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# Plus Ça Change, Plus C'est La Même Chose

Nancy B. Rapoport

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

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# PLUS ÇA CHANGE, PLUS C'EST LA MÊME CHOSE

*Nancy B. Rapoport*

**B**ENJAMIN BUTLER'S 1835 *Plan for the Organization of a Law Faculty and for a System of Instruction in Legal Science in the University for the City of New-York*<sup>1</sup> will make any law school dean feel like Yogi Berra: it's "deja-vu all over again." The issue of how best to organize a curriculum to train legal professionals was a hot topic then, and it's a hot topic now.

Part of the reason that curricular reform was and still is a hot topic stems from the debate on whether legal education provides a good value compared to its cost. These days, law professors are duking it out in books and on the Internet, with some alleging that many law schools "scam" students by charging high tuition for a worthless degree<sup>2</sup> and others projecting "a mean pre-tax lifetime

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*Nancy Rapoport is the Gordon Silver Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Copyright 2013 Nancy B. Rapoport. All rights reserved.*

<sup>1</sup> Reprinted below at pages 71-98.

<sup>2</sup> For example, Debby Merritt has written extensively about the need to reform legal education, *see, e.g.*, Deborah J. Merritt, *Unconscionable Debt*, LAW SCHOOL CAFÉ (April 18, 2013), [www.lawschoolcafe.org/thread/unconscionable-debt/](http://www.lawschoolcafe.org/thread/unconscionable-debt/); DJM, *Tried and true*, INSIDE THE LAW SCHOOL SCAM (December 30, 2012), [insidethelawchoolscam.blogspot.com/2012/12/tried-and-true.html](http://insidethelawchoolscam.blogspot.com/2012/12/tried-and-true.html); *see also* BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); PAUL CAMPOS, *DON'T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR'S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK* (2012).

value of a law degree [of] approximately \$1,000,000.”<sup>3</sup> We’ve returned to the debate about whether law schools should be teaching more of the nuts-and-bolts of legal practice<sup>4</sup> in order to best serve the profession or whether schools should trust their graduates’ first-time employers to provide that training.<sup>5</sup> And we’re worried about whether law schools are going to start closing their doors.<sup>6</sup> Considering that NYU’s law school was born in the mid-1830s, only to die a few years later, the idea that a law school can close its doors

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<sup>3</sup> See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* 1 (2013), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250585](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585).

<sup>4</sup> Yes, I know: the nuts and bolts depend on understanding the nuances of substantive law. I can’t imagine, for example, being able to draft a good contract without understanding the basics of contract theory. Good lawyers, and especially baby lawyers, need to understand the basic substantive law of their practice area, but they also need to be able to figure out how to solve a client’s problem, which is almost never just a theoretical, abstract conundrum. The debate isn’t – or, at least, shouldn’t be – about whether schools must choose between teaching pure theory or pure skills. (The need for theory and practice explains why universities have both Physics and Engineering programs.)

<sup>5</sup> Cf. Karen Sloan, *Largest State Poised to Require Practical Skills Training*, NAT’L L.J. (June 13, 2013), [www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202604163297&Largest\\_State\\_Poised\\_to\\_Require\\_Practical\\_Skills\\_Training&slreturn=20130631130637](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202604163297&Largest_State_Poised_to_Require_Practical_Skills_Training&slreturn=20130631130637) (“A task force of the State Bar of California has recommended that new attorneys be required to complete at least 15 hours of practical skills training and 50 hours of pro bono service before they are admitted to practice.”).

<sup>6</sup> See, e.g., Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013), [online.wsj.com/article/SB10001424127887323664204578607810292433272.html?mod=business\\_newsreel](http://online.wsj.com/article/SB10001424127887323664204578607810292433272.html?mod=business_newsreel). According to Bill Henderson:

Indiana University law professor William Henderson said the changes could occur as early as this fall. “In the ‘80s and ‘90s, a liberal arts graduate who didn’t know what to do went to law school,” Henderson told the Times. “Now you get \$120,000 in debt and a default plan of last resort whose value is just too speculative. Students are voting with their feet. There are going to be massive layoffs in law schools this fall. We won’t have the bodies we need to meet the payroll.”

Debra Cassens Weiss, *‘Massive layoffs’ predicted in law schools due to big drop in applicants*, ABA J. (Jan. 31, 2013), [www.abajournal.com/news/article/massive\\_layoffs\\_predicted\\_in\\_law\\_schools\\_due\\_to\\_big\\_drop\\_in\\_applicants](http://www.abajournal.com/news/article/massive_layoffs_predicted_in_law_schools_due_to_big_drop_in_applicants).

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shouldn't really surprise us today.

Studying the NYU plan and its failure can illustrate what well-meaning hubris can do. Although we could say much about the school's institutional design and leadership, and the social and commercial context in which it was developed and launched (some of which I may address in another forum), I am going to focus here on its proposed curriculum. The lead drafter was Butler, a prominent New York lawyer and statesman who was serving as Attorney General of the United States at the time. He would eventually serve simultaneously as "Principal Professor" (roughly the equivalent of a modern teaching dean) of the NYU law school that he had designed.

Butler divided his curriculum neatly into two parts. One part established a course of study for each of the three years of law school (much as we do today); the other part set out a concurrent course (which Butler called the General Course) that every student would take at the same time, over a three-year cycle. Each of the school's three professors would take responsibility for instruction of one of the years of law school (the Primary, Junior, and Senior years). The head of the school (the Principal Professor) would teach the Seniors and would also be responsible for teaching the General Course. So Butler's version of a law school curriculum would look something like this:

First year	Primary Course	General Course
Second year	Junior Course	General Course
Third year	Senior Course	General Course

Butler further subdivided the curriculum to start with relatively easier concepts, placing those courses of increasing difficulty<sup>7</sup> later

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<sup>7</sup> Given how difficult I found my own first-year Property course, I was tickled by Butler's decision on when to teach Property at NYU: "The *Law of Real Property*, on account of its abstruseness and difficulty, should, in my judgment, be reserved until the last year. . . . I would also assign to the Senior Department, the *Law of Corporations*, and the *Law of Equity* – the former having become in this country, a

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in the curriculum:

*Primary course:* Practice and Pleadings; the Organization and Jurisdiction of Courts; their modes of proceeding in suits at Common Law, and in Equity, Admiralty, and Criminal Courts; and the System of Pleading, generally, and in each of the Superior Courts.

*First year of General/Parallel course:* Law of Nature and Nations; History of American Jurisprudence; Constitutional Law;<sup>8</sup> Principles of Legislation; and Interpretation of Statutes.

*Junior course:* the Law of the Domestic Relations and the various Titles forming the Law of Personal Property, including Commercial and Maritime Law.

*Second year of General/Parallel course:* Criminal Law . . . and Law of Evidence.

*Senior course:* the Law of Real Property, . . . the Law of Corporations, and the Law of Equity.

*Third year of General/Parallel course:* Selections from the Roman Law; and for the last term of the year, which will immediately precede the examination of the students for admission to the Bar, Forensic Duties and Professional Ethics.

As Butler planned the General Course, the students who matriculated during the school's inaugural year would get a year's worth of instruction in the "Law of Nature and Nations; History of American Jurisprudence; Constitutional Law; Principles of Legislation; and Interpretation of Statutes" as well as their standard first-year ("Primary year") instruction in the Primary course subjects quoted above. Those who matriculated in year two would start their version of the General Course with instruction in Criminal Law and Evidence, joining their more experienced ("Junior year") classmates

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most important title, the latter constituting a system by itself, and both being more or less connected with the Law of Real Property."

<sup>8</sup> My colleague David Tanenhaus has pointed out that Butler's choice of placing Constitutional Law in the Primary year raises the question of just what, exactly, would be covered in a Con Law course back then. See email from David Tanenhaus to author (Aug. 1, 2013) (on file with author).

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in that course while taking the standard Primary course as well. Those who matriculated in the school in year three of its existence would join the Junior and Senior students in learning the General Course's segment on Roman Law, Forensic Duties, and Professional Ethics while taking *their* Primary course. In other words, students who matriculated in years two and three of the school's existence would begin the General Course *in medias res*. Because the General Course would be taught over three years, it would take four cycles for the Primary year students to begin at the so-called "first" year of the General Course – if the school lasted that long. It didn't. By 1840, the law school had closed.

### MUSINGS ON WHY BUTLER'S PLAN FAILED

Parts of Butler's plan were actually pretty sensible. Requiring second- and third-year students to take a course side-by-side with first-year students meant that each graduating cohort would know more of those who were following in their footsteps: a perfect way to build an alumni network. The flexibility of holding school in the evening meant that those who wanted to learn at the feet of more senior lawyers were still able to do so by clerking during the day. The systematic nature of Butler's curriculum meant that his graduates would have fewer holes in their knowledge base than would those who studied the law by clerking for lawyers who only specialized in one type of law. Still, the careful design that Butler created didn't work. So what happened?

Although there were many factors that contributed to the demise of the school,<sup>9</sup> the most obvious factor was its low enrollment.

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<sup>9</sup> The Law School Papers of Benjamin Butler: New York University School of Law in the 1830s (Ronald L. Brown, ed. 1987) at 44-45 & n.22 [hereinafter Butler Papers] ("The most significant immediate causes in determining the fate of Butler's enterprise were the conflicts in New York University [due to infighting between the University's administration and its faculty regarding finances and the purpose of a university], certain shortcomings in Butler's plan, the pressures of competing professional work on the commitment of the law faculty to the school, and problems of internal organization at the law school.").

Without a steady and sufficient income, no business can survive: “no bucks, no Buck Rogers,” as the movie *THE RIGHT STUFF* has so aptly pointed out.<sup>10</sup> If too few students enrolled, and if the professors’ salaries were paid solely from tuition revenues (as Butler had proposed), it’s no wonder that the school couldn’t maintain itself. But why such low enrollment?

One possibility is that these potential lawyers were simply more used to the traditional model of clerking. They may just have preferred to learn from experienced lawyers (who, by the way, might be able to give them paying jobs).<sup>11</sup> Another possibility is that NYU’s new school was, by definition, not as much of a safe bet as the more established law schools at Harvard and Yale. Unlike the more “national” perspectives of Harvard and Yale, NYU was to have a “regional” perspective.<sup>12</sup> On the theory that “national” law schools provide more career opportunities for their graduates than do “regional” schools,<sup>13</sup> even though many regional law schools produce lots of smart and talented graduates, Butler’s plan to make NYU’s school a regional one may have been a major miscalculation in terms of attracting a sufficient cohort of students.<sup>14</sup>

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<sup>10</sup> *THE RIGHT STUFF* (Warner Bros. 1983) (quote available at [www.imdb.com/title/tt0086197/quotes](http://www.imdb.com/title/tt0086197/quotes)).

<sup>11</sup> *Cf.* Butler Papers, at 45 (footnote omitted) (“In New York City apprenticeship in the office of a practicing attorney, long required for admission to the bar, was so entrenched that even with the relaxation of the state’s bar-admission rules to induce attendance at New York University’s law school, the city’s numerous “eminent law offices” could be expected to provide stiff competition.”).

<sup>12</sup> *Id.*

<sup>13</sup> This bias in favor of national law schools might explain why I have yet to see law schools tout their regional nature in law porn.

<sup>14</sup> Modern “new” schools have also cast themselves into either the “national” or “regional” camps. The new-ish law school at the University of California, Irvine “seeks to do the best job in the country of training lawyers for the practice of law at the highest levels of the profession,” [www.law.uci.edu/](http://www.law.uci.edu/). The new law school at the University of North Texas Dallas, on the other hand, describes itself thus: “Located within a major metropolitan area that currently lacks a public law school, the UNT Dallas College of Law will increase opportunities for local college graduates to attend law school without the costs associated with relocation or

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Most business failures involve a disconnect between projected revenue and actual revenue (with a corresponding negative relationship between revenue and expenses). In a law school, any disconnect between projected enrollment and tuition can create results ranging from short-term discomfort (e.g., cutting back on luxuries like occasional catered lunches) to long-term misery (like laying off staff or faculty).<sup>15</sup> Butler's new law school was supposed to have attracted 60 or 70 students, but it ended up attracting roughly 20.<sup>16</sup> With such a disparity between projections and reality, the school was doomed. Still, there is a happy ending. NYU's law school came back

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private tuition," [lawschool.untsystem.edu/](http://lawschool.untsystem.edu/). UCI's law school seeks to hire professors who are "committed to the highest standards of excellence in legal scholarship," [www.law.uci.edu/employment.html](http://www.law.uci.edu/employment.html). UNT Dallas seeks to hire professors who can "provid[e] an educational program focused on excellence in developing practice-related competencies, through a curriculum mapped to those competencies and using best instructional practices, including multiple formative and summative assessment throughout, engaged class design, and a spectrum of experiential education," [unt-dallas.peopleadmin.com/postings/1116](http://unt-dallas.peopleadmin.com/postings/1116). My buddy Randy Gordon points out the intrinsic value of a degree from a national law school: more people are likely to take a chance on a graduate from a national school, even one who has failed in successive jobs, than they are to take a chance on someone from a regional school, who might – if he's lucky – get one or two bites from the apple. Email from Randy Gordon to author, Aug. 4, 2013 (on file with author).

<sup>15</sup> For example, this past summer, the Dean of McGeorge School of Law announced staff layoffs:

"In response to the unprecedented drop in applications to law schools across the country, McGeorge School of Law is reducing the size of its student body.

"The law school has reorganized the staff in Sacramento to align with its new size. The school first offered a voluntary severance plan to all staff members. This week it was necessary to lay off several staff members. McGeorge is going to be a smaller law school, but it will continue its proud tradition over 90 years of educating excellent attorneys."

Mark Glover, *McGeorge Law School downsizes student body and staff*, SACRAMENTO BEE (July 5, 2013), [www.sacbee.com/2013/07/05/5547577/mcgeorge-law-school-downsizes.html](http://www.sacbee.com/2013/07/05/5547577/mcgeorge-law-school-downsizes.html).

<sup>16</sup> Butler Papers, at 52 (footnotes omitted) ("Butler recalled, in 1856, that enrollment "did not exceed thirty" during the first and second terms [as compared with an initial enrollment estimate of 60-70 students]").



from the dead and is now a superb place to get a legal education. And the failure of the school that Butler envisioned gives us some useful lessons for dealing with the current crisis in legal education.<sup>17</sup>

## WHAT LESSONS CAN WE LEARN FROM BUTLER'S PLAN?

1. "National" law schools can get away with more mistakes than can  
"regional" law schools.

Butler planned for his school to be a regional law school, rather than one of the national law schools like Harvard or Yale. There is nothing wrong with being a good regional law school,<sup>18</sup> but the demand for graduates from regional schools is, on average, less than the demand for graduates of national ones.<sup>19</sup> If the demand for a

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<sup>17</sup>To those who maintain that there isn't a crisis in legal education today, or that the crisis is temporary, I applaud your optimism in the face of some pretty damning facts about enrollment and the changes taking place in the practice of law. But I don't share your optimism at all.

<sup>18</sup>Few law schools will actually admit that they *are* regional law schools, even though their placement data may indicate that almost all of their graduates stay in the region. A lot of the angst inside law schools seems to me to come from the disconnect between where the professors want to be (at a great national law school) and where they are (at a great regional law school, or a good one, or a decent one). In fact, I don't think that I *ever* checked "regional" as my law school description when I was a dean signing off on the U.S. NEWS data. Although it would be nice if law schools were comfortable with matching their self-image to their reality, I doubt that most schools will acknowledge their regional nature. Moreover, a lot of us teach at schools that blur the line between "regional" and "national." When some of a school's graduates get jobs outside the region, I suppose the school isn't entirely "regional" any more. But how many graduates must a school place outside its region to stop being a regional school?

<sup>19</sup>See, e.g., Deanell Reece Tach, *No Law Student Left Behind*, 24 STAN. L. & POL'Y REV. 353, 371 (2013); David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011) at BU1. And before you write to me to tell me that the top graduates from regional law schools are (1) more in demand and (2) better lawyers than the graduates at the bottom of their class at national law schools, trust me: I know. I married someone who graduated near the top of his class at a regional law school. He found his first law job even before he graduated, and he is a better lawyer than I am.

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school's graduates is high enough, then that school can experiment with its curriculum without risking its graduates' potential livelihood. Stanford, say, can revamp its curriculum without worrying overmuch about jeopardizing its 97% placement rate.<sup>20</sup> Stanford – and Harvard, and Yale, and NYU, and the other top schools – could probably make some seriously bad curricular mistakes, and their graduates would still get jobs *en masse*. A regional school, though, must worry about whether an innovative curriculum might scare off its graduates' employers or its potential students. Some regional schools can get away with a non-traditional curriculum (Northeastern comes to mind),<sup>21</sup> if they've already differentiated themselves in the market with that type of curriculum.<sup>22</sup> Other regional schools do so at their own risk.

2. *If a market is already saturated, then entering the market with a business plan identical to everyone else's plan is a bad idea.*

I've used the phrase "well-meaning hubris" earlier in this essay. I believe that well-meaning hubris<sup>23</sup> is behind the new crop of law schools. Although I genuinely respect the people who are involved in founding them, and although I think that the new schools are likely to provide education ranging from "decent" to "very good," I'm still skeptical about the founders' market research. It's one thing to want to change legal education from within. I'm in favor of changing legal education. But it's quite another thing to assume that the market for legal education is expanding any time soon – or that it will expand ever again. If the market's not expanding, then the two

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<sup>20</sup> [stanford.lawschoolnumbers.com/](http://stanford.lawschoolnumbers.com/).

<sup>21</sup> [www.northeastern.edu/law/academics/curriculum/](http://www.northeastern.edu/law/academics/curriculum/).

<sup>22</sup> Although I've read that Washington & Lee's job placement rate declined after it instituted significant changes in its curriculum, *see* Deborah J. Merritt, *An Employment Puzzle*, LAW SCHOOL CAFÉ (June 18, 2013), [www.lawschoolcafe.org/thread/an-employment-puzzle/](http://www.lawschoolcafe.org/thread/an-employment-puzzle/), I think that it's too soon to reach a conclusion on the long-term effects of that curricular change.

<sup>23</sup> My dad has reminded me that hubris is always followed by nemesis. *See, e.g.*, [www.urbandictionary.com/define.php?term=hubris](http://www.urbandictionary.com/define.php?term=hubris) ("Committing hubris ALWAYS leads to nemesis, the gods' punishment.").

most logical moves are (1) not to enter the market or (2) enter the market, but do it in a very different way.

And by “different,” I don’t mean just tinkering around the edges of legal education. I think it’s great that the University of North Texas-Dallas and Indiana Tech are both concerned with the high cost of legal education. I think it’s great that they’re trying to make sure that their students get a more hands-on educational experience. I *want* them to experiment with new ways of delivering a high-quality and relatively low-cost legal education. But what happens when some of the more established law schools decide to cut tuition<sup>24</sup> or create a more hands-on curriculum?<sup>25</sup> Then the *raison d’être* of those newer schools that were established to keep tuition low and be more hands-on goes away.<sup>26</sup>

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<sup>24</sup> Karen Sloan, *Arizona cuts law school tuition, marking a first*, Nat’l L.J. (April 4, 2013), [www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202594883355](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202594883355) (“The Arizona Board of Regents on Thursday unanimously approved an 11 percent tuition cut for in-state residents at the University of Arizona James E. Rogers College of Law and an 8 percent reduction for nonresidents.”). Of course, the idea of cutting tuition without a big revamping of a school’s curriculum and budget reminds me of the classic debtor name in ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* (6th ed. 2008). Back when I used that textbook to teach Bankruptcy, I was charmed by the debtor named “Shoes Below Cost.”

<sup>25</sup> See, e.g., Judith Romero, *Stanford Law School Advances New Model For Legal Education*, SLS NEWS (Feb. 13, 2012), [blogs.law.stanford.edu/newsfeed/2012/02/13/stanford-law-school-advances-new-model-for-legal-education/](http://blogs.law.stanford.edu/newsfeed/2012/02/13/stanford-law-school-advances-new-model-for-legal-education/)

<sup>26</sup> My colleague Thom Main makes a great point:

I’m always intrigued by the accessibility of dental care. Dentists, like lawyers, graduate with massive amounts of debt. Dentists require massive amounts of capital investment to get their businesses started. Yet dentists manage to start those businesses and charge rates that a high percentage of (still not all, but certainly most) can afford. Dentists do not combine into large firms. Obviously there are a very large number of differences between practicing dentistry and practicing law . . . . But I still think of it as a fascinating counter-example. A group of faculty that want[s] students (1) to be able to represent individuals, but (2) to graduate with a modest amount of debt . . . have no realistic choice other than to start a new kind of law school. I am very sympathetic to their cause.

Email from Thomas Main to author, Aug. 7, 2013 (on file with author).

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Instead of trying to be a cheaper and more experiential law school (mind you, “inexpensive” and “hands-on” are good things to be), why start a new law school at all when some other options might give you more of a market share? Why is it, for example, that business schools don’t start law programs that give business students a good understanding of basic legal principles, along with some more advanced courses that relate directly to the intersection of law and business?<sup>27</sup> I’m willing to bet that there’s more of a market for a non-J.D. law degree than there is for more U.S. law schools.

*3. If you’re going to ask professors to devote their working hours to a law school, you’d best figure out how to pay them at rates that will let them support themselves.*

Butler’s plan failed in part because of low enrollment and in part because his professors drifted away from teaching and back to the more remunerative practice of law.<sup>28</sup> The issue of how much law professors should earn has returned to the limelight.<sup>29</sup> Law schools are expensive to run because most of the fixed costs involve salaries.<sup>30</sup> We full-time faculty members are expensive, especially compared to the cost of adjunct professors, and although we are, on average, better able to spend the necessary time planning and teach-

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<sup>27</sup> Two things strike me as useful about this idea. The first is that some law schools have created master’s degrees for people who want to know some law but who don’t want to be lawyers. See, e.g., Hastings College of the Law, Graduate Division and LL.M. Programs, [www.uchastings.edu/academics/grad-division/index.php](http://www.uchastings.edu/academics/grad-division/index.php). Second, and I admit to being a bit facetious here, why wouldn’t law professors flock to teach at business schools, where the pay is often better?

<sup>28</sup> “In March 1839, Butler discontinued the school in part because of the demands of his federal post, and in October 1839 the school reopened on a reduced scale, Butler telling the university that the pressure of his official duties [as U.S. Attorney] (and competing professional interests of the other members of the faculty) was the sole reason for the curtailment.” Butler Papers, at 56 (footnote omitted).

<sup>29</sup> See, e.g., *The cost of legal scholarship*, INSIDE THE LAW SCHOOL SCAM (Nov. 21, 2011), available at [insidethelawschoolscam.blogspot.com/2011/11/cost-of-legal-scholarship.html](http://insidethelawschoolscam.blogspot.com/2011/11/cost-of-legal-scholarship.html) (calculating how much of a law school’s budget relates to subsidizing faculty scholarship).

<sup>30</sup> Yes, and buildings, and libraries as well.

ing our courses and are more familiar with the pedagogy of teaching, we are not always the best experts when it comes to the law itself. A law school that wishes to cut costs by using a higher ratio of adjunct professors to full-time professors, though, is unlikely to receive ABA accreditation.<sup>31</sup> A law school that wants to keep its tuition low to attract students and that wants to be an ABA-accredited school, therefore, finds itself between a rock and a hard place. A school might try to trim faculty salaries slightly,<sup>32</sup> on the theory that most people who are full-time faculty would rather teach than do something else for more money,<sup>33</sup> but it would have to be careful not to cut salaries so much that the professors must moonlight to make ends meet.<sup>34</sup> It's a bit of a Goldilocks situation: how much can

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<sup>31</sup> ABA Standard 402(a) (The ABA Standards set forth a variety of requirements for ABA accreditation – including the requirement that “[a] law school shall have a sufficient number of full-time faculty to fulfill the requirements of the Standards and meet the goals of its educational program.”); *see also* Interpretation 402-1 (“In determining whether a law school complies with the Standards, the ratio of the number of full-time equivalent students to the number of full-time equivalent faculty members is considered.”). To get a feel for how difficult it is for a school to experiment with things like student-faculty ratios, *see, e.g.,* Margot Slade, *A Little Law School Does Battle with the A.B.A.*, N.Y. TIMES (Feb. 4, 1994), available at [www.nytimes.com/1994/02/04/us/a-little-law-school-does-battle-with-the-aba.html](http://www.nytimes.com/1994/02/04/us/a-little-law-school-does-battle-with-the-aba.html); *see also* [taxprof.typepad.com/taxprof\\_blog/2013/06/mass-school.html](http://taxprof.typepad.com/taxprof_blog/2013/06/mass-school.html); [en.wikipedia.org/wiki/Massachusetts\\_School\\_of\\_Law](http://en.wikipedia.org/wiki/Massachusetts_School_of_Law).

<sup>32</sup> If the school weren't worried about the resulting morale issues, anyway. But modest salary cuts wouldn't save much money, and big ones would have everyone running for the hills.

<sup>33</sup> Or, if I were being Machiavellian, because the school might be skeptical that many of its faculty could get other, higher-paying jobs. *But cf.* Kathleen Sullivan, who can and has.

<sup>34</sup> *But see* Jennifer Smith, *Law-School Professors Face Less Job Security*, WALL ST. J. (Aug. 11, 2013), available at [online.wsj.com/article/SB10001424127887323446404579006793207527958.html?KEYWORDS=law+professors+job+security](http://online.wsj.com/article/SB10001424127887323446404579006793207527958.html?KEYWORDS=law+professors+job+security). If law schools end up doing away with tenure, they might be able to adjust the largest fixed-cost item in their budgets – salaries. If a law school is successful in drastically cutting law professor salaries, then some professors will leave for more remunerative work, and some will stay (either because they just love what they're doing or they can't find employment elsewhere). *Cf.* email from Randy Gordon to author (Aug. 4, 2013) (on file with author) (suggesting that, perhaps, not even

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a law school reduce tuition by reducing law professor salaries (or increasing teaching loads) before the top professors leave? Therefore, when I see a school cut its tuition while national enrollments are in decline, I wonder how the school plans to make ends meet in the long run.

*4. Even though there are a lot of competing pressures on law schools – to become less expensive, to become more hands-on, to maintain the quality of their educational programs in a declining market – law professors are too insulated from these pressures to be ready to accept just how necessary it is to change legal education.*

Somewhat at odds with point #3 above – that to keep good faculty members at a school, the school must pay a decent salary – is the fact that the “new normal” of U.S. legal education involves (for most schools) a significant decline in the number of applicants and a significant pressure to provide reasonable outcomes, such as good bar passage and employment rates. It’s possible for very intelligent people to read articles with headlines such as “Amid Falling Enrollment, Law Schools Are Cutting Faculty” and “Law-School Professors Face Less Job Security” and still not believe that their particular law schools will need to decide between cutting enrollment (with a concomitant cost to the budget) or dropping in the rankings (by matriculating the same number of students, many of whom will have lower LSATs and UGPAs than in prior admission years). Worse, even if they do believe that some small changes are necessary in response to the drop in applications, they will want to take years to debate what their schools should do as a result. In other words, we will still want big raises, *and* lots of money to go to academic conferences, *and* three-course loads, *and* the freedom to teach what we want the way that we want to on the dates and times that we want, because that was the bargain that we struck when we entered academia.<sup>35</sup>

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ryone who sees his salary cut will be able to find jobs outside the academy). Whether large cuts in salaries would inure to the benefit of those paying tuition would, of course, remain to be seen.

<sup>35</sup> My buddy David Friedman pointed out to me how optimism bias – “the tendency of people to believe that their own probability of facing a bad outcome is lower

But we have to change, and people like Deborah Jones Merritt and Brian Tamanaha are making cogent arguments that we can't wait too long to start those changes. How, though, do we get our colleagues to buy into the need for serious change? If our tendency to believe that nothing bad will happen at our school (optimism bias) and our resistance to giving up our current perks (the endowment effect) aren't explicitly challenged, then at least some of us are likely to find ourselves, much like Butler, overseeing the closing of our own schools.

5. *The best lawyers are good people.*

I hate to end this essay on the downer idea that we're just as much at risk of failure as Butler's school was during his day, and so I'd rather suggest a call to arms. Butler was right when he pointed out that it's important to train lawyers not just to be skilled but to be good as well.<sup>36</sup> The idea – clearly central to Butler's conception of a good law school – that the best lawyers retain the ability to think of themselves as professionals with a real calling made me root for Butler's plan to have succeeded. Even though his overall plan failed, this

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than it actually is," see Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEG. STUD. 199, 204 (2006) – gets in the way of recognizing the risks to our law professor lifestyle that stem from the drop in applications. See email from David Friedman to author (Aug. 8, 2013), on file with author ("Optimism bias: 'The market is bad, law schools will require different skill sets, but my law school is immune from all of the change.'"). David also rightly points out that the endowment effect ("The endowment effect describes a phenomenon where people tend to overvalue wealth or objects with which they are initially endowed," David Adam Friedman, *Debiasing Advertising: Balancing Risk, Hope, and Social Welfare*, 19 J.L. & POL'Y 539, 551 (2011); accord, Jolls & Sunstein at 206) gets in the way of law professors voluntarily relinquishing all of the perks that we currently have.

<sup>36</sup> Many modern lawyers agree. See, e.g., *The ATL Interrogatories: 10 Questions with Jeffrey Stone from McDermott Will & Emery LLP*, ABOVE THE LAW (July 31, 2013) ("7. What is the single most important personal characteristic for a successful lawyer in your field? Personal integrity."), [abovethelaw.com/2013/07/the-atl-interrogatories-10-questions-with-jeffrey-stone-from-mcdermott-will-emery-llp/](http://abovethelaw.com/2013/07/the-atl-interrogatories-10-questions-with-jeffrey-stone-from-mcdermott-will-emery-llp/). Other answers to Above the Law's question #7 from other lawyers included such things as drive, judgment, intelligence, and enthusiasm. See [abovethelaw.com/?s=ATL+Interrogatories](http://abovethelaw.com/?s=ATL+Interrogatories). Those traits are good, too.

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professionalism point in particular is one that we should continue to press, especially in light of all of the countervailing pressures on lawyers to treat law more like a business than a profession. Training law students to behave like professionals is an important objective, so we need to work backwards from that principle and figure out how we can do that training in a much more cost-effective way. We have no time to lose.

*GB*