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## Responsible Solutions: Reply to Tamanaha and Campos

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# **RESPONSIBLE SOLUTIONS: REPLY TO TAMANAHA AND CAMPOS**

*By: Jay Sterling Silver\**

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## I. INTRODUCTION

*In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.*

—Felix Frankfurter<sup>1</sup>

At the end of Brian Tamanaha’s instant classic, *Failing Law Schools*,<sup>2</sup> tracing the economic forces behind exorbitant law school tuition and graduate debt and unemployment, he lays out his plan to help resolve the crisis. He would eliminate tenure, dispense with the final year of law school, rely heavily on adjuncts and apprenticeships, and loosen the ABA accreditation standards mandating “one-size-fits-all” law schools to allow the marketplace to fashion more affordable models of legal education.<sup>3</sup> Some schools would remain in the traditional, three-year mode, with faculty conducting research.<sup>4</sup> Others would morph into, or spring up spontaneously as, the “law school parallel . . . of vocational colleges.”<sup>5</sup> Very candidly, Tamanaha explained that the “two-year law schools . . . would be dumping grounds for the

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\* Professor of Law, St. Thomas University School of Law. The author, who has also served as a long-time Associate Dean and as a university administrator, is grateful to Professors Siegfried Wiessner, Lauren Gilbert, Bob Mensel, and Beth Krancberg for their helpful suggestions.

1. Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927), *quoted in* JACK RAND & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 156 (1989).

2. BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 173–77 (2012) [hereinafter TAMANAHA, *FAILING LAW SCHOOLS*].

3. *Id.*

4. *Id.* at 174.

5. *Id.*

middle class and the poor . . . . Few children of the rich will end up in these law schools.”<sup>6</sup> He calls the plan “‘differentiated’ legal education.” Others, including Paul Campos, founder of the *Inside the Law School Scam* web blog<sup>7</sup> and author of *Don’t Go To Law School (Unless)*,<sup>8</sup> and the ABA Task Force (“Task Force”) on the Future of Legal Education, have endorsed Tamanaha’s prescription.<sup>9</sup>

While Tamanaha and Campos, the leading voices in the call to overhaul legal education, have done well to bring the suffering of law grads and the economic forces behind the crisis to the forefront, the “differentiated” model they sponsor will gut the public and private good in the present model and, at the same time, exacerbate graduate unemployment. Moreover, a set of measures exists that more directly and effectively addresses the causes of the crisis and preserves the underappreciated good in the present model. With the crisis only worsening and the ABA’s recent appointment of the Task Force on the Financing of Legal Education<sup>10</sup> to recommend solutions, the debate on the appropriate measures to take and the proper contours of legal education has taken on added urgency.

The trouble with Tamanaha’s two-tiered, “differentiated” model of legal education lies in forging a branch of higher education in the marketplace when it was unchecked market forces that caused the crisis in the first place. Moreover, his plan institutionalizes stratification, demotes legal education from the American academy to trade school status, and aggravates graduate unemployment in the process. The trouble with doing away with tenure is that the legal academy’s independent critique of law and the legal system would be lost, ceding the field to those who buy their spokespersons and lobbyists, and law school clinics could not represent unpopular clients and causes without political pressure or fear of reprisal. The trouble with an army of busy adjuncts replacing experienced, full-time professional educators is that adjuncts normally place less emphasis on the rigorous classroom dialogue that promotes analytical thought and effective advocacy. And the trouble with compressing the study of law into one or

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6. *Id.* at 27.

7. Paul Campos, *Inside the Law School Scam*, LAWYERS, GUNS & MONEY (Aug. 20, 2011), <http://www.lawyersgunsmoneyblog.com/2011/08/inside-the-law-school-scam>; Paul Campos, *INSIDE THE LAW SCHOOL SCAM*, <http://insidethelaw-schoolscam.blogspot.com/> (last visited Oct. 16, 2014); <https://www.blogger.com/profile/0517458696709793419> (last visited Oct. 16, 2014).

8. PAUL CAMPOS, *DON’T GO TO LAW SCHOOL (UNLESS)* (2012).

9. ABA, Task Force on the Future of Legal Education, Working Paper 23–24 (Aug. 1, 2013) (unpublished manuscript), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/aba\\_task\\_force\\_working\\_paper\\_august\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf) [hereinafter ABA, *Task Force*] (using the label “heterogenous,” rather than “differentiated”).

10. Molly McDonough, *Task Force on Legal-Ed Financing Mulls Causes of Rising Tuition at It’s First-Ever Public Meeting*, A.B.A. J. (Aug. 11, 2014, 12:25 AM), [http://www.abajournal.com/news/article/task\\_force\\_on\\_legal-ed\\_financing/](http://www.abajournal.com/news/article/task_force_on_legal-ed_financing/).

two years—in the herd of new law schools that will stampede into the market—is that the low-LSAT students Tamanaha designed these schools for are the ones who are most in need of three years of rigorous instruction. The abbreviated programs, moreover, conflict with the long-standing call to do more to train practice-ready attorneys.<sup>11</sup>

After I noted these problems in a brief piece entitled *The Case Against Tamanaha's Motel 6 Model of Legal Education*,<sup>12</sup> both Brian Tamanaha and Paul Campos took strong exception. In *The Failure of Critics and Leftist Law Professors to Defend Progressive Causes*, Tamanaha objected that I had overestimated the value of legal scholarship relative to its costs,<sup>13</sup> and in a subsequent piece in the *Georgetown Journal of Legal Ethics*, he disagreed with my criticism of his two-tiered system.<sup>14</sup> In *Self-Congratulation and Scholarship*, Campos argued that, contrary to my contentions, tenure and scholarship would thrive in Tamanaha's "differentiated" model, that I had overestimated the value of both, that the model is not a throwback to separate and (un)equal, that talk of teaching analytical skills is an empty slogan for an unnecessary task, and that, as the title of his piece suggests, my views represent the "platitudinous self-congratulation" of law faculty that, "in large[ ] part," caused the crisis.<sup>15</sup>

This Article answers the objections of Tamanaha and Campos and offers a set of solutions that, unlike the popular, perilous, often pretextual fixes put forward by Tamanaha and the Task Force, directly targets the actual causes of exorbitant tuition and graduate unemployment while, at the same time, preserving the public and private good in the present model. In Section II, I address Tamanaha's and Campos's rebuttals to my position that one set of law schools for the rich and one for the poor and middle class represent separate and, with regard to educational quality, *unequal*. In Section III, I respond to Campos's criticism of my view that tenure and scholarship will largely fade away if and when tenure is no longer mandated by the ABA's accreditation standards and, in support of my view, present previously unpublicized evidence about the efforts of law deans to extinguish it.

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11. Debra Cassens Weiss, *New Initiative Promotes Legal Ed Innovation and 'Practice-Ready Lawyers'*, A.B.A. J. (Aug. 29, 2011, 10:30 AM), [http://www.abajournal.com/news/article/new\\_initiative\\_promotes\\_innovation\\_in\\_legal\\_education/](http://www.abajournal.com/news/article/new_initiative_promotes_innovation_in_legal_education/).

12. Jay Sterling Silver, *The Case Against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISC. 50, 56 (2012).

13. Brian Z. Tamanaha, *The Failure of Critics and Leftist Law Professors to Defend Progressive Causes*, 24 STAN. L. & POL'Y REV. 309, 342 (2013) (stating to Silver "the intangible benefits of tenure and scholarship outweigh [the] harms" of "the enormous cost of a law degree or the debt burden this imposes on our graduates.") [hereinafter Tamanaha, *The Failure of Critics*].

14. Brian Z. Tamanaha, *The Problems with Income Based Repayment, and the Charge of Elitism: Responses to Schrag and Chambliss*, 26 GEO. J. LEGAL ETHICS 521, 537–38 (2013) [hereinafter Tamanaha, *Problems*].

15. Paul Campos, *Self-Congratulation and Scholarship*, 60 UCLA L. REV. DISC. 214, 216–17 (2012) [hereinafter Campos, *Self-Congratulation*].

In Section IV, I explain how Campos's rejection of my view that a principal task of the law professor is to cultivate students' analytical skills guts the essence of a legal education and threatens the interests of clients. Section V explains how Campos's thesis that law professors are to blame for the crisis lands far off the mark, and how the charge otherwise serves the effort to push legal education out of the American academy and into the ranks of the trade schools. In Section VI, I place a slightly different emphasis than Tamanaha on the economic dynamics underlying sky rocketing tuition and unemployment and outline five measures that will, by confronting the real causes of the crisis, more directly and effectively help resolve it than Tamanaha's purported fixes. I conclude by joining in Brian Tamanaha's call to the professoriate to actively participate in the quest for solutions, but to sponsor solutions—unlike those of Tamanaha and Campos—that preserve the good in what we do.

## II. THE PERILS OF "DIFFERENTIATED" LEGAL EDUCATION

In the picture of differentiated legal education painted by Tamanaha in *Failing Law Schools*, a handful of elite schools would retain the traditional, three-year program, while—following rescission of the ABA Standards mandating one-size-fits-all law schools—the contours of legal education in his vast lower tier would be reshaped in the marketplace. "The law school parallel . . . of vocational colleges and community colleges . . . , many [of which will be] of two-year duration," would emerge, according to Tamanaha,<sup>16</sup> who assures us that his model "is not the race to the bottom prophesied by [the American Association of Law Schools]."<sup>17</sup> "[My model] simply recognizes," he goes on, "that every law school need not be a Ritz-Carleton [sic]. A Holiday Inn-type law school would provide a fine education for many, adequate for the type of legal practice they will undertake."<sup>18</sup> The mass of lower-tier schools are, according to Tamanaha, for a "law graduate who wishes to engage in a local practice," while the few top-tier schools are for "a graduate aiming for corporate legal practice."<sup>19</sup> Tamanaha thus formalizes—and embraces—the social stratification in legal education and the legal profession: "Liberal egalitarians," he continues, "will likely protest that the . . . two-year law schools advocated here would be dumping grounds for the middle class and the poor. This is true. Few children of the rich will end up in these law schools."<sup>20</sup>

Tamanaha is correct, and *this* liberal egalitarian objects to his "differentiated" legal education on four grounds. First, the plan goes far

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16. TAMANAHA, *supra* note 2, at 174.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 27.

beyond the mere recognition that law grads' prospects of working for a Wall Street firm or hanging up a shingle on Main Street are tied to the status of their alma mater. His brave new world of legal education is a loud endorsement of unequal *education*, an inferior, cut-rate experience, based on class that devalues the interests of the students of his second-class institutions and their future clients. It is the unabashed institutionalization of class-based stratification. "Tamanaha may be wearing a backpack," Elizabeth Chambliss observes, "but he is pitching the interests of entrenched, elite clients and the shrinking circle of law schools that serve them—the old market winners whose continuing privilege depends on the rest of us going quietly (or taking the heat)."<sup>21</sup>

Although Tamanaha conceded that his "two-year law schools . . . would be dumping grounds for the middle class and the poor," he bristled at Chambliss's characterization of his system as "elitist," complaining that "she repeats this epithet again and again and again without precisely articulating why."<sup>22</sup> I can explain why she is correct and why his Holiday Inn-type programs, in addition to providing separate and unequal educational experiences, are elitist and inadequate with respect to clients. Only those who measure the importance of a case by the money at stake in it view the wills and divorces and criminal charges to be handled by the graduates of Tamanaha's abbreviated programs—likely to be more like a Motel 6 than a Holiday Inn—as small and mundane matters requiring less training to handle. What often appears to be a simple will, divorce, or an open-and-shut criminal prosecution is not when counsel with a well-trained mind and a broad legal education looks more deeply. Measured by the human impact a case has on the parties and their families, the "small and mundane" matters brought to local practitioners by the middle class and poor often tower in importance over matters handled by Wall Street firms. If human impact were the measure, we might well extend the training of local practitioners beyond that of those bound for prestigious firms (whose training is often completed by the firm, anyway). The charge of elitism stands.

Second, we already have evidence of what some of the "Holiday Inn-type law school[s that] would provide a fine education" under Tamanaha's system will look like. The distinguished-sounding Southern California Institute of Law, with campuses in Santa Barbara and Ventura, is a good example of the innovative solutions to be forged in the marketplace. The California Institute of Law's (the "Institute") particular innovation was to challenge, on First Amendment grounds, the rule requiring law schools to post their bar passage statistics on the

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21. Elizabeth Chambliss, *It's Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, 26 GEO. J. LEGAL ETHICS 423, 437 (2013).

22. Tamanaha, *The Failure of Crits supra* note 14, at 534.

school's website.<sup>23</sup> By sheer coincidence, the Institute's passage rate was reportedly seven percent.<sup>24</sup>

Tamanaha, nonetheless, sings the praises of—and pins his hopes on—unaccredited law schools.<sup>25</sup> As the American Association of Law Schools (AALS) predicts,<sup>26</sup> however, opening legal education to the marketplace will be a race to the bottom. Sound pedagogy and the marketplace's sensitivity to student demands, for example, do not mix well. As Debra Rhode explains:

[S]tudent interests are not necessarily consistent with those of the ultimate consumers—clients and the public. Education is one of the rare contexts where buyers may want less for their money . . . . In the absence of accreditation standards, law schools would need to compete for applicants who view “less as more” in terms of academic requirements.<sup>27</sup>

As Robert Condlin put it, “‘The customer is always right’ may have worked for Marshall Field, but it is a prescription for disaster in legal education.”<sup>28</sup> Michael Simkovic and Frank McIntyre elaborate: “[T]reating students as customers could reduce rigor because many professors, particularly those who are insecure about their jobs, respond to such incentives by easing classroom workloads and inflating grades. The result may be that student customers study less, learn less, and are less prepared for the professional world.”<sup>29</sup>

Third, the solution to a crisis spawned by uncontrolled market forces—which includes more and more graduates being dumped into the flooded job market—is not further deregulation and the swarm of new law schools it would generate. Indeed, more law schools would only exacerbate graduate unemployment. Tamanaha and Campos would, in effect, ham-handedly aggravate one half of the crisis as they lamely attempt to resolve the other half.

And finally, law—including the study of its formation, meaning, institutions, responsibilities, and consequences—is an academic discipline that belongs, as such, exactly where it is right now: in the

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23. Jacob Gershman, *Law School Claims Bar Passage Rate is Meaningless*, WALL ST. J.L. BLOG (Aug. 8, 2013, 6:20 PM), <http://blogs.wsj.com/law/2013/08/08/law-school-claims-bar-passage-rate-is-meaningless/>.

24. *Id.*

25. TAMANAHA, *supra* note 2, at 12, 18–19.

26. Letter from Michael A. Olivas, AALS President, to Hewlett H. Askew, Consultant on Legal Education (Mar. 28, 2011), *available at* <https://web.archive.org/web/20140825233513/http://www.aals.org/advocacy/Olivas.pdf> (accessed by searching for Ass'n Am. Law Schools in the Internet archive index).

27. Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 446 (2013).

28. Robert Condlin, *'Practice Ready Graduates': A Millennialist Fantasy* 9 (Nov. 18, 2011) (Univ. Md. Legal Studies Research Paper No. 2013-48), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2316093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316093).

29. Michael Simkovic & Frank McIntyre, *Populist Outrage, Reckless Empirics: A Review of Failing Law Schools*, 108 NW. U. L. REV. ONLINE 176, 196 (2014).

American academy.<sup>30</sup> At Oxford, for example, law is viewed as “an academic discipline” in which

[t]he object is to understand the law, to see how it has developed and how it will develop, to criticise the law where criticism is just, to attempt to relate the law to the society in which and for the benefit of which it operates, and to investigate theories of what the law is and why the law should be obeyed - or, indeed, exist.<sup>31</sup>

Relegating law to trade school status reflects a shallow view of the significance and complexity of law and a disturbingly mechanistic view of what lawyers do and the skills they need to do it. Academic institutions, as Thorstein Veblen cautioned almost a century ago in *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men*, cannot be forged in the marketplace: “[B]usiness enterprise is . . . incompatible with the spirit of the higher learning. Indeed . . . these two lines of endeavour . . . are as widely out of touch as may be.”<sup>32</sup>

Campos criticized my opposition to the differentiated model. First, he seemed to suggest that I had twisted Tamanaha’s words in my characterization of the model as a form of stratification, noting that “Tamanaha’s suggested reforms would result, Silver says, in a stratified system of legal education.”<sup>33</sup> Of course I said it’s stratified. Tamanaha himself has bluntly told us so at least twice, observing that the “two-year law schools advocated here would be dumping grounds for here the middle class and the poor,”<sup>34</sup> and moreover, when he recently acknowledged that “Chambliss, [Philip] Schrag, Silver, and other critics are correct that a more differentiated system of legal education will cement the existing two hemispheres [of law schools].”<sup>35</sup>

Next, in a sort of argument in the alternative, Campos admonished me for finding fault with the stratified nature of differentiated legal education because, as he explained, “[f]ew areas of American life are as hierarchically stratified as the legal profession in general and the law school component of it in particular.”<sup>36</sup> The argument strikes me as a rather odd defense of a scheme that further formalizes social stratification: it’s okay to make it worse, Campos is telling us, because it’s pretty bad already.

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30. See generally, e.g., JAN M. SMITS, *THE MIND AND THE METHOD OF THE LEGAL ACADEMIC* (2012).

31. *Law (Jurisprudence)*, JESUS C., OXFORD, <http://www.jesus.ox.ac.uk/subjects/law> (last visited Aug. 7, 2014).

32. THORSTEIN VEBLÉN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 48 (1918), available at <http://www.ditext.com/veblen/veb3.html>.

33. Campos, *supra* note 15, at 221.

34. TAMANAHA, *FAILING LAW SCHOOLS*, *supra* note 2, at 27.

35. Tamanaha, *Problems*, *supra* note 14, at 539.

36. Campos, *supra* note 15, at 222.



In an article in the *Georgetown Journal of Legal Ethics*, Tamanaha objected to my contention that, under his system, law students “would no longer be able to select freely among the various career paths within the profession after exposure to the different areas of law.”<sup>37</sup> “Silver’s objection,” he argued, “is based on the premise that law students currently *are* ‘able to select freely among the various career paths within the profession.’ This is sheer fantasy.”<sup>38</sup> As proof, Tamanaha noted that only a small percentage of graduates of fourth-tier law schools go on to work for the nation’s most prestigious firms.<sup>39</sup>

While, of course, few from lower-ranked schools ascend to a Skadden Arps, Tamanaha knocks down a straw man here. The assertion that law students “would no longer be able to select freely among the various career paths within the profession after exposure to the different areas of law in law school” is *not* a claim that a significant number of grads from third- and fourth-tier schools now go on to Wall Street firms. Instead, it refers to two additional inadequacies inherent in the one- and two-year trade schools under Tamanaha’s formula that would, in his own words, offer “a bare bones legal education” for “a graduate who wishes to engage in a local practice.”<sup>40</sup> First, competence in one area of law, no matter how “local” and pedestrian it might seem to Tamanaha, requires familiarity with concepts learned in a broad array of doctrinal and clinical courses taken in a three-year program. Just because the clients of local practitioners don’t pay as much as corporate clients, they are nonetheless entitled to equally well-trained counsel.<sup>41</sup> And second, exposure to that broad array of courses and clinical experiences is what helps students understand which areas of practice they prefer and are best suited for.<sup>42</sup> Corpo-

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37. Tamanaha, *Problems*, *supra* note 14, at 537–38.

38. *Id.* at 538.

39. *Id.*

40. *Id.*

41. Although the issue is beyond the scope of this Article, there are strong pedagogical reasons not to lop off the final third of legal study. Among those who oppose the idea is Michael Olivas, past president of the AALS: “If we weren’t doing it well enough in three years . . . how are we supposed to do it in two?” Kenneth Jost, *Law Schools: Is a Legal Education Worth Its Costs?*, 23 CQ RESEARCHER 353, 361 (2013), available at <http://library.cqpress.com/cqresearcher/cqresrre2013041900>. Dean Erwin Chemerinsky agrees: “[A] two-year juris doctor degree . . . is a terrible idea. The profession needs law schools to produce lawyers who are better prepared for the practice of law, which is not possible to do in two-thirds the time.” Erwin Chemerinsky, *ABA Report Lacking Solutions for Law Schools*, NAT’L L.J. (Feb. 10, 2014), available at <https://advance.lexis.com/document/?pdmfid=1000516&crd=4b483f07-d3b5-40fe-92d8-a5dd939de5bf&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5BG5-C1F1-DY35-F4XB-00000-00&pddocid=urn%3AcontentItem%3A5BG5-C1F1-DY35-F4XB-00000-00&pdcontentcomponentid=8024&ecompr=vhyg&earg=sr6&prid=5fbbd7e1-f696-4f27-a696-ab9107e1eb74>.

42. Long-time dean Doug Ray made the point, in remarks to a recent entering class, that “[l]aw school is a transforming experience and you may be best suited for a career that is different from what you have in mind now.” Douglas Ray, former

rate mergers and SEC filings may be out, but that still leaves a plethora of areas of practice to learn about and explore.

### III. THE PROSPECTIVE DEMISE OF TENURE AND SCHOLARSHIP

Through their scholarship, law professors give voice to the common interest in a way that, by definition, lobbyists and privately sponsored think tanks cannot. With the immense disparity in wealth continuing to climb,<sup>43</sup> and the ability of the wealthy to influence lawmakers and to buy up the media, the independent voice of the legal professoriate has an irreplaceable role in the debate on law and justice. The degree to which the scholarly critique of law and the legal system—dependent on tenure for its vitality—will survive under Tamanaha’s tenureless system of “differentiated” legal education is thus a critical question. I asserted that, if and when the ABA accreditation standard mandating tenure is rescinded, tenure and the scholarship it protects from the fear of reprisal will largely fade away.<sup>44</sup> Campos strenuously objected, countering that I exaggerated the effect of Tamanaha’s alternative model on the survival of tenure and the output of scholarship. Under the new system, according to both of them, traditional law schools replete with tenure and scholarship would exist side-by-side with the cheaper, abbreviated model that lacked both, and—whatever the value of legal scholarship<sup>45</sup>—an ample stream of it would continue to flow.<sup>46</sup> “Many law schools will continue to offer tenure . . . and research support,” Tamanaha assures us.<sup>47</sup> I was wrong, in Campos and Tamanaha’s eyes, to believe that tenure would generally dry up and, with it, most of the stream of truly independent scholarship. In fact, Campos called the idea that it would dry up “incredible.”<sup>48</sup> And as proof that I had overestimated the evisceration of tenure and scholarship under the differentiated model, he pointed out that “[a]t no point in *Failing Law Schools* does Tamanaha specify how many

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Dean, St. Thomas Univ. Sch. of Law, Remarks to First Year Class (Aug. 14, 2013) (email excerpt from speech on file with author).

43. See Annie Lowry, *The Wealth Gap in America is Growing, Too*, N.Y. TIMES (Apr. 2, 2014, 10:15 AM), <http://economix.blogs.nytimes.com/2014/04/02/the-wealth-gap-is-growing-too/>.

44. See Silver, *supra* note 12, at 55.

45. See TAMANAHA, *FAILING LAW SCHOOLS*, *supra* note 2, at 61; Campos, *supra* note 15, at 221. The relevance and value of legal scholarship have long been debated, and now, in context of the current crisis, its cost relative to its value has added another dimension to the debate. When I observed, for example, that legal scholarship provides an alternative critique of law and the legal system in the common interest that will be lost or contorted with tenure, Tamanaha responded that its cost to students was too high. Tamanaha, *supra* note 13, at 342. The long-standing debate on the value of scholarship will continue and is beyond the scope of this article.

46. TAMANAHA, *FAILING LAW SCHOOLS*, *supra* note 2, at 61; Campos, *supra* note 15, at 221.

47. TAMANAHA, *FAILING LAW SCHOOLS*, *supra* note 2, at 174.

48. Campos, *supra* note 15, at 220.

schools he believes ought to move to a significantly lower-cost [i.e., tenure and scholarship free] model.”<sup>49</sup>

The answer, of course, is that Tamanaha need not *bother* to specify a number. Even if he had, no university administration or private venture operating a law school would listen anyway, and nearly all schools would eliminate tenure—and, in the process, genuinely independent scholarship—as quickly as they could assemble the board of trustees. Since, according to Tamanaha, “many schools” would choose to retain tenure and produce scholarship, and “[e]specially at the lower ranked schools where graduates have a lower expected income, the students should not be made to bear a costly burden for faculty research,”<sup>50</sup> it would be up to the Harvards and Yales of the law school world to preserve tenure and scholarship. The trouble is, they won’t. It is precisely the Harvards and Yales that have, largely under the radar, lead the fight to extinguish tenure. Indeed, as members of the Board of Directors of the American Law Deans Association (ALDA) representing over 130 law school deans, the deans at Harvard, Stanford, Chicago, Michigan, Northwestern, Duke, and Cornell, among others, pressed the Department of Education and the ABA Council of the Section on Legal Education to sack tenure as soon as possible. In a 2008 letter to the Council, for example, the deans stated that “terms and conditions of employment [i.e., tenure] have no place in the Standards and should be removed,” and that “tenure and similar security provisions *not be required*,” thus allowing the deans to avoid “incurring permanent obligations to specific individuals.”<sup>51</sup>

Tenure would be out, virtually across the board, for a variety of reasons. In addition to reducing the law school budget, the elimination of tenure would consolidate authority in the hands of the law

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49. *Id.* at 221 n.24.

50. TAMANAHA, FAILING LAW SCHOOLS, *supra* note 2, at 61.

51. Letter from Bd. of Dirs. of Am. Law Deans Ass’n, to ABA Council on Legal Educ. 2–3 ABA (July 21, 2008), available at [http://apps.americanbar.org/legaled/committees/subcomm/security%20of%20position\\_comment\\_ALDA.pdf](http://apps.americanbar.org/legaled/committees/subcomm/security%20of%20position_comment_ALDA.pdf). Two years earlier, the Deans Association attempted an end run around the ABA, imploring the Department of Education to “require the ABA to revise or rescind these standards [requiring tenure] prior to granting continued recognition” of the ABA as the accrediting body for legal education. Am. Law Deans Ass’n, *Public Comment on the Application of the American Bar Association (“ABA”) for Reaffirmation of Recognition by the Secretary of Education (“Secretary”) as a Nationally Recognized Accrediting Agency in the Field of Legal Education*, NAT’L ASS’N C. U. ATT’YS 2, [http://www.nacua.org/documents/ALDA\\_Comment.pdf](http://www.nacua.org/documents/ALDA_Comment.pdf) (last visited Dec. 1, 2013). In a letter to ABA Task Force on Accreditation, the Dean’s Association said it “urges the Task Force to recommend that the Council remove from the Standards all references to terms and conditions of employment and urges that the Council do so as soon as possible.” Letter from Bd. of Dirs. of Am. Law Deans Ass’n, to Accreditation Policy Task Force (Jan. 3, 2007), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/comment\\_comprehensive\\_review\\_alda\\_january\\_2009.doc](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/comment_comprehensive_review_alda_january_2009.doc).

school and university administrations, which must now spar with the faculty over school policy in light of the ABA mandate that faculty participate in the governance of the academic program. Former AALS President Michael Olivas calls the attempts to rescind the tenure requirement, “a plan to reconstitute the law professoriate into a contingent, part-time, untenured faculty, apparently to strengthen the hand of school administrators in the service of ‘flexibility’ and ‘business-like efficiencies.’”<sup>52</sup> The Executive Committee of the Minority Groups Section of the AALS was even more to the point: doing away with tenure “has long been craved by some career administrators in education . . . to rid institutions of those professors who take faculty self-governance seriously.”<sup>53</sup>

The Executive Committee hit the nail on the head. In the law deans’ letter to the ABA’s Council of the Section on Legal Education, the group that ultimately promulgates the Standards, the deans pushed for the elimination of the Standard mandating faculty co-governance in academic affairs. “[L]aw schools should be able to adopt whatever governance structure that they or their parent universities choose,” the Deans Association recommended.<sup>54</sup> In addition, with tenure gone, the university and law school administrations would worry less about potential donors being turned off by scholarship that rubbed them the wrong way.<sup>55</sup>

Tamanaha has charged the professoriate with the “regulatory capture” of the ABA Council of the Section on Legal Education and the accreditation process.<sup>56</sup> If that were true, dropping the tenure requirement from the Standards would be unspeakable. In point of fact, though, former law dean and current Syracuse University President Kent Syverud, President of the Law Deans Association<sup>57</sup> at the time it lobbied the Department of Education to do away with law school tenure, is the same Kent Syverud who chaired the Council when it recommended purging tenure and who has also served on the Council’s Standards Review Committee and its Accreditation Policy Task

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52. Michael A. Olivas, *Academic Freedom and Academic Duty*, ASS’N AM. LAW SCHOOLS (Jan. 7, 2011), <http://www.aals.org/services/presidents-messages/academic-freedom-academic-duty/>.

53. Collective letter from law professors, to The Hon. Solomon Oliver, Jr., Council Chairperson & Barry A. Currier, Managing Dir. of Accreditation & Legal Educ. at 5 (Feb. 4, 2014), available at <http://blurbawg.typepad.com/files/law-professors-letter-to-the-aba-on-tenure.pdf>.

54. *Id.*

55. See, e.g., Robert Kuehn & Bridget McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 69–70, 78–79, 89 (2011).

56. TAMANAHA, FAILING LAW SCHOOLS, *supra* note 2, at 35–36.

57. *Law School’s Syverud Named President of American Law Deans Association*, DAILY REG. (Jan. 16, 2003, 10:00 AM), [http://www.vanderbilt.edu/Register/jan13\\_03/20030116syverud.html](http://www.vanderbilt.edu/Register/jan13_03/20030116syverud.html).

Force.<sup>58</sup> It is important to consult and involve experienced law professors in the oversight of legal education, as they have been, but talk of professors having captured the regulatory process amounts to conspiracy theory.

The trouble with dropping tenure and ceding control of academic policy to administrators, as Veblen explained, lies in the organic relationship between institutional structure and the process of higher education and scholarship:

[T]he system and order that so govern the work [of educators and scholars] are the logical system and order of intellectual enterprise, not the mechanical or statistical systemization that goes into effect in the management of an industrial plant or the financing of a business corporation. . . . Neither can that intellectual initiative and proclivity that goes in as the indispensable motive force in the pursuit of learning be reduced to any known terms of subordination, obedience, or authoritative direction.<sup>59</sup>

The bottom line is that the output of independent scholarship wouldn't simply be reduced to the level of a decade or two ago; it would slow to a trickle. Only a small handful of legal scholars would be left standing, unable to cover much of the waterfront in a world where law—and the problems related to it—are burgeoning.<sup>60</sup> And to the extent that anyone at the trade school variety of Tamanaha's differentiated model was inclined or found time to write, she or he would do so without tenure, and thus with all the fear and pressure it safeguards against, or alternatively, by fitting the content to the Procrustean Bed of what at-will or year-to-year employees are comfortable saying. Could an untenured Tamanaha writing about the failings of his school or an untenured Campos steering applicants away from his institution reasonably expect a new contract at the end of the year? Campos and Tamanaha's premise that, under Tamanaha's model, tenure would survive at enough law schools to ensure a healthy flow of independent scholarship is simply and clearly incorrect.

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58. See ABA Section of Legal Educ. and Admissions to the Bar, Council Meeting Minutes (Aug. 9, 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/december\\_2013\\_council\\_open\\_session/2013\\_august\\_council\\_open\\_session\\_minutes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/december_2013_council_open_session/2013_august_council_open_session_minutes.authcheckdam.pdf).

59. VEULEN, *supra* note 32, at 57.

60. [T]he growth in journals has been dramatic, but the growth in the law has outstripped it by far, in the legislatures, the courts, and the bureaucratic agencies.

. . . [R]egulations newly proposed or adopted by the regulatory agencies multiply at a breathtaking rate.

. . . The need for a healthy and prolific fourth estate of law reviews in our legalistic society ought to be clear.

John Paul Jones, *In Praise of Student-Edited Law Reviews: A Reply to Professor Dekanal*, 57 UMKC L. REV. 241, 244–45 (1989).

One of the solutions I sponsor in Section VI below, having law professors teach an extra class each semester, would itself reduce scholarship, but in a far different way. Still putting out their very best work, a broad array of scholars would continue to address the broad array of problems from a broad array of perspectives.

Next, Campos criticizes the statement in my piece that “the legal professoriate develops suggestions for law in the common interest that are not produced by the powerful lobbies generating law today.”<sup>61</sup> His take on the observation: “That these valuable critiques of the legal system constitute an important practical counterweight to the invidious effect self-interested actors have on the legal system . . . [is] utterly fantastic.”<sup>62</sup> He adds that “[t]he claim that legal decisionmakers (let alone other powerful social actors) are influenced significantly by legal scholarship seems so implausible on its face that it is all the more remarkable that legal academics feel free to make it without any supporting evidence.”<sup>63</sup> Naturally, his skepticism is shared by other opponents of tenure. Tamanaha remarked, for example, that “[r]iding one intellectual fad after another, law professors are spinning their wheels going nowhere.”<sup>64</sup> So what if tenure *does* embolden professors to write what they think, their attitude seems to be, no one is going to listen to it, anyway.

One problem with Campos’s critique is that, in a poorly performed sleight of hand, he reshapes the premise that legal scholarship produces “suggestions for law in the common interest” to the narrower “claim that legal decisionmakers ([and] other powerful social actors) are influenced significantly by legal scholarship.” I cannot really blame him for attempting the trick<sup>65</sup>—I, too, would be skittish about trying to rebut the simple, self-evident premise that legal scholarship can represent the common interest in a way that “the powerful lobbies generating law today” cannot. Campos then performs another trick, making his claim that scholarship is uninfluential vanish into thin air by attributing much of the “fundamental shift in the cultural conversation” about the value of a legal education to “the pioneering work of Bill Henderson on the economics of legal education, and Brian Tamanaha’s . . . book *Failing Law Schools*.”<sup>66</sup>

Not all of the opponents of tenure concur with Tamanaha and Campos, though, that legal scholarship has been largely ineffectual. Indeed, some oppose tenure for the very reason that it *has* been

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61. Silver, *supra* note 12, at 55.

62. Campos, *Self-Congratulations*, *supra* note 15, at 220.

63. *Id.* at 221 n.23.

64. TAMANAHA, *FAILING LAW SCHOOLS*, *supra* note 2, at 56.

65. A.k.a. the Straw Man fallacy. See PATRICK J. HURLEY, *INSTRUCTOR’S EDITION: A CONCISE INTRODUCTION TO LOGIC* 129–30, 706 (11th ed. 2012).

66. Paul Campos, *Goodbye Is Too Good a Word*, *INSIDE THE LAW SCHOOL SCAM* (Feb. 27, 2013, 4:43 AM), <http://insidethelawschoolscam.blogspot.com/2013/02/goodbye-is-too-good-word.html>.

effective. In what sounds to me like the ultimate *defense* of scholarship, Walter Olson, author of *Schools for Misrule: Legal Academia and an Overlawyered America*, charges, for example, that legal scholarship has “revolutionized (or created from scratch) whole fields of law, from products liability to sexual harassment to class action law.”<sup>67</sup> According to some of the opponents of tenure then, the pen must be wrestled from the hand of the professoriate because it’s wreaked havoc, and according to others, it is to be taken away because scholarship is ineffectual.

Here, the dueling assessments of the effectiveness of scholarship by the opponents of tenure reflect the ideological nature of such appraisals. Olson, for example, fails to mention law and economics, and originalism, two other movements heavily influenced by scholarship, among the dastardly deeds of the professoriate. And Campos sees the claim that scholarship “develops suggestions for law in the common interest that are not produced by the powerful lobbies” as an “utterly fantastic” waste of breath unless, of course, the suggestions reflect his own views. Tamara Piety sees the political dimension to the critique of tenure and scholarship: “One gets the sense that what bothers some critics is the subject matter. . . . The usual suspects are anything having to do with feminism or critical race, or perhaps critical approaches generally.”<sup>68</sup>

#### IV. THE ROLE OF THE LAW PROFESSOR

The crisis, and the call to overhaul legal education, has focused attention on all aspects of the study of law and the law professor’s role in it. In Tamanaha’s new model, less-costly adjuncts represent a significant savings that will lower tuition and, to a significant extent, replace full-time faculty. In *The Case Against the Motel 6 Model of Legal Education*, I cautioned that busy practitioners are likely to lack the Socratic rigor of experienced, full-time law professors that help cultivate analytical skills and effective advocacy,<sup>69</sup> and I noted that,

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67. See WALTER OLSON, *SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA* 2 (2011).

68. Tamara Piety, *The Utility of Scholarship—Round Two*, FACULTY LOUNGE (Feb. 13, 2013, 7:26 PM), <http://www.thefacultyounge.org/2013/02/the-utility-of-scholarship-round-two.html>.

69. Silver, *supra* note 12, at 58. Adjuncts have an important role in legal education. Just as law is highly specialized, they are specialists within the law school curriculum, teaching important corners of the law, with which no full-time member of the faculty is sufficiently acquainted. Some are highly skilled teachers, as well, who understand that a principle task of the law professor is to refine analytical and advocacy skills, and not just lecture on rules. Many, however, do not understand this, or, because their employment is largely dependent on student evaluations, inflate grades and substitute war stories from practice for classroom rigor. As Michael Seigel explains:

[L]aw school administrators do not consider a class consisting primarily of the reminiscences of a successful lawyer about “the glory days” to be a

[m]ore than teaching students what to think, the law professor must—like the old adage about teaching a man to fish so he can feed himself for a lifetime—teach students *how* to think. Whether the client is a corporation whose counsel would've emerged from one of Tamanaha's elite, three-year programs or an average Joe whose lawyer was herded through a cut-rate, two-year school, all clients need and deserve a lawyer who thinks as well as she can.<sup>70</sup>

Campos took strong exception. “Time and time again,” he complained, “we hear that law school teaches people—and not just any people but adults who enter law school with at least seventeen years of formal education—how to think.”<sup>71</sup> In Campos's eyes, I have rudely insulted our students. He continues, questioning the coherence of my claim: “I have been a law professor twenty-three years, and I confess that I have no idea what those in the academy mean when they claim law professors teach students how to think.”<sup>72</sup> The notion that we “teach students how to think” is, to Campos, just more “platitudinous self-congratulation.”<sup>73</sup>

The trouble is that it's not; it is exactly what law professors are paid to do, Socratically<sup>74</sup> or otherwise. Despite—or actually because of—

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worthwhile pedagogical experience. . . . [E]ffective teaching requires students to be engaged as active learners. . . . Listening to story after story—some perhaps not even particularly relevant to the topic at hand—is the polar opposite of active learning. Even though a practitioner might not initially decide to teach through the “war story method,” she might be tempted to do so after realizing the difficulty of the Socratic method. Especially for a new teacher, anything resembling Socratic teaching requires many hours of preparation for each hour of class, along with significant pedagogical skill in the classroom itself. Storytelling is so much easier. And besides, she was hired to share her accumulated wisdom and knowledge with the students, was she not?

Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 *Sr. Louis U. L.J.* 1191, 1191–92 (2006). Michael Simkovic and Frank McIntyre explain the economic dynamics behind the absence of adjunct rigor:

Adjuncts typically give higher grades than full-time faculty, apparently because they face greater pressure to obtain high course evaluations so their contracts will be renewed. Professors can increase enrollments and boost course evaluations by assigning better grades for less work because students actively shop for classes. Students also give better course evaluations to professors who grade more generously and who flatter students—and worse evaluations to those who demand more work and more substantive learning.

Simkovic & McIntyre, *supra* note 29, at 195.

70. Campos, *Self-Congratulations*, *supra* note 15, at 223 (citing Silver, *supra* note 12, at 57).

71. *Id.*

72. *Id.*

73. *Id.* at 217.

74. The oft-maligned Socratic Method goes hand in hand with the teaching and practice of critical thinking skills. It is not the only way to accomplish the task, but it is an excellent one, which explains its use in American law schools since the days of Langdell. Campos, nonetheless, criticized my statement that the Socratic method “is a snug fit with the pedagogical needs of future attorneys.” Campos, *self-congratulation*, *supra* note 15, at 223 (citing Silver, *supra* note 12, at 58). Perhaps Campos, like



the seventeen years of prior schooling, often in overcrowded public schools where teachers must teach to the standardized tests mandated by legislators—students learn *not* to think.<sup>75</sup> The general failure of primary and secondary education to develop strong critical-reasoning skills is well documented.<sup>76</sup> According to one highly regarded study, many college graduates are unable “to sift fact from opinion, make a clear written argument or objectively review conflicting reports of a situation or event . . . without being swayed by emotional testimony

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many others, confuses the Socratic Method with merely posing questions to students about a case or rule of law or, worse, asking them in a fashion that provokes anxiety. What Socrates did in the marketplace in Athens was far different, and when applied to the study of law, refines critical thinking at the same time it sheds light on a topic. See DONALD PALMER, *DOES THE CENTER HOLD? AN INTRODUCTION TO WESTERN PHILOSOPHY* 28–31 (5th ed. 2010). Socrates would begin a dialogue, often with a stranger, by soliciting a general statement or principle about a grand subject, like wisdom or truth or justice, on which most people had one opinion or another. *Id.* He would politely seek more enlightenment through subsequent questions that, in fact, would expose the loose assumptions, contradictions, and gaps in logic of the speaker’s initial premise. *Id.* The speaker—who often realized he was the student rather than the teacher only after the dialogue—was, in fact, being taught a broader lesson about critical thinking, including the construction of solid arguments, the perils of generalization and oversimplicity, the assessment of underlying assumptions, and the indeterminacy of language and principles and rules. *Id.* And as Professor Sherman Clark observes:

The Socratic questioning and answering central to the law school classroom aims to overcome the tendency to rely on easy but inadequate answers to hard but unavoidable questions. It requires us to become comfortable with, or at least capable of, confronting uncertainty. . . . This capacity is essential to the study and practice of law, because important legal questions often do not have clear and easy answers.

Sherman J. Clark, *Law School as Liberal Education*, 63 J. LEGAL EDUC. 235, 241 (2013).

The University of Chicago Law School’s website tells us that the Socratic Method is not a mere bromide there, either:

We are teaching reasoning skills, and the process of discovering a right answer is often more important than the answer itself. Mistakes—or perhaps, more accurately, tentative steps toward a solution that lead us down unavailing but illuminating paths—are part of learning. . . . [T]he Socratic Method is an important part of modern law teaching. . . . [O]ne reason the University of Chicago is known as the place that trains the finest lawyers in America is our faculty’s long-standing and continuing commitment to this challenging method of teaching the law.

See Elizabeth Garrett, *The Socratic Method (Green Bag Article)*, UNIV. CHI. L. SCH., [http://www.law.uchicago.edu/socrates/soc\\_article.html](http://www.law.uchicago.edu/socrates/soc_article.html) (last visited May 19, 2014) (quoting Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law School*, 1 GREEN BAG 2D, 199 (1998)) (reviewing LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997)), available at [http://www.greenbag.org/v1n2/v1n2\\_review\\_garrett.pdf](http://www.greenbag.org/v1n2/v1n2_review_garrett.pdf).

75. See Kenneth Bernstein, *Warnings from the Trenches*, ACADEME, Jan.–Feb. 2013, at 33.

76. See, e.g., RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 35 (2011) (“Commitment to [critical reasoning] skills appears more as a matter of principle than practice.”).

and political spin.”<sup>77</sup> And while professors are old enough to have had to hone their writing skills through research papers in college, many of our students have graduated from college having written next to nothing.<sup>78</sup> As a result, colleges are now busy fashioning and requiring critical thinking—a.k.a. “Baby Logic”—courses.<sup>79</sup> Does Campos find such courses insulting because, at that point in their lives, students have had *thirteen* years of formal education? All of Professor Campos’s students may, as some students do, think brilliantly when they walk in the door, but many students at many schools, especially now as LSAT scores on a test designed to gauge critical thinking skills are plummeting,<sup>80</sup> do not. Like Jeremy Telman says of a two-year J.D., “I think many of our law students need more schooling, not less, to help them to develop cognitive abilities that they should have worked on in college but didn’t.”<sup>81</sup> Indeed, of the high LSAT scorers who would attend Tamanaha’s first-rate, three-year schools and the low scorers at the two-year, bargain-basement variety, the *latter* would have the greater need for a third year of rigorous analytical work. And as Amy Mashburn reminds us, “[L]egal educators must consider not only their students’ needs, but also the well-being of their future clients . . . who will pay the price for inadequacies in their training.”<sup>82</sup>

Campos wonders what “teaching students how to think” really means.

It is short for teaching how to think *critically*; that is, for starters, to identify the weak or fallacious reasoning in and evaluate the various assumptions underlying arguments and rules and opinions; to construct analogically sound arguments; to appreciate the relationship of truth and advocacy, and the rational and emotional dimensions of persuasive advocacy; and to understand that so-called facts are not immu-

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77. Sarah Rimer, *Study: Many College Students Not Learning to Think Critically*, McClatchyDC (Jan. 18, 2011), [http://www.mcclatchydc.com/2011/01/18/106949\\_study-many-college-students-not.html?rh=1](http://www.mcclatchydc.com/2011/01/18/106949_study-many-college-students-not.html?rh=1).

78. George Leef, *What is The National Survey of Student Engagement Telling Us?*, THE JOHN WILLIAM POPE CTR. FOR HIGHER EDUC. POLICY (Nov. 21, 2006), <http://www.popecenter.org/commentaries/article.html?id=1758#.U-MSKIBdUyg>.

79. Mark Bauerlein, *Critical Thinking in the Curriculum—Donald Lazere*, CHRON. OF HIGHER ED. (July 7, 2011), <http://chronicle.com/blogs/brainstorm/critical-thinking-in-the-curriculum-donald-lazere/37094>.

80. Jerry Organ, *Thoughts on Fall 2013 Enrollment and Profile Data Among Law Schools*, THE LEGAL WHITEBOARD (Mar. 2, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2014/03/thoughts-on-fall-2013-enrollment-and-profile-data-among-law-schools.html>. See also Jordan Weissman, *The Wrong People Have Stopped Applying to Law School*, THE ATLANTIC (Apr. 10, 2012, 10:37 AM), <http://www.theatlantic.com/business/archive/2012/04/the-wrong-people-have-stopped-applying-to-law-school/255685/>.

81. Jeremy Telman, Comment to *Rodriguez & Estreicher NY Times Op-Ed in Support of Two-Year Law Degree*, BRIAN LEITER’S LAW SCH. REP. (Jan. 19, 2013, 10:03 AM), <http://leiterlawschool.typepad.com/leiter/2013/01/rodriguez-estreicher-ny-times-op-ed-in-support-of-two-year-law-degree.html>.

82. Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 647 (2008).

table stones to be thrown or dodged, but change shape through the lenses of experience, ideology, and perspective.<sup>83</sup> Holmes understood this when he observed that “[t]he law is the calling of thinkers.”<sup>84</sup> These skills are taught through explication, example, and practice. Treating a student’s mind as a receptacle for endless blackletter rules to be regurgitated on an exam does nothing, on the other hand, to advance critical thinking or prepare a student to succeed in practice. Though Campos objects, I stand by the position that an attorney’s ability to vindicate her client’s rights and achieve her client’s goals turns more on orderly, creative thought and clear exposition than on the memorization of rules.<sup>85</sup> Elizabeth Garrett put it well when she said:

The law will change over the course of our lifetimes, and the problems we confront will vary tremendously. Law professors cannot provide students with certain answers, but we can help develop reasoning skills that lawyers can apply, regardless of the legal question.<sup>86</sup>

Talk of teaching students how to think deeply and analytically is thus neither platitudinous nor insulting. For the same reason we don’t hand a law license to someone who has read a stack of casebooks on his or her own, we shouldn’t license attorneys whose teachers haven’t drawn out their potential to digest complex material, form logical arguments, and lucidly present them. The refinement of these skills does not occur magically when students are showered with rules. And with LSAT scores in free fall, the task is more important than ever. Fred Schauer, author of the highly-regarded book *Thinking Like a Lawyer*,<sup>87</sup> doesn’t see teaching students how to think as an insulting platitude, either. And neither does Trevor Morrison, the dean at N.Y.U.:

What sometimes frustrates me in discussions about the crisis in legal education is that phrases like “critical thinking,” “analytical reasoning,” and “problem solving” often get caricatured or treated as

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83. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600–16 (1981) (describing, *inter alia*, how the expansion and contraction of the window in time within which an event is considered to have occurred can decisively affect fact finding). Kelman’s insights on “time-framing”—which can apply equally to perspectival shifts in distance, specificity of detail, and so on—are important tools to provide future lawyers. Jay Sterling Silver, *On the Appropriate Breadth of Coverage*, 19 LAW TCHR. 24 (2012).

84. OLIVER WENDELL HOLMES, JR., *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29 (1920), reprinted in THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 372 (Hugh Rawson & Margaret Miner eds., rev. ed. 2006).

85. Oxford University agrees: “Law as taught in Oxford is much more than the mere learning and retention of detailed rules and their operation.” Jesus College, Oxford (last visited August 7, 2014), *supra* note 31.

86. Garrett, *supra* note 74.

87. See FREDERICK SCHAUER, THINKING LIKE A LAWYER (2009). See also EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (2009).

clichés. Great law schools like N.Y.U. must be attentive to the changing demands of a legal marketplace, but need not give up on the more enduring values of a legal education.<sup>88</sup>

Failing to understand the primacy of the task and to work hard to enhance these skills in students who pay so dearly for them would, on the other hand, be tremendously insulting. Exorbitant tuition is bad enough; the failure to cultivate critical thinking skills in students would mean they get nothing for their money.

Next, Campos posits a sort of proof that legal scholarship and claims about teaching how to think are empty shibboleths. He argues that, if I cannot prove that either “the quality of legal education or the social value of scholarship are substantially higher than they were a generation ago” when tuition, faculty salaries, and the number of law review articles were lower and teachers taught more classes, then I am wrong to assert that scholarship and efforts to cultivate thinking skills have value.<sup>89</sup> If they did have value, he reasons, higher salaries would mean recent law graduates perform better than earlier graduates, and more articles would have cured more problems. The trouble here, of course, is that output does not, by necessity, vary with remuneration—or today’s professional athletes would be performing hundreds of times better than those of a few decades ago—and that the assessment of social good is as dependent on one’s politics as the assessment of music and art is on personal taste. Campos’s formula is a loose assortment of variables masquerading as a logical proof.

#### V. VILIFYING THE FACULTY ON THE WAY TO TRADE SCHOOL STATUS

Law professors have come in for a lot of blame lately. Much of it comes from struggling and embittered law graduates blowing off steam on scam blogs, with their ire directed at law professors, the face of the institution they hold responsible for their suffering. Some blame has come from professors,<sup>90</sup> and even the Task Force has gotten into the act: law professors, the Task Force has told us, are “people who have sought out their positions because of a desire to avoid a market- and change-driven environment.”<sup>91</sup> As Sherrilyn Ifill ob-

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88. Peter Lattman, *Columbia Professor Is Chosen Dean of N.Y.U.’s Law School*, N.Y. TIMES (Apr. 3, 2013, 6:03 PM), [http://dealbook.nytimes.com/2013/04/04/columbia-professor-is-chosen-dean-of-n-y-u-s-law-school/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2013/04/04/columbia-professor-is-chosen-dean-of-n-y-u-s-law-school/?_php=true&_type=blogs&_r=0).

89. Campos, *Self-Congratulation*, *supra* note 15, at 224.

90. See, e.g., Jeffrey Harrison, Comment to *The Utility of Scholarship—Round Two*, THE FACULTY LOUNGE (Feb. 13, 2013, 8:37 PM) (“95% of legal scholarship is a waste.”), <http://www.thefacultylounge.org/2013/02/the-utility-of-scholarship-round-two.html>.

91. ABA, *Task Force*, *supra* note 9. “Law faculty are socialized by each other and new faculty absorb beliefs, practices, and expectations from more senior faculty,” the report goes on. *Id.* at 14.

serves, “[I]t’s always good fun to disparage members of the academy as pampered and isolated egoists.”<sup>92</sup>

But Campos has gone further. In his response to my article, he indicts law professors who defend aspects of the current model as the *cause* of the crisis, a critique that doubles as an argument to move legal education out of the academy and into the ranks of the trade schools. Referring to my contentions that tenure and legal scholarship have value and that the cultivation of analytical skills lies at the heart of the law professor’s job, Campos articulates his central thesis in *Self-Congratulation and Scholarship* this way: “These claims illustrate how . . . the crisis of the American law school is in large part a product of the tendency of law school faculty to indulge in platitudinous self-congratulation.”<sup>93</sup> A good thesis has far-reaching implications. Unfortunately, the far-reaching implications of his thesis have nothing to do with its facial claim, but instead with the number of fallacies and rhetorical traps one can cram into a single sentence.

The thesis simultaneously blends no less than *ad hominem*, rigged argumentation, smear, rhetorical entrapment, and scapegoating. First, judging the merits of an assertion—in this case, that a lot of what law professors traditionally do has value—on an alleged attribute or aspect of the speaker is classic *ad hominem*.<sup>94</sup> Second, since a law professor’s defense of an aspect of his or her traditional role can always be characterized as self-promotional and self-interested, then only critics, like Campos, can make credible statements. The game is rigged. Like Freud’s notion of *resistance*, the rejection of a premise is simply viewed as more evidence of its truth,<sup>95</sup> and real debate becomes impossible.

Third, labeling the defense of what law professors do as self-laudatory suggests that all of Campos’s colleagues who believe in what they do and work hard at it are mere self-promoters, which is no more appropriate than attempting to smear the more visible critics of traditional legal pedagogy by calling them publicity hounds. Fourth, to propose to do away with aspects of legal education that many of one’s colleagues feel have significant value, and then to attack their defense as “self-congratulatory,” is a rhetorical trap: one must choose between not responding and being seen as humble, or expressing their views

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92. Danielle Citron, *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS (July 1, 2011), <http://www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html>.

93. Campos, *Self-Congratulations*, *supra* note 15, at 216–17.

94. *Ad hominem* circumstantial, to be exact. See HURLEY, *supra* note 65, at 131.

95. See, e.g., ALBERT ELLIS ET AL., PERSONALITY THEORIES: CRITICAL PERSPECTIVES 119 (2009) (“Freud suggested that what he called resistance to the analysis signified progress in the therapy: the greater the *resistance*, the closer the analyst was getting to the source of the patient’s neurosis.”), available at [http://www.sagepub.com/upm-data/23240\\_Chapter\\_5.pdf](http://www.sagepub.com/upm-data/23240_Chapter_5.pdf).

and displaying hubris. Not much of a choice, and one that certainly chills debate.

And fifth, to blame law professors for the crisis in legal education is, in light of the actual dynamics of the crisis, pure and simple scapegoating. Indeed, Campos's own recognition of the crisis as a market failure<sup>96</sup> works as a kind of performative refutation of his thesis. Moreover, in light of the venomous nature of some of the debate on the Internet,<sup>97</sup> and his celebrity status among scam bloggers, such tactics can only further dampen debate.

In addition to the fallacies, there is a bit of irony here, as well. On the one hand, maintaining that the independent critique of law has value constitutes shameful self-congratulation; on the other, crediting one's *own* critique with helping bring about a "fundamental shift in the cultural conversation," as Campos has,<sup>98</sup> is somehow entirely different.

None of which is to say that law professors haven't made out well or that a large portion of the law school budget doesn't go to faculty salaries and support.<sup>99</sup> It is merely to say that law professors are neither the architects nor the operators of the system, as others, like Campos, have charged. As Tamanaha conceded in *Failing Law Schools*, the rise in faculty salaries over the years, which represent a sizable portion of a law school's budget, is one of the places where the run up in tuition landed, rather than a cause of the run up.<sup>100</sup> "[W]e must be careful," Tamanaha cautions us, "not to misapprehend effect for cause—mistaking what law schools have spent their stream of tuition dollars on for the reasons tuition rose."<sup>101</sup> Law professors, in other words, are not the *cause* of the crisis, and doing away with tenure to reduce faculty costs fails to address the real causes, which I will look at and propose measures to combat in the next section.

Just as the defense of current pedagogy cannot automatically be characterized as self-aggrandizement, self-interest, indifference, or denial, care must be taken not to reflexively interpret opposition to a particular set of solutions as the uncritical endorsement of the status quo. The defense of things like legal scholarship, tenure, and rigorous Socratic teaching is not, per se, indifference to runaway tuition, oppressive graduate debt, and high unemployment, nor is it a negation of the need for law schools to adapt swiftly to the technology-based changes in the delivery and structure of legal services. It is not a denial that part of the run up in tuition over the years landed in the

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96. Campos, *Self-Congratulations*, *supra* note 15, at 217.

97. See, e.g., *Third Tier Corroded Waste: Catholic University of America Columbus School of Law*, THIRD TIER REALITY (July 17, 2014, 7:34 AM), available at <http://thirdtierreality.blogspot.com/2014/08/third-tier-moist-hot-waste-university.html>.

98. See Campos, *Goodbye Is Too Good*, *supra* note 66.

99. See TAMANAHA, *Failing Law Schools*, *supra* note 2, at 3.

100. *Id.* at 127–28.

101. *Id.* at 128.

pockets of faculty, nor an unwillingness by faculty to fashion effective solutions, even when they come at a significant cost to them. That is not to say there are not faculty who are, in fact, indifferent to or in denial over the crisis. It simply means that opposition to the particular measures Tamanaha and Campos have laid out is not, in and of itself, obstructionism.

## VI. REAL SOLUTIONS

Real solutions address root causes, not mere effects, and preserve what is good. Tamanaha has clearly outlined most of the unfettered economic forces behind exorbitant tuition and graduate debt and unemployment and has cast light on the suffering of law graduates nationwide. These achievements are commendable. Unfortunately, his tenureless, market-driven alternative to traditional legal education eliminates much of the public and private good in the current model without directly targeting the causes.

As Tamanaha has documented,<sup>102</sup> soaring law school tuition and graduate debt trace back to a confluence of factors, including: (1) market-based pricing in which the Harvards and Yales ratchet up tuition each year to whatever level the market, afloat on student loans, will bear, and the non-elite schools fall quickly in line ten or fifteen thousand dollars behind;<sup>103</sup> (2) bloated overhead charges, as noted below; (3) the heretofore endless line of wannabe lawyers willing—in part based on overly optimistic employment data previously released by law schools—to mortgage their futures;<sup>104</sup> (4) law schools' fear of falling in the *U.S. News* rankings, with the resultant focus on the costly metrics of median LSAT scores and per student expenditures;<sup>105</sup> and, of course, (5) the student loan program, which the late Senator Daniel Patrick Moynihan warned back in the early seventies would result in skyrocketing college tuition and, in his words, “was a ‘national disaster’” waiting to happen.<sup>106</sup>

Although the causes of graduate unemployment, like those of inordinate tuition and graduate debt, are pretty clear, as well, one of them has been conveniently underpublicized. Attention has focused on the

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102. *See generally id.*

103. *Id.* at 130–34.

104. *But see also* Rhode, *supra* note 27, at 444 (“[A]pplicants, subject to biases toward optimism, have engaged in ‘magical thinking.’”).

105. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1, available at [http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all&_r=0) (“Like business schools and some high-profile athletic programs, law schools subsidize other fields in universities that can’t pay their own way.”).

106. Debra Cassens Weiss, *Two-Year Law School Was a Good Idea in 1970, and It’s a Good Idea Now, Prof Tells ABA Task Force*, A.B.A. J. (Feb. 10, 2013, 1:36 AM), [http://www.abajournal.com/news/article/two-year\\_law\\_school\\_was\\_a\\_good\\_idea\\_in\\_1970\\_and\\_its\\_a\\_good\\_idea\\_now](http://www.abajournal.com/news/article/two-year_law_school_was_a_good_idea_in_1970_and_its_a_good_idea_now).

recent recession; the ongoing, technology-based transformation in the delivery of legal services, which, like automation in manufacturing, eliminates jobs; and the need for debt-laden graduates to charge more than the middle class can afford.<sup>107</sup> Less attention has been paid to the fact that, to put it very bluntly, *there are too many law schools*.

Quite naturally, cash-strapped universities and entrepreneurs seeking new revenue centers have found the case for opening a new law school, or buying up an existing one, pretty compelling. Law schools are cash cows for universities,<sup>108</sup> and now private ventures,<sup>109</sup> and have proliferated at a rate many times that of population growth over the last century in both good economies and bad.<sup>110</sup> The university's central administration skims off a substantial portion of law school tuition revenues under the guise of "overhead," reflecting, in principle only, the university's expenditures on the law school. Overhead normally represents something in excess of twenty percent of the law school's gross revenues<sup>111</sup> and is often reported to run considerably higher.<sup>112</sup> Indeed, as noted in *The Chronicle of Higher Education*, "law deans are increasingly complaining that larger percentages of their budgets are being diverted to subsidize money-losing parts of their universities, and that administrators essentially treat law schools

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107. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129 (2009); DOCUMENTING THE JUSTICE GAP IN AMERICA, LEGAL SERVS. CORP. (2010), available at <http://www.lsc.gov/JusticeGap.pdf>; Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 *GEO. J. LEGAL ETHICS* 989, 990–91 (1998).

108. Segal, *supra* note 105.

109. In a 1996 consent decree between the Justice Department and the ABA following a lawsuit brought by the Massachusetts School of Law, the ABA, as the sole accrediting body for legal education, agreed to permit private, for-profit ventures to obtain accreditation. See generally *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

110. See *ABA Approved Law Schools by Year*, ABA, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html) (last visited Mar. 12, 2014); Katherine Mangan, *Supporters Defend Law Dean Dismissed in Dispute Over Revenue*, *CHRON. OF HIGHER EDUC.* (Aug. 1, 2011), <http://chronicle.com/article/Supporters-Defend-Law-Dean/128463/>; Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 *LOY. J. PUB. INT. L.* 1, 20 (2006).

111. See Thomas L. Shaffer, *Commentary: Four Issues in Accreditation of Law Schools*, 59 *WASH. U. L. REV.* 887, 895 n.38 (1981); Segal, *supra* note 105; Mangan, *supra* note 110. Tamanaha places the figure between fifteen and thirty. TAMANAHA, *supra* note 2, at 127.

112. *Read the UB Dean's Letter to the Law School Community*, *BALT. SUN* (July 29, 2011, 1:01 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-law-dean-letter,0,3949860.story> (in which the former law school dean charged that University took forty-five percent of the law school's annual revenues as overhead). Proving that things can always be worse, a long-time dean at Fordham recalled that, when he assumed the helm at the law school in 1982, the University was helping itself to sixty percent of his school's revenues. ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 323 (2012).



as cash cows.”<sup>113</sup> And, of course, at the proprietary schools, law school revenues represent profits.

Even now, with applications and LSAT scores in sharp decline and massive unemployment among law graduates, new law schools are springing up across the country exacerbating the problem of graduate unemployment, including start-up ventures at Concordia University in Boise, Idaho;<sup>114</sup> Indiana Tech in Ft. Wayne;<sup>115</sup> Belmont University in Nashville;<sup>116</sup> Lincoln Memorial in Knoxville;<sup>117</sup> North Texas University in Dallas;<sup>118</sup> and Thomas Cooley’s new branch in Tampa.<sup>119</sup> In Florida, where the number of law schools has doubled over the last fifteen years, a coterie of Daytona Beach businessmen are on the brink of opening that state’s thirteenth law school, and even large state schools, like the University of California at Irvine, have joined the party.<sup>120</sup>

Since the 1996 consent decree between the ABA and the Justice Department ending the ABA’s ban on proprietary law schools,<sup>121</sup> private groups have opened up, or bought out, six schools, including Argosy’s Savannah, John Marshall (Atlanta), and Western State law schools and InfiLaw’s Phoenix (now Arizona Summit),<sup>122</sup> Charlotte, and Florida Coastal schools of law. InfiLaw is currently waging a bat-

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113. Mangan, *supra* note 110.

114. The University’s main campus is in Portland, Oregon. Karen Sloan, *ABA Delays Action on Concordia Law’s Accreditation*, NAT’L L.J. (Aug. 12, 2014), available at <http://www.nationallawjournal.com/id=1202666575459/ABA-Delays-Action-on-Concordia-Laws-Accreditation?mcode=1202619035693&slreturn=20140712184747>.

115. See Debra Cassens Weiss, *Fifth Indiana Law School to Open with a Fraction of Hoped-for 100 Students*, A.B.A. J. (July 29, 2013, 5:49 AM), [http://www.abajournal.com/news/article/fifth\\_indiana\\_law\\_school\\_to\\_open\\_with\\_a\\_fraction\\_of\\_hoped-for\\_100\\_students](http://www.abajournal.com/news/article/fifth_indiana_law_school_to_open_with_a_fraction_of_hoped-for_100_students).

116. Karen Sloan, *Nation’s Newest Law School Prepares to Open its Doors*, NAT’L L.J. (Aug. 20, 2013, 4:32 PM), <http://www.nationallawjournal.com/id=1202616286658>. Indiana Tech, for example, planned for an inaugural class of one hundred students to help defray, among other expenses, the cost of a new \$15,000,000 building. Asked, just as the first day of orientation got underway, whether the school had met its target, the Dean responded, “[W]e know we have 32 [students] . . . [T]here is another student whose application is complete and who expects to start tomorrow if we admit him today. We’ll take him.” *Id.*

117. *Id.*

118. See John G. Browning, *Will UNT’s New Law School Succeed?*, D CEO (Apr. 2013), <http://www.dmagazine.com/publications/d-ceo/2013/april/will-unt-dallas-law-school-succeed>.

119. See *About the Tampa Bay Campus*, THOMAS M. COOLEY LAW SCH., <http://www.cooley.edu/tampabay/about.html> (last visited Apr. 19, 2014).

120. See *ABA Approved Law Schools by Year*, ABA, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html) (last visited Mar. 12, 2014).

121. See *supra* note 109.

122. Following a decline of nearly fifty percent in first-year enrollment, Phoenix changed its name to Arizona Summit Law School, with the Dean explaining “[t]he new name highlights our commitment to the success of our students . . . and provides a supportive academic environment.” Karen Sloan, *Phoenix School of Law Adopts New Brand*, NAT’L L.J. (Nov. 4, 2013).

tle to take over the Charleston School of Law in Charleston, South Carolina.<sup>123</sup> Charlotte and Florida Coastal are two of the largest law schools in the country.<sup>124</sup>

The law school bubble we see bursting should, of course, have come as no surprise. As I recalled in the UCLA piece, for example:

As with the housing and derivatives catastrophes, the signs of impending doom, which were everywhere, went conveniently unheeded. Years ago, for example, when a consortium of private lenders threatened to curtail student loans to students at law schools whose graduates had high default rates, it was painfully evident that legal education was a house of cards . . . atop unstable market forces.<sup>125</sup>

There is more than a little irony in the fact that Tamanaha, in *Failing Law Schools*, reveals the market forces that created the crisis<sup>126</sup> and then, under his differentiated law school model, relies on the marketplace to fix everything. We see the same sort of irony with Campos, who exposed InfiLaw's seedy practices in *The Atlantic*,<sup>127</sup> yet who supports the differentiated model that paves the way for more InfiLaws. Their solutions are an awful lot like trying to solve the housing and derivatives crisis by further deregulating banking. Indeed, reducing tuition by loosening accreditation standards and allowing the market to shape cheaper, abbreviated alternatives to the traditional model would, as struggling colleges and wily entrepreneurs throw up law schools faster than ever, aggravate unemployment. Tamanaha largely concedes the point: "[r]educing the mandatory curriculum from three to two years raises the specter of increasing the flow of lawyers onto an already oversupplied market."<sup>128</sup>

There is also no guarantee that the savings represented by a law faculty of untenured, at-will professors top heavy with adjuncts would bring down tuition. The central administration at many schools, dependent on law school overhead charges to make ends meet, simply could not afford to.

The failure of Tamanaha and Campos to aim at the real causes of the crisis entails more than just irony. It is a kind of bait and switch. The blame they assign to tenured law faculty and the ABA Stan-

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123. Debra Cassens Weiss, *Are InfiLaw's For-Profit Law Schools Succeeding? Plan to Buy Fourth School Spurs Concerns*, A.B.A. J. (Oct. 22, 2013, 10:44 AM), [http://www.abajournal.com/news/article/are\\_infilaws\\_for-profit\\_law\\_schools\\_succeeding\\_purchase\\_of\\_fourth\\_school/](http://www.abajournal.com/news/article/are_infilaws_for-profit_law_schools_succeeding_purchase_of_fourth_school/).

124. *Id.*

125. Silver, *supra* note 12, at 53–54 (internal citation omitted).

126. TAMANAHA, *FAILING LAW SCHOOLS*, *supra* note 2, at 126–34.

127. See generally Paul Campos, *The Law-School Scam*, THE ATLANTIC (Sept. 2014), <http://www.theatlantic.com/features/archive/2014/08/the-law-school-scam/375069/>.

128. TAMANAHA, *supra* note 2, at 174.

dards<sup>129</sup> dovetails with efforts—like those of the American Law Deans Association outlined in Section III—to consolidate in the hands of the administration authority over the academic program, which is now shared by the tenured faculty and the law school administration under the present ABA Standards. Various provisions in the Standards represent unnecessary expenses and must be rescinded or rewritten—like the wasteful mandate of redundant print and electronic library collections that recently was jettisoned<sup>130</sup>—but, as Paul McGreal observes, “it would be the purest of coincidences that the cost of an ABA-approved legal education just so happens to equal the amount of revenue that a law school generates in the current market.”<sup>131</sup>

With refreshing candor, Tamanaha has recently conceded the need for better solutions: “Frankly, I don’t like my own proposals. . . . I would happily abandon my proposals for better ones. But I have yet to see any suggestions from critics that solve the fundamental problems that plague legal education.”<sup>132</sup>

I accept the challenge. The following five measures will help curb the forces that drive up law school tuition annually, substantially reduce tuition, and limit the number of newly minted attorneys cast into a contracting legal job market. At the same time, the measures will help preserve the considerable private, pedagogical good in the present model as well as the public good of competent legal representation and the independent critique of law and the legal system.

The first two measures constrain the market forces that operate to raise law school tuition annually according to whatever the market will bear and that incentivize the continued proliferation of new law schools that aggravates graduate unemployment. The first measure would tighten, rather than loosen, the ABA accreditation standards to prevent university administrations, through an inflated “overhead”

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129. See, e.g., Michael L. Coyne, *ABA and Legal Education: Change Won't Come from Within*, NAT'L L.J. (May 8, 2013) (“[T]he ABA’s law school accreditation process had been captured by full-time academics at ABA law schools who then used that process for their own economic benefit at the expense of students and the public.”). Contrary to the claim of Coyne and others that law schools or law professors control the accreditation apparatus, most of the members of the ABA’s Council of the Section on Legal Education, the group responsible for the Standards, are lawyers, judges, and prominent individuals outside the profession. See 2014–2015 Council, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/about\\_us/leadership.html](http://www.americanbar.org/groups/legal_education/about_us/leadership.html) (last visited Oct. 17, 2014).

130. See ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014-2015, at 41–42 (2014) [hereinafter ABA STANDARDS AND RULES OF PROCEDURE], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf).

131. Paul McGreal, *Brian Tamanaha on the Rising Cost of Legal Education*, THE FACULTY LOUNGE (Aug. 17, 2012, 10:00 AM), <http://www.thefacultylounge.org/2012/08/brian-tamanaha-on-the-rising-cost-of-legal-education.html>.

132. Tamanaha, *Problems*, *supra* note 14, at 539.

formula, from subsidizing university shortfalls or other poor performing programs. Presently, ABA Standard 202 governing law school resources requires only that a university give an accounting of the law school revenues it diverts to other programs;<sup>133</sup> take all you want, just tell us what you took. Standard 202 should be supplanted by language clearly limiting the central university's take to *actual* overhead expenses, and requiring an *independent* accounting to ensure accuracy. Doing so would lower tuition and disincentivize universities with law schools from raising tuition as high as possible each year, and those without law schools from opening new ones up as revenue centers.

The second measure would tighten the ABA Standards to require start-up law schools to show, prior to a grant of provisional accreditation, that their graduates will serve an underserved population and will not exacerbate lawyer unemployment. This requirement is consistent with the ABA's goal of "[a]ssur[ing] meaningful access to justice for all persons,"<sup>134</sup> and with its duty, as the sole accreditor of law schools, to safeguard the consumers of legal education.<sup>135</sup>

The third and fourth proposals, neither of which is likely to endear me to faculty and administrators, are law school austerity measures that will help reduce tuition. The third is to cut the salaries of full-time faculty and deans by twenty percent and do away with sabbaticals and research stipends. Law professors are especially well remunerated by academic standards,<sup>136</sup> and would remain so after the

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133. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 130, at 10. Standard 202 requires only that a law school's "financial resources . . . be sufficient to carry out its program of legal education" and that the university provide the law school with an accounting "for all charges and costs assessed against resources generated by the law school and for any use of resources generated by the law school to support non-law school activities and central university services." *See id.*

134. *See* ABA POLICY AND PROCEDURES HANDBOOK 2013–2014, at 3 (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/2013\\_2014\\_ch\\_1\\_13\\_webversion\\_greenbook\\_updated\\_after\\_2014\\_midyear.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_2014_ch_1_13_webversion_greenbook_updated_after_2014_midyear.auth_checkdam.pdf).

135. Brian Leiter has proposed a sound addition to the Standards of his own: "[T]he ABA should prohibit all member law schools from participating in 'evaluation' exercises by profit-making organizations, such as *U.S. News*," which, he notes, "creates the idiotic incentive to spend as much as possible, without regard to efficiency." Brian Leiter, *The ABA Task Force Working Paper (WP) on "the Future of Legal Education," Part II*, BRIAN LEITER'S L. SCH. REP. (Aug. 7, 2013), <http://leiterlaw-school.typepad.com/leiter/2013/08/the-aba-task-force-working-paper-on-the-future-of-legal-education-part-ii.html>. Al Garcia, the dean at St. Thomas in Florida, took the courageous step of refusing to submit the *U.S. News* questionnaire, but few, if any, others followed suit. *See* Julie Kay, *Florida Law School Dean Boycotts 'U.S. News' Rankings Survey*, FLA. BUS. REV. (May 3, 2010).

136. The salary data gathered annually by SALT shows, for example, that in 2012 the median annual salary of a tenured full or associate law professor at the 68 law schools responding to SALT's annual salary survey—none of them elite schools—was in the low \$140,000 range, with a median summer research stipend of \$12,000, for a total of somewhere in the mid 150's for a tenured professor receiving a summer research stipend at a typical school. *See, e.g.*, Society of American Law Teachers, SALT EQUALIZER (May 2013), <http://www.saltlaw.org/wp-content/uploads/2013/06/SALT->

cut.<sup>137</sup> As auto workers, public school teachers, and state employees understand, wage concessions are a fact of life in tough times, and with the exception of being a baseball player, our jobs will remain the best in the world.

The fourth measure is to increase teaching loads by one course per semester—meaning the vast majority of law professors will teach three courses per semester, rather than the two that represents the current course load at most law schools. In addition to the immediate, modest savings in the adjunct budget line, the fifty percent increase in teaching productivity of the full-time faculty<sup>138</sup> will, as tenured baby-boomers retire over the next decade and many are not replaced, yield major savings. Teaching an extra course each semester will still allow time for scholarship, particularly over the summer.

The final measure, rather than calling for a change in the ABA rules, would require the strict enforcement of Standard 316.<sup>139</sup> To prevent law schools from opening their doors even wider to the very poorest performers on standardized tests who are sure to fail the bar exam and exacerbate graduate unemployment, and to put those schools that do out of business, the ABA must not loosen or turn a blind eye to Standard 316 whereby a law school loses its accreditation if its graduates do not pass the bar in sufficient numbers over the last five years.<sup>140</sup> The doomsday machine built into Standard 316 must stay well-oiled,<sup>141</sup> which would represent a rather sharp departure

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salary-survey-20131.pdf. By comparison, the median for full professors at 1,285 colleges reporting salary data to the American Association of University Professors in 2012 is \$83,500, i.e., over forty percent less. See *Almanac of Higher Education 2012*, CHRON. OF HIGHER EDUC. (Apr. 8, 2012), <http://chronicle.com/article/faculty-salaries-table-2012/131433>. While the data from the Chronicle's Almanac is for "full" professors, rather than tenured, and the median for tenured college professors is likely to be higher, the point here is that the difference, even if a bit less, is dramatic.

137. With a twenty percent cut, the median base salaries of full and associate law professors with tenure would still exceed the salaries of full professors in other disciplines by a full twenty-five percent. See *Almanac of Higher Education*, *supra* note 136.

138. At the elite schools where the average teaching load is less than two courses per semester, teaching an extra course each semester will amount to an increase in productivity in excess of fifty percent. See Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 546 (2007) (citation omitted).

139. Standard 316 (formerly Interpretation 301-6). ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 130, at 20.

140. *Id.* The rule requires that, in at least three of the past five years, either seventy-five percent of the graduates of a law school who sat for a bar exam must have passed or its average pass rate for first-time takers must have been within fifteen points of the state average (of the state where they most frequently sat for the exam). *Id.* In 2012, for example, the first-time takers at thirty-one schools had bar passage rates below seventy-five percent. See, e.g., U.S. NEWS & WORLD REP., BEST GRAD SCHOOLS 76–80 (Anne McGrath, ed., 2014), available at [http://www.academia.edu/6784475/US\\_News\\_World\\_Report\\_Best\\_Graduate\\_Schools\\_2014\\_Guidebook](http://www.academia.edu/6784475/US_News_World_Report_Best_Graduate_Schools_2014_Guidebook).

141. In a recent poll on Brian Leiter's *Law School Reports* website asking how many ABA-accredited law schools would close over the next decade, roughly one quarter of the respondents believed eleven or more would, while a majority selected

from past practices—as former AALS President Michael Olivas put it, “[A] gentleman’s agreement leads to virtually no school having its taxi medallion taken away.”<sup>142</sup> The closing of a law school is a catastrophic event for faculty, administrators, and other employees (other law schools will happily absorb its students); but so is the crushing debt and joblessness of legions of new law graduates. With the Ave Maria School of Law in Florida having fallen out of compliance with Standard 316 following the July 2014 bar exam,<sup>143</sup> the Council of the Section on Legal Education will soon have to show its colors with regard to the doomsday machine.

The cumulative savings from these measures—which would vary somewhat from school to school—will significantly lower tuition, perhaps by as much as thirty-five to forty percent if all the measures were adopted, disincentivize the creation of new law schools that aggravate graduate unemployment, and preserve the considerable good in legal education. Here, briefly, is a rough, unscientific estimate of the potential savings. Limiting overhead to the university’s *actual* expenses would save somewhere in the vicinity of fifteen percent of a law school’s revenues in most cases, and significantly more in others. Cutting the salaries of permanent faculty and deans by twenty percent and doing away with sabbaticals and research stipends would, based on estimates that the full-time faculty represents somewhere around fifty percent of the law school budget,<sup>144</sup> saving another ten to twelve percent or so. If a twenty percent cut were infeasible, a ten or fifteen percent cut would still represent a substantial savings of anywhere from five to nine percent. And increasing teaching loads from the norm of two courses per semester to three, along with the elimination of sabbaticals and research stipends, would, over time, represent a savings of another fifteen percent or so from the resultant one-third reduction in full-time faculty labor costs.<sup>145</sup> Tuition and student debt could be cut, as a result, by as much as thirty-five to forty percent. And, by strictly enforcing the doomsday provision of Standard 316

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the choice of between one and ten. *Predictions about Closings of ABA-Accredited Law Schools Over the Next Decade*, BRIAN LEITER’S L. SCH. REP. (Oct. 3, 2013), <http://leiterlawschool.typepad.com/leiter/2012/10/predictions-about-closings-of-aba-accredited-law-schools-over-the-next-decade.html>.

142. Michael Olivas, *A Personal Reflection on Law Teaching, or How I Became an Establishment Insider on the Outside*, 99 RADICAL TCHR. 34, 39 (2014), available at <http://radicalteacher.library.pitt.edu/ojs/index.php/radicalteacher/article/view/57/59>.

143. In the last five years, Ave Maria’s annual bar passage rate for first-time takers has been within fifteen percent of the state average for first time takers only twice, thus running afoul of the ABA Standard 316 described *supra* note 140. See Florida Board of Bar Examiners (last visited Oct. 30, 2014), available at <https://www.florida barexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/660E3F5B6C35DE2585257C0B006AA3F4>.

144. TAMANAHA, FAILING LAW SCHOOLS, *supra* note 2, at 3.

145. Which has been adjusted downward based on the prior twenty percent reduction in wages.

whereby accreditation is contingent on bar passage,<sup>146</sup> schools at the bottom of the LSAT pecking order will either hold the line in admissions or go under not long after their poor standardized test takers take the bar. Either way, graduate unemployment would, to a modest degree, be reduced.

## VII. CONCLUSION

In *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, Brian Tamanaha chides law faculty falling loosely on one side of the ideological spectrum for not decrying the current crisis and working toward solutions.<sup>147</sup> Confronting the crisis of exorbitant tuition and graduate debt and unemployment is, of course, a responsibility of *all* law faculty, regardless of political persuasion. And given the plight of our students and graduates, a premium attaches to fair and open debate, free of distortion and invective, over the appropriate actions to take. The debate has been commendable in this regard, although the ad hominem, mischaracterizations, and reckless assignments of blame by Professor Campos stand out as an exception and can only constrict the debate.

A prerequisite to resolving the crisis is an understanding of the forces at work in the decades-long run-up in tuition and debt, as well as those that exacerbate law graduate unemployment at a time when the legal job market is contracting. Once understood, it becomes clear that the purported evils of tenure, scholarship, and rigorous, traditional classroom pedagogy are not the culprits in the crisis, and that faculty who defend them are not, per se, indifferent to or in denial over the crisis.

The five measures I have proposed to combat the actual causes of the crisis and reduce the cost of tuition and the rate of graduate unemployment will do so more effectively than Professor Tamanaha's perilous model of differentiated legal education, while at the same time preserving the considerable good in the present model. That good, often unappreciated or maligned, lies in the refinement of students' analytical skills in a world of complex and ever-changing law—a pre-

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146. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 130, at 24–25. A couple of dozen law schools now live in the shadow of a doomsday machine. Standard 316 of the *Standards for Approval of Law Schools* dictates that, to stay in business, a school must meet one of two conditions with respect to bar passage. *Id.* at 24. In at least three of the past five years, either seventy-five percent of the graduates of a law school who sat for a bar exam must have passed or its average pass rate for first-time takers must have been within fifteen points of the state average (of the state where they most frequently sat for the exam). *Id.* In a normal year, more than fifty schools hover around the seventy-five percent mark, with many in jeopardy of falling below. *See, e.g.*, BEST GRAD SCHOOLS, *supra* note 140, at 76–80. In 2011, for example, fifty-one schools had passage rates below eighty percent, with eleven below seventy-five percent. *Id.* In 2012, the number below seventy-five percent climbed to thirty-one, nearly tripling. *See id.*

147. Tamanaha, *The Failure of Crits*, *supra* note 13.

requisite for competent representation and professional success, not to mention personal satisfaction—and the unfettered critique of law and the legal system on behalf of those who cannot buy their spokespersons and lobbyists.

Broader faculty participation in the quest for solutions to the crisis is an obligation in view of the plight of our graduates, whether or not their suffering is visible to us. Of the measures I have put forward, some will be painful to faculty. Sharing our students' pain, though, is a form of solidarity. And we are obliged, with legal education at the crossroads, to defend its place in the American academy and prevent it from being relegated to the commercial world of trade schools to be shaped by the same type of crude market forces that got us in trouble in the first place.