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# THE KIDS AREN'T ALRIGHT: RETHINKING THE LAW STUDENT SKILLS DEFICIT

*Rebecca Flanagan\**

Now, the youth of all lands and ages hates nothing more cordially than work, actual, unadulterated work. . . 'He went by the way of least resistance' to the one-time respectable A.B. degree.<sup>1</sup>

## I. INTRODUCTION

It's whispered by colleagues in the law school halls. It's lamented in faculty lounges. Incoming law students aren't "what they used to be." No one seems to define "what they used to be"—only that once upon a time, a better time, students were more prepared for law school, spent more time studying, and didn't need so much support. Criticism of lackadaisical, underprepared, or unmotivated students has a long history,<sup>2</sup> but recent research suggests that incoming law students are less prepared than previous generations of law students. Undergraduate education has changed over the last fifty years.

Many of today's college graduates do not have the

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<sup>1</sup> William E. Dodd, *Are College Students Out of Joint?*, N.Y. TIMES (June 8, 1907)

<http://query.nytimes.com/mem/archive-free/pdf?res=9E03E3D81E30E233A2575BC0A9609C946697D6CF>.

<sup>2</sup> An article from the New York Times in 1951 complained that students held an "I don't care" attitude towards school. N.Y. TIMES, *Students Held Lazy*, (Dec. 2, 1951) <http://timesmachine.nytimes.com/timesmachine/1951/12/02/issue.html>.

fundamental thinking and reasoning skills necessary to master the law school curriculum. College students spend less time studying during their undergraduate years. College students expect higher grades with considerably less effort than previous generations. Student evaluations of teaching influence undergraduate faculty, putting pressure on professors to award high grades in return for positive evaluations. College students learn to “game” their education, working less while receiving higher grades, but failing to acquire the thinking skills that provide the foundation for later success.

These issues are not distributed equally across undergraduate colleges and universities; privileged students show gains in thinking skills while students from poorer backgrounds never catch up to their better-prepared peers. While these changes in undergraduate education have been hotly debated on college campuses since the 2011 publication of *Academically Adrift: Limited Learning on College Campuses*, law schools have not been engaged in the discussion. Legal education has not dealt with changes that leave students less prepared for the type of disciplined thinking, close reading, and analytical rigor required to succeed in law school.

This article examines empirical research on the changes in undergraduate education since the 1960s and discusses the challenges facing law schools admitting underprepared students. Part II explores the growing body of research focused on limited learning on undergraduate campuses. Section A discusses the consensus emerging on undergraduate campuses that students are not developing the critical thinking, analytical reasoning, and writing skills that should be the cornerstone of their intellectual development. College graduates are unprepared to master “thinking like a lawyer.” Section B discusses the continuing decline of the liberal arts and humanities in favor of more career-oriented courses and majors. Fewer and fewer undergraduate students are choosing to major in the subjects that promote the skills necessary for early success in law school. Section C discusses the dramatic decrease in student study time since 1960, reviewing research suggesting that undergraduate students spent 1/3 less time studying in 2003 than they did in 1961.<sup>3</sup> The decline in study

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<sup>3</sup> Philip Babcock & Mindy Marks, *The Falling Time Cost of College: Evidence From Half a Century of Time Use Data*, 93 REV. ECON. & STAT. 468, 468 (2011).

time corresponds with literature suggesting a consumerist orientation among college students; students (and their parents) view their undergraduate years as a credentialing process instead of an academic experience. Section D explores how grade inflation and student evaluations of teaching (“SETs”) have blurred the distinctions between extraordinary and average students. Declines in fundamental thinking skills and study time, as well as grade inflation, have created an undergraduate learning environment that is less rigorous than undergraduate education fifty years ago. As a result, large numbers of incoming law students are underprepared for law school academics, and unaccustomed to the time demands required for law school success.

Part III explores how law schools have traditionally helped academically underprepared and at-risk students. Law schools were created at the turn of the twentieth century to educate men from elite colleges and universities, men who had training in classics and the liberal arts.<sup>4</sup> As law schools desegregated, and allowed large numbers of women and previously underrepresented groups to matriculate, law schools developed Academic Support Programs (ASPs) to provide community as well as academic support. However, these programs tend to be small, exclusive, and limited in scope. Traditional ASPs are not designed to address deficits in fundamental thinking skills at a systemic level. Research suggests that the brightest undergraduate students gain the fundamental skills to master law school academics. The drop in law school matriculants since 2010, however, means that fewer bright and prepared students are pursuing legal education. Therefore, more students attending law school will need additional support in order to master the sophisticated, higher-order thinking skills necessary for law school success. Part III concludes with an explanation of why traditional ASPs will not be enough to prepare students at modal and less-competitive law schools for the challenge of “thinking like a lawyer.”

Part IV frames the challenge of under preparedness as a “wicked problem.”<sup>5</sup> “Wicked problems,” as applied to legal

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<sup>4</sup> See ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S*, 97–102 (1983) (for a more thorough discussion of the history of law schools and exclusionary practices designed to limit the practicing bar to ethnically superior “native white Americans”).

<sup>5</sup> Judith Wegner, *A Legal Education Prospectus: Law Schools and Emerging*

education by Judith Wegner, “occur when the factors affecting possible resolution are difficult to recognize, contradictory, and changing; the problem is embedded in a complex system with many clear interdependencies, and possible solutions cannot be readily selected from competing alternatives.”<sup>6</sup> “Wicked problems” are so complex that singular solutions are impossible. Part IV concludes by posing questions for law schools admitting students with lower levels of academic preparedness. Who is responsible for ensuring entering law students are prepared to tackle introductory legal problems? How do we address the fundamental skills deficit of incoming law students in a time of constrained budgets, declining enrollment, and rampant criticism? How can law schools rethink the traditional curriculum to include additional skills instruction and still make time for experiential education? All law schools should be involved in the conversation about systemic under preparedness, although not all law schools will have the same number of underprepared students. The broader legal community should reflect on these questions because the answers will require all stakeholders to invest in changes to undergraduate and legal training.

## II. UNDERGRADUATE EDUCATION JUST ISN’T WHAT IT USED TO BE

It’s an old lament, bemoaned by every person who has ever taught school, students aren’t what they used to be.<sup>7</sup> Professors recall some long-ago time, when students walked ten miles in the snow to get to school, and no one was ever late to class. In that mythical time, students were always prepared and the world was a better place. This lament may be age-old, but the substance of the complaint gained significant empirical weight with the publication of *Academically Adrift: Limited Learning on College Campuses* by Richard Arum and Josipa Roksa.<sup>8</sup>

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*Frontiers: Reframing Legal Education’s “Wicked Problems”*, 61 RUTGERS L. REV. 867, 871 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> See generally Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN ST. L. REV. 1119, 1122–23 (2012) (foreshadows most of the criticisms of underprepared law students explored in this article); see also, Wegner, *supra* note 5, at 987.

<sup>8</sup> RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2011).

While Arum and Roksa's research caused an uproar on many undergraduate campuses, they were not the only scholars challenging the assumption that college students were gaining valuable skills.<sup>9</sup> The decline in students majoring in liberal arts, and the increase in students choosing pre-occupational majors, has called into question the role of acquiring life-long learning skills at undergraduate universities. College students study less than previous generations.<sup>10</sup> Despite a dramatic decrease in hours spent studying, college students are receiving higher grades.<sup>11</sup> Although law school professors may complain about students' lack of preparation in faculty lounges,<sup>12</sup> law schools have not been engaged in an institutional discussion about the decreased competencies among incoming students.

#### A. *Limited Learning on College Campuses*

While *Academically Adrift* is not the first book to claim that undergraduate education is not providing students with fundamental skills,<sup>13</sup> the research from the book generated considerable discussion on college campuses.<sup>14</sup> Arum and Roksa

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<sup>9</sup> See Doug Lederman, *Less Academically Adrift?*, INSIDE HIGHER ED., May 20, 2013, <https://www.insidehighered.com/news/2013/05/20/studies-challenge-findings-academically-adrift> ("It's hard to think of a study in the last decade that has had a bigger impact on public discourse about higher education and the internal workings of colleges and universities alike than has *Academically Adrift*."); see also, David Glenn, *New Book Lays Failure to Learn on Colleges' Doorstep*, CHRON. HIGHER EDUC., Jan. 18, 2011, <http://chronicle.com/article/New-Book-Lays-Failure-to-Learn/125983/?inl>; Kevin Carey, *'Trust Us' Won't Cut It Anymore*, CHRON. HIGHER EDUC., Jan. 18, 2011, <http://chronicle.com/article/Trust-Us-Wont-Cut-It/125978/>.

<sup>10</sup> See Babcock & Marks, *supra* note 3.

<sup>11</sup> See Carey, *supra* note 9 ("Yes, there's been grade inflation. A-minus is the new C.").

<sup>12</sup> See Rapoport, *supra* note 7, at 1143.

<sup>13</sup> See generally ANDREW HACKER & CLAUDIA DREIFUS, HIGHER EDUCATION? HOW COLLEGES ARE WASTING OUR MONEY AND FAILING OUR KIDS—AND WHAT WE CAN DO ABOUT IT (2010); MARK C. TAYLOR, CRISIS ON CAMPUS: A BOLD PLAN FOR REFORMING OUR COLLEGES AND UNIVERSITIES (2010), GAYE TUCHMAN, WANNABE U: INSIDE THE CORPORATE UNIVERSITY (2009), DEREK BOK, OUR UNDERACHIEVING COLLEGES (2006) (contains criticism of undergraduate colleges and universities, but lacks the emphasis on empirical studies that distinguish Arum and Roksa's work).

<sup>14</sup> See Richard Vedder, *Academically Adrift: A Must-Read*, CHRON. HIGHER EDUC. (Jan. 20, 2011), <http://chronicle.com/blogs/innovations/academically-adrift-a-must-read/28423>; see also Mark Bauerlein, *The Challenge of 'Academically Adrift'*, CHRON. HIGHER EDUC., (Jun. 13, 2011), <http://chronicle.com/blogs/brainstorm/the-challenge-of-academically-adrift/36173>; see also Scott Jaschik, *'Academically Adrift'*, INSIDE HIGHER EDUC., (Jan. 18, 2011), [http://www.insidehighered.com/news/2011/01/18/study\\_finds\\_large\\_numbers\\_of\\_college](http://www.insidehighered.com/news/2011/01/18/study_finds_large_numbers_of_college)

examined the Collegiate Learning Assessment (“CLA”), a test of “broad competencies” that should be developed in college, specifically critical thinking, analytical reasoning, problem solving, and writing.<sup>15</sup> The CLA was developed in 2002 by the Council for Aid to Education to measure the “value added,” or institutional contribution to student learning, by comparing “similarly situated” students (using SAT or ACT scores), across a wide variety of colleges and universities.<sup>16</sup> The CLA differs from other measures of undergraduate learning because it did not rely on proxies to measure student learning, and set to test skills across domains.<sup>17</sup> To measure these skills, the CLA used three open-ended assessment components: a performance task and two analytical writing tasks. The performance task asked undergraduate students to generate a memo,<sup>18</sup> very similar to a closed-universe legal writing assignment. The analytical writing tasks asked students to create and deconstruct an argument.<sup>19</sup> The writing tasks focused on the type of thinking required during the first year of law school, asking students to challenge assumptions and present both sides of an argument.<sup>20</sup> The CLA was graded using a rubric published by the Council for Aid to Education. Students are graded on assessment of evidence, analysis and synthesis of data and information, and consideration of alternative perspectives.<sup>21</sup>

Using the CLA, Arum and Roksa tracked the academic progress of 2,322 students enrolled at a variety of four-year colleges and universities.<sup>22</sup> Students were measured “in their first semester of college . . . and at the end of their sophomore year.”<sup>23</sup> No “statistically significant gains in critical thinking, complex reasoning, and writing skills” were found in 45% of the

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\_students\_don\_t\_learn\_much#sthash.p53yU2fe.dpbs; see also Jacques Steinberg, *How Much Do College Students Learn, Study?*, N.Y. TIMES (Jan. 17, 2011), <http://nyti.ms/1fWZIS5>; Gail Collins, *Humming to Higher Ed*, N.Y. TIMES (Oct. 21, 2011), <http://www.nytimes.com/2011/10/22/opinion/humming-to-higher-ed.html?smid=pl-share>.

<sup>15</sup> ARUM & ROKSA, *supra* note 8, at 21.

<sup>16</sup> Roger Benjamin & Marc Chun, *A New Field of Dreams: The Collegiate Learning Assessment*, 5 PEER REV. 26, 27 (2003).

<sup>17</sup> *Id.* at 26.

<sup>18</sup> ARUM & ROKSA, *supra* note 8, at 21–22.

<sup>19</sup> *Id.* at 21.

<sup>20</sup> Wegner, *supra* note 5, at 896.

<sup>21</sup> ARUM & ROKSA, *supra* note 8, at 22.

<sup>22</sup> *Id.* at 145.

<sup>23</sup> *Id.* at 20, 35.

students studied.<sup>24</sup> Although Arum and Roksa did not measure students after four years of college, previous studies have found that roughly 63% of the change in critical thinking skills occurs by sophomore year.<sup>25</sup>

Although the CLA is not without its critics,<sup>26</sup> Arum and Roksa's research was confirmed by the Wabash National Study of Liberal Arts Education, which found that students made no measurable improvement in critical thinking skills during the first year of college, and thirty percent of students showed no growth or a decline in critical thinking skills after four years of college.<sup>27</sup> While no test can provide a complete picture of undergraduate learning, and both tests have some weaknesses,<sup>28</sup> the results of the CLA and the Wabash study confirm the discomfoting anecdotal reports of law professors.<sup>29</sup> The CLA and Wabash study are best interpreted as snapshots of a changing landscape, providing some evidence of negative change that should spark institutional discussion and reflection.

Previous studies of undergraduate learning confirm findings of a long-term decline in skills acquisition among undergraduates.<sup>30</sup> Examining data collected throughout the 1980s and 1990s, Ernest Pascarella and Patrick Terenzini found that college students in the 1990s were "making...appreciably smaller" gains in critical thinking during their undergraduate years when compared to colleges

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<sup>24</sup> *Id.* at 36.

<sup>25</sup> ERNEST T. PASCARELLA & PATRICK T. TEREZINI, HOW COLLEGES AFFECT STUDENTS VOL. 2 A THIRD DECADE OF RESEARCH 157 (2005) (findings are also supported by Rykial's study of community college freshmen and sophomores, found 165–66).

<sup>26</sup> See, e.g., Alexander W. Astin, *In 'Academically Adrift,' Data Don't Back Up Sweeping Claim*, CHRON. OF HIGHER EDUC. (Feb. 14, 2011), <http://chronicle.com/article/Academically-Adrift-a/126371/>.

<sup>27</sup> See ARUM & ROKSA, *supra* note 8, at 36; see also WABASH NATIONAL STUDY OF LIBERAL ARTS EDUCATION, *available at* <http://www.liberalarts.wabash.edu/storage/4-year-change-summary-website.pdf>. (last visited, Sept. 15, 2014).

<sup>28</sup> See Trudy W. Banta & Gary R. Pike, *Revisiting the Blind Alley of Value Added*, 19 ASSESSMENT UPDATE 1 (2008) (discussing the problems associated with all tests seeking to measure "value added" during the college years); see also James S. Cole et.al., *Predicting Student Achievement for Low Stakes Tests with Effort and Task Value*, 33 CONTEMP. EDUC. PSYCHOL. 609 (2008) for a discussion of the problems associated with low-stakes testing at the college level ("[studies] indicate that if students do not perceive importance or usefulness of an exam, their effort suffers and so does their test score.").

<sup>29</sup> Rapoport, *supra* note 7, at 1120.

<sup>30</sup> PASCARELLA & TEREZINI, *supra* note 25.



students measured in the 1980s.<sup>31</sup> A 1991 synthesis of studies of college students in the 1980s, found that seniors had a 34% advantage over freshmen in critical thinking and a 19% advantage over freshmen in writing.<sup>32</sup> Examining studies of college students from the 1990s, Pascarella and Terenzini found seniors had only a 19% advantage over freshmen in critical thinking skills. While these findings are controversial, it is troubling to consider that these studies have not found positive evidence of broad-based skills acquisition by college students since the 1990s. College students are not demonstrating the widespread gains in skills that would indicate that a college education is a value-added, academic experience.

Despite the fact that both the Wabash Study and the CLA found limited learning among college students, the differences between the studies are indicative of patterns of inequality on college campuses. Unlike the CLA, which included students from a variety of undergraduate colleges and universities, the Wabash study was limited to undergraduates studying at liberal arts colleges. Students at the liberal arts colleges measured in the Wabash Study “did suggest that the typical instructional/learning environment for liberal arts college students was significantly different from that of their counterparts at research universities or regional institutions.”<sup>33</sup> Compared to the Wabash study, the CLA found a lower proportion of students gained critical thinking, complex reasoning, and writing skills. However, the CLA included a much broader sample of students from twenty-four colleges and universities of “varying sizes, selectivity, and missions . . . , and

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<sup>31</sup> PASCARELLA & TEREZINI, *supra* note 25, at 205 (differing from the CLA or Wabash study, each of which focused on a specific test of student learning, Pascarella and Terenzini’s work focused on analyzing multiple studies of college learning throughout the 1990s); *see also* ARUM & ROKSA, *supra* note 8, at 35–36.

<sup>32</sup> PASCARELLA & TEREZINI, *supra* note 25, at 156.

<sup>33</sup> Ernest T. Pascarella & Charles Blaich, *Lessons from the Wabash National Study of Liberal Arts Education*, CHANGE, Mar.–Apr. (2013), available at [http://www.changemag.org/Archives/Back%20Issues/2013/March-April%202013/wabash\\_full.html](http://www.changemag.org/Archives/Back%20Issues/2013/March-April%202013/wabash_full.html) (The Wabash Study included nineteen liberal arts colleges throughout the country: Alma College, Bard College, Butler University, Coe College, Columbia College (Chicago), Connecticut College, Gustavus–Adolphus College, Hamilton College, Hampshire College, Hope College, Ivy Tech Community College, Kirkwood Community College, San Jose State University, University of Kentucky, University of Michigan, University of North Carolina–Wilmington, University of Notre Dame, Wabash College, and Whittier College).

included large research universities . . . , historical black colleges and . . . , Hispanic-serving institutions,” as well as liberal arts colleges.<sup>34</sup>

A closer look at the results of the CLA suggest colleges and universities participating in the assessment were not closing the “achievement gap” between privileged students and their socioeconomically disadvantaged peers. “Initial CLA performance tracks closely with family background”;<sup>35</sup> white students from more educated families scored higher on the CLA when they entered college than their socioeconomically and ethnically diverse peers. Students from families with less education, and/or from a “racial/ or ethnic minority group, demonstrated the “lowest levels” of skills in critical thinking, complex reasoning, and writing skills . . . when they entered college.”<sup>36</sup> The gaps in performance between privileged students and their less-advantaged peers were “virtually the same” at the end of the sophomore year as at the start of college.<sup>37</sup> Most troubling, students who scored in the top 10 percent of the CLA improved by more than 1.5 standard deviations, or gained 43%, between the fall of their freshman year and the end of their sophomore year.<sup>38</sup> Students who started out behind on critical thinking skills remained behind through their first two years of college, while students who started ahead, gained more than their peers. The results of the CLA “suggest higher education . . . reproduces social inequality.”<sup>39</sup>

These results support the contention that learning how to “think like a lawyer” is “associated with higher-order thinking familiar to those students with strong academic preparation,” but foreign to students from nontraditional backgrounds.<sup>40</sup> Law schools admit a diverse population of students, from across the socioeconomic spectrum and from a variety of undergraduate schools. Due to these differences, incoming students have widely differing levels of academic preparation. Crafting a plan to help these students without stigmatizing them has been an

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<sup>34</sup> ARUM & ROKSA, *supra* note 8, at 20.

<sup>35</sup> *Id.* at 38.

<sup>36</sup> *Id.* at 54.

<sup>37</sup> *Id.* at 38.

<sup>38</sup> *Id.* at 56.

<sup>39</sup> *Id.* at 40.

<sup>40</sup> Wegner, *supra* note 5, at 936.

ongoing challenge for the last fifty years, and the results of the CLA and Wabash studies make it clear the issue will continue. Summer programs, orientation, and academic support programs will need additional resources and strategies to reach students earlier in their academic career to ameliorate skills deficits between other incoming students.

Providing additional academic supports to incoming students is essential because deficits in critical thinking skills have disproportionate effects on the study of law. Critical thinking skills are particularly important to law schools because they provide the foundation for the higher-order thinking skills required during 1L year. “Thinking like a lawyer” has been equated with “sophisticated ‘critical’ thinking.”<sup>41</sup> Critical thinking has many definitions and can be broken into two forms: critical thinking with a cognitive component, and a disposition to think critically.<sup>42</sup> A generally accepted definition of the cognitive component of critical thinking includes “systematic evaluation of what you have heard and read . . . an ability to ask and answer critical [interrelated] questions at appropriate times” and the formulation of follow-up questions.<sup>43</sup> The disposition to think critically includes an “inclination to ask challenging questions and follow the reasons and evidence wherever they lead, tolerance for new ideas, willingness to use reason and evidence to solve problems, and willingness to see complexity in problems.”<sup>44</sup> At their core, both types of critical thinking involve questioning knowledge. Questioning requires students to remember, understand, and apply content knowledge, before analyzing and evaluating the knowledge and discerning what is important, what is missing, and what is vague. Incoming law students need both the cognitive ability and dispositional motivation to think critically in order to be successful in law school.

This type of critical thinking provides the foundation for the “key intellectual tasks” associated with the sophisticated higher order thinking required in law school.<sup>45</sup> The “key

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<sup>41</sup> *Id.* at 900.

<sup>42</sup> PASCARELLA & TEREZINI, *supra* note 25, at 156.

<sup>43</sup> M. NEIL BROWNE & STUART M. KEELEY, ASKING THE RIGHT QUESTIONS: A GUIDE TO CRITICAL THINKING, 2 (8th ed., 2007).

<sup>44</sup> PASCARELLA & TEREZINI, *supra* note 25, at 157.

<sup>45</sup> Wegner, *supra* note 5, at 929.

intellectual tasks” of the first year of law school include a “structured form of analysis . . . focuse[d] on individual cases,” application of legal doctrine to complex fact scenarios, synthesis of complex ideas, and evaluation that considers the logic and consistency of doctrinal developments and their relationship to conceptual themes.<sup>46</sup> At the heart of these tasks is the ability and disposition to question the facts of a case, whether legal doctrine should apply, or the logic of a decision, and to use those questions to form a broad understanding of doctrinal themes. Before students can master “key intellectual tasks,” they must have mastered critical thinking.

These “key intellectual tasks” are identified in the Carnegie Report on Legal Education, *Educating Lawyers*, as the “first apprenticeship” of legal education.<sup>47</sup> The “first apprenticeship” is the “cognitive apprenticeship,” beginning during the first year of law school, and develops students’ reasoning through the use of the case dialogue and Socratic method.<sup>48</sup> The case-dialogue method uses aggressive questioning about unfamiliar, foreign content. In this way, the case dialogue method in law school could be compared to critical thinking in a new language. Students without the ability to think critically in non-legal contexts will have great difficulty applying higher order thinking skills in a new, more challenging legal contexts. Incoming students need to have firm foundation in basic critical thinking before they can move on to more advanced critical thinking in a new domain.

Undergraduate institutions, especially liberal arts colleges, consider the development of critical thinking skills in their students to be the core of their educational mission.<sup>49</sup> The studies suggesting the undergraduate institutions are not fulfilling this mission ignited significant controversy on college campuses. However, there is little institutional evidence law schools have been aware of the empirical research on the decline in skills acquisition at the undergraduate level. Despite the complaints of individual professors that current

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<sup>46</sup> *Id.* at 936–37.

<sup>47</sup> WILLIAM M. SULLIVAN ET. AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW*, 28 (2007).

<sup>48</sup> Wegner, *supra* note 5, at 887.

<sup>49</sup> Woo-jeong Shim & Kelly Walczak, *The Impact of Faculty Teaching Practices on the Development of Students’ Critical Thinking Skills*, 24 INT’L J. OF TEACHING AND LEARNING IN HIGHER EDUC. 16, 16 (2012).

law students just aren't the same as law students from the past, there has been a dearth of empirical research indicating that entering law students are less prepared than prior generations. There are many articles lamenting the underpreparedness of recent law school graduates, but these articles focus on deficiencies in practical or experiential education at the law school level.<sup>50</sup> Law schools have not been engaged in serious dialogue about the academic deficiencies of incoming students.<sup>51</sup>

There are many explanations for this oversight, starting with the incremental nature of the problem. Undergraduate students didn't change suddenly or abruptly in a manner that would raise red flags to law school admissions professionals or professors; the decline in preparedness occurred over the past fifty years. Law school grading policies also mask the decline in student preparedness.<sup>52</sup> Most law school use curved, or normed, grading instead of objective tests, thus students' skills and knowledge are measured against their current peers, not past classes or defined knowledge.<sup>53</sup> Few law professors teaching today remember the average law student of the 1960s or 1970s. In fact, most senior faculty members were law students between 1970 and 1980.<sup>54</sup> The cyclical nature of law school admissions also masked the problem. Until recently, law school

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<sup>50</sup> See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C.J.L. & SOC. JUST. 247 (2012); see also Scott Westfahl, *Response: Time to Collaborate on Lawyer Development*, 59 J. LEGAL EDUC. 645 (2010); see also Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 103 (2013); see also Robert I. Reis, *Law Schools Under Siege: The Challenge to Enhance Knowledge, Creativity, and Skill Training*, 38 OHIO N.U. L. REV. 855 (2012); see also James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735 (2012).

<sup>51</sup> Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, Valparaiso Law Faculty Publications (2013), available at [http://scholar.valpo.edu/law\\_fac\\_pubs/116/](http://scholar.valpo.edu/law_fac_pubs/116/) (a notable addition to the research literature).

<sup>52</sup> See Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A Nationwide Survey of Law School Grading And Grade Normalization Practices*, 65 UMKC L. REV. 819, 820–28 (1997).

<sup>53</sup> Wegner, *supra* note 5, at 875.

<sup>54</sup> See also Wegner, *supra* note 5, at 988–90. (A law professor would need to be roughly 82 years old to remember incoming law students from 1960, assuming he or she graduated law school at 23, spent five years in practice, and entered the academy in 1960. While there are law professors still teaching into their 80s, it is a relatively rare occurrence.)

admissions went through boom and bust cycles mirroring the general state of the economy.<sup>55</sup> Law schools would see an upturn in applicants during recessions, as prospective students, particularly applicants with high aspirations and enviable skills, hoping to wait out poor employment prospects by enrolling in graduate programs. During times of high employment, fewer students would apply to law school, and the caliber of the applicant pool as a whole would decline, with the best potential applicants accepting jobs and fewer people willing to make the jump to graduate school.<sup>56</sup> The incremental nature of the decline in fundamental skills along with these trends in admission has previously prevented law schools from engaging in a dialogue about the problem.

*B. The Decline of a Liberal Arts Education and What It Means to Critical Thinking Skills*

As far back as Blackstone, the common understanding was that a “solid grounding in the liberal arts” was required for anyone serious about pursuing post-graduate legal education.<sup>57</sup> Defining the liberal arts and humanities is difficult, with definitions ranging from “engagement with the major aspects of human knowledge and values”<sup>58</sup> to “a source of national memory and civic vigor, cultural understanding and communication.”<sup>59</sup> Listing the subject matters included in the liberal arts and humanities is a bit misleading, because their core value isn’t in their subject matter. Almost all definitions of

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<sup>55</sup> *First Year and Total J.D. Enrollment by Gender 1947–2011*, AMER. BAR. ASS’N. (Jul. 17, 2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_1yr\\_total\\_gender.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf) (following this graph, one can chart how more students enrolled shortly after the start of an economic recession, followed by declines during economic recoveries.).

<sup>56</sup> See Jonathan D. Glater, *Law School Calls as Economy Slows*, N.Y. TIMES (Aug. 24, 2001), <http://www.nytimes.com/2001/08/24/business/law-school-calls-as-economy-slows.html?smid=pl-share>; see also Rebecca R. Ruiz, *Recession Spurs Interest in Graduate Law Schools*, N.Y. TIMES (Jan. 9, 2010), <http://www.nytimes.com/2010/01/10/education/10grad.html>.

<sup>57</sup> George Anastaplo, *Justice, The Liberal Arts, and Some Basic Training for Lawyers*, 36 LOY. U. CHI. L.J. 329, 329 (2005).

<sup>58</sup> Stanley N. Katz, *The Liberal Arts in School and College*, CHRON. HIGHER EDUC. (Mar. 10, 2006), <http://chronicle.com/article/The-Liberal-Arts-in-School-and/10344/>.

<sup>59</sup> *The Heart of the Matter: The Humanities and Social Sciences for a vibrant, competitive, secure nation*, AM. ACAD. ART & SCI. 9, (2013), [http://www.humanitiescommission.org/\\_pdf/hss\\_report.pdf](http://www.humanitiescommission.org/_pdf/hss_report.pdf).

the liberal arts focus on skills instead of content. Liberal arts and humanities teach “flexibility, creativity, critical thinking, and communication skills,”<sup>60</sup> as well as skills in analysis and written communication.<sup>61</sup> Liberal arts may be “viewed as classical education and an intellectual adventure, as learning for its own sake and pursuing the life of the mind.”<sup>62</sup> The liberal arts were assumed to provide students with the skills and knowledge to become civic and professional leaders, to prepare them for lifelong learning and inquiry.<sup>63</sup>

Despite these lofty aspirations, the liberal arts have been in decline since the 1960s, with fewer students choosing liberal arts majors, and some disciplines within the liberal arts disappearing completely from college campuses.<sup>64</sup> The decline of liberal arts majors and colleges has been lamented throughout higher education journals and the popular media.<sup>65</sup> It is the liberal arts’ focus on critical thinking and broad knowledge that is the source of the problem. While these skills are highly valued by employers, they do not provide specific, marketable competencies for a defined, entry-level job.<sup>66</sup> With college tuition rising substantially since the 1980s,<sup>67</sup> parents and students are less worried about thinking skills and lifelong

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<sup>60</sup> Carol T. Christ, *Myth: A Liberal Arts Education is Becoming Irrelevant*, AM. COUNCIL ON EDUC., Spring 2012, <http://www.acenet.edu/the-presidency/columns-and-features/Pages/Myth-A-Liberal-Arts-Education-Is-Becoming-Irrelevant.aspx>.

<sup>61</sup> Steven Brint, et al., *From the Liberal to the Practical Arts in American Colleges and Universities: Organizational Analysis and Curricular Change*, 76 J. HIGHER EDUC. 2, 152 (2005) (quoting Bowen and Bok).

<sup>62</sup> HACKER & DREIFUS, *supra* note 13, at 95.

<sup>63</sup> Kimberly A. Goyette & Ann L. Mullen, *Who Studies The Arts and Sciences? Social Background and the Choice and Consequences of Undergraduate Field of Study*, 77 J. HIGHER EDUC. 3, 497 (2006).

<sup>64</sup> Michael Delucchi, “*Liberal Arts*” *Colleges and the Myth of Uniqueness*, 68 J. HIGHER EDUC. 414, 421 (1997).

<sup>65</sup> See Brint, *supra* note 61; see also W. Norton Grubb & Marvin Lazerson, *Vocationalism in Higher Education: The Triumph of the Education Gospel*, 76 J. HIGHER EDUC., 1, (2005); see also Victor Davis Hanson, *The Death of the Humanities*, DEFINING IDEAS (Jan. 28, 2014), <http://www.hoover.org/research/death-humanities>; see also *Jilting Liberal Arts Can Hurt U.S., to a Degree*, FISCAL TIMES (Jan. 9, 2013), <http://www.thefiscaltimes.com/Articles/2013/01/09/Jilting-Liberal-Arts-Can-Hurt-the-US-to-a-Degree>; see also Rosanna Warren, *The Decline of the Humanities—and Civilization*, NEW REPUBLIC (Jul. 17, 2013), <http://www.newrepublic.com/article/113763/why-we-need-liberal-arts>.

<sup>66</sup> Dan Berrett, *All About the Money*, CHRON. HIGHER EDUC. (SEPT. 18, 2012), <http://chronicle.com/article/All-About-the-Money/134422/>.

<sup>67</sup> See Robert B. Archibald & David H. Feldman, *Explaining Increases in Higher Education Costs*, 79 J. HIGHER EDUC. 268, 268 (2008).

learning than adequate return-on-investment.<sup>68</sup> The decline in liberal arts majors has corresponded with a parallel rise in the practical arts, or pre-occupational majors.<sup>69</sup>

The thinking skills of liberal arts majors may be highly valued later in a professional career, but they lack the pre-occupational label that would give immediate entry into a specific career.<sup>70</sup> Bachelors' degrees in occupational fields now account for almost 60% of degrees awarded, up from 45% in the 1960s.<sup>71</sup> Business degrees, comprised of majors in general business, finance, accounting, marketing, and management account for almost 20% of bachelors' degrees; making business majors the most popular field of study.<sup>72</sup> While some business majors make more money than liberal arts majors immediately after graduation,<sup>73</sup> research demonstrates that they do not show the same gains in thinking skills as their peers who majored in liberal arts disciplines. Business majors, despite their career successes, had the weakest gains on the CLA<sup>74</sup> and spent less time preparing for class than any other major.<sup>75</sup> The dearth of thinking skills in business programs is evident from the poor results of business majors on professional school entrance exams. Business majors score lower on the GMAT,

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<sup>68</sup> Patricia Cohen, *In Tough Times, the Humanities Must Justify Their Worth*, N.Y. TIMES (Feb. 25, 2009), <http://www.nytimes.com/2009/02/25/books/25human.html>; see also HACKER & DREIFUS, *supra* note 13, at 101 (noting that students "were constantly badgered by parents and relatives who wanted to know how supposedly useless subjects would help them move up the social ladder.").

<sup>69</sup> Delucchi, *supra* note 64, at 414.

<sup>70</sup> See generally, Tamar Lewin, *As Interest in the Humanities Fades, Colleges Worry*, N.Y. TIMES (Oct. 30, 2013), <http://www.nytimes.com/2013/10/31/education/as-interest-fades-in-the-humanities-colleges-worry.html?smid=pl-share> (statement of Pauline Yu, president of the American Council of Learned Societies)("Colleges are increasingly being defined narrowly as job preparation, not as something designed to educate the whole person.").

<sup>71</sup> Brint et. al., *supra* note 61, at 151.

<sup>72</sup> David Glenn, *The Default Major: Skating Through B-School*, N.Y. TIMES (Apr. 14, 2011), available at <http://www.nytimes.com/2011/04/17/education/edlife/edl-17business-t.html>.

<sup>73</sup> NAT'L ASS'N. COLL. & EMP., *Average Starting Salary for Grads With Bachelor's Degrees Rises 2.4 Percent*, (Sept. 12, 2013), available at <http://www.nacweb.org/about-us/press/bachelor-degree-starting-salary-rises.aspx>. ("the average starting salary for Class of 2013 college graduates stands at \$45,327 . . . Among the Class of 2013, the business disciplines experienced the largest increase to their overall average starting salary, which rose 7.9 percent to \$55,635." Business majors had the second-highest average starting salary, only topped by engineering majors.).

<sup>74</sup> ARUM & ROKSA, *supra* note 8, at 105–06.

<sup>75</sup> Glenn, *supra* note 72 (quoting the National Survey on Student Engagement).



the entry exam for M.B.A. programs, than students in every other major.<sup>76</sup> Of the twelve most common majors to take the Law School Admissions Test (LSAT), finance majors ranked sixth. More distressingly, business administration majors ranked eleventh out of twelve majors on average LSAT scores.<sup>77</sup> The portrait painted of business majors is grim, but other pre-occupational majors have similar profiles.<sup>78</sup> The exception is found in engineering, where students study more than other majors, and ranked third out of twelve majors on the LSAT.<sup>79</sup>

Compared to their peers in pre-occupational majors, students who major in liberal arts disciplines do better on most measures of learning. Students in the social science/humanities and science/mathematics majors perform higher on tests of critical thinking, analytical reasoning, and writing than other majors, and were more likely to take classes with significant reading and writing requirements.<sup>80</sup> Significant reading and writing experiences are critical to students looking to attend law school and represent the most profound occupational tools of practicing attorneys.<sup>81</sup> While conducting a study, Babcock and Marks found liberal arts and humanities majors studied more than pre-occupational majors, with the exception of engineering majors.<sup>82</sup> Study skills are also critically important for students looking to enter a professional program that demands at least forty-five hours a week of preparation and study time.<sup>83</sup>

Despite the profile of liberal arts majors as more learned than their pre-occupational peers, liberal arts disciplines continue to decline in numbers compared to students enrolled as pre-occupational majors. The reasons for the decline may be varied, but there is a wide gap between the types of students who choose liberal arts majors and those who choose pre-

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<sup>76</sup> Glenn, *supra* note 72.

<sup>77</sup> Michael Nieswiadomy, *LSAT Scores of Economics Majors: The 2008–2009 Class Update*, 43 J. ECON. EDUC. 3, 5 (2010).

<sup>78</sup> ARUM & ROKSA, *supra* note 8, at 105.

<sup>79</sup> Nieswiadomy, *supra* note 77, at 5.

<sup>80</sup> ARUM & ROKSA, *supra* note 8, at 104–05.

<sup>81</sup> See RUTH ANN MCKINNEY, *READING LIKE A LAWYER VI*, (2005).

<sup>82</sup> In both the 2004 HERI survey and the 2003 NSSE survey, engineering students studied the most, while business and education students studied the least. After engineering students, students majoring in the sciences and letters studied the most. Babcock & Marks, *supra* note 3, at 475.

<sup>83</sup> MCKINNEY, *supra* note 81.

occupational majors. Liberal Arts majors are more likely to have parents who completed post-graduate education, and almost all liberal arts majors come from families of higher mean socioeconomic status.<sup>84</sup> Students who attended selective colleges were more likely to major in the liberal arts.<sup>85</sup> Of the twelve majors with at least 1,900 students taking the LSAT, seven were liberal arts majors, and four out of five majors with the highest average LSAT scores were liberal arts majors.<sup>86</sup>

The continuing decline in the number of liberal arts majors presents both a challenge and an opportunity for law schools. The present law school curriculum assumes all incoming students have some basic proficiency in the liberal arts.<sup>87</sup> However, the increase in pre-occupational majors has made it less likely that incoming law students have foundational knowledge of philosophy, history, English, classics, and other liberal arts and humanities subjects. This presents a challenge to law schools, because liberal arts majors are more likely to do well on the LSAT, are more likely to show gains in critical thinking, analytical skills, and writing, are more likely to have studied more in college, and are more likely to have taken courses with significant reading and writing requirements. Although liberal arts majors are the most likely to succeed in law school, they represent a small and shrinking percentage of all college graduates. If law schools acknowledge the shift from liberal arts to pre-occupational majors, they can craft a 1L curriculum that provides, instead of assumes, this foundational knowledge. This will require law schools to examine the composition of their admitted students, assess their curricular choices, and make deliberate decisions about prior knowledge and course content.

*C. Decreases in Student Study Time Since 1960 (or, Students Really Aren't The Same as They Use To Be)*

While the decrease in the number of liberal arts majors should provoke reflection on curricular choices in law schools, other factors are also contributing to the decline in basic skills

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<sup>84</sup> Goyette & Mullen, *supra* note 63, Table 1 at 9.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> The five majors with the highest average LSAT scores were economics, philosophy, engineering, history, and English. Nieswiadomy, *supra* note 77, at 5.

<sup>87</sup> Rapoport, *supra* note 7, at 1143–44.

among incoming students. One trend that mirrors the decline in fundamental skills is the decline in student study time per credit hour at the undergraduate level. A longitudinal study of academic time investment by economists Philip Babcock and Mindy Marks uncovered dispiriting changes in time spent studying by undergraduates. Students are devoting only twenty-seven hours per week to their academics (fifteen hours in class, and twelve hours to study time), but studies have shown this was not always the case.<sup>88</sup> Babcock and Marks studied datasets collected in 1961, 1981, 1987–1989, and 2003–2005, controlling for representativeness, framing and composition effects, compared the data to alternative datasets, and found that across all majors, colleges, and socioeconomic strata, students studied significantly less in 2003–2005 than in 1961.<sup>89</sup> Starting with data collected by Project Talent, a 1961 survey compiled from a nationally representative random sample of college students, students studied an average of 24.43 hours outside of class, with more than “67% of full-time students at four-year colleges studying more than twenty hours per week” in 1961.<sup>90</sup> By 2003, only 20% of students studied at least 20 hours a week or more.<sup>91</sup> After accounting for the effects of differing wording in the questions from Project Talent and the National Longitudinal Survey of Youth, Babcock and Marks “observed statistically significant declines in study time of about eight hours per week between 1961 and 1981, about two hours per week between 1988 and 2004, [or roughly] 10 hours per week between 1961 and 2003.”<sup>92</sup>

The results from Babcock and Marks’ study have been confirmed by the most recent National Survey on Student Engagement (“NSSE”).<sup>93</sup> The NSSE conducted by Indiana

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<sup>88</sup> Babcock and Marks, *supra* note 3, at 477.

<sup>89</sup> *Id.* at 471 (framing effects result when differently worded questions yield different responses, despite similar measuring criteria. Project Talent, The National Longitudinal Survey of Youth (1981), the Higher Education Research Institute (1988 and 2004), and the National Survey of Student Engagement (2003) used slightly different wording to collect data on student study time.)

<sup>90</sup> *Id.* at 470.

<sup>91</sup> *Id.* at 470 (using data from the National Survey of Student Engagement (“NSSE”) from 2003, and comparing the data of the 156 schools that provided data to Project Talent in 1961).

<sup>92</sup> *Id.* at 472.

<sup>93</sup> NATIONAL SURVEY OF STUDENT ENGAGEMENT, Annual Results 2013, 9, *available at* [http://nsse.iub.edu/NSSE\\_2013\\_Results/pdf/NSSE\\_2013\\_Annual\\_Results.pdf](http://nsse.iub.edu/NSSE_2013_Results/pdf/NSSE_2013_Annual_Results.pdf).

University Center for Postsecondary Research and funded by the Carnegie Foundation, invites more than 1.6 million college students at more than 600 colleges and universities to complete the survey.<sup>94</sup> The NSSE's "primary activity is annually surveying college students to assess the extent to which they engage in educational practices associated with high levels of learning and development."<sup>95</sup> The 2013 results indicate that freshmen spent an average of fourteen hours preparing for class, and seniors spent an average of fifteen hours preparing for class.<sup>96</sup> The NSSE also confirms that students majoring in the liberal arts read more for class than their peers in other majors, averaging eight hours of reading per week.<sup>97</sup>

Students who study more during their undergraduate years are more prepared for the extra study time that is required for success in law school. Success in law school requires at least two hours of reading for each hour of class time. Full-time law students need to spend at least thirty hours a week preparing for class.<sup>98</sup> Students who are used to studying less than five hours a week during their undergraduate years are going to have a rougher adjustment to the thirty hours of reading time required to keep up with law school classwork, and will have an even more difficult adjustment to the outlining, practice exams, and study group work that requires an additional five to seven hours per week.<sup>99</sup>

### 1. *The rise of consumer-orientation among college students*

One of the explanations for the decline in skills acquisition and study hours is the consumer orientation of undergraduate students since the 1980s. This is an area where empirical research is just emerging, although qualitative and descriptive research on this subject is substantive.<sup>100</sup> A number of forces

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<sup>94</sup> *Id.* at 4.

<sup>95</sup> *Id.* at 1.

<sup>96</sup> *Id.* at 9 (finding students studying slightly more than students studied by Babcock and Marks, the differences were minor. Removing engineering majors from the data, seniors were down to an average of 14 hours of class preparation per week. This is significantly less than the 24.43 hours of studying reported by students in 1961.).

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

<sup>98</sup> MCKINNEY, *supra* note 81.

<sup>99</sup> *Id.*

<sup>100</sup> Daniel B. Saunders, *Exploring a Customer Orientation: Free Market Logic and College Students*, REV. HIGHER EDUC., 212 (2014) ("A number of scholars have

converged during the 1980s to change the value orientation of college students: state support for higher education fell and tuition increased and<sup>101</sup> focus on efficiency and effectiveness increased.<sup>102</sup> Beginning in the 1990s, parental involvement increased, giving rise to the term “helicopter parent.”<sup>103</sup> Increasingly, parents insert themselves into the educational process, demanding better customer service in exchange for their tuition payments, and distorting the educational process by treating the learning process like a co-purchased consumer transaction.<sup>104</sup>

One of the more troubling aspects of the customer orientation of students is an increased focus on the extrinsic outcomes of a college degree, while decreasing the intrinsic motivation and rewards associated with the pursuit of a college degree.<sup>105</sup> The change from student-as-learner to student-as-customer has strong negative implications for personal motivation and investment in the learning process. Recent research has found that instrumental motives, or motives extrinsic to the primary activity, weakens internal, intrinsic motivation.<sup>106</sup> When people hold both instrumental motivations, (such as a desire for good grades) as well as intrinsic motivations, (such as a desire to learn and understand) the instrumental motives undermine or “crowd

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discussed the conceptualization of students as customers and its negative manifestations as pervasive in higher education; they provide logically sound arguments to support their claims. Although faculty and staff have substantial anecdotal evidence which suggest students view themselves as customers, the literature in this area as a whole falls quite short of providing a reliable understanding of the extent to which students actually express a customer orientation. . .the few empirical articles concerning college students as customers lack trustworthiness due to poor research methodologies.”).

<sup>101</sup> Lynne Eagle & Ross Brennan, *Are Students Customers? TQM and Marketing Perspectives*, 15 *QUALITY ASSURANCE EDUC.* 1, 44 (2007).

<sup>102</sup> Michael Delucchi & William L. Smith, *A Postmodern Explanation of Student Consumerism in Higher Education*, 25 *TEACHING SOCIOLOGY* 4, 323 (1997).

<sup>103</sup> See generally Mark Taylor, *Helicopters, Snowplows, and Bulldozers: Managing Students’ Parents*, 74 *BULLETIN*, available at <http://www.acui.org/publications/bulletin/article.aspx?issue=304&id=1842> (2006) (discussing consumer expectations by parents, “since I’m paying, I think I deserve some answers.”).

<sup>104</sup> Patricia Somers & Jim Settle, *The Helicopter Parent: Research Toward a Typology (Part I)*, 86 *COLL. & UNIV.* 18, 24 (2010).

<sup>105</sup> Saunders, *supra* note 100, at 202, 205.

<sup>106</sup> Amy Wrzesniewski et. al., *Multiple Types of Motives Don’t Multiply the Motivation of West Point Cadets*, *PNAS EARLY EDITION*, Jun. 30, 2014, available at <http://www.pnas.org/cgi/doi/10.1073/pnas.1405298111>.

out” the intrinsic motivation, and lead to lower motivation, persistence, and performance.<sup>107</sup> Students with extrinsic motivation, such as a consumer orientation toward college, are less likely to seek and persist at challenging learning experiences that lead to gains in thinking skills.<sup>108</sup>

The consumer orientation, and corresponding extrinsic motivations, “radically alters” the fundamental nature of education.<sup>109</sup> Students no longer see themselves as partners in a relationship designed to further growth; consumer orientation frames the relationship between student and teacher as customer and service provider, with the customer expecting satisfaction. Students who view education as an economic transaction become preoccupied with their GPA, sacrificing “deeper, critical analytic learning” in pursuit of a credential they can exchange on the market.<sup>110</sup> Students expect “to be given high grades in return for paying tuition and showing up.”<sup>111</sup> A customer does not expect to put in substantial effort after a monetary transaction, whereas a student must put in effort to learn and grow. The student-as-customer focuses on the end product of the transaction—a satisfactory grade—instead of the process of learning and gaining knowledge.<sup>112</sup> A customer orientation reduces the opportunity for students to challenge themselves, to “engage with ambiguities,” and risk failure in order to grow intellectually and personally.<sup>113</sup> Because an essential element of legal education is the ability to “grapple with uncertainty in order to develop professional judgment,” college students’ consumer orientation leaves them unprepared for the pedagogical challenges they must face as law students.<sup>114</sup>

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<sup>107</sup> *Id.* at 1, 5.

<sup>108</sup> *Id.* at 1.

<sup>109</sup> Saunders, *supra* note 100, at 209.

<sup>110</sup> Delucchi & Smith, *supra* note 102, at 325.

<sup>111</sup> Michael Delucchi & Kathleen Korgen, “We’re the Customer—We Pay the Tuition”: *Student Consumerism among Undergraduate Sociology Majors*, 30 TEACHING SOCIOLOGY 1, 101 (1997).

<sup>112</sup> Saunders, *supra* note 100, at 209.

<sup>113</sup> *Id.*

<sup>114</sup> Wegner, *supra* note 5, at 889.

*D. An Introduction to Grade Inflation, Student Evaluations, and Student Underpreparedness*

When college students view themselves as consumers, they expect a satisfactory customer experience, resulting in an “extreme focus” on the product they purchase, grades.<sup>115</sup> Grade inflation has a long history, beginning in the 1960s. Beginning in the 1980s, it has been closely linked to the student-as-customer orientation at colleges and universities.<sup>116</sup> In turn, grade inflation at the undergraduate level has a role in the decline of study time, reduced learning, and student underpreparedness, because students no longer need to study long hours to earn respectable grades.<sup>117</sup> Like the declines in fundamental skills and study time, widespread grade inflation happened slowly over the course of the past fifty years. The marked rise in exceptional grades, especially at private four-year colleges, has made it more difficult for law schools to distinguish between an average or mediocre student and an extraordinary student. Law schools can no longer use grades to distinguish between applicants, and must instead place increased reliance on the LSAT to differentiate between applicants. Students, accustomed to very high grades in return for little work during their undergraduate careers, are unprepared for the amount of work required to receive a passing grade in a law school class. Adding to students’ frustration, they have not gained the fundamental thinking skills necessary to master the more complex reasoning and analysis law school requires to earn the grades they are accustomed to receiving.

The reasons for grade inflation are varied and complex, but the rise of the student evaluation of teaching in conjunction with grade inflation has unique importance to law student underpreparedness. Undergraduate institutions started using student evaluations of teaching (“SETs”), in the 1970s. The use of SETs became widespread in the 1980s and increasingly began to be used in tenure and retention decisions, creating

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<sup>115</sup> Saunders, *supra* note 100, at 211.

<sup>116</sup> Stuart Rojstaczer & Christopher Healy, *Where A Is Ordinary: the Evolution of American College and University Grading*, 114 *TEACHER’S COLLEGE RECORD* 1, 6 (2012) [hereinafter *Where A is Ordinary*] (“Students were no longer considered acolytes, but consumers of a product.”)

<sup>117</sup> Jeffrey R. Young, *Homework? What Homework?*, *CHRON. HIGHER EDUC.*, Dec. 6, 2002, available at <http://chronicle.com/article/Homework-What-Homework-/2496>.

perverse incentives for instructors to award more high grades. The widespread implementation of SETs was a factor in the changed value orientation of students. At schools that publish SETs, students used them to find classes with higher mean grades.<sup>118</sup> Students' misuse of SETs reflect lower academic expectations by faculty, lesser workloads for students, which results in less learning by students.<sup>119</sup>

### 1. *History of grade inflation*

Controversy over grade inflation is not new. The first study of grade inflation dates back to 1928, by H.H. Remmers of Purdue University although grade inflation did not gain widespread notice and condemnation until the 1960s.<sup>120</sup> There is consensus among academics that grade inflation in the 1960s was caused by external political factors that placed greater pressure on instructors to give students higher grades.<sup>121</sup> Instructors began to abandon D and F grades to prevent students from being removed from school and becoming subject to the military draft. In 1960, C was the most common grade at four-year colleges, but by 1965, B's had supplanted C's as the most awarded grade.<sup>122</sup> The 1960s were also a time when elite universities became more interested in seeing their students gain admission to graduate and professional programs, and higher grades improved admission rates.<sup>123</sup> By the 1970s, A's had become the second most common grade awarded.<sup>124</sup>

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<sup>118</sup> Richard Vedder, *Student Evaluations, Grade Inflation, and Declining Student Effort*, CHRON. HIGHER EDUC., Jun 19, 2010, available at <http://chronicle.com/blogs/innovations/student-evaluations-grade-inflationdeclining-student-effort/24926> (the research referred to in this article, by Scott Carell and James West, will be discussed in more detail below).

<sup>119</sup> See Christopher Winship, *The Faculty-Student Low-Low Contract*, 48 SOC. 232 (2011).

<sup>120</sup> H.H. Remmers, *The Relationship Between Students' Marks and Student Attitude Towards Instructors*, 28 SCH. AND SOC. 759 (1928).

<sup>121</sup> See Stuart Rojstaczer and Christopher Healy, *Grading in American Colleges and Universities*, TEACHERS COLLEGE RECORD, March 4, 2010, available at <http://www.tcrecord.org/PrintContent.asp?ContentID=15928> [hereinafter *Grading in American Colleges and Universities*]; see also Catherine Rampell, *A History of College Grade Inflation*, N.Y. TIMES Jul. 14, 2011, <http://nyti.ms/1cNm3gh>; see also Robert McGuire, *Grade Expectations*, YALE ALUMNI MAGAZINE, Sept./Oct. 2013, <https://www.yalealumnimagazine.com/articles/3735>.

<sup>122</sup> *Where A is Ordinary*, *supra* note 116, at 6.

<sup>123</sup> VALEN JOHNSON, *GRADE INFLATION*, 5, 2003 (quoting Dartmouth professor Noel Perrin).

<sup>124</sup> *Where A is Ordinary*, *supra* note 116, at 6.



Despite the steep rise in grades during the Vietnam War era, grade inflation did not continue on a linear upwards trajectory. Students in the early-to-mid 1970s, through the 1980s, experienced grade deflation. Grades of C's, D's, and F's increased during this time, and there was a reduction in the percentage of A's awarded to students. There are no definitive answers to why grade inflation slowed during those years, but some researchers speculate that the end of the draft caused instructors to go back to more stringent, pre-Vietnam grading standards.<sup>125</sup>

Grade inflation resumed in the mid-1980s, and it has continued unabated to today. Although grade inflation is a nationwide issue, it is not uniform across types of institutions. Nationally, private colleges give slightly more A's and B's than public universities of similar student selectivity.<sup>126</sup> Private colleges "award 5% . . . more A and B grades combined than public schools of equal selectivity."<sup>127</sup> Highly selective private colleges and universities give significantly higher grades than other types of institutions.<sup>128</sup> While the higher grades at more selective institutions could be the result of better prepared students, evidence suggests this is not the case. Students are receiving better grades despite no appreciable rise in student quality, as measured by SAT and ACT scores.<sup>129</sup> This discrepancy in the distribution of A's and B's across institutions has importance to law student preparedness. An A from a private college does not represent the same evaluation of student work as A from a public college. Differences were also found between science and engineering colleges and other colleges and universities, with science and engineering colleges using more stringent grading. There are also geographic discrepancies, with colleges and universities located in the South awarding lower grades than colleges and universities

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<sup>125</sup> *Id.* at 12.

<sup>126</sup> *Id.* at 1.

<sup>127</sup> *Id.* at 11.

<sup>128</sup> See *Grading in American Colleges and Universities*, *supra* note 121; see also Kenneth Jost, *Grade Inflation: The Issues*, 12 CQ RES. 505, 507–12 (2002) (discussing grade inflation at such highly selective schools as Harvard, University of Pennsylvania, Haverford, Hampshire, and Dartmouth).

<sup>129</sup> Stuart Rojstaczer & Christopher Healy, *Attempts to Relate Recent Grade Inflation to Improved Student Quality and Other Factors*, available at <http://www.gradeinflation.com/> (this website is maintained by Rojstaczer and Healy, and updated as they add schools to their research on grade inflation).

nationally.<sup>130</sup> Despite these minor differences, grade inflation is a significant issue at the majority of colleges and universities. Roughly 43% of grades awarded in 2008 were A's, an increase of 28 percent since 1960 and 12% since 1988.<sup>131</sup> Unlike grade inflation in the 1960s, the rise in the average GPA has not been motivated by obvious external or political factors.<sup>132</sup> Researchers such as Rojstaczer and Healy have concluded that grade inflation is the result of abandoned grading standards in higher education, caused by a lack of oversight in an unregulated profession.<sup>133</sup> Researchers have also examined culture change since the 1980s. The 1980s saw a dramatic increase in the cost of higher education,<sup>134</sup> and a movement towards a "consumer-based approach" to teaching.<sup>135</sup> Students are "screened" at admission, and colleges view it as their mission to help all matriculating students "succeed."<sup>136</sup>

Other research suggests that grade inflation begins at the high school level, and college-level grade inflation results from the distorted expectations of students, who have only earned high grades throughout their academic career. A very large study conducted by the ACT Corporation found grade inflation among high school students by measuring ACT composite scores and high school GPAs over thirteen years, from 1991 to 2003.<sup>137</sup> Because the ACT is constructed to measure the same content every year, the relationship between high school GPA and ACT composite score should be stable.<sup>138</sup> However, the ACT study demonstrated that students in 2003 had a higher high school GPA at every composite score point, concluding the average high school GPA has been inflated 12.5% between 1991 and 2003.<sup>139</sup> A similar study conducted by the College Board,

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<sup>130</sup> *Where A is Ordinary*, *supra* note 116, at 5, 10.

<sup>131</sup> *Id.* at 1, *see also* Rampell, *supra* note 121.

<sup>132</sup> *Where A is Ordinary*, *supra* note 116, at 16.

<sup>133</sup> *Id.* at 2.

<sup>134</sup> *See* Archibald & Feldman, *supra* note 67.

<sup>135</sup> *Where A is Ordinary*, *supra* note 116, at 16.

<sup>136</sup> *Id.*

<sup>137</sup> *Are High School Grades Inflated?*, ACT, Inc. (2005) available at <https://www.act.org/research/policymakers/pdf/issues.pdf>.

<sup>138</sup> *Id.* at 2.

<sup>139</sup> In a follow-up study, researchers from ACT did not find grade inflation between 2004 and 2011. However, these results are skewed because the ACT test was adopted a statewide test in those years, and teachers were known to "teach to the test." *Id.* at 4; *but c.f.*, Qian Zhang & Edgar I. Sanchez, *High School Grade Inflation from 2004 to 2011*, ACT RESEARCH REPORT SERIES (2013), available at

the company that produces the SAT, measured high school GPAs between 1996 and 2006, as well as grade non-equivalence between scores earned on Advanced Placement (AP) tests and the grades awarded by teachers in AP courses.<sup>140</sup> Like the ACT, SAT and AP test scores measure the same content over time, and both examinations are subject to rigorous statistical tests to ensure equivalence over time.<sup>141</sup> College Board researchers found that the average GPA for the class of 1996 was 2.64, but by 2006, it was 2.90, without a corresponding increase in SAT scores. Researchers looking at equivalence between AP scores and AP grades found that schools used widely differing grading standards, and equivalence between AP grades and AP test scores varied by high school.<sup>142</sup>

Although there are many theories to explain grade inflation, there is no generally accepted method to curb the problem. Grade inflation changes the definition of student success when all but the lowest-achieving students are clustered between the A- and B+ range. The definition of student success is complicated by the data indicating that students are studying significantly less than previous generations of college students and demonstrating little improvement in critical thinking, analytical reasoning, and writing skills during their undergraduate years. Students expect higher grades, but are not showing evidence of learning.

## 2. *The effects of grade compression on law schools*

Grade inflation goes hand-in-hand with grade compression. Because the average GPA can only be raised so far, grades for many students become compressed between an A and high B's. This compression makes it more difficult for law schools admissions professionals and academic support personnel to distinguish between incoming students who are exceptionally bright and talented, and their peers who may have earned similar grades, but have only average thinking and reasoning

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[http://www.act.org/research/researchers/reports/pdf/ACT\\_RR2013-3.pdf](http://www.act.org/research/researchers/reports/pdf/ACT_RR2013-3.pdf).

<sup>140</sup> Kelly E. Godfrey, *Investigating Grade Inflation and Non-Equivalence*, COLL. BD. RESEARCH REPORTS (2011), available at <https://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2011-2-investigating-grade-inflation-non-equivalence.pdf>.

<sup>141</sup> *Id.* at 4.

<sup>142</sup> *Id.* at 14.

skills. Grade compression is the result of grade inflation, and it has significant relevance to law schools. Grade compression and grade inflation results in over-reliance on the LSAT as a proxy for academic ability,<sup>143</sup> exaggerating the problems inherent in using standardized tests in admission.<sup>144</sup> Critics already note that the LSAT is too heavily relied upon, providing advantages for students with the resources to attend commercial prep courses.<sup>145</sup> In a study measuring the effect of grade inflation on the admissions process at ten law schools with relatively stable levels of selectivity, the reward for scoring higher on the LSAT “rose by about 50 percent [between 1992 and 1997], while the rewards for being ranked higher in terms of GPA remained the same.”<sup>146</sup> Even the Law School Admissions Council (LSAC), which administers the LSAT, states that the test is useful for a “limited purpose,” and should be used with other criteria.<sup>147</sup> However, LSAC also notes that undergraduate GPA alone is a “fairly poor predictor of later academic achievement.”<sup>148</sup> Admissions professionals have no other tool to distinguish between applicants with near-identical grade point averages other than the LSAT<sup>149</sup> and other, arguably less reliable measures of potential, such as personal statements and recommendations.

Grade compression also makes it more difficult for law schools to identify students who may have a specific academic weaknesses that could be addressed early in law school, through additional attention from an academic support professional, a specialized summer preparatory course, pre-orientation or one-on-one counseling. When exceptional and

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<sup>143</sup> Winai Wongsurawat, *Grade Inflation and Law School Admissions*, 16 QUALITY ASSURANCE IN EDUC. 232 (2008) (unfortunately, there are no more recent studies tracking the increased use of LSAT in law school admissions).

<sup>144</sup> See generally Phoebe Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, (2006) (making a much broader case for overreliance on the LSAT than this article asserts here).

<sup>145</sup> See Pamela Edwards, *The Shell Game: Who Is Responsible For The Overuse Of The LSAT In Law School Admissions?*, 80 ST. JOHN'S L. REV. 153, 161–62 (2006).

<sup>146</sup> Wongsurawat, *supra* note 143, at 224–25.

<sup>147</sup> Lisa Anthony et. al., *LSAT Technical Report Series*, 6 (2013) available at [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-13-03.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-13-03.pdf).

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

<sup>149</sup> *Grading in American Colleges and Universities*, *supra* note 121 (“Graduate schools, professional schools, and employers will likely heavily discount students’ undergraduate achievements and instead rely on standardized test scores in making evaluations.”).

mediocre college work are graded equally in the undergraduate setting, law schools can only address academic deficiencies after students are experiencing academic difficulty in law school. It is significantly more difficult to help a student after they have a semester or year of low grades than it is to provide additional support to prevent students from learning dysfunctional study habits, earning low grades, and becoming disillusioned with law school.

Perhaps the most pernicious effect of grade inflation is the diminished motivation of students. If “grades are the primary currency of academia,” students have little motivation to push themselves to learn more. An A is the top of the grading scale, so their extra effort cannot be rewarded. Students receive high marks regardless of their effort. The lack of rigor in the undergraduate curriculum lulls students into a false sense of competency. Students who have only received A’s and B’s, through little effort, are unprepared for the challenge of law school academics. Students are less likely to understand that being admitted to law school is not enough to succeed in law school.

### *E. Students Evaluations of Teaching and Declining Student Learning*

One of the more controversial theories, explaining the rise in grades from the mid-1980s to today, is the positive correlation between students’ grades and positive student evaluations of teaching or SETs. SETs were introduced at undergraduate institutions in the 1970s, and widely employed by colleges and universities beginning in the 1980s.<sup>150</sup> The motivation behind implementing SETs in the 1980s was positive; educational researchers, as well as individual professors, sought to improve teaching techniques by soliciting the opinions of students.<sup>151</sup> Despite the positive motivation behind their implementation, the use of SETs in faculty tenure, promotion, and retention decisions assumes the unproven thesis that students are accurate evaluators of teaching effectiveness.<sup>152</sup> Although most educational researchers “accept

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<sup>150</sup> See generally Laura Langbein, *The Validity of Student Evaluations of Teaching*, 27 PS: POL. SCI. AND POL. 545, 545–53, (1994) (by 1988, 80% of liberal arts colleges used student evaluations of teaching as a measure to evaluate teaching).

<sup>151</sup> JOHNSON, *supra* note 123, at 151.

<sup>152</sup> See Langbein, *supra* note 150, at 551 (“It is, in fact, unclear what student

that proposition that assigned grades are positively correlated with student evaluations of teaching,” many attribute the correlation to factors unrelated to grade leniency.<sup>153</sup> One prominent explanation is the teacher-effectiveness theory.<sup>154</sup> The teacher-effectiveness theory posits that instructors become more successful by employing more effective teaching methods, thus improving student learning and students grades.<sup>155</sup> Traditional observational studies of the relationship between grades and SETs cannot differentiate between instructors that “buy” higher SETs through grade leniency, and teachers who employ more effective teaching methods, therefore resulting in higher SETs.<sup>156</sup> Observational studies, which do not have a control group, cannot determine the source of the positive correlation between student grades and SETs because of the difficulty in accounting for variation in environmental factors, such as prior student interest in the area of study, student motivation, the level of the course, differences in grading norms across academic disciplines, demographic variations in student population or discrepancies between student grade expectations.<sup>157</sup>

The difficulty in determining the relationship between positive SETs and student grades led to a landmark study at Duke University. Professor Valen Johnson conducted an empirical, experimental study of the relationship between grade leniency and SETs at Duke University during the 1998-1999 academic year.<sup>158</sup> The Duke Undergraduates Evaluate

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ratings really measure. There is evidence to support the argument that the ratings are a popularity contest as well as the argument that ratings are a measure of quality instruction.”); *see also* JOHNSON, *supra* note 123, at 163.

<sup>153</sup> JOHNSON, *supra* note 123, at 48.

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

<sup>155</sup> Richard Stratton et al., *Faculty Behavior, Grades, and Student Evaluations*, J. ECON. EDUC. 5, 6 (1994); *see also* JOHNSON, *supra* note 123, at 49.

<sup>156</sup> *See* JOHNSON, *supra* note 123, at 81 (Observational studies are considered less reliable because researchers observe subjects and draw inferences from their behavior, but do not use a control group to control for bias).

<sup>157</sup> *Id.* at 69, 72, 81, 84 (“It is important to note the other theories explaining student bias in SETs. Grade attribution theory posits that students attribute a high grade in a course to personal characteristics, but will attribute a low grade in a course to poor teaching. Grade attribution theory and grade leniency theory have some overlap, with students rating most highly the professors from whom they receive the highest grades. The intervening variables theory posits that environmental factors can explain the positive correlation between SETs and student grades. Observational studies “have proven inappropriate for establishing a causal link between these variables.”).

<sup>158</sup> *Id.* at 11.

Teaching (“DUET”)<sup>159</sup> project was formed after considerable discussion among faculty at Duke regarding the proportion of A’s awarded to undergraduates.<sup>160</sup> DUET was an online course evaluation system that invited all full-time undergraduates to participate in course evaluation during two, three-week periods: the first period commencing the week prior to fall registration, and the second period commencing a week prior to registration for spring classes.<sup>161</sup> By participating in the DUET study, students could view fall course evaluations and grade data for the classes in which they planned to enroll in the spring semester.<sup>162</sup> Unbeknownst to students, DUET recorded every student query searching for mean course grades or a summary of course evaluations data entered by other students.<sup>163</sup> Therefore, the researchers could measure whether a student viewed the fall semester course evaluations and grade data, as well as whether the student subsequently enrolled in the course for the following semester.

The DUET study was designed to disentangle biasing effects when correlating SETs, grades, and student course selection.<sup>164</sup> Student evaluations were “regressed based on grades, mean item responses collected from other students, and prior student interest variables” to clarify the extent to which grades reflect a biasing effect on SETs.<sup>165</sup> Researchers could determine if students lowered the course evaluation after viewing their grade in the class because survey responses were collected from students before and after they received their final course grades to determine the magnitude of the bias grades have on SETs.<sup>166</sup> The results from the DUET study confirmed that student grades have a biasing effect on SETs.<sup>167</sup> DUET demonstrated a linear relationship between grades and

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<sup>159</sup> *Id.* at 16–17. For a thorough discussion of the DUET methodology, see JOHNSON, *supra* note 123, at 84–125.

<sup>160</sup> *Id.* at 2 (“ . . . grades at Duke University had risen steadily until in 1997, over 45% of all grades awarded to undergraduates at Duke were A’s of one flavor or another. Fewer than 15% of graders were C+ or lower.”).

<sup>161</sup> *Id.* at 17.

<sup>162</sup> JOHNSON, *supra* note 123, at 17.

<sup>163</sup> *Id.* at 24.

<sup>164</sup> *Id.* at 49, 83 (biasing effects are those factors that affect SETs but are not related to either effective teaching or student learning).

<sup>165</sup> *Id.* at 11.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 118.

SETs in courses where students expected to receive a grade above a C- (less than 3% of student grades were awarded below a C-).<sup>168</sup>

The DUET study also analyzed the relationship between grades and student selection of classes. While this portion of the study was based on fewer student responses<sup>169</sup> due to the early termination of the study,<sup>170</sup> the results confirm what many undergraduate professors know anecdotally; students manipulate course selection to enhance their GPA.<sup>171</sup> The study found the influence of grading policies on student course selection to be substantial. Students were about twice as likely to select a course with an A- mean course grade over a course with B mean course grade.<sup>172</sup> The finding that students “reward” teachers that give better grades further explains the rise in grade inflation since the 1980s. Students are more likely to enroll in classes that have higher mean grades and therefore, the instructors who grade less stringently are less likely to have undersubscribed or cancelled courses.<sup>173</sup>

The selection of a course with a higher mean course grade does not by itself imply that students are seeking easier courses. Research has confirmed that students give higher SETs in less difficult courses.<sup>174</sup> DUET found that “increases in mean course grade and increases in individual student grades are associated with decreases in course difficulty.”<sup>175</sup> A survey of sociology majors at a mid-sized public university in the Northeast found that 73.3% of students would enroll in a course “that resulted in little or no learning if they were

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<sup>168</sup> *Id.* at 107–08.

<sup>169</sup> *Id.* at 179–81.

<sup>170</sup> *Id.* at 17, 26, (The DUET study was schedule to run for three years, but was terminated after one year due to complaints by professors who believed the DUET study represented a violation of their privacy, as well as opposition by professors who believed their course enrollments would suffer as a result of publication of mean course grades.).

<sup>171</sup> *Id.* at 168.

<sup>172</sup> *Id.* at 193.

<sup>173</sup> *Id.*

<sup>174</sup> *But cf.* MICHAEL HUNTER SCHWARTZ ET AL., WHAT THE BEST LAW PROFESSORS DO (2013) (while the authors suggest that law students would take one of the extraordinary teachers profiled in the book even if it would result in a lower grade, these professors are outliers. Student may be willing to risk a lower grade in law school if they will be taught by one of the best law teachers in America, but the modal teacher, especially at the undergraduate level, does not provide the benefits of an extraordinary teacher).

<sup>175</sup> JOHNSON, *supra* note 123, at 93, 94.



assured an A grade.”<sup>176</sup> These findings help explain why no “statistically significant gains in critical thinking, complex reasoning, and writing skills” were found in 45% of the college students.<sup>177</sup> This also helps explain why Babcock and Marks found that college students devote 13 hours less per week to academics in 2004 than college students did in 1961.<sup>178</sup>

DUET is not the only study to have found students “game” course selection to maximize their GPA. In April 1996, the Cornell University Faculty Senate adopted a policy to publish course median grades on the registrar’s website, under a tab titled “Useful Links.”<sup>179</sup> The purpose of this policy was to give students a more accurate idea of their performance in a course, by allowing them to compare their grade with the course median. However, a longitudinal study on the effects of publicizing course medians demonstrated that students used the published medians to “game” course selection.<sup>180</sup> Researchers Talia Bar, Vrinda Kadiyali, and Asaf Zussman compared median grades in courses taught before the publication of course medians, from 1990–1997, and the same courses taught after the publication of medians, 1998–2004.<sup>181</sup> They found that the share of students receiving grades in A range strongly increased: a 16% increase in the number of classes with a median grade in the A range, and a 42% increase in the number of student enrolled in courses with median grades in the A range.<sup>182</sup> The course median data was not listed prominently on the registrar’s website, and students had to have knowledge of the data in order to use it to select their classes, so researchers additionally surveyed 500 students in the Economics department to determine if students were accessing the data to inform course selection. Almost 60% of the students indicated that they visited the website, and roughly 80% indicated that they used the information to select courses “or have heard of other students doing so.”<sup>183</sup>

One of the consequences of the publication of course

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<sup>176</sup> Delucchi & Korgen, *supra* note 111, at 104.

<sup>177</sup> ARUM & ROKSA, *supra* note 8, at 36.

<sup>178</sup> Babcock & Marks, *supra* note 3, at 468.

<sup>179</sup> Talia Bar et al., *Grade Information and Grade Inflation: The Cornell Experiment*, 23 J. ECON. PERSP. 93, 94 (2009).

<sup>180</sup> *Id.* at 105.

<sup>181</sup> *Id.* at 95.

<sup>182</sup> *Id.* at 98.

<sup>183</sup> *Id.*

medians is the possible punishment of professors who grade more stringently. Fewer students enroll in courses with a lower course median, making it more likely the course will be cancelled. Students with lower GPAs have the most to gain by enrolling in more leniently graded courses. Higher-ability students are also discouraged from choosing strictly graded courses, because they will likely be compared to only other high-ability students, which results in a higher likelihood of a lower grade in the course.<sup>184</sup> Even ambitious, high-ability students looking for academic challenges would be made better off by choosing the more leniently graded courses; high-ability students would be risking discrimination in post-graduate employment opportunities and admission to graduate and professional school because their lower-ability peers would have earned higher grades from lenient courses.

A 2010 study at the U.S. Air Force Academy (USAFA) confirmed the findings of the DUET and Cornell studies, finding that students “reward” teachers with better SETs if they receive better grades.<sup>185</sup> The USAFA is a highly unique post-secondary institution; not only are students selected in a competitive manner, unlike other college admissions processes,<sup>186</sup> but once students are enrolled they must take a common core of courses, which are taught using a common syllabus, and tested using the same exam during a common exam period.<sup>187</sup> Students do not select their professors; they are randomly assigned to professors of varying experience and qualifications.<sup>188</sup> All professors are given access to the final exam before it is administered, which allows (but does not require) professors to “teach to the test.”<sup>189</sup> Additionally, students are randomly assigned to follow-on, higher level courses that build on the material and learning from the earlier courses. Teaching to the test may result in higher course grades, but negatively impact deep learning, resulting in lower grades in follow-on, higher level courses.<sup>190</sup> The study

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<sup>184</sup> *Id.* at 107.

<sup>185</sup> Scott E. Carrell & James E. West, *Does Professor Quality Matter? Evidence from Random Assignment of Students to Professors*, 118 J. POL. ECON. 409, 412 (2010).

<sup>186</sup> *Id.* at 413–14.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 411.

<sup>189</sup> *Id.* at 412.

<sup>190</sup> *Id.* at 410, 412 (“our results indicate that professors who excel at promoting contemporaneous students achievement, on average, harm the subsequent

measured the performance of 10,534 students from fall 2000 to the spring of 2007,<sup>191</sup> using student performance from 2,820 separate course-sections taught by 421 different faculty members,<sup>192</sup> and found that students' evaluation scores are "positively correlated with" course grades, but "negatively correlated with deep learning," as demonstrated by performance in follow-on, higher level courses.<sup>193</sup> The USAFA study adds weight to the argument that SETs do not measure student learning, but do measure students' satisfaction with their course grades.

It can be argued that the findings of the DUET study, as well as the findings from studies at Cornell and the U.S. Air Force Academy, are not representative of the vast majority of college students today. Students attending these elite universities are highly ambitious and have a demonstrated history of academic achievement. Non-traditional students, such as students who work full time and students with children, may be less influenced by SETs and courses with high median grades and more interested in courses that meet at times when they can make it to campus and which meet degree requirements. Non-traditional students presumably have less access to the sources of informal, word-of-mouth information about "gut" courses and easy professors, but still have access to online peer generated reviews, such as those found on RateMyProfessor.com.<sup>194</sup>

The work of Rojstazer and Healy confirms that schools with more non-traditional students, such as public commuter universities (as compared to public flagship and private universities), have less grade inflation than private colleges and large flagship universities.<sup>195</sup> This could be evidence that non-traditional students are less likely to use SETs to "game" course selection and reward professors that grade more leniently. This could be because they are less motivated by high grades and more motivated to find classes and professors that can accommodate work schedules and family commitments. However, this could also be evidence that students at

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performance of students in more advanced classes.").

<sup>191</sup> *Id.* at 414.

<sup>192</sup> *Id.* at 415.

<sup>193</sup> *Id.* at 428.

<sup>194</sup> Bar et al., *supra* note 179, at 107.

<sup>195</sup> *Where A Is Ordinary*, *supra* note 116, Table 1 at 4.

commuter colleges are so underprepared by the time they reach college that they are not capable of meeting even a lower level of achievement. Until more research is completed regarding these students and colleges, the reasons for the lesser level of grade inflation at less competitive colleges and universities is up to speculation.

There needs to be more research on the relationship between student preparedness and grade inflation because the problem reaches places in academia that should be immune from the influence of SETs. In large research universities, where professors are awarded tenure based on research and publication, SETs should have less influence and, therefore, grade inflation is presumably caused by a different factor.<sup>196</sup> An alternative explanation for grade inflation is “grade grubbing,” also referred to as student nuisance. “Grade grubbing,” or student nuisance, is defined as “students pestering professors for better grades.”<sup>197</sup> Faculty members at research universities find that student nuisance reduces time and energy needed for research, which is used to determine tenure.<sup>198</sup>

For example, in a study at UC-Irvine where SETs are not used in determining tenure and promotions, researchers found that professors are more likely to grade leniently to avoid the time costs associated with student nuisance.<sup>199</sup> Seventy-two percent of professors surveyed found student nuisance costly (in terms of time) or very annoying.<sup>200</sup> The majority of “pestering” students are lower-level performers, with the vast majority (76.51% of pesterers) ranking below the 70<sup>th</sup> percentile in their class.<sup>201</sup> Therefore, it is advantageous for professors, especially assistant professors working towards tenure, to award high grades to reduce the time cost associated with student nuisance. The research confirmed that assistant professors awarded higher grades than adjunct or full

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<sup>196</sup> Wan-Ju Iris Franz, *Grade Inflation Under the Threat of Students' Nuisance: Theory and Evidence*, 29 *ECON. EDUC. REV.* 411, 412 (2010).

<sup>197</sup> *Id.* at 412. For commentary about grade grubbing internationally, see Chris Parr, *Please Professor, I Want Some More*, *TIMES HIGHER EDUC.* (Feb. 28, 2013) <http://www.timeshighereducation.co.uk/news/please-professor-i-want-some-more/2002088.article>.

<sup>198</sup> *Id.* at 419.

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

<sup>200</sup> *Id.* at 416.

<sup>201</sup> *Id.* at 421.

professors in all but one course studied.<sup>202</sup> An alternative explanation is that assistant professors are less experienced with “grade grubbing,” and do not know how to respond to students who try to get a grade changed. The UC-Irvine study may provide an additional explanation for grade inflation, but more research is needed to confirm the relationship between student nuisance and grade inflation at institutions that do not use SETs to award tenure.

The finding that lower-performing students are more likely to engage in “grade grubbing” and resulting grade inflation further supports the contention that grade inflation has a detrimental effect on law schools. If law schools had better data through more accurate undergraduate grades,<sup>203</sup> they could more accurately direct students who have demonstrated lesser mastery of fundamental skills to academic assistance programs.<sup>204</sup> An example of this intervention would be one-on-one tutoring in legal writing for students with below average grades in writing intensive undergraduate courses. Students with lower grades in courses focusing on logic and analytical thinking could receive assistance in the form of a summer pre-orientation program. It is much more difficult for law schools to target students with demonstrated deficiencies when all grades are compressed between the A and B range.

*F. Summary: How Undergraduate Education Has Been “Gamed”*

The lamentation of law professors that students “just aren’t what they used to be” is more than the idle chatter of ageing academics. Most entering law students know less than prior generations of law students. Students have found that maximizing grades, minimizing study time, and focusing on the credentialing aspect of college education results in a more pleasurable, less stressful experience, but one that leaves them ill-prepared for higher-level intellectual tasks.<sup>205</sup> The

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<sup>202</sup> *Id.* at 419.

<sup>203</sup> Franz, *supra* note 196, at 111.

<sup>204</sup> Mark Graham & Bryan Adamson, *Law Students’ Undergraduate Major: Implications for Law School Academic Success Programs (ASPs)*, 69 UMKC L. REV. 533, 535 (2001).

<sup>205</sup> Delucchi & Korgen, *supra* note 111, at 101 (describing the “academic milieu” at colleges and universities “as one in which students do not expect higher education to involve effort, challenge, or constructive criticism.”).

undergraduate experience has changed from one of intellectual rigor and exploration to one that focuses on personal pleasure, much like a four-year vacation.<sup>206</sup>

### III. PREPARING THE UNDERPREPARED: ACADEMIC SUPPORT PROGRAMS

The empirical research suggests many students entering law school are unaccustomed to the amount of studying necessary for law school success; do not have the critical thinking and analytical reasoning skills that provide the foundation for “thinking like a lawyer;” and expect grades above a 3.3. Although law schools have a long history of providing extra support to students who are underprepared for law school, they are not designed to provide systemic support.<sup>207</sup> ABA Standard 303, Interpretation 303-3, requires law schools to provide the academic support necessary to “complete the program, graduate, and become a member of the legal profession.”<sup>208</sup> However, traditional academic support programs were designed to help a limited, discrete group of students for a limited time. This model works if only a limited number of students are in academic distress. The sheer number of students who are graduating from college without adequate skills to master the law school curriculum poses significant challenges to the traditional model of student support. An examination of the history of academic support programs, and the expansion of these programs as greater proportions of entering students request or require academic assistance, demonstrates the limitations of ASPs when most entering students need assistance.

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<sup>206</sup> HACKER & DREIFUS, *supra* note 13, at 114 (noting that “colleges are caught up in an extravagant amenities race, tripping over each other to provide luxuries, large and small.” The result of this “race” is skyrocketing tuition, and college environment more like a five-star resort than an educational experience); *see also* Glenn, *supra* note 72 (quoting a business student, “In a typical day, ‘I just play sports, maybe go to the gym. Eat. Probably drink a little bit. Just kind of goof around all day.’ He says his grade-point average is 3.3.”).

<sup>207</sup> Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing The Law School*, 5 CHARLESTON L. REV. 269, 275–79 (2011).

<sup>208</sup> A.B.A., *ABA Standards and Rules of Procedure for Approval of Law Schools 2013–2014*, 24 available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_fal\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_school\\_s\\_body.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_fal_aba_standards_and_rules_of_procedure_for_approval_of_law_school_s_body.authcheckdam.pdf)

### A *Brief History of Academic Support Programs (“ASPs”)*

The difficulty with using traditional ASPs to address widespread skills deficits is rooted in the history of ASPs. ASPs began more than thirty years ago, and have their roots in two places: minority-retention programs and academic programs to help “non-traditional” law students.<sup>209</sup> “Non-traditional” is a term that has no precise definition, but non-traditional includes students with learning and physical disabilities, students outside the age range of the typical or modal law student, and students who represent diversity outside of racial or ethnic background.<sup>210</sup> By 1995, over 100 law schools offered some support to assist minority and nontraditional students.<sup>211</sup> These academic support programs were premised on the idea that some specialized or additional instruction, either before or during law school, would mitigate or overcome the disadvantages faced by students with lesser entering credentials (measured by LSAT score and undergraduate GPA).<sup>212</sup> The results from these early programs, which focused on a discrete, exclusive group of students, had mixed results depending on the type of intervention.<sup>213</sup> However, these programs struggled with how to measure success<sup>214</sup> and faced criticism from scholars who questioned the appropriateness of “retooling” minority and non-traditional law students to fit within traditional legal academia.<sup>215</sup> ASPs tailored to the needs of minority and non-traditional students had to choose between an assimilationist model, which viewed ASP solely as a means of enhancing academic performance, and a “learning

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<sup>209</sup> Kristine Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 158–59 (1995); see also Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond-Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?*, 73 UMKC L. REV. 497 (2004).

<sup>210</sup> Knaplund & Sander, *supra* note 209, at 159–60.

<sup>211</sup> *Id.* at 158–59.

<sup>212</sup> *Id.* at 160.

<sup>213</sup> *Id.* at 169.

<sup>214</sup> Leslie Yalof Garfield & Kelly Koenig Levi, *Finding Success in the “Cauldron of Competition:” The Effectiveness of Academic Support Programs*, 2004 BYU EDUC. & L. J. 1, 4 (2004) (It is difficult to measure “success” of an ASP due to ethical issues. There can be no control group of students who should receive additional services, but are left out of the program.).

<sup>215</sup> Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 740 (2000).

theory approach,” which sought to address legal pedagogy and its effect on students of color.<sup>216</sup> Both models were criticized because they focused on the second-class learning environment within ASPs, which were (and, at many law schools, remain) marginalized within the law school hierarchy, leaving students of color and non-traditional students stigmatized and alienated.<sup>217</sup> As late as 1997, academic literature described a “common mission” for ASPs, as “provid[ing] diverse persons access to legal education, help[ing] create community, [and] help[ing] diverse students succeed and excel academically.”<sup>218</sup>

As ASP organizations grew in number, their mission moved beyond providing supplemental instruction to students of color and non-traditional law students to providing support for students that faced academic difficulty or had admissions predictors that placed them at risk of academic difficulty, regardless of race, ethnicity, or status.<sup>219</sup> By the mid-1990s, ASPs began to expand beyond their original “core mission,” in part because of challenges to the constitutionality of minority-only programs.<sup>220</sup> This expansion posed an ideological problem for ASPs; programs designed to provide marginalized students with the means to navigate an alienating pedagogy through community and group solidarity are not necessarily the same programs that foster academic success in majority law students with skills deficits.<sup>221</sup>

Despite the fact that programs designed to assist students of color and non-traditional law students and programs focused on assisting students in academic difficulty did not share complementary goals, law schools merged these programs under the umbrella of ASP.<sup>222</sup> Throughout the 2000s, ASPs expanded their mission to provide assistance to any student experiencing academic difficulty at any point in their academic

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<sup>216</sup> *Id.* at 761–62.

<sup>217</sup> *Id.* at 765.

<sup>218</sup> Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 842 (1997).

<sup>219</sup> Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 251 (1996).

<sup>220</sup> Suni, *supra* note 209, at 502.

<sup>221</sup> See Iijima, *supra* note 215, at 772–74, (advocating for bifurcated ASPs; “Falseit is important to create and maintain a separate character between tutorial programs designed to improve law school exam results, and programs designed to make underrepresented populations in the law school community succeed in the environment.”).

<sup>222</sup> Cerminara, *supra* note 219, at 251.



career. By 2005, ASP's mission had grown to include post-graduate bar exam success programs.<sup>223</sup> Despite the expansion of ASPs, their target population is still limited to students at risk of academic difficulty, academic dismissal, or failure on the bar exam at many law schools. For a limited number of schools, ASPs reach all students through "extensive and pervasive" programs.<sup>224</sup> However, because students often require one-on-one counseling to determine the source of their academic challenge and frequently require additional meetings to ameliorate academic deficiencies, ASPs are time and labor intensive. The majority of ASPs are limited to certain students, constrained in what they may "teach" (or if they may "teach" at all) and remain relegated to second-class status, staffed by non-tenure track faculty or staff members.<sup>225</sup>

*B. Academic Support in a Time of Increased Need and Decreasing Budgets*

For law schools facing the challenge of underprepared law students at a systemic level, the majority of ASPs are understaffed, underfunded, and unprepared to help students at a systemic level. Most law schools assume that the majority of the incoming students will be able to master the law school curriculum, and a small number of students with specific deficiencies will master the curriculum after limited assistance. A small staff (or a staff of one) was adequate to meet the needs of students with low predictors (LSAT scores and undergraduate GPA) when these factors were considered the correct measure of law student preparedness. The problem of grade inflation throughout undergraduate colleges and universities calls into question whether undergraduate GPA is an accurate predictor of law student preparedness, as grade compression makes it increasingly difficult to distinguish between a student prepared for the rigors of law school and a mediocre student who "gamed" course selection and failed to gain critical thinking skills.

Law schools' reluctance to evaluate the effectiveness of the

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<sup>223</sup> Louis N. Schulze Jr., *Alternative Justifications for Academic Support II: How "Academic Support Across the Curriculum" Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 CAP. U. L. REV. 1, 25 (2012).

<sup>224</sup> *Id.* at 5.

<sup>225</sup> *Id.* at 26.

instructional program has made it difficult for law schools to empirically measure student learning during the first year of law school. Because law school exams are “curved” or normed at most law schools, there is no absolute measure of student achievement.<sup>226</sup> If students are coming in less prepared than their predecessors, it is very likely that students are learning less because they are starting farther behind. It is very difficult for law professors to see whether students are demonstrating less mastery over the subject matter than their predecessors because exams are curved against students in the same class. It is difficult if not impossible to measure students against prior classes without a comprehensive, summative, criteria-referenced exam, conducted each year for several years. Because student preparedness has slipped slowly, almost imperceptively, over fifty years, it is difficult for law schools to measure if students are learning. The new ABA focus on outcome measures should assist law schools assessment of students learning during the course of law school.<sup>227</sup>

Compounding the problem of underprepared law students is the fact that the problem does not affect all law schools equally. The most academically prepared students—students who majored in the liberal arts and took courses with rigorous reading and writing requirements and showed the most significant gains in critical thinking and analytical skills; students who studied more than twenty hours per week—are likely to cluster at the most selective law schools.<sup>228</sup> The most selective law schools (colloquially referred to as “T14”)<sup>229</sup> have

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<sup>226</sup> Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE B. 11 (2008) (the ABA report explicitly states that law schools should “conduct criteria-referenced assessments which judge by one standard of performance rather than grading on a curve.”).

<sup>227</sup> *Id.*

<sup>228</sup> See HACKER & DREIFUS, *supra* note 13, at 69; see also *Best Law Schools*, U.S. NEWS AND WORLD REP. L. SCH. RANKINGS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=992008> (last visited Sept. 19, 2014).

<sup>229</sup> See David Lat, *The Decision: Tempted by the T14*, ABOVE THE L. (Apr. 15, 2013), <http://abovethelaw.com/2013/04/the-decision-tempted-by-the-t14/>; see also Nicole Weber, *Do T14 Law Schools Produce Better Associates?*, VAULT BLOGS (May 16, 2014), <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/do-t14-law-schools-produce-better-associates/> (“T-14” law schools are the fourteen law schools that have comprised the top of U.S. News and World Report rankings since their inception 1987. The T-14 are remarkable due to the lack of movement among the top fourteen law schools; while there are minor year-to-year variation, Yale has been ranked the #1 law school since the inception of rankings, and no law school ranked in the top 14 in

endowments and funding to provide extra support to students in need, but are far less likely to admit students with substantial remedial academic issues.<sup>230</sup> Schools that admit students with lower entering credentials are likely to be ranked lower in the rankings, rely more on tuition revenue for funding, and be most hurt by the recent declines in law school enrollments.<sup>231</sup> Because these schools are more likely to rely on tuition revenue rather than endowment revenue, these schools are less able to fund broad-based ASPs to serve larger number of students at a time when the need for more fundamental skills training is growing.<sup>232</sup>

In conclusion, ASPs—the traditional method of addressing fundamental skills deficits in students—are ill equipped to provide the necessary instruction and support to the large number of academically underprepared students matriculating at law schools. While a small number of less-competitive or “access” law schools have created ASPs that provide support to all students, these school-wide programs are at risk due to declining enrollment and lower revenue. At a time when more and more incoming students are underprepared to master the law school curriculum, and fewer and fewer students are enrolling in law school, law schools need to question whether they are providing adequate services to matriculating students.

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1987 has fallen outside the top fourteen.)

<sup>230</sup> See Brian Leiter, *Top 20 Law Schools by Size of Endowment* [sic] (based on data from 2000), BRIAN LEITER'S L. SCH. REP. (Sept. 1, 2006), available at [http://leiterlawschool.typepad.com/leiter/2006/09/top\\_20\\_law\\_scho.html](http://leiterlawschool.typepad.com/leiter/2006/09/top_20_law_scho.html). Although this information is dated, it is unlikely that law school endowments, ranked in the hundreds of millions, have fluctuated so much that they would affect the availability of per pupil spending. All but one of the top twenty law schools ranked by size of endowment are also in the top twenty-five law schools ranked by U.S. News and Report; the outlier is Mercer Law School, ranked #104 in the most recent rankings; see also, *Mercer University (George)*, U.S. NEWS AND WORLD REP. L. SCH. RANKINGS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/mercer-university-george-03041> (last visited Sept. 19, 2014).

<sup>231</sup> See, e.g., Debra Cassens Weiss, *One Law School's Credit Rating Drops to Junk-bond Status*, A.B.A. J. (Dec. 9, 2013), [http://www.abajournal.com/news/article/one\\_law\\_schools\\_credit\\_rating\\_drops\\_to\\_junk\\_bond\\_status\\_the\\_weak\\_become\\_wea](http://www.abajournal.com/news/article/one_law_schools_credit_rating_drops_to_junk_bond_status_the_weak_become_wea); see also Jacob Gershman, *A Divide in Legal Education, New Report Says*, WALL ST. J. L. BLOG (Dec. 6, 2013), <http://blogs.wsj.com/law/2013/12/06/a-divide-emerges-in-legal-education-system-new-report-says/>.

<sup>232</sup> See STANDARD AND POOR'S RATING SERVICE, *As Law School Demand Drops, Credit Quality Among U.S. Schools Diverges*, available at [www.standardandpoors.com/ratingsdirect](http://www.standardandpoors.com/ratingsdirect) (pointing out that stand-alone law schools, unaffiliated with larger universities, are struggling because they rely on tuition to fund operations).

Because the decline in law school admissions and the decline in law student preparedness are not evenly distributed across all law schools, the problem of law student underpreparedness does not have a one-size-fits-all answer.<sup>233</sup> Law schools need to evaluate the preparedness of their incoming students, as well as the support programs in place for their students.

#### IV. QUESTIONING THE FUTURE OF THE FIRST YEAR CURRICULUM

##### A. *Is the relationship between undergraduate education and law schools a "Wicked Problem"?*

Law student underpreparedness is not a problem with a singular solution; it is a "wicked problem." The idea of "wicked problems" was first introduced into the legal literature in 2009.<sup>234</sup> Borrowing the concept from public policy, reform of legal education was framed as a "wicked problem:"

A "wicked problem" cannot be definitively described or understood (since it is seen differently by different stakeholders, has numerous causes, and is often the symptom of other problems). "Wicked problems" cannot be readily resolved (since they are characterized by a "no stopping rule" resulting from cascading consequences that are difficult to discern at the outset), and can only be addressed in 'better or worse' ways, rather than by proving solutions are "true" or "false."<sup>235</sup>

The problem of underprepared law students has all the elements of a "wicked problem"; it does not have a definitive formulation, because the problem presumes a specific solution.<sup>236</sup> Embedded in the problem of responsibility for legal training is the problem of preparation for the law school curriculum; before law schools can contemplate how to reform the curriculum, they must understand incoming students level of preparedness for higher-order thinking tasks.

Law schools may address the problem of

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<sup>233</sup> See Gus Lubin, *The Law School Crisis Doesn't Exist At Places Like Yale*, BUS. INSIDER (Jan. 30, 2013), <http://www.businessinsider.com/law-school-crisis-doesnt-exist-at-yale-2013-1>.

<sup>234</sup> Wegner, *supra* note 5, at 868.

<sup>235</sup> *Id.* at 870.

<sup>236</sup> Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCI. 161 (1973).

underpreparedness by starting with internal change. However, questions of internal changes to better prepare law students for the law school curriculum bring up broader issues involving law school reform. If law schools decide that the best solutions involve additional ASPs, or adopting academic support across the curriculum, law schools need to investigate how to balance the goals of academic support. One of the challenges of expanding ASPs is how to manage providing support for all incoming students without further diluting or eliminating ASPs' role in fostering diversity.<sup>237</sup> Law schools must better integrate ASPs into the curriculum so they can have a "significant impact", but they must do so without alienating doctrinal faculty.<sup>238</sup>

If law schools do decide to address the problem of underprepared students through internal measures, cost becomes an important factor. It will be a substantial challenge to address the fundamental skills deficit of incoming law students in a time of constrained budgets and declining enrollment.<sup>239</sup> Law schools must balance the expense of expanded ASPs against the costs created by faltering support in the marketplace for underprepared lawyers. An alternative to expanded ASPs are "learning centers," first advocated by Professor Wegner, where all students and faculty can receive services from intensive support to diagnostic testing.<sup>240</sup>

Law schools may choose to retrain faculty to better address the fundamental skills deficits of incoming students. If law school faculty is unwilling to work with ASPs, or ASPs cannot be further expanded, law schools can partner with faculty at schools of education to help law professors use teaching techniques that address student skills deficits. Most law schools have a wealth of institutionally-related or

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<sup>237</sup> See Suni, *supra* note 209, at 501–02; see also Aaron N. Taylor, *As Law Schools Struggle, Diversity Offers Opportunities*, CHRON. HIGHER EDUC. (Feb. 10, 2014), <http://chronicle.com/article/As-Law-Schools-Struggle/144631/>.

<sup>238</sup> Suni, *supra* note 209, at 505.

<sup>239</sup> See Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. L. BLOG (July 15, 2013), <http://online.wsj.com/news/articles/SB10001424127887323664204578607810292433272>; Paul L. Caron, *Catholic University Imposes 20% Budget Cut Due to Declining Law School Enrollment*, TAX PROF BLOG (Apr. 17, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/04/catholic.html](http://taxprof.typepad.com/taxprof_blog/2013/04/catholic.html).

<sup>240</sup> ROY STUCKEY ET. AL., BEST PRACTICES FOR LEGAL EDUCATION, 161–63 (2007) (quoting Judith Wegner, *Better Writing, Better Thinking: Thinking Like a Lawyer*, 31 (2003) (unpublished manuscript) (on file with Roy Stuckey)).

geographically-close resources to help them tackle the challenge of underprepared law students. Law schools need to be willing to address the issue of underprepared law students, and ask for assistance for other academics with more expertise in learning and teaching.

Another element of the “wicked problem” facing reform of legal education is how responsibility should be allocated for legal training.<sup>241</sup> All law schools should start by asking who is responsible for ensuring entering law students are prepared to tackle the 1L curriculum. Law schools need to discuss whether undergraduate institutions should be responsible for pre-law preparation, or if this task is better suited to law schools. If it is the responsibility of undergraduate institutions, law schools can work with colleges and universities to better prepare students. Law schools can work with the LSAC, which already has a presence in undergraduate education, to audit courses to determine their content and rigor.<sup>242</sup> Law school may chose to follow the admissions model provided by medical schools, which requires students to take specific classes as a prerequisite to admission.<sup>243</sup> Law schools can partner with stakeholders to choose a better path for pre-law students.

This article has spent many pages formulating the problem of underprepared law students, but has only considered the problem from the perspective of law schools. Many constituencies outside of the legal community would contend that undergraduate education is working quite well,<sup>244</sup> or that

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<sup>241</sup> *Id.* at 871, 943 (noting that “first year reform is probably not a ‘wicked problem,’” structural reforms to address pre-law underpreparedness go beyond the first year curriculum because the problem reaches into undergraduate institutions).

<sup>242</sup> See *The Credential Assembly Service (CAS), Applying to Law School*, LSAC available at <http://www.lsac.org/jd/applying-to-law-school/cas> (last visited Sept. 29, 2014). The LSAC, through its Credential Assembly Service, already works with undergraduate institutions to collect transcripts and letters of recommendation. Additionally, the LSAC provides an interpretive guide to undergraduate grading systems; see also *Interpretive Guide to Undergraduate Grading System, Publications*, LSAC available at <http://www.lsac.org/lisacresources/publications/igugs> (last visited Sept. 29, 2014). The interpretative guide provides law schools with information “about the various undergraduate school grading systems, policies, and degree requirements.” It does not, however, provide substantive information about courses.

<sup>243</sup> See *Admission Requirements*, ASS’N OF AM. MED. C., <https://www.aamc.org/students/applying/requirements/> (last visited Sept. 19, 2014).

<sup>244</sup> Eric Hoover, *The Science of Student Satisfaction*, CHRON. HIGHER EDUC. (Nov. 1, 2010), <http://chronicle.com/blogs/headcount/the-science-of-student-satisfaction/27654>. (A confounding issue is the satisfaction of undergraduates themselves. Students who feel “a sense of belonging” and “connected to campus life” are more satisfied with their college choice. Students do not mention a strong academic

the problems facing undergraduate education have to do with rising tuition.<sup>245</sup> Others believe that college's primary failure is the inability to prepare students for an increasingly competitive global economy.<sup>246</sup> Post-secondary institutions that see a problem are more likely to focus the criticism on increasingly underprepared secondary school graduates who cannot master basic college level work.<sup>247</sup> Competing stakeholders frame the problem of underprepared graduates in competing ways. Before law schools can tackle the problem of underprepared law students, they must wrestle with how to frame the problem.

Law schools cannot solve the problem of underprepared law students on their own. The schools must work with multiple constituencies. Even for law schools that choose to tackle the problem of underprepared law students through internal measures, each will frame the problem of underprepared law students differently depending on the demographics of their incoming student body, their mission, their financial stability, their faculty, and their internal culture. Law schools must establish whether law student underpreparedness can be addressed through internal changes at individual law schools, or whether law schools will need to work in concert with the LSAC, ABA, and other stakeholders to provide a more thorough response to student underpreparedness. Each law school may see a different problem, and will want to ask different questions about the nature and the source of underprepared law students, including whether the problem affects their school at all.

Law schools also need to ask questions about the three-year curriculum. At a time when there are calls to expand experiential education, to provide "practice-ready" graduates,<sup>248</sup>

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component or rigorous learning experiences as a part of what makes them satisfied with their college experience.).

<sup>245</sup> See Archibald & Feldman, *supra* note 67.

<sup>246</sup> See, e.g., *Prepare the American Workforce to Compete in the Global Economy*, PRESIDENT'S COUNCIL ON JOBS AND COMPETITIVENESS, <http://www.jobs-council.com/recommendations/prepare-the-american-workforce-to-compete-in-the-global-economy/> (last visited Sept. 19, 2014).

<sup>247</sup> ARUM & ROKSA, *supra* note 8, at 33, 34 (describing the problem this way; "... high school students are expected to enroll in college and complete bachelor's degrees, even when they are poorly prepared to do so judging from their grade point averages, high school rank, or courses taken.").

<sup>248</sup> Jacob Gershman, *The Practice-Ready Law Graduate is a Fantasy, Says Professor*, WALL ST. J. L. BLOG (Aug. 30, 2013), <http://blogs.wsj.com/law/2013/08/30/the->

as well as contradictory calls to shorten law school to two years,<sup>249</sup> law schools should rethink the traditional curriculum to include additional skills instruction. Due to the recession and the crisis in post-law school employment statistics, law schools have been focused on cost, efficiency, and graduating lawyers ready to work with clients on their first day at the office. Law schools have not grappled with the interrelated question of pre-law preparedness and how this relates to post-graduate success. Law schools need to think about how to use the first-year curriculum to better prepare students to maximize their learning in clinics and externships, which may, in turn, better produce “practice-ready” graduates. Law schools need to think about structural change to the three year curriculum, how to include additional training in critical thinking and reasoning skills, so students can maximize professional training later in their law school careers.

One of the reasons cited for the decline in legal hiring since 2007 is the rapid adoption of technology to streamline legal work. Most law schools have not adopted technology in the same fashion as legal practice.<sup>250</sup> Gains in technology have the potential to make legal education more efficient and better prepare students for the challenge of “thinking like a lawyer.” Law schools have not explored the possibility of employing educational technology to help prepare students for the rigors of law school academics.

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practice-ready-law-graduate-is-a-fantasy-says-professor/; see also Sarah Mui, *Law Firms Say They Want ‘Practice Ready’ Grads—But Who Are They Actually Hiring?*, A.B.A. J. (June 21, 2013), [http://www.abajournal.com/news/article/around\\_the\\_blawgosphere\\_washington\\_lee\\_ba\\_rterball\\_writing\\_man\\_of\\_steel/](http://www.abajournal.com/news/article/around_the_blawgosphere_washington_lee_ba_rterball_writing_man_of_steel/); see also Alfred S. Konefsky & Barry Sullivan, *There’s More to the Law Than ‘Practice-Ready’*, CHRON. HIGHER EDUC. (Oct. 23, 2011), <http://chronicle.com/article/Theres-More-to-the-Law-Than/129493/>.

<sup>249</sup> See Matt Barnum, *The Two-Year Law Degree: A Great Idea That Will Never Come to Be*, THE ATLANTIC (Nov. 12, 2013), <http://www.theatlantic.com/education/archive/2013/11/the-two-year-law-degree-a-great-idea-that-will-never-come-to-be/281341/>; see also Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES (Jan. 17, 2013), <http://mobile.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html>; see also Colleen Flaherty, *2 Years for Law School?*, INSIDE HIGHER EDUC. (Aug. 26, 2013), <http://www.insidehighered.com/news/2013/08/26/president-obama-calls-cutting-year-law-school#sthash.pUDWih43.dpbs>.

<sup>250</sup> Some law schools have adopted cutting edge legal technology to prepare their students, but these programs are unique and limited in scope. See the ReInvent Law Laboratory at Michigan State College of Law, <http://reinventlaw.com/main.html>, as well as Law Without Walls at University of Miami School of Law, <http://www.law.miami.edu/academics/law-without-walls.php?op=0>.



Core Grammar for Lawyers<sup>251</sup> is an online program for teaching law students the basics of grammar, punctuation, and writing style, and Core Grammar for College Students can be used by college students to prepare for their first year of law school.<sup>252</sup> Advances in educational technology make it possible for pre-law students to master some of the basic skills necessary for success in law school without re-enrolling in college courses. Law schools can partner with undergraduate institutions to expand the distribution of software to help students master basic skills before matriculation. While educational technology is not a panacea, and will not address all the skills deficits of incoming law students, it may be part of the solution for some law students at some law schools.

“Wicked problems” are marked by what Horst and Rittel call a “no stopping rule.” A “no stopping rule” means that there are no criteria to tell when the correct solution has been reached. Law student underpreparedness is, in many ways, an eternal question—subject to the no stopping rule. As long as there are critics of lawyers, there will be critics of how lawyers should be trained.<sup>253</sup> As the nature of law practice evolves, the nature of law student competencies changes.<sup>254</sup> Unless there is universal consensus on the nature of law practice, some constituencies will question the student competencies necessary to master the law school curriculum. As a consequence, the legal academy should question whether incoming students have the necessary skills to tackle the ill-defined questions that are essential to “thinking like a lawyer.”

Similar to the “no stopping rule,” wicked problems do not have true or false answers, but instead have good or bad solutions.<sup>255</sup> Many parties are interested in law student preparedness and have the right to question the solutions to the problem, such as law school faculty, the practicing bar, and

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<sup>251</sup> See *Welcome, CORE GRAMMAR FOR LAW.*, <http://www.coregrammarforlawyers.com> (last visited Sept. 19, 2014).

<sup>252</sup> See *Welcome, CORE GRAMMAR FOR COLL.*, <http://coregrammarforcollege.com> (last visited Sept. 19, 2014).

<sup>253</sup> One only needs to read Shakespeare to understand the nature of lawyer criticism. See Peter Lattman, “*The First Thing We Do, Let’s Kill All the Lawyers*”, WALL ST. J. L. BLOG (Oct. 4, 2006), <http://blogs.wsj.com/law/2006/10/04/the-first-thing-we-do-lets-kill-all-the-lawyers/> (providing a brief, and amusing, discussion about Shakespeare’s feelings about lawyers).

<sup>254</sup> See David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 1127 (2009).

<sup>255</sup> Rittel & Webber, *supra* note 236, at 162.

future law students, as well as undergraduate stakeholders, whose livelihoods may be dependent on any changes law schools request of colleges and universities. Each party involved in the process of determining the nature of the problem of law student underpreparedness has a right to judge the proposed solution to the problem, as well as a right to decide how the problem is framed and understood. A solution that may be good for one stakeholder, such as requiring specific pre-law courses that stress critical thinking and writing skills, will be perceived as onerous and unfair to another stakeholder, such as future law students who have already graduated with a bachelors' degree. There is no "true" answer to the problem of underprepared law students, no solution that can be discovered and tested without corresponding effects on multiple stakeholders.

Any solution to the "wicked problem" of law student underpreparedness is a "one-shot" solution, because the solution creates irreversible consequences. No matter how law schools choose to address the problem of law student underpreparedness, the choice will change undergraduate institutions, the lives of future law students, and undergraduates considering law school, as well as the nature of law schools. Every solution will reverberate throughout undergraduate universities as well as law schools, and millions of lives will be affected by any changes implemented to better prepare students for law school academics. Requiring law students to take additional skills courses during their 1L year will affect whether some students want to attend law school, especially if they are part-time students with limited extra time for supplemental skills instruction. Requiring pre-law courses will affect undergraduate institutions, many of which are struggling with substantial budget cuts that limit their ability to offer additional classes.<sup>256</sup>

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<sup>256</sup> See Sarah Hebel, *From Public Good to Private Good: How Higher Education Hit a Tipping Point*, CHRON. HIGHER EDUC. (Mar. 3, 2014), <http://chronicle.com/article/From-Public-Good-to-Private/145061/> (public colleges have seen substantial budget cuts since 1987, limiting their ability to offer additional classes); see also Tamar Lewin, *California Bill Seeks Campus Credit for Online Study*, N.Y. TIMES (Mar. 12, 2013), <http://www.nytimes.com/2013/03/13/education/california-bill-would-force-colleges-to-honor-online-classes.html?pagewanted=all> (public universities in California, struggling under years of massive budget cuts and corresponding cuts to courses that many students needed to graduate, tried to allow students to take online classes for credit in order to graduate on time).

The “wicked problem” of law student underpreparedness does not lend itself to a singular solution. A solution that might work for one law school might be detrimental to another. Not all law schools are similarly situated to address the problem, and a minority of very selective law schools might not be seeing the problem at all, whereas less selective or “access” law schools might have been grappling with this issue without naming the problem. Different law schools will have different responses, because of their culture, history, mission, and the demographic make-up of their student body. Providing a list of solutions will be less helpful to law schools looking to address the problem of underprepared law students than a list of questions that can help schools assess how to address the problem based on their individual characteristics.

Although a singular solution will not work, all law schools should be asking questions to determine the extent of the problem at their school. Not every question is relevant to every law school, and there are unique questions some law schools need to ask that are not included in this article. Each question for law schools requires much more research before law schools can understand how any potential solution will affect their students. Embedded in each question is a different model for change, and each model creates new difficulties that will need to be addressed. Much more can be said about each potential model for change, and not every model will be appropriate for every law school. These questions create a starting point for a dialogue between law schools and stakeholders. This dialogue may not provide easy solutions, but it will begin the process of remedying the challenge of law student underpreparedness.

## V. CONCLUSION

This is a unique moment for law schools to reconsider their mission. The crisis in legal education, brought on by the economic recession of 2007, is receding. Many law schools are still struggling with under-enrollment, but the popular press is no longer skewering law schools about employment statistics on a daily basis.<sup>257</sup> Now that the enrollment crisis is receding,

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<sup>257</sup> See Jordan Weissmann, *Apply to Law School Now!*, SLATE (June 25, 2014), [http://www.slate.com/articles/business/moneybox/2014/06/apply\\_to\\_law\\_school\\_now\\_yes\\_we\\_re\\_serious.html](http://www.slate.com/articles/business/moneybox/2014/06/apply_to_law_school_now_yes_we_re_serious.html); Jacob Gershman, *Are Law Schools Heading into a Bull Market?*, WALL ST. J. L. BLOG (June 26, 2014), <http://blogs.wsj.com/law/2014/06/26/are-law->

law schools have a responsibility to reconsider who attends graduate legal training, what types of pre-law preparation are sufficient to prepare students to “think like a lawyer,” and whether structural change is the answer. Law schools can no longer assume all students enter post-graduate legal training with the academic preparation, proficiency in critical thinking, or time management skills necessary to master thinking like a lawyer. Law schools need to begin a dialogue with internal constituencies, such as students and faculty, as well as with the broader legal community. This is the moment for law schools to begin a conversation with multiple stakeholders, from undergraduate institutions, accrediting agencies, testing companies, to alumni, trustees, and donors, to remedy the challenge of underprepared students and improve legal training.

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schools-heading-into-a-bull-market/; see also Jordan Weissmann, *Now is a Great Time to Go to Law School*, SLATE (June 30, 2014), [http://www.slate.com/articles/business/moneybox/2014/06/why\\_now\\_is\\_a\\_great\\_time\\_to\\_go\\_to\\_law\\_school\\_part\\_2.html](http://www.slate.com/articles/business/moneybox/2014/06/why_now_is_a_great_time_to_go_to_law_school_part_2.html); see also Jennifer Smith, *Big Law Firms Resume Hiring*, WALL ST. J. (June 23, 2014), <http://online.wsj.com/articles/big-law-firms-resume-hiring-1403477513?tesla=y&mg=reno64-wsj>; see also Ryan Calo, *Why Now Is A Good Time To Apply to Law School*, FORBES (Nov. 24, 2013), <http://www.forbes.com/sites/ryancalo/2013/11/24/why-now-is-a-good-time-to-apply-to-law-school/>.