

## Law School Without Borders

*Dorothy A. Brown\**

I. INTRODUCTION.....	1050
II. THE BEST LAWYERS .....	1053
III. THE BEST TEAM .....	1055
IV. THE BEST CURRICULUM.....	1061
V. ROADBLOCKS .....	1064
VI. COMPARISON WITH OTHER REFORM EFFORTS .....	1065
VII. CONCLUSION.....	1068

You never want a serious crisis to go to waste.

Rahm Emmanuel<sup>1</sup>

### I. INTRODUCTION

The Coming Jobs War describes a bleak statistic: there are about 3 billion people worldwide that want a “good job”<sup>2</sup> but there are only about 1.2 billion jobs that fit that description in the world. The 1.8 billion job deficit means we are in a jobs war.<sup>3</sup> So the

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\* Professor of Law, Emory University. The views expressed herein are solely mine and do not represent the views of Emory University. I would like to thank Carol Anderson, A. Mechele Dickerson, Sherman James, Trina Jones, Amanda Lewis, Charles Shanor, and Claire Sterk for helpful comments and assistance on an earlier draft. I would also like to thank Mr. Yossef Annab for excellent research assistance. I also thank the symposium participants for helpful comments. JD (Georgetown); LLM (Tax) (New York University). © 2013

<sup>1</sup> Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J. (Nov. 21, 2008, 12:01 AM), <http://online.wsj.com/news/articles/SB122721278056345271>.

<sup>2</sup> JIM CLIFTON, *THE COMING JOBS WAR 2* (Gallup Press 2011) (“A *good* job is a job with a paycheck from an employer and steady work that averages 30+ hours per week.”) (emphasis in original).

<sup>3</sup> *Id.* (“[Three] billion [people] tell Gallup they work or want to work. Most of

underemployment problem that the legal profession faces<sup>4</sup> is not parochial to the legal profession, but a systemic global one. And the legal underemployment problem has now rolled downhill to law schools.

The current law school business model is no longer sustainable. Class sizes are shrinking in order to retain U.S. News rankings, which results in less revenue generated, wreaking havoc on the ability to balance budgets. The law school business model built on an excess pool of “highly qualified applicants,” however that was determined, no longer exists for most law schools. The data to support this abounds. Only 4 out of about 200 law schools saw an increase in applications this past academic year.<sup>5</sup> Ten years ago there were 100,000 applicants to law school; in 2013 there were roughly half as many.<sup>6</sup> Several saw dramatic decreases in the entering class size.<sup>7</sup> Just as Biglaw’s business model stopped working when corporations said they would no longer subsidize the training of first year associates,<sup>8</sup> the law school business model built on an excess pool of “qualified applicants” as determined by U.S. News (high LSAT; high GPA) no longer exists for most law

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these people need a full-time formal job. The problem is that there are currently only 1.2 billion full-time, formal jobs in the world. This is a potentially devastating global shortfall of about 1.8 billion good jobs.”).

<sup>4</sup> See, e.g., Adam Cohen, *With the Downturn, It’s Time to Rethink the Legal Profession*, N.Y. TIMES, Apr. 2, 2009, [http://www.nytimes.com/2009/04/02/opinion/02thu4.html?\\_r=3](http://www.nytimes.com/2009/04/02/opinion/02thu4.html?_r=3) (“The employment pains of the legal elite may not elicit a lot of sympathy in the broader context of the recession, but a lot of hard-working lawyers have been blindsided, including young associates who are suddenly finding themselves with six-figure student-loan debts and no source of income.”). See also *Law Schools Challenged to Adapt to Fundamental Changes in the Legal Industry*, MOODY’S INVESTORS SERV. (May 5, 2014) (on file with author) (“Like many industries, the legal sector is undergoing notable change driven by multiple factors, including technology and globalization.”).

<sup>5</sup> Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?pagewanted=all> (“Of some 200 law schools nationwide, only 4 have seen increases in applications this year.”).

<sup>6</sup> *Id.* (“In 2004 there were 100,000 applicants to law schools; this year there are likely to be 54,000.”).

<sup>7</sup> Alicia Albertson, *Cooley, NYLS Have Largest Enrollment Declines Since 2010-2011*, NAT’L JURIST, (Feb. 17, 2014), <http://www.nationaljurist.com/content/cooley-nyls-have-largest-enrollment-declines-2010-2011> (“Eighteen law schools saw enrollment drop by more than 30 percent.”).

<sup>8</sup> Ashby Jones & Joe Palazzolo, *What is a First-Year Associate Worth?*, WALL ST. J. (Oct. 17, 2011), <http://online.wsj.com/news/articles/SB10001424052970204774604576631360989675324> (“Traditionally, law firms have recouped costs of young attorneys by giving them simple jobs . . . and passing the costs along to clients in the form of billable hours billed at \$200 or \$300 a pop. But many companies are now refusing to pay those kinds of bills.”).

schools.<sup>9</sup>

Now that the music has stopped, instead of law schools having more people than seats, we have more seats than people. Accordingly, law schools are shrinking class size to stave off any negative impact on their U.S. News rankings. But shrinking class size means shrinking revenue, so either some part of the budget must be cut, or universities will have to subsidize the deficit in perpetuity—a very unlikely occurrence.<sup>10</sup>

The largest expenditure in most law school budgets is faculty salaries and benefits, so that should be the natural focus of budget-cutting.<sup>11</sup> But it will not be. While law firms can fire partners, law schools cannot fire tenured law professors easily while remaining open.<sup>12</sup> This, of course, is not true for many legal research and writing faculty, clinical faculty, and adjunct professors who can be terminated more easily because most do not have tenure.<sup>13</sup> While the ABA has

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<sup>9</sup> Jordan Weissmann, *The Wrong People Have Stopped Applying to Law School*, THE ATLANTIC (Apr. 10, 2012), <http://www.theatlantic.com/business/archive/2012/04/the-wrong-people-have-stopped-applying-to-law-school/255685/> (describing how students with 170–174 on the LSAT are not applying to law schools in the percentages that have historically applied to law school with the same LSAT score).

<sup>10</sup> Compare Tyler Gieseke, *Facing Low Enrollment, Law School Gets a \$2.2 Million Boost*, UWIRE (June 4, 2014), <http://uwire.com/2014/06/04/facing-low-enrollment-law-school-gets-a-2-2-million-boost/> (describing the University of Minnesota's decision to subsidize the law school) with Paul Caron, *Catholic University Imposes 20% Budget Cut Due to Declining Law School Enrollment*, TAXPROFBLOG (Apr. 17, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/04/catholic.html](http://taxprof.typepad.com/taxprof_blog/2013/04/catholic.html) (discussing Catholic University's decision to enact 20 percent cut in operational expenditures due to declining enrollment of their law school).

<sup>11</sup> David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&module=Search&mabReward=relbias%3Ar&r=0> (“[A]bout half of a law school's budget is spent on faculty salary and benefits, and that tenure-track faculty members consume about 80 percent of the faculty budget.”).

<sup>12</sup> WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 667–84 (John Wiley & Sons, 5th ed. 2013) (describing circumstances under which tenured faculty can be fired due to financial exigency or program closures).

<sup>13</sup> In *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKCL. REV. 351, 351 (2004), Susan P. Liemer, writes:

The general practice in law schools in the United States is for professors who have traditional tenure or are on the traditional tenure track to vote on all matters at faculty meetings. Non-tenure-track visitors and adjuncts generally do not attend faculty meetings and do not vote. Fellows who teach some classes while working on graduate law degrees and students who serve as teaching assistants also usually do not attend faculty meetings and do not vote. It is much more difficult, however, to generalize about full-time faculty who teach in the law school clinics, legal writing programs, and libraries.

backed off of its proposal to do away with the tenure requirement, consider how much more difficult it would be for me to publish this as an untenured faculty member.<sup>14</sup>

This Essay proceeds by describing what the best lawyers do, work backwards into the skill set required to produce such lawyers and then answers the question of what type of law school curriculum would be likely to cultivate those skills. The Essay uses a recent lawsuit as a backdrop to describe how to operationalize the approach. It then describes some of the hurdles to implementing the approach and compares the approach with other law schools that are implementing parts of the approach. The Essay concludes by acknowledging that law schools can and should do better.

## II. THE BEST LAWYERS

A law school that wants to thrive in the twenty-first century needs to think about a curriculum that produces the best lawyers. But that begs the question: What do the best lawyers do? For an answer, I turn to my friend Briggs Tobin, who for many years was the GE Senior Counsel for Transactions and someone who has regularly thought about this question when he decides who to hire as outside counsel. Briggs is an Emory law alumni, who has generously come to Emory to talk to our students over the last several years. Here is what he says the best lawyers do.<sup>15</sup> The best lawyers are leaders first and foremost. They are also talent magnets. People run towards them and do not flee from them.

The best lawyers are curious, courageous, and accessible. They have business savvy and an ability to see around corners. They identify issues before the client does. They synthesize information and only pass along the important parts, and above all are concise. The best lawyers do not wait for the phone to ring. They do not miss an opportunity to add value. They do not just raise issues and questions, but come with options, solutions and a recommendation. The best lawyers never let a client lose sight of the big picture. Today, a law school that produced graduates with these skills would have a sustainable business model because the legal profession would run to

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<sup>14</sup> Cf. Victor Fleischer, *The Unseen Costs of Cutting Law School Faculty*, N.Y. TIMES (July 9, 2013), <http://dealbook.nytimes.com/2013/07/09/the-unseen-costs-of-cutting-law-school-faculty/?module=Search&mabReward=relbias%3Ar> (describing the benefits of having tenure when making policy recommendations that would increase taxes on the wealthy and powerful).

<sup>15</sup> PowerPoint presentation that Mr. Briggs Tobin made to the class (on file with author).

hire those graduates. As a result, applications would soar and the problems facing many other law schools would not affect this one. But there is a problem.

A law school that tried to instill these qualities would have to make several changes. First, it would need to change its admissions process from one tied so closely to LSAT scores, to one that incorporates a much wider array of skills including leadership, team work, and emotional intelligence, to name a few. Second, it would need to change its criteria for new faculty hires in order to attract lawyers best able to teach these skills.

But these two changes are unlikely. In addition to suffering the normal blog chatter, the law school would in all likelihood plummet in the U.S. News rankings. After that happened, the Dean who tried to implement these changes would likely be fired by central administration and the next Dean would be hired specifically to reverse all of the changes and return to the previously unsustainable business model. But that optimistically assumes that the faculty would support the Dean's vision.

More likely what would happen is any Dean who tried to implement these changes would, at a minimum, meet resistance on the part of faculty.<sup>16</sup> As a matter of faculty governance, most law school faculty handbooks would not enable Deans to unilaterally implement curricular reform. Such reform would require at least a majority vote of the faculty.

As a brief aside, even I have to admit there are only about a handful of law professors who actually need tenure, because most academics are risk averse and never do anything really controversial their entire professional careers. I, however, need tenure. I use the privileged perch that tenure affords to say things that people often do not want to hear.<sup>17</sup>

The Dean would certainly risk losing her school's membership in the Association of American Law Schools ("AALS"), because in this altered universe, faculty producing scholarship for the sake of scholarship will no longer work.<sup>18</sup> In fact, law schools may not even

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<sup>16</sup> Cf. David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011) [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-belawyers.html?pagewanted=all&module=Search&mabReward=relbias%3Ar\\_r=0](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-belawyers.html?pagewanted=all&module=Search&mabReward=relbias%3Ar_r=0) (describing the experience of Dean Edward L. Rubin at Vanderbilt when he tried to engage in substantive curriculum reform).

<sup>17</sup> See, e.g., Dorothy A. Brown, *Tales From A Tax Crit*, 10 PITT. TAX REV. 47 (2013). This applies even more to the public scholarship that I engage in when writing op-eds—at least as judged by many of the comments made.

<sup>18</sup> Cf. Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme*

need all (or even most) faculty to produce scholarship, which is likely to result in no longer satisfying AALS membership rules.<sup>19</sup> The Dean who tried to implement these changes would likely be fired and the next Dean would reverse all of the changes and return to the previously unsustainable business model. But that optimistically assumes that the faculty would support the Dean's vision.

So that is my starting point for bold reform. I want to create a law school experience designed to produce lawyer-leaders. Those graduates will be able to add value to every transaction, project, or case that they touch. Those lawyers will be able to turn away work. They will never be out of work regardless of the economy and the market for lawyers.

### III. The Best Team

To concretize this, I want to provide a hypothetical situation and ask the question: What type of law school education would prepare the lawyer-leader to represent the client in such a way that, at the end of the day, their reputations as well as their clients were improved. My thought experiment approach is entitled Law School Without Borders. I want to start with a case study ripped from the headlines<sup>20</sup> and ask what type of law school experience would produce graduates equipped to deal with this client.

Your client calls you very upset. She is near tears. She notifies you that she is being sued, or, more specifically, her restaurant is being sued for racial discrimination and sexual harassment, and she just received a copy of the complaint. Your client, a nationally known Southern-style celebrity chef, owns 51% of the restaurant with her brother.

Your client is a white female, and, coincidentally, so is the plaintiff. The plaintiff is a former general manager of the restaurant. Your client has a multi-million dollar business empire, including several million dollar endorsement deals, cookbooks, including one

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*Court's Use of Legal Scholarship*, 106 NW. L. REV. 995, 998 (2012) ("Over the last sixty-one years, the Supreme Court has used legal scholarship in 32.21% of its decisions.").

<sup>19</sup> See, e.g., AALS Bylaw Section 6-1(b), available at [http://aals.org/about\\_handbook\\_requirements.php](http://aals.org/about_handbook_requirements.php) ("The [AALS] values and expects its member schools to value: (i) a faculty composed primarily of *full-time teachers/scholars*." (emphasis added)).

<sup>20</sup> The facts of the case study are taken from the *Jackson v. Deen* complaint. See Complaint, *Jackson v. Deen*, No. 1203016743, available at <http://multimedia.savannahnow.com/media/030612Deen.pdf> (last visited Aug. 9, 2014). One critique of this case study is most clients do not require this level of expertise. My response would be that if you can help with a complicated case, then you can also help with a less complicated one. The reverse is not necessarily true.

scheduled to come out by year end, and two TV shows on the cooking network. Her recent earnings were put at \$17 million, making her the fourth highest earning chef according to Forbes.<sup>21</sup>

Your client adamantly denies being racist. She also denies that she is sexist. She is deeply offended by the charges. She believes the plaintiff is trying to extort money from her because of her celebrity position and does not want to pay her a dime, but she wants to be vindicated in court. You are sympathetic on the phone and make arrangements to have a copy of the complaint picked up and messengered to your office. You then tell her you would like to meet with her in a few days to discuss options. She thanks you and hangs up the phone. Now what do you do? You call Olivia Pope, right?<sup>22</sup> Since this is reality and not television, you get to work. You call together a meeting of your team.

First, you want to find out whether the client will prevail in the lawsuit, which, as it turns out, will be the easiest part of your task. You ask an associate to write a memo on what it takes in your jurisdiction for a plaintiff to prevail in this type of discrimination suit. The associate is also asked to research whether a white plaintiff can file suit for racial discrimination against black workers.<sup>23</sup> You tell the associate to not discuss this research with anyone outside of the team. You worry about the public relations perception of word getting out that your client is considering filing a no-standing lawsuit against the plaintiff. It could look like she is arguing not that she is innocent, but that the wrong person is suing her, and if the right person sued her she would lose.

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<sup>21</sup> See Erin Carlyle, *Paula Deen: Diabetes Hasn't Dented her Earnings*, FORBES (July 18, 2012, 1:06 PM), <http://www.forbes.com/sites/erincarlyle/2012/07/18/paula-deen-diabetes-diagnosis-hasnt-dented-her-earnings/>.

<sup>22</sup> Olivia Pope is the fictional character created by Shonda Rhimes in the ABC television show *Scandal*, based on the real life exploits of Judy Smith who represented Monica Lewinsky and Michael Vick, among others. See The Reliable Source, *Judy Smith, The Inspiration for Olivia Pope, Talks About Life Amid 'Scandal'*, WASH. POST (Dec. 9, 2013), <http://www.washingtonpost.com/blogs/reliable-source/wp/2013/12/09/judy-smith-the-inspiration-for-olivia-pope-talks-about-life-amid-scandal/>. Paula Deen ultimately hired Judy Smith to represent her. *Id.*

<sup>23</sup> As it turns out, the standing question was fatal to plaintiff's racial discrimination claim. Ultimately part of the Deen lawsuit was thrown out, because the white plaintiff lacked standing to sue. This was because she was white and not the target of the alleged abuse. See Dashiell Bennett, *Paula Deen's Racial Discrimination Lawsuit Was Thrown Out*, THE WIRE (Aug. 13, 2013, 7:52 AM), <http://www.thewire.com/entertainment/2013/08/paula-deen-racial-discrimination-case/68254/>.

You already know that it is very difficult for plaintiffs to prevail in race discrimination cases without a tape recording or a smoking gun, which leads you to expect the research will suggest that your client would prevail if this went to trial.<sup>24</sup> That the law was on her side could cause the client to want to fight, but your primary job is to make sure that the client does not lose focus. This is about more than winning a lawsuit. Her business empire could be at stake if her brand does not survive this litigation. If you believe this is a one of a kind lawsuit, then winning the lawsuit could cause her to lose everything.

Second, you assign a team to research how your client makes her money and how important her brand is to whether she continues to make money. They must assess how her brand would be impacted if these allegations were made public. How much of her income comes from endorsements, cookbooks, personal appearances, restaurants, etc.? How much would her brand be damaged if this lawsuit is allowed to take its course in the courts? Would her earning potential disappear overnight or would it occur over a period of time? What odds would the experts give that the brand would be able to weather this storm? On the other hand, is this a fight that could help her brand? People like to see that you can take a punch. Is fighting back the more responsible approach? What would that scenario look like?

As an aside, you may be thinking this is not what lawyers do. That is right. This is not what lawyers should be doing, but this is what lawyers need to be thinking about. The lawyer could not perform the analysis, but they can hire the outside experts in marketing and branding who could but the lawyer would be able to interpret and assess their analysis. The key would be for the lawyer to be trained to spot the circumstances when this outside expertise would be needed. Lawyers hire outside experts all the time. Think medical malpractice, among other things, where lawyers work with doctors. Lawyers in many ways have to be interdisciplinary.

Third, you assign a team to research any statements your client has made on race. You ignore the sexual harassment at this stage, because gender discrimination does not bring the kinds of headlines that racial discrimination does. Only if your client gets a clean bill of health on the race front, will you look at the gender piece.

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<sup>24</sup> See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010).

You are not naïve; you realize that this case will first be tried in the media, before it ever comes to trial—plaintiff’s attorney will see to that.<sup>25</sup> The goal here is to see what statements are out there in terms of your client and African Americans that can be found by a Google search. What, if anything, has she said about race relations in this country? What has she said about blacks? How do blacks view her? Does the fact that she is a southerner help or hurt her here? Weathering a race discrimination charge is not easy, but it is doable. There are, however, deal breakers. Has she ever used the n-word? Referred to blacks in other disparaging ways? Has she exhibited unconscious bias toward blacks? Nothing is fatal with the right apology, but some apologies will be easier to make than others.

One minor issue that you want addressed is whether it makes sense for her to keep her 51% interest in the restaurant going forward, given how much this lawsuit could affect her overall earnings potential and how little it contributes to her net worth. Also, you know that she spends very little time at the restaurant. Should she seriously consider selling her interest in the restaurant? For what amount?

Finally, if it is determined that to protect the brand going forward, the client has to be convinced to settle, how best to approach her given how adamant she is that she wants to fight to prove that she is not a racist? Alternatively, if it is determined that the best way to protect the brand is to fight, what are the next steps and is she on board with what will be required of her?

As you work on reviewing the complaint, your teams are busy at work and report back to you in short order. What you find out from their reports convinces you that you need to settle this case as soon as possible, before it ever gets to the discovery stage. Not because the law is against your client. Your client is likely to prevail at trial. The problem is she will probably be broke by the time the trial would occur. A million dollar check and sealed confidentiality agreement would be preferable to the millions of dollars that she would jeopardize if public attention is drawn to your client’s views about race. What did your team report back?

Her brand is tied up in her being everybody’s grandma. She may not speak the King’s English, but we all love grandma. Grandma makes us feel warm and embraced. Bigot granny does not. A race

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<sup>25</sup> Cf. *Jackson v. Dean*, No. CV412-139, 2013 U.S. Dist. LEXIS 122784 (S.D. Ga. Aug. 23, 2013). Lawyers representing Deen filed a motion against Plaintiff’s attorney asking for sanctions to be imposed and for him to be removed as Plaintiff’s attorney. *Id.* Deen’s lawyers alleged that Plaintiff’s attorney “used possible media attention to threaten the Defendants.” *Id.* at \*1.

discrimination charge completely destroys this view of our client—not with everyone, but with her national sponsors. In fact, there would be some support for her as a victim of a disgruntled former employee who unfairly played the race card.<sup>26</sup> Unfortunately, that would not outweigh the national sponsors' skittishness. They would be worried about a boycott. We could predict that all major retailers that have endorsement contracts with her would fire her if her views on race were made public. Her television shows would be canceled. Her forthcoming cookbook might be canceled. There is no national brand if she is labeled as a racist. She returns to being the local Savannah chef she started out as, assuming people in Savannah continue to support her and the restaurant.

The single most damaging research that your team has turned up is an interview given around the time it was revealed that our client had Type II diabetes, presumably at least partially as a result of eating her own high-fat cooking. She announced her diabetes along with an endorsement for a diabetes drug manufacturer and the media attention was focused on that awkward problem. Almost everyone missed what she had to say about race.<sup>27</sup> If the race discrimination lawsuit becomes public and reporters started rooting around, the client probably would not be so lucky the second time around.

Our client was interviewed by New York Times reporter Kim Severson.<sup>28</sup> The interview was in front of a live audience and was recorded.<sup>29</sup> Severson asked, "Do you have a pride about the south that you can articulate and how do you place the racism and the slavery within that?"<sup>30</sup> Our client responded:

I do. It's funny. I think I feel like the South is almost less prejudiced because black folks played such an integral part in our lives. They were like our family and we didn't see ourselves as being prejudiced.<sup>31</sup>

Our client continues. She also talks about the suicide of her great grandfather after the Civil War ended:

My great grandfather was so devastated. He had lost his son, he had lost the war and he didn't know how to deal with life with no one to help

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<sup>26</sup> See Aly Weisman, *Paula Deen Lands \$75 Million to \$100 Million New Business Deal To Reboot Her Brand*, BUSINESS INSIDER, (Feb. 13, 2014, 3:50 PM), <http://www.businessinsider.com/paula-deen-lands-multi-million-dollar-business-deal-2014-2>.

<sup>27</sup> See Dorothy A. Brown, *Deen's Altered Universe*, CNN (Mar. 17, 2014, 1:50 PM), <http://www.cnn.com/2014/03/04/opinion/brown-deen-12-years-a-slave/>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Quynhanh Do, *Paula Deen on Race in 2012 TimesTalk*, N.Y. TIMES (June 22, 2013), <http://www.nytimes.com/video/us/100000002296089/paula-deen-on-race-in-2012-timestalk.html>.

<sup>31</sup> *Id.*

operate his plantation. There were 30 something people on his books and the next year's Census I go to find there's like zero. Between the death of his son and losing all the workers. He went out (I'm sure) into the barn and he shot himself because he couldn't deal with those kind of changes. And they were terrific changes.<sup>32</sup>

Never once does she mention the word slavery. Her great grandfather did not own slaves—he had “workers.” He had no one to “help” operate his plantation. Is that what we are calling slave labor these days? Our client seems to be blaming the freed slaves for her great grandfather's death. It is not their fault that they preferred to be free rather than remain slaves and he had to figure out how to make his business model work without free labor. Our client believes that whites in the South, as a general matter treated their slaves like “family.” She tells us that Southerners are less prejudiced and her cite? Slavery. Really? You know how this is going to play in the 21st century. Your client makes it seem that slavery was good for the slaves. You can predict that the national sponsors will be gone like the wind.

You will also recommend that she sell her interest in the restaurant. This may not be the last plaintiff, and it does not make sense that she could get drawn into this type of lawsuit again. You recommend that she sell it to her brother and remove herself from everything having to do with the restaurant.

That means that you will need to have the “come to Jesus” conversation with your client, as we like to call it in the South. You will have to get her to see that others will hear her words and think she is racist, at worst, or unconsciously biased against blacks as the best case scenario. Yes, there will be those who will see her as a victim, and continue to support her. Her national sponsors, however, will not see her as the victim. They will see her as damaged goods. You cannot refer to slaves as family, workers, or helpers. You cannot blame former slaves, now free men and women, for the suicide of your great grandfather. Slaves were not employees. You do not treat family members the way you treat slaves. Anyone who says otherwise is in deep, deep denial and will be excoriated in the press. She may generally think her heart is pure, and her family and friends may agree, but her business associates may not. They will think that she is radioactive and flee from her. They will do it publicly and swiftly. They will not return her phone calls. She will find out from reading the newspaper or watching the news that she has been fired, or she will hear from a reporter that another sponsor has dropped her. You need to settle the case and settle it immediately. Under seal. No publicity.

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<sup>32</sup> *Id.*

Announce that you are hiring experts to do a full review of workplace policies. It will at most be a one-day story. That is the preferable choice.

If, however, the client wants to fight, that will be much harder. When you meet with her you ask, “If asked under oath: ‘Have you ever used the n-word,’ what will your answer be?” Your client says, “of course.” You try again by responding as follows: “You need to settle this. The n-word is fatal. Our brand experts say this. But if we were going to try to fight it, you would have to issue an apology that was so pitch perfect, the most adamant of critics would support you.” Everybody loves a redemption story. The apology would begin by answering the New York Times reporter’s question—better than the first time.

You tell your client that she will need to reconcile her pride for the South with its history of slavery and racism. She needs to answer that question, and then she can try to reclaim her brand and salvage her reputation. To facilitate that, you hire an historian of the South and slavery to help her understand that slaves, as a general matter, were not treated as family. Does she have any specific knowledge of how the slaves were treated by her great grandfather? The historian will explain to her that slavery was a dehumanizing system that corrupted everyone it touched—slave owner and slave alike—and that the horrors of slavery were ended by the Civil War and the South was wrong. After several hours with the historian, your client reluctantly—and probably tearfully—agrees to settle. You hash out the agreement with opposing counsel. The End.

#### IV. THE BEST CURRICULUM

What type of law school education would produce such a lawyer-leader? Twenty-first century lawyers need to be able to work in teams and get along with people with different world views and different ways of solving problems. The diversity I am talking about here is not only race or ethnicity, gender, or sexual orientation, but it also includes intellectual diversity. By this I do not mean conservative or liberal political ideologies, but diversity of perspectives: sociology; history that includes the treatment of historically marginalized groups; economics; finance; business; marketing and branding; psychology, including emotional intelligence and unconscious bias; and journalism/new media. This kind of interdisciplinary training helps you to think of different ways of looking at a problem, asking the question, applying methodologies, and examining the various social, economic, and cultural forces that may be playing out in the situation. In our context,

the law trains you to look at a problem one way: is the client likely to win or lose this case? The interdisciplinary training helps you to see that winning the case is a minor backdrop to the significance of how the lawsuit could destroy this client's business future.

A law school that incorporates more than just teaching students how to think like lawyers, but how to also solve problems and take a leadership role will graduate students better equipped to add value to their firms and clients on the first day. Emotional intelligence should not be underestimated. By emotional intelligence, I mean empathy, exercising good judgment, maturity, wisdom, common sense, and last, but not least, the ability to have difficult conversations successfully. The LSAT does not help us with any of this.<sup>33</sup> Emotional intelligence could require a level of maturity that may not be present in the typical twenty-two-year-old first year law school student.

The law school that would best prepare lawyer-leaders would require students to be taught not only by law professors, but also by historians, psychologists, business school professors, doctors, sociologists, and economists, among others. In some instances law school classes would be co-taught with faculty in other disciplines. In other instances law students would take classes with students from other disciplines in other departments taught by non-law school faculty, and the students would be required to apply their knowledge in a legal context to make it legally relevant.<sup>34</sup>

The key to the success of the interdisciplinary approach would be a capstone class. This kind of interdisciplinary training could then be brought together in a capstone class that focuses on real cases, real clients, and encourages students to put this interdisciplinary training

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<sup>33</sup> Marjorie M. Shultz & Sheldon Zedeck, 26 *Lawyering Effective Factors*, <http://alumni.ggu.edu/Document.Doc?id=92>. In *As Law Schools Struggle, Diversity Offers Opportunities*, THE CHRONICLE OF HIGHER EDUC. (Feb. 10, 2014), <http://chronicle.com/article/As-Law-Schools-Struggle/144631/>, Aaron N. Taylor writes:

Marjorie M. Schultz and Sheldon Zedeck, two University of California at Berkeley professors, conducted a study in which they identified 26 skills that were important to lawyer effectiveness. The skills ranged from the abilities to write, speak, and listen effectively to the abilities to feel empathy for others and passion for one's work. The professors found that the LSAT had very weak predictive value for 10 of the skills and no value at all for the other 16. Interestingly, two of the 10 correlations were negative—meaning, the higher the LSAT score, the less effective the lawyers in the study were at exhibiting the skills in question (in this case, networking and community service). Undergraduate GPA had even less predictive value across the 26 skills.

<sup>34</sup> As an aside, I would also imagine that law professors would also be able to add value to many non-law school classes in the greater university setting.

to work. During the semester, the students would work with law professors, practicing attorneys, and professors from other disciplines. The class might begin with a case study that has all of the players in the room discussing the case study from their single discipline based perspectives, then the class would continue a discussion that puts all the pieces together to demonstrate that the latter is better than the former.

Returning to our case study, a capstone course could be designed as follows: during the first class, the students are given the hypothetical, and the law professor leads them through the legal analysis and an opinion that tells the client she will win. The class is then walked through the disaster that strategy proved to be. Next, the students get to consider the case study through the interdisciplinary lens of expertise. You have in the room: the lawyer, the historian, the economist, and the branding expert. You then have someone play the client and have the conversation with the client. On this note, you may want to bring in an employee from Human Resources to discuss how to have difficult conversations. You then have the experts model the discussion for the class. You would describe how the missteps and focus solely on the legal outcome, led to the client becoming radioactive and to the destruction of her brand. An interdisciplinary dissection of what went wrong in the Paula Deen case, even before the deposition became public, would become the backdrop for the rest of the semester.<sup>35</sup>

Over the course of the semester, you discuss a different case study each week and place more and more responsibility on the students. In the first half of the class, we have experts modeling the discussion. During the second half of the semester, we have students in charge of each class presenting a case study and leading the class through it. For each case study, the instructor determines which other outside experts need to be in attendance. A history professor? Psychology professor? Sociologist? Historian? Economist? Branding expert? Initially, it will be the law professor's responsibility to make sure the appropriate experts will be present and can add their expertise and, most importantly, demonstrate the value of their perspectives. As the semester progresses, it becomes the students' responsibility. If the students do not select the right composition, the law professor needs to secretly have the right expert on standby. By the end of the

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<sup>35</sup> Cf. Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009) (describing keystone course in "thinking like a deal lawyer" in Drexel's transactional law program); Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. OF LEGAL EDUC. 498 (1995).

semester, every student has had a chance to work on a team that represented a “client.” After the presentation, the class and the experts dissect what was presented, pushing for better client representation. The focus must always be on adding value and not letting the client lose sight of the big picture. Real world clients with messy facts would be at the center of the learning environment before a student graduated.

The mechanics could take many forms. One idea would be to split the students up into separate law firm teams. You will want to switch teams for specific assignments to ensure that students get to work with different people throughout the semester. What you do not want to happen is that students select their team members and wind up only working with their friends or people that they like and who think like them. You hope that some student is particularly difficult to work with, because in the real world you will have members of your team who may be difficult to work with, but can still add significant value. This is because when teams have disagreements and work through them, their decision making is improved.<sup>36</sup>

You can have students be on point for certain areas of expertise based on their personal preferences or just assign them a perspective. Alternatively, and I think preferably, you could assign specialty areas to students and make sure that the specialty area changes several times over the course of the semester. The goal by the end of the semester will be for the class to review a case study, decide what expertise they need to have on their team to add the most value to their client, and present a case study.

The goal is to create a law school where students will cross borders and see law as one tool in their toolkit. A law school where students come to appreciate that a legal education is not merely studying and analyzing cases, but also thinking about how the real world outside of the law operates and when that reality should impact the advice given to clients should provide a superior educational experience.

## V. ROADBLOCKS

What are potential objections? Many faculty members will object to this approach. Law professors who think that all we should be doing is teaching the law will object to this curriculum reform. Law professors who will be teaching these capstone courses may have to

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<sup>36</sup> See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. OF PERSONALITY & SOC. PSYCHOL. 597 (2006) (describing better decision-making when juries are not homogeneous).

2014]

*LAW SCHOOL WITHOUT BORDERS*

1065

change how they teach. They may need startup time to create the case studies. They may also need some course release during the semester that they teach the capstone course. That may mean their colleagues may have to teach more classes, or teach classes they would prefer not to teach. Boutique courses with limited enrollment with no tie to the real world may have to be eliminated from course catalogues. Many law school faculty currently teaching may not be interested in teaching (or equipped to teach) capstone courses. Solutions will take many forms.

Law faculties will have to change who they hire. The skill set that I am describing is not the skill set valued by law school hiring committees. In addition, a law school looking to implement such changes will have to navigate American Bar Association (ABA) requirements. For example, the ABA has a requirement on the number of non-law school courses that students can take for law school credit. To get this program off the ground, a waiver of ABA rules may need to be sought.<sup>37</sup>

The cost of implementing the law school without borders approach will have to be considered. Typically, graduate students can take other graduate level courses without additional expense, provided there is space available in the desired class. If, however, cost was a barrier, there may be external development opportunities for such a program. Alumnae should be interested in helping their alma mater get a reputation in the market for preparing the world's best lawyers.

#### VI. COMPARISON WITH OTHER REFORM EFFORTS

If I were to look around the country, there are several law schools that are doing pieces of what I suggest. First, New York University's third year curricular reform in which they announced that they were placing an emphasis on developing leadership and collaborative skills in their law students which is an important piece of the puzzle.<sup>38</sup> Equally important is the renewed emphasis on the regulatory state and

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<sup>37</sup> For example the ABA limits the number of non-J.D. classes students can take and have count towards their law degree credits. See ABA PROPOSED STANDARDS FOR APPROVAL OF LAW SCHOOLS § 311(B). The most recent draft proposal was approved by the Council on Legal Education in March and was scheduled to be voted on in August. See American Bar Association, *Sections of Legal Education and Admissions to the Bar* (2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/201404\\_src\\_meeting\\_materials\\_proposed\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/201404_src_meeting_materials_proposed_standards.authcheckdam.pdf).

<sup>38</sup> *NYU Law Announces Ambitious New Study-Abroad Program as Part of Curricular Enhancements Emphasizing Focused Study in Third Year*, NYU LAW (Oct. 17, 2012), NYU\_LAW\_ANNOUNCES\_STUDY-ABROAD\_PROGRAM\_CURRICULAR\_ENHANCEMENTS\_THIRD\_YEAR.

the proliferation of federal and state regulation.<sup>39</sup> A recent announcement noted that New York University is now offering student evaluation and instruction in emotional intelligence (“EQ”). The press release stated, “[A]n ability to deal with people in a thoughtful and empathic manner is critical to good leadership.”<sup>40</sup> During 1L orientation, all entering J.D. students were invited to take an online EQ assessment as a means of identifying skills they should think about developing further. Nevertheless, this is too timid an approach. All students should be required to take the online EQ assessment, and then New York University Law School needs to do something with the results. There was mention also that certain classes will incorporate EQ instruction; however, those classes have not been identified, so time will tell how well this initiative is implemented.

Second, Stanford Law School reformed its third year curriculum to allow law students to pursue joint degrees and created capstone courses that would integrate the non-J.D. perspective into classroom discussion.<sup>41</sup> The idea of taking classes outside of the law school is a good thing, but a joint degree is not. I do not think the J.D./PhD graduates of Stanford Law School will be rewarded by any market other than the market for law professors—a market that is even worse than the market for entry level lawyers right now. Stanford Law School’s courses on how to bring an invention to market, how to engineer a complex business deal, or how to translate complex scientific concepts into a courtroom or policymaking setting, have the potential to add real value to the students in those classes. The problem, however, is that those courses are not required, and a student could take a series of non-J.D. classes and never have the opportunity to apply the knowledge in a legal context. There is no required capstone course or any other means of ensuring that Stanford Law School’s law students are bringing their interdisciplinary knowledge to bear in their legal studies, merely that they have some understanding of that other discipline.

Third, Washington and Lee University School of Law’s idea of a hands-on experiential third year is also a part of what is necessary for law schools going forward. That approach, however, is not interdisciplinary, nor could it be done easily. Washington and Lee University’s only graduate school is the law school. A real problem

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *Stanford Law School Advances New Model for Legal Education* (Feb. 13, 2012), <http://blogs.law.stanford.edu/newsfeed/2012/02/13/stanford-law-school-advances-new-model-for-legal-education/>.

with this approach, however, is that many law professors have very little practice experience and, for the most part, it occurred years ago in a very different market.<sup>42</sup> Perhaps that is one explanation why the legal market is not flocking to hire these graduates.<sup>43</sup> I would go one step further and argue that if a law school announces a major curriculum reform designed to address the realities of the legal profession but does not change its hiring criteria, one should be skeptical about whether any real change in the education provided to students is going to occur.

Finally, there have been recent calls by some, including President Obama, to abolish the third year of law school.<sup>44</sup> This is a laughable

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<sup>42</sup> In *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 129–30 (2010), Brent E. Newton writes:

The data showed that the typical non-experiential tenure-track professor had only three years of practical legal experience before being hired as a full-time faculty member. The amount of prior practical experience differed significantly by tier. For instance, for the schools in tier one, the median was only 1 year and the mean was 1.79 years; 45.6% of the entry-level tenure-track professors hired by these schools since 2000 had *no* prior practical experience. Conversely, for the schools in tier four, the median years of prior practical experience was 6 years and the mean was 7 years; nearly 86% of those professors had some amount of prior practical experience.

<sup>43</sup> Deborah Jones Merritt has provided a detailed analysis about Washington & Lee's employment statistics. In *An Employment Puzzle*, LAW SCHOOL CAFÉ (June 18, 2013, 10:24 PM), <http://www.lawschoolcafe.org/thread/an-employment-puzzle/>, she writes:

Using those two measures, Washington and Lee's employment outcomes for 2011 were noticeably mediocre. By nine months after graduation, only 55.0% of the school's graduates had obtained full-time, long-term jobs that required bar admission. That percentage placed Washington & Lee 76th among ABA accredited schools for job outcomes. Using the second, broader metric, 64.3% of Washington & Lee's class secured full-time, long-term positions. But that only nudged the school up a few spots compared to other schools—to 73rd place. In 2012, the numbers were even worse. Only 49.2% of Washington & Lee's 2012 graduates obtained full-time, long-term jobs that required a law license, ranking the school 119th compared to other accredited schools. Including JD Advantage jobs raised the percentage to 57.7%, but lowered Washington & Lee's comparative rank to 127th. These numbers are depressing by any measure; they are startling when we remember that Washington & Lee currently is tied for twenty-sixth place in the *US News* ranking. Other schools of similar rank fare much better on employment outcomes.

<sup>44</sup> See, e.g., Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES (Jan. 17, 2013), [http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html?\\_r=0](http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html?_r=0) (arguing for allowing students to take the bar exam after two years of law school); Dylan Matthews, *Obama Thinks Law Schools Should Be Two Years. The British Think It Should Be One.*, WASH. POST (Aug. 27, 2013), <http://www.washingtonpost.com/blogs/wonk>

suggestion. Law schools are currently under attack because we do not teach what employers think need to be taught, and somehow giving us one less year to do so is the solution? Making the three years more relevant to what our graduates will actually be doing once they graduate is the better answer.

## VII. CONCLUSION

Lawyers today need to be curious and courageous. Thomas Friedman said the goal of education generally should be to instill the passion for life-long learning. I would argue that one of the goals of legal education would be to awaken or instill curiosity, especially about things we know very little about. It should not be about teaching any of our students to think that they are the smartest person in the room. That attitude will get clients in a lot of trouble.

To be successful in any field requires adding value. If you can do it without much thought, a computer will be doing it pretty soon.<sup>45</sup> Law schools specifically, and higher education more generally, need to get ahead of the market.

Lawyers in the 21st century need to be trained leaders. We have to be the one in the room to say no when no one wants to hear it. Our clients will continue to hire us, because we help them to realize that no was ultimately the right answer. As Evan R. Chesler, Chairman of Cravath, Swaine, & Moore and one of the members of the committee to revamp New York University Law School's curriculum said during that school's announcement of its third year curricular reform, "When things are at their worst, lawyers need to be at our best."<sup>46</sup> What law schools are currently doing is nowhere near our best.

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blog/wp/2013/08/27/obama-thinks-law-school-should-be-two-years-the-british-think-it-should-be-one/. If students take the bar exam in the summer after their second year, what do they do until their results come in? Law firms may be reluctant to hire in the absence of results; perhaps law firms would be unwilling to hire them as summer associates given their sitting for the bar exam because it suggests during their third year the students plan to do something other than attend the third year of law school.

<sup>45</sup> Either it will be done by a computer, or it will be sent offshore where it can be done cheaper. See Josh Blackman, *The Path of Big Data and the Law*, SOC. SCI. RES. NETWORK (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2332842](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332842) (unpublished manuscript) (glimpsing into the future where computers may be taking the practice of law).

<sup>46</sup> See *supra* note 33; *The Forum: Making the Most of Law School: What We're Doing and What You Can Do* (Oct. 17, 2012), [http://www.law.nyu.edu/news/NYU\\_LAW\\_ANNOUNCES\\_STUDY-ABROAD\\_PROGRAM\\_CURRICULAR\\_ENHANCEMENTS\\_THIRD\\_YEAR#video](http://www.law.nyu.edu/news/NYU_LAW_ANNOUNCES_STUDY-ABROAD_PROGRAM_CURRICULAR_ENHANCEMENTS_THIRD_YEAR#video).