the kinds of distinction necessary to achieve it," never mind that you would have risked accumulating astronomical debt, and potentially betrayed your family in the process.<sup>84</sup>

The following provides another example of the reaction that is all too common among our peers in the academy when confronted with

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81. *Id.*

82. *Id.*

83. *Id.* See earlier discussion.

84. Giancola & Kahlenberg, *supra* note 62, at 14.

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the harsh data revealed by Professor Sander. It is an approach that chooses to dismiss the importance of the findings by questioning whether it would even make any difference, whether it would matter at all, to pursue socioeconomic integration at elite law schools.

That brings me to what I regard as the most interesting issue raised by Professor Sander's article: whether law schools have good reason, and in particular good diversity reasons, to increase the proportion of their entering students who come from lower [socioeconomic] backgrounds. I am *dubitante*.<sup>85</sup>

Whether intentional, or otherwise, the above conveys the disdain with which the contributions of those from the "lower classes" are oftentimes regarded in the academy. It shouts, "we do not want you here!" And although we have been taught to consider how the *habitus* of the lower and working classes might stymie their upward relative and absolute intergenerational mobility, much of the recent data sheds light on how it is the *habitus* of the upper ranks that bear the brunt of responsibility for the "bottom stuck."<sup>86</sup>

Legal scholars should know better. Roscoe Pound long ago taught us that "[t]he law makes habits," and yet we appear to miss the fact that one's sense of what is attainable will be difficult to alter if not supported by concrete examples of "people like us" at the top of the education ladder. A new *habitus* can, and must, be fashioned from altering admissions practices at elite law schools. And a focused and extensive effort to increase significantly the numbers of students from low and/or middle socioeconomic backgrounds can be ensured with the stick of loss of accreditation if the pursuit is not prioritized by elite law schools. The legal profession, and civil society, has only to gain from this effort. The lack of diversity of *life experience* in elite law schools is a problem in need of immediate attention. Note the following argument in favor of greater socioeconomic diversity at elite schools.

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85. Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U. L. REV. 683, 704 (2011).

86. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (The University of Chicago Press ed., 1987).

Being raised in a low-income household is fundamentally different from having heard one's parents or grandparents reminisce about the income-related hardships and deprivations of their youth. It is also different from seeing one's extended family still living in poverty. What we need both as a matter of fairness and for the sake of a broadly diverse pipeline to our nation's leadership are people with first-hand experiences of being low-[socioeconomic] and/or first-generation college.<sup>87</sup>

### E. And Then There's Trump

Pa móde cristôm ta estód calóde  
 E justiça de povo nunca tem voz  
 Lá de bô tribuna bô ta insultá  
 E caluniá, tê Deus na ceu  
 Ma cma debóxe de ceu tudo tem seu limite  
 Bô pudêr ca ê infinito  
 O li ê que ê Cabo Verde<sup>88</sup>

When the citizenry loses faith in its country's leaders, institutions of government, as well as its own power to influence the body politic, the Nation suffers. It has become increasingly clear to many Americans that their concerns are not reflected by the majority of those who ascend the pathways leading to this country's seats of power. Legal education bears a greater share of responsibility than other segments of higher education for this state of affairs given that 55% of the Senate and 37.8% of the House are holders of law degrees.<sup>89</sup> A minority of Americans, only thirty-eight percent, currently believes their children will successfully climb the

87. Pruitt, *supra* note 58, at 1011.

88. CESÁRIA ÉVORA, TUDO TEM SE LIMITE (Lusafrica 1995).

“Why do Christians remain silent  
 And justice for the people is never spoken  
 From your judge's bench you insult  
 And slander even God in Heaven  
 But here on Earth everything has its limits  
 Your power is not infinite  
 This right here is Cape Verde.”

89. Congressional Research Service, Membership of the 115th Congress: A Profile, 4 (2017), <https://fas.org/sgp/crs/misc/R44762.pdf>.

socioeconomic ladder and experience a higher quality of life.<sup>90</sup> The explanation behind the relatively low rate of Americans still willing to believe in the American Dream can be found in the data. Historical rates of intergenerational upward mobility show that while “90% of the children born in 1940 ended up in higher ranks of the income distribution than their parents,” only 40%, of the cohort born in 1980, have been able to do so.<sup>91</sup> And this is even bleaker when we consider the likelihood of a child in 2017 ever experiencing the scenarios of the classic Horatio Alger *rags to riches* fables.

Children whose parents are in the bottom quintile of income have a 9.0 percent probability of reaching the top fifth of the income distribution.<sup>92</sup>

The data related to *absolute* intergenerational mobility is equally dispiriting. The Urban Institute points out that “[f]or Americans in all social classes *except the most affluent* [emphasis added by the author], household income, wealth, and assets have declined in real dollars since the 1990s.”<sup>93</sup> And yet, the financial outlook of those in the top quintile, households with incomes above \$112,000, has improved at rates that far outpace those experienced by the rest of society.<sup>94</sup>

Richard V. Reeves has recently written a powerful work

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90. Carol Graham, *Is the American dream really dead?* THE GUARDIAN, (June 20, 2017), <https://www.theguardian.com/inequality/2017/jun/20/is-the-american-dream-really-dead>.

91. *Id.*

92. Urban Institute, *How Are Income and Wealth Linked to Health and Longevity?* 9 (Steven H. Woolf et al. eds., 2015), <https://www.urban.org/sites/default/files/publication/49116/2000178-How-are-Income-and-Wealth-Linked-to-Health-and-Longevity.pdf>.

93. *Id.* at 8.

94. RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM AND WHAT TO DO ABOUT IT 3 (Brookings Institution Press ed., 2017); “The top fifth of U.S. households saw a \$4 trillion increase in pretax income in the years between 1979 and 2013. The combined rise for the bottom 80 percent, by comparison, was just over \$3 trillion. The gap between the bottom fifth and the middle fifth has not widened at all. In fact, there has been no increase in in equality below the eightieth percentile. All the in equality action is above that line.” *Id.* at 6.

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highlighting the fact that it is not the one percent, but rather the top twenty percent of the socioeconomic distribution, whose *habitus* is operating to create a *glass floor* for their children, which at the same time acts as a glass ceiling for “other people’s children.”<sup>95</sup>

...the glass floor protecting affluent kids from falling acts also as a glass ceiling, blocking upward mobility for those born on a lower rung of the ladder. The problem we face is not just class separation, but class perpetuation.<sup>96</sup>

Reeves’ critique is a familiar one to the readers of Ivan Illich, reinforcing and confirming that education serves as a primary mechanism for reproducing upper middle-class status across generations.<sup>97</sup>

When we hoard opportunities, we help our own children but hurt others by reducing their chances of securing those opportunities. Every college place or internship that goes to one of our kids because of a legacy bias or personal connection is one less available to others.<sup>98</sup>

The uncomfortable truth Reeves highlights is that socioeconomically advantaged young people are the recipients of affirmative action throughout their educational and professional trajectories. It is not sufficient to bestow educational enrichment advantages to them as children, but increasingly acceptable to rig the game as they get older in a manner that all but eliminates competition from their less affluent peers.<sup>99</sup>

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95. *Id.* at 10. It is also my wish to pay tribute to Lisa Delpit’s classic work in the area of education equity. LISA DELPIT, *OTHER PEOPLE’S CHILDREN: CULTURAL CONFLICT IN THE CLASSROOM* (The New Press ed., 1995, 2006).

96. Reeves, *supra* note 95, at 10.

97. *Id.* at 10-11.

98. *Id.* at 12.

99. “Since 1996, education expenditures among the affluent have increased by almost 300 percent, while education spending among every other group is basically flat.” David Brooks, *How We Are Ruining America*, N.Y. TIMES (July 11, 2017), [https://www.nytimes.com/2017/07/11/opinion/how-we-are-ruining-america.html?rref=collection%2Ftimestopic%2FIncome%20Inequality&action=click&contentCollection=timestopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=7&pgtype=collec](https://www.nytimes.com/2017/07/11/opinion/how-we-are-ruining-america.html?rref=collection%2Ftimestopic%2FIncome%20Inequality&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=7&pgtype=collec)

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A senior executive at a charitable foundation asked me to hold off publishing until he had secured a sought-after internship for his daughter at an organization his foundation funds. (I think he was joking.) A Brookings colleague has just gotten her third child into an Ivy League college by playing the legacy card. When the daughter of a liberal columnist failed to make it into a highly selective private school, he called a well-placed friend who called a family member who happens to run the school. Then she got in.<sup>100</sup>

That Reeves had the courage to point out that his friends and colleagues should know “their actions were morally wrong” and that they “conferred an unfair advantage” is perhaps one of the most significant contributions made by his powerful book.<sup>101</sup> In the debate over legal education’s future, there has been far too little honesty in describing the policy preferences of elite institutions as not only serving the interests of elite individuals, but harming those students not so comparatively fortunate. And there has been a surprising willingness, on the part of many of the scholars engaged in this debate, to dismiss the harm done to young low-socioeconomic status people in the name of preserving the illusion of meritocracy.

#### F. Unacceptable Externalities

As the reader will see in the next section, Ivan Illich long ago cautioned that the poor in society are forced to bear the greatest costs of ever-increasing and prescribed educational treatment regimens, all under the guise of supposedly helping those at the bottom achieve upward mobility. The recent research has shown he was correct to state that this was a losing proposition, likely to fail in improving one’s socioeconomic lot in life, but also likely to add psychological harm on top of financial injury.

Inevitably, this hidden curriculum of schooling adds prejudice and guilt to the discrimination which a society practices against some

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100. Reeves, *supra* note 95

101. *Id.*

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of its members and compounds the privilege of others with a new title to condescend to the majority.<sup>102</sup>

In fact, it is possible that at the time Illich was writing about the costs borne by the poorest members of society, he could not have anticipated the magnitude of the problem. The harmful physiological toll that inequitable access to the *right* education credentials, the vehicle historically presented as the gateway to upward mobility, has taken on the American people cannot be overstated. Recent studies show that young marginalized adolescents in the United States of America will fare better when they stop believing in the fable of meritocracy. Researchers recently examined the trajectories of marginalized young people to uncover that in line with the body of social psychological research on system justification theory, “believing the system to be fair, just, and meritocratic” in sixth grade “predicted worsening trajectories of outcomes” such as lowered self-esteem, increases in deviant behavior, and worsening of classroom behavioral regulation.<sup>103</sup>

The researchers concluded that over time, these idealistic young people may suffer profound stress over the fact that they are unable to succeed in a system they once perceived as fair and one which would reward them for their hard work and ability to play by the rules.<sup>104</sup> Instead, their more cynical counterparts, who understood at an early age that the system is rigged against them, will be less likely to grow up believing their comparative lack of “success” is somehow a reflection of personal shortcomings.<sup>105</sup>

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102. IVAN ILLICH, DESCHOOLING SOCIETY (1971).

103. Social psychological research on system justification theory “proposes that individuals are motivated to justify and rationalize existing social arrangements, defending and bolstering the status quo simply because it exists.” Erin B. Godfrey, Carlos E. Santos & Esther Burson, *For Better or Worse? System-Justifying Beliefs in Sixth-Grade Predict Trajectories of Self-Esteem and Behavior Across Early Adolescence*, 2017 CHILD DEV. 1 (2017).

104. *Id.* at 2-11. “[T]hese same early beliefs about the fairness of the system may become a liability over time, as youth become increasingly cognizant of how the larger socioeconomic system puts them and their group at a disadvantage, and as their identity as a marginalized group member becomes more salient.”

105. *Id.* at 2-11. “[Those] who are more critically conscious—who understand the economic, political, historical, and social forces that contribute to inequity, feel empowered to change these conditions, and take part in social action—have better

These recent findings serve to support the longstanding research showing that “system justification,” defined as “attributing poverty and wealth to individual causes (lack of ability/effort) rather than structural causes (lack of jobs)” harms those on the bottom of the socioeconomic ladder.<sup>106</sup> Indeed, for “marginalized adults,” it is “associated with lower self-esteem and higher depressive and anxious symptoms.”<sup>107</sup> All of this is particularly poignant given the fact that “youth from low-[socioeconomic status] and inner-city areas are more likely to attribute poverty to individual factors” and are thus at greatest risk of the negative health outcomes that flow from these increased rates of emotional distress.<sup>108</sup> Researchers explain that a belief in the fairness of the system at a young age is increasingly linked to negative outcomes in the areas of grades, school behavior, and occupational outcomes because, “[t]o believe the system is fair, marginalized youth must accept on some level that they and their group deserve their marginalized place in society.”<sup>109</sup> The larger system, of course, and those comfortably situated on the uppermost tiers of the economic distribution, are the greatest beneficiaries. This is due to the fact that those who internalize their own “failure” are far less likely to direct their ire toward those “structuring structures.”<sup>110</sup>

It is perhaps no surprise then to learn that poor people in the United States, one of the wealthiest countries in the world, actually experience *more* stress than their counterparts in Latin America.<sup>111</sup>

It seems that being poor in a very wealthy and unequal country—which prides itself on being a meritocracy, and eschews social support for those who fall behind—results in especially high levels of stress and desperation.<sup>112</sup>

There are high costs to being poor in America, where winners win big, but losers fall hard. Indeed, the dream, with its focus on individual initiative in a meritocracy, has resulted in far less

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occupational outcomes.”

106. *Id.*

107. *Id.* at 2.

108. *Id.* at 3.

109. *Id.* at 3.

110. Lizardo, *supra* note 70.

111. Graham, *supra* note 91.

112. *Id.*

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public support than there is in other countries for safety nets, vocational training, and community support for those with disadvantage or bad luck.<sup>113</sup>

And the health outcomes correlated with the lowest levels of socioeconomic status are nothing short of stunning. Centers for Disease Control and Prevention data reveals that those communities possessing the lowest levels of education and income “systematically exhibit the poorest health.”<sup>114</sup> The opposite is also true: those who find themselves on the upper tiers of wealth and educational attainment also experience improved health.<sup>115</sup> The research shows that educational attainment and income provide psychosocial and material resources that protect against exposure to health risks in early and adult life. There is also an established link between financial adversity and stress, with resultant negative health effects on the body’s immune system.<sup>116</sup> Among the health outcomes experienced by the lowest income groups are shorter life span, increased rates of depression, nervousness, and somatic complaints such as pain.

#### G. Scamblogging as Elixir

The only silver lining in the current crisis in legal education may be that young people are channeling their angst in a healthier manner by refusing to internalize their inability to “get ahead” in the legal

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113. *Id.*

114. Pamela A. Meyer, Paula W. Yoon, & Rachel B. Kaufmann, *Introduction: CDC Health Disparities and Inequalities Report — United States*, 62 *CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY.* 3, 15 (2013).

115. *Id.* at 3. “At age 25, Americans in the highest income group can expect to live more than six years longer than their poor counterparts. The Social Security Administration reports that retirees at age 65 are living longer, but since the 1970s those with earnings in the top half of the income distribution have seen their life expectancy increase by more (6.0 years) than those in the bottom half (1.3 years)...Income is also associated with mental health. Compared with people from families who earn more than \$100,000 a year, those with family incomes below \$35,000 a year are four times more likely to report being nervous and five times more likely to report sadness ‘all or most of the time’ Somatic complaints (i.e., the pain and other physical ailments that people experience due to stress and depression) also occur more commonly among people with less income.”

116. Urban Institute, *supra* note 87, at 7.

profession.<sup>117</sup> This may yet stand as one of the greatest contributions made by Paul Campos, and the whole of the “scamblogging” movement. Their efforts have resulted in a legitimate avenue through which young Americans may direct their rage outward, rather than inward, and thus may have helped ameliorate some of the negative health outcomes shown to be linked to a belief in a meritocratic system. In this light, it is also possible to view as positive the recent data showing that educational institutions are rapidly losing the respect of the American people, with a more pronounced decline among Republicans. The Pew Research Center reported that “[a] majority of Republicans and Republican-leaning independents (58%) now say that colleges and universities have a negative effect on the country, up from 45% last year.”<sup>118</sup>

This awakening among the American people should be welcomed, not scorned, by the academic community. It is after all simply a visible manifestation of the harm long endured by those at the bottom of the socioeconomic ladder. It opens the door for honest people to admit and voice the systemic flaws imbedded in the current educational structure and carries with it the promise that concrete action might be taken to dismantle legal education’s flimsy castle made of paper credentials. A foundationally sound edifice might then surface if we are mindful to include all members of society in its construction. Even those who have graduated from elite law schools recognize the perils of a legal education pathway that is segregated along class lines.

...to the extent that law schools represent the training ground for a large number of our Nation's leaders and to the extent that we want to cultivate a set of leaders with legitimacy in the eyes of the citizenry, class diversity, like race diversity, may signal to all citizens that the law school path to leadership is open to people from a broad range of class backgrounds.<sup>119</sup>

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117. Barnhizer, *infra* note 156; Jewel, *supra* note 15.

118. PEW RES. CTR., SHARP PARTISAN DIVISIONS IN VIEWS OF NATIONAL INSTITUTIONS (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/07/11101505/07-10-17-Institutions-release.pdf>.

119. Angela Onwuachi-Willig, *Class, Classes, and Classic Race-baiting: What's in a Definition?*, 88 DENVER U. L. REV. 807, 807-08 (2011).

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The next section of this article provides a theoretical framework through which to design a future of legal education that is genuinely democratic and driven by bottom-up reforms that are student-focused and public-oriented. In so doing, it looks to Ivan Illich as the model for the modern law professor and law school administrator interested in prioritizing the *needs* of students situated at the bottom of the socioeconomic ladder over the *preferences* of the adults at the top of the hierarchy. The legal education cathedral of the future is currently in its infancy, and Ivan Illich might yet become its architect.

## II. Ivan Illich: Envisioning the Future of Legal Education

What is perhaps most startling about Ivan Illich's disdain for the role played by higher education credentials is that he was one of those individuals for whom educational success came with great ease. Ivan Illich was a man of extraordinary intellect, a polyglot at an early age, who attained the title of monsignor in the Catholic Church and the position of vice-rector of a Catholic University in Puerto Rico.<sup>120</sup> Illich was born in Vienna in 1926 to a Catholic Croatian father and a Jewish mother.<sup>121</sup> He would personally experience the German annexation of Austria and its impact on the Jewish citizenry when he was expelled from his school in 1941 due to his ancestry. Undeterred, he would go on to study in Italy and Switzerland, earning master's degrees in theology and philosophy as well as a doctorate in history by the age of twenty-four.<sup>122</sup> Although the exact number of languages is disputed, it is certain that at the time of his death, Illich was fluent in German, Yiddish, Italian, French, Serbo-Croatian, Latin, Greek, English, Spanish and Portuguese.<sup>123</sup> Referred to by some as "prophetic," and others as an "anarchist philosopher," Illich and his writings have assumed an almost mythical dimension as our modern day struggles over systemic injustices reveal the same

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120. Todd Hartch, *Ivan Illich and the American Catholic Missionary Initiative in Latin America*, 33 INT'L BULL. OF MISSIONARY RES. 185, 185 (2009); Carl Mitcham, *The Challenges of This Collection*, in THE CHALLENGES OF IVAN ILLICH 9, 9 (Lee Hoinacki et al. eds., 2002).

121. Hartch, *supra* note 115, at 185.

122. *Id.*

123. *Id.*

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enduring educational hierarchies decried by Illich all those decades ago.

By all objective measures, institutionalized schooling favored Illich, and yet his writings exposed a deep-seated distrust of, and contempt for, the rituals and hierarchy of educational systems, their commodification of knowledge, and the competitive posture students are forced to assume despite their unequal positions at the starting line. These features of institutionalized teaching and learning were anathema to Illich's democratic vision of education. The writings of Illich reflect a profound understanding of the manner in which educational institutions often come to harm those who are most vulnerable and, perhaps most significantly, how these same institutions dismiss the knowledge and skills that can be acquired outside of formal schooling. At a time when legal education in the United States is being critiqued, dissected, and repackaged, it would prove enlightening for those in the legal academy to reflect on many of the writings of Ivan Illich.

#### A. Liberating Education from Its Role as a Tool of Social Class Reproduction

First, Illich is best understood as egalitarian to a fault in his conception of the ideal model of educational delivery. His is a radical theory of education in keeping with the tumultuous period in which he lived, one shaped by the fascist waves that swept through Europe in the first part of the 20th century and later influenced by the unrest of the Americas in the 1960s and 1970s. Illich's views were also firmly rooted in his Catholic faith, but he was no strict adherent of church doctrine. Instead, Illich embraced liberation theology along with the controversial approaches taken by the Latin American educators, such as Paulo Freire, who were his contemporaries. Although the two held very different views at times, Illich is *Freireian* in his reverence for the student-cum-teacher who is replete with self-sufficiency. Illich critiqued educational institutions for strongly favoring and rewarding those who are dependent, pliant and prone to sycophantism. At the heart of Illich's views was a profound distaste for the illusion of meritocracy that a system of education helps to promote. He wrote:

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The legitimization of hierarchical distribution of privilege and power has shifted from lineage, inheritance, the favor of king or pope, and ruthlessness on the market or on the battlefield to a more subtle form of capitalism: the hierarchical but liberal institution of compulsory schooling, which permits the well-schooled to impute guilt to the lagging consumer of knowledge for holding a certificate of lower denomination.<sup>124</sup>

In accordance with Illich's understanding of society, he rightly perceived that the starting line was skewed in favor of a privileged class. He went further to explain the manner in which this credentialing system created winners and losers and then forced the losers to internalize their failure. This "hidden curriculum" he perceived to be one of the key lessons taught by schooling systems and described it as "a ritual that can be considered the official initiation into modern society, institutionally established through the school. It is the purpose of this ritual to hide from its participants the contradictions between the myth of an egalitarian society and the class-conscious reality it certifies."<sup>125</sup>

Illich regarded the "losers" in this system, the high school drop-outs, the holders of GED certificates, and graduates of community colleges, and in today's era, he might similarly regard the graduates of lower-tier law schools, as being forced to carry permanent badges of their unequal standing. In today's debate over legal education, one can clearly see the wisdom of Illich's recognition that "the poor are the first victims of more school."<sup>126</sup> It is no longer good enough for the "poor" to acquire the same education credentials as the rich, because a J.D. from a lower-tier school does not signal the same as one from a top twenty school. And so those lower-socioeconomic status students who have worked hard to secure the credentials they believe will help them ascend the socioeconomic ladder find that once again their accomplishments are discounted by those eager to preserve the "long-standing, persistent hierarchy of American law schools,"<sup>127</sup> and the profession.<sup>128</sup>

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124. Illich, *supra* note 1, at 98.

125. *Id.*

126. *Id.* at 97.

127. Olufunmilayo Arewa, Andrew P. Morriss & William Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 942 (2013).

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And although it is commonplace for scholars to recognize that “graduates of lower-ranked law schools were always less likely to secure desirable high-paying legal jobs,”<sup>129</sup> few take the time to investigate the affirmative actions taken in the past and present to preserve the competitive advantage enjoyed by graduates of elite schools.<sup>130</sup> This pattern is identical in undergraduate educational institutions. In fact,

“while more poor kids attend college in recent years, the gain is mostly explained in attendance at less selective colleges—community colleges with a two-year degree, or for-profit institutions—whereas the class gap has widened in selective institutions.”<sup>131</sup>

Additionally, attendance at four-year institutions is similarly structured across class lines, with the most privileged students attending the most elite colleges and universities.

In stark contrast to what we see today in higher education, Illich’s commitment was to “a radically equitable access to goods, rights, and jobs.”<sup>132</sup> In fact, the hierarchical class structure promoted and legitimized through institutionalized education serves as fodder for Illich’s most visceral critiques.

The pursuit of education credentials thus defines a new class structure for society within which the large consumers of knowledge—those who have acquired greater quantities of knowledge stock—can claim to be of superior value to society. They represent gilt-edged securities in a society’s portfolio of human capital, and access to the more powerful or scarcer tools of production is reserved to them.<sup>133</sup>

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128. Scholars point to the presence of a stark bimodal employment structure. *Id.* at 967.

129. Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269, 280 (2016).

130. See generally Arewa, *supra* note 122 (providing significant contribution to the scholarship through a historical analysis of the various steps taken to create and preserve a rigid hierarchy in legal education).

131. Wald, *supra* note 124, at 279.

132. Illich, *supra* note 1, at xiv.

133. *Id.* at 84.

Illich recognized that those willing and able to consume ever larger quantities of commodified knowledge would hold a “form of currency more liquid than rubles or dollars.”<sup>134</sup> That this currency would always be disproportionately held by those who begin “earlier, healthier, or better prepared,” struck Illich as an unacceptable externality.<sup>135</sup> In accordance with Illich’s world view, knowledge was not to be treated as commodity but as a resource to be shared with one’s neighbor. He understood education as a recursive process, with true learning achieved only when an instructor first learned from his pupil, and as an ongoing journey impossible to encapsulate within a paper credential.

#### B. Acting in Accordance with One’s Beliefs

Illich did not only preach his message, but practiced it throughout his life. Although his own educational trajectory invited an expanse of options, he made the decision to train to be a Roman Catholic parish priest, and “served in that role in Washington Heights, Manhattan, then a very poor community of recent, chiefly Puerto Rican, immigrants.”<sup>136</sup> In that role, Illich was mindful of the cultural differences among the recently arrived Puerto Ricans and sought to learn more about their way of life prior to commencing his ministry. Shortly after arriving at Incarnation Parish, Illich travelled to Puerto Rico, learned Spanish, and immersed himself in the culture for one month.<sup>137</sup> This enabled Illich to approach his ministry in a way that would resonate with his parishioners. One of his fellow priests who had the opportunity to work with him during those years made the following observation:

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134. *Id.*

135. *Id.* at xiii; “The name we now give to this commodity is ‘education,’ a quantifiable and cumulative output of a professionally designed institution called school, whose value can be measured by the duration and the costliness of the application of a process (the hidden curriculum) to the student.” *Id.* at 84.

136. Bruce Miller, *The Place of Law in Ivan Illich’s Vision of Social Transformation*, 34 W. NEW ENG. L. REV. 507, 512 (2012).

137. Joseph P. Fitzpatrick, S.J., *Ivan Illich as We Knew Him in the 1950s*, in THE CHALLENGES OF IVAN ILLICH 34 (Lee Hoinacki et al. eds., 2002).

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He was keenly aware of the importance of ministering to [his parishioners] in a spiritual and religious style that made sense to Puerto Ricans in the context of their culture and traditions. He saw the danger of seeking to make them over in the image of the Irish or German Catholicism of New York.<sup>138</sup>

Illich approached his ministry in the same manner that he would later approach his critique of educational institutions. He believed in the strength and resources of individuals over those of institutions and he sought to facilitate networks or webs among and between his parishioners. In an effort to recreate some of the strong social networks these recent immigrants had left behind, Illich rented an apartment in one of the tenements occupied by many of the recent immigrant families from Puerto Rico.<sup>139</sup> He then recruited women volunteers from the parish to set up the apartment in an informal and neighborly style. In what would become known as *El Cuartito de María* [The Little House of Mary], “the young women could play with the children and mind them while their mothers were shopping; [] women could gather for friendly conversation; and [] the young women simply fulfilled the role of good neighbors.”<sup>140</sup> Illich’s approach was highly effective precisely because it mirrored the type of informal networks that existed in Puerto Rican neighborhoods. Of course, Illich would not have been able to implement this plan had he not taken the time to travel to Puerto Rico and learn about the people with whom he would be working in New York City.<sup>141</sup> His friend and fellow priest wrote the following about *El Cuartito de María*:

Looking back on this, I recognize his clear conviction of the need to enable the people to use their own resources in order to cope with their problems rather than constructing agencies and institutions to care for them.<sup>142</sup>

An additional example of Illich’s democratic approach to education can be seen in the manner in which he structured his

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138. *Id.* at 35.

140. *Id.* at 36.

141. *Id.*

141. *Id.*

142. *Id.*

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priestly duties. Due to Illich's success in New York working with the Puerto Rican population, he was assigned by Cardinal Spellman to serve as the vice rector of the Catholic University in Puerto Rico, where he would later establish the Institute of Intercultural Communication.<sup>143</sup> Throughout his time in Puerto Rico, Illich often dispensed with the need for formal pulpit and church facilities, instead electing to draw from the local resources to give mass. Again, one of his close friends at the time reflects:

For example, when Illich was assigned to Puerto Rico in 1956, he began a practice of visiting a small community of Puerto Ricans in a barrio called Playita Cortada, not far from Ponce. He would construct a temporary altar on the porch of a small family house and gather the people for mass. It was most impressive to see the impact of Illich's ministry among these poor people.<sup>144</sup>

This approach also reflected Illich's belief in the power of "place" in the context of education, and how to best ensure an authentic dialogue between teacher and student. Illich would remain remarkably consistent throughout his life in preferring genuine communication, and could hardly contemplate education, without the concomitant possibility that the teacher might also learn from the student. The *Illichean* brand of education could only be housed in venues with ample room for all voices.

For a quarter of a century, now, I have tried to avoid using a microphone, even when addressing a large audience. I use it only when I'm on a panel, or when the architecture of the auditorium is so modern that it silences the naked voice. I refuse to be made into a loudspeaker. I refuse to address people who are beyond the reach of my voice. I refuse to address people who are put at an acoustic disadvantage during the question period because of my access to a microphone. I refuse, because I treasure the balance between auditory and visual presence, and reject that phony intimacy which arises from the distant speaker's overpowering "whisper." More often than not, both host and audience have accepted my decision. The auditorium is hushed, people strain to listen, the few who have impaired hearing move to the front.

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143. *Id.* at 38.

144. *Id.*

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Several young persons have told me by letter that, since the evening we first met, they have trained their voices to increase their reach and timbre—as rhetors have done for a long time. But there are deeper reasons why I have renounced the microphone—its use in those circumstances in which I am physically present. I believe that speaking creates a place. Place is something precious that to a large degree has been obliterated by the homogeneous space generated by speedy locomotion, standardized planning, screens and loudspeakers. These powerful techniques displace the voice and dissolve speech into a message, coded sound waves that fit universal space. “Speakers” can make a voice omnipresent in a physical space of any size. But only the *viva vox* has the power to engender the shell within which speaker and audience are in the locality of their encounter. I can now look back on many conversations that came about as a result of my refusal to let my voice be digitally deconstructed and mechanically synthesized before it would be heard. A majority of those who shared in these reflections express their satisfaction at my insistence on the “naked” voice. They accept as not unreasonable my insistence on limiting an audience to the range of the speaker’s organ.<sup>145</sup>

Illich was unafraid to antagonize his superiors in the Catholic Church by taking positions that were helpful to his parishioners but contrary to church doctrine. This willingness to subvert went beyond pedagogy to broach substance as well. For instance, Illich was eventually dismissed from his post as administrator of the Catholic University in Puerto Rico after speaking out against the Catholic Church’s opposition to contraception.<sup>146</sup> This led Illich to Cuernavaca, Mexico, where he established a language school and began to write the works for which he is now remembered.<sup>147</sup>

In the same manner as his ministry attempted to collapse the distance usually artificially inserted between priest and parishioner, in teaching style as well as subject matter, Illich’s writings ultimately advanced an absolute assault on the hierarchical structure of education. Illich railed against the traditional model of professor

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145. Ivan Illich, *The Loudspeaker on the Tower*, (Apr. 8, 2000), [http://www.davidtinapple.com/illich/2000\\_loudspuu.pdf](http://www.davidtinapple.com/illich/2000_loudspuu.pdf).

146. Miller, *supra* note 137, at 512.

147. *Id.*

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perched high above *his* pupils, preferably standing behind a podium and elevated above the mere mortals who arrive in the classroom with empty minds eager to be filled with the professor's words of wisdom—and ultimately the institutions that promote the idea that an individual must have undergone such a process in order to be regarded as educated. Illich discerned a world of difference between education and credentialing, a refrain likely to earn praise from a generation saddled with debt in pursuit of those very credentials.

### C. Restoring Faith in the Individual: Illich's Transgression

Illich's belief in the individual to learn on her own and from her peers was boundless. Underlying his entire thesis on education reform was the "abiding belief in the intelligence and self-reliance of the individual who could come to solutions through his own awareness."<sup>148</sup> Around *this* faith, the whole of Illich's work was built. In the early 1970s, Illich set out to champion a new approach to teaching and learning. This framework was discussed in what would become one of his most famous works, *Deschooling Society*, written in 1971. In it, Illich outlined the purposes that any good educational system ought to possess.<sup>149</sup> Illich envisioned a *deschooled* learning environment in which the ritual of age-graded and credentialed schooling would be replaced by an individual's right to access educational resources throughout the whole of her life.<sup>150</sup> It is this relentless emphasis on the individual's strength, intelligence, and resilience, which stands in direct opposition to the current societal acceptance of the elite law school diploma as imprimatur of relevance. Illich favored recognition of proven skills, knowledge, and action. He had no tolerance for discrimination on the basis of factors that were not directly linked to an individual's ability to demonstrate possession of those traits.

As such, Illich critiqued the manner in which institutionalized schooling dismissed the skills and knowledge of those lacking specific credentials or teaching certificates. Paramount to his vision

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148. Marion Boyars, *The Adventure of Publishing Ivan Illich*, in *THE CHALLENGES OF IVAN ILLICH* 45 (Lee Hoinacki et al. eds., 2002).

149. IVAN ILLICH, *DESCHOOLING SOCIETY* 93 (Penguin Education ed., 1971).

150. *Id.*

of democratized education was that these artificial impediments be removed. He suggested as a first step that skilled individuals be provided with incentives to share their knowledge.<sup>151</sup> This particular suggestion fit within his view of what it meant to share skills and information with those outside a prescribed community. In addition to the benefits that would be conveyed to interested learners by allowing access behind the veil of institutionalized schooling, in essence, “allow[ing] him to look into the windows of the control room or the parliament, if he cannot get in the door,” the exercise was one Illich perceived as a transgression of spiritual significance. It’s been written about Illich that “[t]he parable of the Good Samaritan is central to [his] thinking.”<sup>152</sup> Illich reflected on the parable writing:

Perhaps the only way we could recapture it today could be to imagine the Samaritan as a Palestinian ministering to a wounded Jew. He is someone who not only goes outside his ethnic preference for taking care of his own kind but who commits a kind of treason by caring for his enemy. In so doing he exercises a freedom of choice whose radical novelty has often been overlooked.<sup>153</sup>

It is clear that a parallel can be drawn to the modern elite law school professor, as well as others occupying positions of privilege within the legal profession, who might yet commit treason against her own elite institution by caring for students outside of her socioeconomic milieu. It is not only knowledge about law practice or legal rules that might be disseminated, but transparency about the truths of hierarchy in elite legal education and the profession. In so doing, that individual, in a similar manner to Illich, risks antagonizing her own circle, but gains the intangible esteem of those who recognize the sacrifice. Note the example below, a distinctly *Illichean* transgression written by Professor Lani Guinier.

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151. Ivan Illich, *The Deschooled Society*, in EDUCATION WITHOUT SCHOOLS 16 (Peter Buckman ed., 1973).

152. Rosa Bruno-Jofré & Jon Igelmo Zaldívar, *Ivan Illich’s Late Critique of Deschooling Society: “I Was Largely Barking Up the Wrong Tree”*, 62 EDUC. THEORY 573, 588 (2012).

153. *Id.*

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The testocracy, a twenty-first-century cult of standardized, quantifiable merit, values perfect scores but ignores character. Indeed, the boy with the winning scores, derisive grin, and bad manners could be a poster child for the closely fought college admissions competition. The testocracy teaches the cocky boy to internalize success and to take personal credit for the trappings of privilege, including the educational resources and networks of his college-educated parents. He has learned that individual achievement trumps collective commitment. Those who reach the finish line faster will reap their rewards here on earth. And one of those rewards is the right to brag.

The boy still squirming with resentment in the back row knows the difference between being proud and being a jerk. He has the instincts of character. One should not boast, preen, or complain. Yet, he knows that, to the academic world, his character counts less than his SAT scores. He knows that the SAT opens doors to the best schools and by extension to long-term success. This boy is from a working-class family.<sup>154</sup>

In addition, the *Illichean* mindset, such as that reflected by Guinier's willingness to consider the *other*, might lead a partner at a big law firm, a Supreme Court Justice, or faculties of law to hire those whose life paths have been radically different from the rather uniform educational and professional trajectories of those who disproportionately inhabit such quarters of the profession. The previous section highlighted the many contributions made by Ivan Illich to today's debate on the future of legal education. Although it is highly unlikely he intended to do so at the time, his vision for an equitable society, in which education plays a part, but credentials in the form of artificial gatekeepers, are not regarded as *the* goal, stands as a viable path forward for those in the academy who are interested in pursuing genuine democratization of legal education. The next, and final, section of this article seeks to persuade the reader that the path ultimately taken by the legal academy and the ABA should be grounded in *Illichean* principles.

### III. Reframing ABA Recommendations in Support of

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154. LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA X* (Beacon Press ed., 2015).

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## Democratizing Legal Education

If we were to task the ABA with a set of concrete reforms with the stated purpose of increasing access to the legal profession for those from lower-middle- and working-classes, what form would our recommendations take. Realistic proposals would likely contain more than just a few strands of Illich's work. First, the proposals would be informed by those we seek to reach. Far greater care would be taken to ensure that potential solutions are framed as direct answers to the challenges confronted by the target demographic. Honesty and transparency would permeate every facet of the exchange of information that occurs between individual potential law students and institutions of legal education. Second, those engaged in the debate over the future of legal education, and who speak from positions of privilege, would consider the ramifications of their proposals, particularly on those possessing the least power. This would require learning lessons from history and refusing to pursue reforms likely to exclude lower-SES students from legal education and the profession. Third, reforms put forth would distinguish between credentialing and education, and fully recognize the importance of both in the labor market awaiting new law graduates. The primary and relentless focus of legal education reformers would be to ensure equity in the distribution of the knowledge Illich describes as the "currency more liquid than rubles or dollars."<sup>155</sup> Instead of narrowing the curricular experience for those students from lower socioeconomic classes, we would seek to guarantee their educational experiences contain the same opportunities for enrichment and acquisition of knowledge stock obtained by their wealthier counterparts.

### A. Recognizing and Voicing the Problem

The hidden curriculum is a ritual that can be considered the official initiation into modern society, institutionally established through the school. It is the purpose of this ritual to hide from its participants the contradictions between the myth of an egalitarian

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155. Illich, *supra* note 1, at 84.

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society and the class-conscious reality it certifies.<sup>156</sup>

The hidden curriculum thus both defines and measures what education is, and to what level of productivity it entitles the consumer. It serves as a rationale for the growing correlation between jobs and corresponding privilege—which translates into personal income in some societies and into direct claims to time-saving services, further education, and prestige in others.<sup>157</sup>

The evidence that the upper tiers of legal education are the province of the affluent and privileged is irrefutable. Yet, the elite law school credential is permitted to serve as a proxy for job qualifications, notwithstanding the unfair competitive advantage it thus confers on those disproportionately favored in the lottery of birth. A lack of transparency must not be allowed to compound the harm inflicted by the current inequitable system. One of the first orders of business undertaken by the ABA must be to require law schools to report the socioeconomic status of their students. If the ABA chooses not to take steps to diversify the class status of student bodies at the upper tiers of legal education, it must at least be honest about the current hierarchy's relationship with socioeconomic status.

It would not be an onerous task for the ABA to encourage legal education to prioritize the acquisition of student biographical data indicative of socioeconomic status. The majority of law school applicants currently fills out an electronic application form published by the Law School Admission Council ("LSAC"), which asks students, among other questions, to report the highest level of educational attainment and occupation of their parent(s).<sup>158</sup> Individual law schools should be required by the ABA to collect and track this data for their admitted students. In addition, any concerns,

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156. Illich, *supra* note 1, at 88.

157. Illich, *supra* note 1, at 84.

158. Despite this, it is worth noting that LSAC's website currently makes no mention of SES other than a passing reference in its blanket diversity statement, while simultaneously including individual pages for racial/ethnic minorities and LGBT applicants. I applaud LSAC's efforts in reaching out to these other constituencies, but would urge it to also include a separate page for students who are from lower socioeconomic strata and/or who identify as first-generation professionals. LSAC, <https://www.lsac.org/jd/diversity-in-law-school/racial-ethnic-minority-applicants> (last visited Nov. 4, 2017).

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that student applicants might fail to provide responses to these questions in the course of the application process, could be addressed by encouraging law schools to follow up at their orientation program with a one-page survey. In either case, the administrative burden imposed on law schools would be slight in comparison to the likely benefits of a concerted effort on the part of legal education to unmask the pretense of meritocracy that currently attaches to the elite law school credential. The impact of finally and conclusively exposing institutions of legal education as “class houses” overwhelmingly segregated by socioeconomic status would help weaken the reflexive tendency to overvalue the elite law school credential.

The ABA already has the tools to mandate disclosure of this information, and only a slight revision to its existing accreditation standards would be required. ABA Standard 509 currently requires law schools to publicly disclose on their websites admissions and enrollment data, including academic, transfer, and other attrition; and class sizes for first-year and upper-class courses; employment outcomes; bar results, among other relevant information. Standard 509 should be revised to include a requirement for the disclosure of demographic information pertaining to the socioeconomic make-up of the school’s student body. Again, this would not be unduly burdensome for the individual law school as information about parental levels of education and occupation are already gathered through LSAC’s electronic application. The added benefit of including this additional disclosure requirement in Standard 509 is that the Guidance Memo accompanying Standard 509’s 2016 revision explains that “[v]iolations of these obligations may result in sanctions under Rule 16 of the Rules of Procedure for Approval of Law Schools.”<sup>159</sup> In other words, consequences would follow a law school’s failure to comply.

In addition, the manner in which law schools are to comply with the requirement for disclosures under Standard 509 is also already determined. The Standard calls upon schools to “publish[] on a law school’s website,” “post[] conspicuously and in a readily accessible location,” and include a prominently featured link “on the main page for admissions/prospective students.” The fact that the structure for

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159. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 509 (AM. BAR ASS’N 2016).

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making disclosures already exists strengthens the argument in favor of requiring demographic data pertaining to the socioeconomic status of a law school's student body.

The additional benefit of shining a light on the problem of socioeconomic exclusivity in the upper tiers of the legal academy is that doing so places the ABA in a rather uncomfortable position. Certainly, the ABA might still choose to simply report on the class disparities across the legal education hierarchy, but continued inaction on matters of class coupled with increasingly visible and accurate demographic data might subject it to increased demands for much-needed changes. One might hope that specific proposals such as increasing the levels of need-based scholarship funding would gain greater traction at that time. Although, given the rather muted response to Professor Richard Sanders' study, it is not entirely certain that additional data, standing alone, would prompt the ABA to act to increase the numbers of low-SES students in legal education.

Already, those engaged in the debate over the future of legal education and the crisis scholars discussed in the preceding sections have made great strides in persuading the ABA to increase transparency when it comes to the costs and benefits of law school attendance. Note the following written by the ABA Commission on the Impact of the Economic Crises on the Profession and Legal Needs.

Choosing to attend law school is a big decision that prospective law students should not take lightly. Although many factors may influence one's decisions about whether and where to attend law school, a proper understanding of the economic cost of a legal education is vital for making an educated decision. Far too many law students expect that earning a law degree will solve their financial problems for life. In reality, however, attending law school can become a financial burden for law students who fail to consider carefully the financial implications of their decision.

What many do not know, however, is that these costs often exceed the expected return on their investment in the job market. Prior to the recession, starting salaries for associates at large law firms stabilized around \$160,000 a year, and many prospective law students expect to be able to earn a comparable amount. In reality, however, only 23% of the graduates of the class of 2008

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started with such a high salary, including only 37% of those who went into private practice. Shockingly, most of the rest of the graduates, about 42%, started with an annual salary of less than \$65,000.<sup>160</sup>

The ABA should take steps to update this document on an annual basis, tailor the starting salary information to different regional markets, require law schools to post it annually on their websites and disseminate to students at open houses, career fairs, and at incoming orientation programs. It is true that the non-profit Law School Transparency has been engaged in this work since 2009, but the ABA would be able to bring greater resources and data to the effort.

Finally, it is important that the increased transparency on the part of individual law schools be required, and not simply suggested by the ABA. While certainly admirable that individual professors have stepped forth in an attempt to provide such transparency to their students, the message needs to be far more detailed, comprehensive, and unified throughout all of legal education. Note the following example provided by Professor Daniel Barnhizer.

Even after grades post for the first semester, the lack of attrition is stunning, particularly since I explain year after year in the strongest possible terms that maintaining a sub-3.0 GPA is a good indication that the student should cut his or her losses since the big law jobs are now almost certainly out of reach. Students may be consciously aware of the risks associated with investing in a legal education, but once they are in our doors they do not seem to adjust their behavior in response to that risk.<sup>161</sup>

Without a concerted response on the part of the legal academy, there is no guarantee that the students most in need of such disclosures will ever receive them, nor that their message, if delivered at all, will occur in time to inform decision-making.

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160. AM. BAR ASS'N, COMMISSION ON THE IMPACT OF THE ECONOMIC CRISES ON THE PROFESSION AND LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL (2009).

161. Daniel D. Barnhizer, *Cultural Narratives of the Legal Profession: Law Schools, Scamblogs, Hopelessness, and the Rule of Law*, 2012 MICH. ST. L. REV. 663, 685 (2012).

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## B. The ABA's Role in Making Habitus

Not only has the redefinition of learning as schooling made schools seem necessary, it has also compounded the poverty of the unschooled with discrimination against the uneducated. People who have climbed up the ladder of schooling know where they dropped out and how uneducated they are. Once they accept the authority of an agency to define and measure their level of knowledge, they easily go on to accept the authority of other agencies to define for them their level of appropriate health or mobility. It is difficult for them to identify the structural corruption of our major institutions.<sup>162</sup>

Inevitably, it organizes society into many layers of failure, with each layer inhabited by dropouts schooled to believe that those who have consumed more education deserve more privilege because they are more valuable assets to society as a whole.<sup>163</sup>

Although initially troubling that the ABA Task Force's 2014 report on the Future of Legal Education diplomatically stated that "culture cannot be changed through prescription,"<sup>164</sup> thus signaling a rather passive stance on the part of legal education's only nationally relevant accreditation body, other aspects of the ABA's work signal a greater opportunity for democratizing legal education in line with the vision of Ivan Illich. First, the Task Force report can be interpreted as providing a long overdue apology to the early proprietary law schools, recognizing the importance of schools historically "commit[ed] to providing opportunity for legal education to those who might otherwise not have it."<sup>165</sup> And although the Task Force stopped short of explicitly recognizing the need for greater socioeconomic inclusivity in legal education, it nonetheless emphasized the need to preserve "schools of access." In so doing, the Task Force took a tentative step toward addressing the concerns of those students seeking entrée into the legal profession, and with it the promise of upward socioeconomic mobility. The focus, albeit vague

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162. IVAN ILLICH, *TOOLS FOR CONVIVIALITY* 20 (Marion Boyars ed., 2001).

163. *Id.* at 45.

164. AM. BAR ASS'N, *TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS* (2014).

165. *Id.*

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in its framing, placed by the Task Force on increasing the value and decreasing the cost of a law degree are of critical importance to students from lower socioeconomic tiers. While it is promising to see the Task Force critiquing those “law school ranking methodologies that uncritically confuse higher cost per student with higher educational quality,” it is equally important for the ABA to ensure that any progress made in increasing access and affordability is not undercut by a push to further segment legal education credentials. Ultimately, both the educational experience and the certification received by students across all tiers of law schools should remain, if not precisely identical, at least worth the same currency in the labor market.<sup>166</sup> Freedom to innovate and differentiate from the ABA mold is certainly welcome, but caution is needed when contemplating proposals likely to lead to further stratification in a profession already divided along class lines. Otherwise, instead of democratizing access to the profession, we will succeed only in preventing members of the working- and lower-middle classes from obtaining the requisite knowledge stock for career advancement.

### C. The Historical Significance of the ABA’s Admission: Déjà Vu All Over Again

Legal scholars point out that the tenor of the debate around access to the legal profession has reached a fever pitch many times throughout the history of the ABA.<sup>167</sup> In fact, descriptions of an

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166. *Id.*

167. Barry B Boyer & Roger C Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 223 (1974). The following acknowledgments by the author of the article highlight the striking parallels between those issues debated by the ABA then and now. *Id.* at 221. “The tendency to see a ‘crisis’ in every current issue often is muted when viewed in the broader perspective of history. It is possible that the law schools are performing better in all respects than ever before, but are suffering from a widespread psychology of rising expectations in which improved performance suffers by comparison with exaggerated notions of what can or should be done. Moreover, our society may be making increased, and sometimes unrealistic, demands on lawyers and the legal system as other social institutions lose influence and authority. While the causes or validity of the current concern about legal education are unclear, the existence of such concern on the part of many perceptive observers is evident.” “This Article was prepared as a Report to the American Bar

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academy in crisis have long been relied upon as a mechanism for ushering in changes to the policies and practices of law schools. History shows us that the particular reforms likely to follow a period of crisis in legal education rarely succeed in helping students at the bottom of the socioeconomic ladder. Note the following concerns expressed at proceedings of the Section on Legal Education in 1920.

I think most of us ... [agree that] there is a substantial difference between work done in the day schools and the work done in the night schools, and that a really adequate legal education cannot be obtained incidentally after a day's work has been done.<sup>168</sup>

These factory-type schools, sometimes called 'sausage-mills,' are immensely profitable... Without idea or purpose of doing more than cram their students for the Bar examination, these schools have made very difficult, if not almost impossible, the development of a better type of part-time school.<sup>169</sup>

... second-rate law schools ... that exist for revenue only, [are] gaining ground on the higher grade law schools.<sup>170</sup>

As such, it should be with a healthy dose of skepticism that we contemplate the ABA's most recent reforms and proposals. To the

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Foundation to aid in the planning phase of a Foundation program of studies on legal education. The authors wish to express their gratitude to Spencer L. Kimball, Executive Director of the American Bar Foundation and Barbara A. Curran, Yakov Avichai, and Felice J. Levine of the Foundation staff for their patient support and critical assistance in the preparation of this Article. In addition, the American Bar Association Special Committee for a Study of Legal Education, under the capable direction of Chairman LeRoy Collins, provided many valuable insights and comments in the course of this study." See also Julius Cohen, *Crisis in Legal Education*, 15 U. OF CHI. L. REV. 588, 588 (1948); Jerome Hall, *A 2-2-2 Plan for College-Law Education*, 56 HARV. L. REV. 245, 247-48 (1942). "The most obvious proof of this is the enormous volume of criticism that has filled legal periodicals since 1914, when Redlich published his epochal criticism of the case-method of instruction. Examine the *Index to Legal Periodicals* and you will find a mounting flood of criticism and proposed reforms."

168. *1919 Handbook of the Association of American Law Schools and Proceedings* 78 (1920).

169. Rustad, *supra* note 63 at 299.

170. *Id.* at 302. (quoting proceedings of the Section of Legal Education, 6 A.B.A.J. 64, 81 (1920)).

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extent that the ABA's recent actions have been motivated by a desire to respond to the *crisis* in legal education, the rest of the legal academy should take great care to ensure the reforms do not perversely harm the very students the crisis scholars ostensibly sought to help. In its haste to appear responsive to the bad press circulating within and outside of the academy, a number of poor choices have been made.<sup>171</sup> One comment submitted in response to the Task Force's report sums up the inherent conflict between the problem highlighted in the crisis literature and the solutions proposed by the ABA's Task Force.

Tell the Task Force to address the high cost of legal education and it asks the ABA to endorse 1) reducing law school from three years to two, 2) eliminate the requirement of an undergraduate degree for admission to law school, 3) let paid work 'count' toward legal education, 4) reduce the tenured faculty, 5) cut faculty research, 6) embarrassingly, prohibit U.S. News from counting expenditures per student in its rankings, so law school Deans won't have that incentive to spend money for the sake of spending money, 7) let non-lawyers practice law.<sup>172</sup>

The most distressing element of the ABA's proposals is that they are not put forth as system-wide reforms. Instead, they are directed at a subset of disproportionately low-SES students and the law schools they attend. The general consensus appears to be that *these* students might do well enough with a lesser education, or that a lesser credential might in fact be just what *they* seek. Of course, the elite schools, and their students, are expected to continue on as they have, with no change of course suggested. Professor Fox, whose comments were excerpted above drew a parallel between the legal and medical profession, and posited that were we to reduce a physician's education and training by one-third, the consumer public might wish

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171. AM. BAR ASS'N, *supra* note 163. "The Task Force was asked to submit a report within two years. Because of the urgency of the matter, the Task Force took it upon itself to accelerate the timeline and is submitting this Report and Recommendations in December 2013, so that it can be further refined and considered at the February 2014 Meeting of the ABA House of Delegates."

172. Am. Bar Ass'n, Task Force on the Future of Legal Education, Comment from Lawrence J. Cox (Oct. 31, 2013).

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to stamp a “scarlet fraction” on those “two-thirds doctors.”<sup>173</sup> In many ways, his observation rings all too true because what the ABA Task Force proposed would be to further segment the profession along class lines, with only the affluent able to pursue full certification. Already, it has been shown that the same certificate, the J.D., is worth differing amounts in the labor market depending upon the *eliteness* of the institution. If the crisis scholars, and others, are genuinely concerned with the financial well-being and job prospects of low-SES students, they should take greater care to ensure equity, rather than hyper-stratification. Let us not permit a hasty response, on the part of the ABA, to result in the delivery of *less* to working-class and lower-middle-class students.

A better alternative is to encourage the ABA to directly address the real crisis, the dearth of low-SES students in legal education and the profession, and the attendant class segregation that has been an immutable feature of the law school hierarchy. The ABA can choose to utilize its accreditation authority to impose socioeconomic heterogeneity at the upper tiers of the legal academy. It can require law schools to disclose their rates of socioeconomic inclusivity. Such reforms have the potential to diversify the legal profession along class lines, but faculty and students at lower-tier law schools who are students of history likely do not hold out great hope that such a path will be chosen by the ABA.

An examination of the early part of the ABA’s history reveals that the *current* crisis in legal education is remarkably similar to the *old* crisis. In fact, an argument can be made that the ABA was born out of the same crisis that today motivates the Section of Legal Education and Admissions to the Bar, the formation of the Commission on the Future of Legal Education, along with the numerous scholars penning works of crisis literature. Many of these modern scholars and self-proclaimed change agents could quite easily find their ideological doppelgangers by investigating records of speeches and addresses given over a century ago. The same proposals expressed today for purging legal education of certain schools, *and their students*, on the basis of alleged under-qualifications, insufficient numbers of jobs, and the high costs of a legal education, were made in the late nineteenth, and early twentieth

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173. *Id.*

centuries.

John Henry Wigmore of Northwestern recommended that law schools exclude outside work of any kind. He felt the schools should structure their programs to exclude night students by having only day lectures. Those who must work could not dedicate the necessary time to law school, Wigmore said, and therefore they should not aspire to a legal education.<sup>174</sup>

In 1908, the Section recommended that evening programs be lengthened to four years instead of three, making the endeavor costlier and less desirable to those living under tight financial constraints. It then announced that two years of college should precede entry into law school, again ignoring (perhaps intent on obliterating), aspirations of the striver class.<sup>175</sup> “Between 1890 and 1910, the number of night law schools in the U.S. nearly quadrupled.”<sup>176</sup> “[B]etween 1923 and 1929, the number of evening law students increased 140%.”<sup>177</sup> “By 1929, part-time schools were training nearly two-thirds of all law students in an increasingly crowded field.”<sup>178</sup> Professor Koenig described these developments as having presented a “challenge” to “the patrician legal profession.”<sup>179</sup> Despite providing access to those unable to afford a daytime law school or to pay for the undergraduate degree that the daytime schools had begun to require, these schools were the target of vociferous critiques,<sup>180</sup> often driven as much by racism and xenophobia, as by class prejudice.<sup>181</sup> The push to “raise standards”

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174. *Id.* at 14.

175. Susan K. Boyd, *The ABA's First Section: Assuring a Qualified Bar*, 18 (1993).

176. Michael J. Mazza, *The Rise and Fall of Part-Time Legal Education in Wisconsin*, 81 Marq. L. Rev. 1049, 1055 (1998).

177. Rustad, *supra* note 63, at 277.

178. *Id.* at 275.

179. *Id.* at 278.

180. Boyd, *supra* note 176, at 16.

181. *Id.* at 16. “Bigotry and prejudice permeated the established bar and law school world. There clearly was egregious discrimination against African-Americans, Jews, Catholics, and immigrants from places other than Northern Europe. A great deal of the criticism of night and proprietary law schools stemmed from the fact that these institutions provided access for a vast section of the

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served as a thinly masked pretense for the real goal of limiting access to working-and- lower-class students, many of whom were ethnic and racial minorities, immigrants, or first-generation Americans.

Note the following address made to the AALS in 1915:

If you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. Emigrants and sons of emigrants, remembering the respectable standing of the advocate in their old home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble.<sup>182</sup>

Specific reforms for increasing the size of law faculties and increasing the number of volumes in law school libraries set the stage for the ABA's ascension in 1923 to the role of law school accreditor.<sup>183</sup> The Illichean ideal of a democratic and unschooled pathway into the legal profession met its demise. There were those at the time astute enough to realize the devastating class implications, and they mourned the loss of the earlier model.

Is it a contest between low standards and high standards? If it was, I would take my place at once on the side of the higher standards. [It is] a contest between arbitrary quantitative and plutocratic standards and reasonable quantitative and democratic standards ... whether we shall say that a man must have his education in an institution, or he may show that he was able, by struggle and sacrifice and extraordinary application, to get those requirements outside of any educational institution.<sup>184</sup>

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population.” *See also* Rustad, *supra* note 63, at 275.

182. Mazza, *supra* note 177, at 1062.

183. “By Year approved,” American Bar Association: Section of Legal Education

[https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html)

184. Boyd, *supra* note 176, at 33.

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In light of this problematic past, lower-tier law school administrators and faculties may reasonably believe that the best way to weather this current storm is by continuing to quietly engage in their work while the academy considers whether it is time to move on to the next perceived crisis. However, another approach could be to take a page out of the playbook of those members of the legal academy *then* who were willing to call a spade a spade and condemn the critics for their inability to appreciate the class dimensions of the law school reform debates of their time. Whether or not such tactics would lead to concrete changes in the admissions practices of today's elite law schools is an open question. What is true is that our predecessors certainly did not mince words when they employed this approach. I leave you with the following example from Dean Edward Lee of John Marshall who brilliantly rebuked the argument that requiring a college degree for admission to law school posed no obstacles because the "young man of today was not worth his salt who could not secure a college education..."<sup>185</sup>

Mr. Root hardly needed to be worth much to gain a college education, for his father was long an honored professor of Hamilton College, whose home was across the way from the college buildings. Nor did Mr. Taft have to be worth more, for his father was Attorney-General of the United States, a graduate of Yale, and it would have been a throw-back if he did not spend four years beneath the "elms of dear old Yale."<sup>186</sup>

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185. *Id.*

186. Boyd, *supra* note 174.