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Frank H. Wu

UC Hastings College of the Law, wuf@uchastings.edu

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REFORMING LAW SCHOOLS: A MANIFESTO

*Frank H. Wu**

OVER the past several years, I have been blogging about legal education. When I was encouraged to begin writing on the subject, I wondered who would care to read about it. As it turns out, both the legal marketplace and the higher education marketplace started to experience change of the greatest magnitude. Law schools have attracted intense interest.

I have edited many of the posts here to make three related arguments: legal education has worth; it must adapt; and the changes that are needed are structural. I begin with an overview.

TWO SCHOOLS OF THOUGHT¹

There are two schools of thought about legal education.

One insists that law schools are fundamentally fine. They face only a momentary lull in demand. They will recover so long as they continue to do as they have done.

Another contends that the educational program leading into legal practice is fundamentally flawed. It needs reform even if the marketplace temporarily improves. The recent economic crisis exposed problems that had always been there.

I count myself among those who embrace the latter view. Adaptation is necessary, not optional. But, it already is underway, and it is in need of encouragement.

Anyone who offers observations about a subject of such significance, to those who make a living through argument, should take care at the outset to frame the issues. The rule of law is the basis of our democracy. It constitutes one of the ideals we offer the world.

Our aspirations in the abstract, as well as our ability to lead the lives we take for granted in mundane aspects, depend on an independent, principled bench and the members of the bar who advance causes and represent clients. We

* Chancellor, Dean, and William B. Lockhart Professor, University of California Hastings College of the Law.

The University of California Hastings College of the Law is affiliated with the University of California, having been established in 1878 as the original law department for the UC system; it also has always been an independently governed stand-alone institution, with its own board, state appropriation, budget, and policies.

1. This section is reprinted from Frank H. Wu, *It's Time to Rethink Law School*, DAILY J. (S.F., Cal.) (Aug. 11, 2014), available at <http://www.uchastings.edu/news/articles/2014/08/wuf-daily-journal.pdf>.

conduct elections generally free of corruption, preceded by campaigns in which candidates declare their philosophies, thanks to law. We are able to buy food and drugs that have been tested and usually are not tainted, with recourse if there has been a mistake, thanks to law.

The tech boom that defines San Francisco, where my law school is located, is based primarily on engineering and science. But inventions generate entrepreneurial success only as they are monetized. A legal infrastructure protects intellectual property and enables, for example, initial public offerings. Our commerce with Russia and China would be greatly improved if they developed legal systems that were transparent, robust, predictable, and reliable, like ours.

Likewise, recent progress in the recognition of the rights of LGBT individuals has been embodied by legal transformation.² Discriminatory conventions of the past have given way to anti-discrimination norms, though there remain unresolved tensions related to asserted religious exemptions.³ Although observers may disagree on the proper outcomes to disputes, everyone acknowledges that law is of paramount importance. All government regulation takes the form of law in some sense, and social justice movements that proceed through law avoid chaos.

Thus, the assertion, made by angry bloggers and then repeated by the mainstream media, that legal education is virtually worthless, should be accepted as the hyperbole it is. There is—and there always will be, barring failure of democracy itself—a role for lawyers. Then, there must also be a means of preparing them for their roles as leaders.

Yet, the critics have a point. There should be vigorous discussion of how many lawyers are optimal, how they are trained, and what they should pay for the privilege of joining the profession. The problem of legal education is more than one problem. At least three major concerns should be addressed.

First, there appears to be a glut of lawyers. Ironically, there also is unmet legal need. This seeming contradiction is explained by the maldistribution of lawyers. A surplus of lawyers wishes to work in so-called “BigLaw,” the giant firms serving corporations and high net-worth individuals. A deficit of lawyers, meanwhile, is available for old-fashioned general practice. There is insufficient funding for government lawyers, including those who would offer services to the poor who cannot afford an attorney; city attorneys, prosecutors, and public defenders have workloads that cannot reasonably be supposed to ensure competent representation, and non-trivial levels of legal work are simply being left undone.

On its face, this supply-and-demand imbalance is not merely, or even mainly, a problem for law schools. It is a general problem facing the legal profession. It is the result of inexorable forces, including technological advances, structural innovations (such as outsourcing and contract positions), and increasing sophistication on the part of purchasers of services.

2. See generally *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

3. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Lawyers once possessed magic knowledge, not widely available; specialists in specific fields commanded a premium over peers without similar expertise. But much of what we now do can be accessed by the public over the internet, and either the public cannot discern quality, or it is satisfied with “good enough.” Much of legal practice can be done by individuals overseas, with less training, or in allied fields such as accounting. And, it can be packaged as a commodity, with the financial risks associated with uncertainty being shifted onto the lawyer rather than burdening the client.

Some law firms have sought to conceptualize themselves as businesses. Other law firms have preferred to regard themselves as a true partnership of professionals. Regardless of their culture, they find themselves facing the same challenges as other industries in an era of hyper-accelerating change, and they cannot suppose they are above competition.

Second, there is the cost structure of higher education. There is a lack of appreciation between professors, on the one hand, and students, on the other hand, which is mutual, complete, and regrettable. Almost all academics balk at crude characterizations of “return on investment.” They value learning intrinsically—valuable in its own right—not instrumentally, as a means to an end. Almost all who call themselves consumers (and the families paying the bills) demand measurements of job placement. They no longer believe, if they ever did, that critical thinking by itself is valuable. The same unease is spreading beyond law schools to liberal arts colleges. The importance of American creativity to American competitiveness is not appreciated, and both are threatened.

Until recently, these considerations in the law school context were masked by the same exuberant expectations that led to the recession. People assumed law school was a great bet: for any student who was accepted, at any school, for any graduate, regardless of their performance. Law school was promoted as a reasonable default option, even for those unsure of what lawyers in fact do for a living. That was not true before, but it has become obvious now: law school is for people who want to work in law or who have a well-thought-out plan related to law (for example, operating a family business or entering public life).

Student loan debt is on the cusp of becoming the public policy hot button for the middle class. Its effects are not uniform. The notion that higher education can be a public good has been all but lost. Individuals pursuing a profession are told implicitly that they will not be subsidized in their efforts. Those who do not come from privilege will not be materially supported in upward mobility, and those from all backgrounds who wish to enter public service as a career will not be helped either.

Law schools face complications of existential magnitude altering their business model. The two tactics that were most popular in the past are no longer available. Those expedients were increasing tuition or increasing enrollment (or both). Tuition is the subject of populist outrage. The drop in applications is unprecedented, steep, and with no bounce back.

Law schools are turning to alternate revenue sources, such as private philanthropy, new curricula, and straightforward commercial activity. These may be necessary, but they are not sufficient because they do not offset deficits

in the core of the enterprise; they are off by at least an order of magnitude in fiscal terms. Moreover, the demands to improve rankings, enhance student services, and even employ graduates accumulates exorbitantly on the expenditure side of the ledger.

Third, there are the perennial complaints about the skills imparted during three years of formal schooling. The century-old case method is transitioning toward skills training. The task forces of the American Bar Association and the California Bar are urging us along.⁴

The analysis of appellate decisions remains integral to the first-year courses, but it amounts to an incomplete education, at best. A competent lawyer must be able to reason from precedent and interpret statutes according to canons, but it would be an incompetent lawyer, even if restricted to appellate practice, who could accomplish only those tasks. Whether it is substantive areas that were non-existent a generation ago—related to the internet, for example—or techniques such as alternative dispute resolution—which were regarded as fads—there is so much more law to which a lawyer ought to be exposed. This is exacerbated by the demands within law firms, which are conducive to neither training nor mentoring.

A lawyer should be like a doctor. There is no medical school graduate who altogether lacks clinical experience. Every licensed physician has seen a live patient presenting actual symptoms before charging anyone for a diagnosis. Yet some law school graduates manage to do quite well by book learning alone. They need not interview, counsel, or draft, to earn honors, if their exams and seminar papers are good enough.

The types of lawyers that the world looks for also have multiple skill sets. They blend STEM (science, technology, engineering, and math) backgrounds with the legal discipline. They were accountants, or, at a minimum, they can read a balance sheet and determine if a venture is making money or losing it. They are fluent at a business level, not merely conversational, in Chinese, Spanish, Russian, or perhaps more than one other language. They are partners to their clients, taking seriously not only the concepts of representation but also advice and counsel.

Put all this together. There has not been, in the recollection of anyone now living, a similar set of challenges for law schools. As with all such situations, however, leaders must spot the issues. We are in danger. We should not deny that.

I welcome the opportunity. We must cooperate—bench, bar, teachers, students—to take apart the system and put it back together again better.

4. See AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf; STATE BAR OF CALIFORNIA TASK FORCE ON ADMISSIONS REGULATION REFORM, PHASE I FINAL REPORT 24 (2013), available at [http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_\(FINAL_AS_APPROVED_6_11_13\)_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf).

Law schools cannot be the proverbial “ivory tower,” even if their constituents would like to construct them as such. There is no “moat” sufficient to protect them from the bench and the bar, with which they should be related.

LAW REMAINS VITAL⁵

Look at China. Specifically, observe what happens when a Chinese citizen, who is ambitious and intelligent, makes some money. I do not mean they become superrich. I mean they attain a middle class status comparable to the average American.

The Chinese invest in the United States. They put their newfound wealth in American bonds, American stocks, and American real estate. They do so on a staggering scale that plays into the fears of Yellow Peril. More to the point, they transfer assets to the United States (including human capital in the form of children to be educated), notwithstanding the relative growth rates of the two nations. That is, they prefer the United States with its more modest returns.

I submit a key reason is law. In American Treasury bills, companies, land, or even plain bank deposits, the ordinary person can have confidence that, whatever partisan political changes take place and despite government shutdowns, there is an extraordinarily high likelihood that nobody will steal one’s possessions. An infrastructure has been built, imperfect though it may be, ensuring that. In China, there are not similar guarantees.

BUT WE ARE NEVER COMING BACK⁶

People ask me all the time, “Isn’t it all a cycle?” They want to know if the legal marketplace will come back, with legal education then following.

My answer is, “No.”

A better answer, like most law professor’s answers to simple questions, would be, “It depends on what you mean.”

Yes, law as a business will rebound. It has already done so by some measures. However, it will not come back in the same form. Nothing ever does.

We all are the products of our backgrounds. For me, that means Detroit.

The American automakers, which gave the Motor City its nickname, once enjoyed 99% market share. You can look it up or ask your grandfather, who likely was a “Ford man” or a “Chevy man,” identifying with a brand as strongly as marketing gurus wish for. That was transformed by the oil shocks of the 1970s.

Despite the challenge from overseas, the “Big Four” car companies always believed that the domestic consumer would be patriotic and prefer their products. It is true, as gas prices dropped intermittently, shoppers demanded land yachts

5. This section is an excerpt from Frank H. Wu, *Law Remains Vital*, HUFFINGTON POST (updated Jan. 23, 2014, 6:58 PM EST), http://www.huffingtonpost.com/frank-h-wu/law-remains-vital_b_4271564.html.

6. This section is reprinted from Frank H. Wu, *We’re Never Coming Back*, ABOVE THE LAW (Oct. 31, 2013, 2:41 PM), <http://abovethelaw.com/2013/10/were-never-coming-back/>.

again. But, the recovery was always to a point lower than before; there also was market realignment underway that cannot be reversed.

There is an even more pertinent example for legal education. It is so-called “BigLaw.”⁷ These giant firms serve as an excellent example, however, of how these two phenomena should not be confused.

Alongside the normal business cycle on the one hand is profound market restructuring on the other hand. The cycle should not obscure the trend.

While many law firms—those that remain—are enjoying profits per partner at levels that exceed the bullish figures before the Great Recession, they are doing it by different means than before. Assuming business picks up, which it has in some specialties and a few regions (but ought not be counted on more generally), law firms that have come to terms with this environment are not likely to revert to their former selves. They altered their cultures permanently, even if they were motivated by circumstances that were temporary. Unlike an automobile factory, a law firm does not recall laid off employees.

The structure of successful law firms is different now. They have bounced but to a different place.

The guaranteed means of ensuring increased profitability with flat revenue, not to mention decreasing demand, is to share the money with fewer people. This is hardly a sustainable model of growth. It does highlight the point that there are different configurations of the business model that may be more efficient, and those are increasingly the norm. Firms have revised the length of the partnership track, the amount of leverage, the requirements of equity, stratification of compensation, calculations of realization rates, and roles within the organization.

All enterprises must confront global competition (for law firms, including especially from accounting firms), technological advances, and outsourcing. They will continue to use every available technique to raise the premiums they can charge and lower the cost of doing business.

Client expectations control, and they are not the same as before. In-house counsel have a sophistication they did not a generation ago, enabled by big data. They can analyze even significant levels of risk, turning complex problems into commodity work.

Thus, prospective entrants into legal practice have adjusted. They are free agents who care about work-life balance. They give no more loyalty than they believe they will receive.

Yet, I remain an optimist about the rule of law. The reason is legal services are still needed. The very economic factors that are disruptive necessitate new legal responses.

Our economy is about constant change. The tech sector depends on innovation. But everywhere else, too, that has become the norm. Even Ford, GM, and Chrysler are offering exciting products.

7. I should insert the caveat that the giant law firms, whether they are high-end or mid-market, have always constituted a minority of the bar, even in economic boom times.

WHAT THREATENS LAW FIRMS⁸

As a law school dean, I spend quite a bit of time thinking about how to reinvent legal education. As I meet with our alumni, I realize that they spend an equal amount of time thinking about how to reinvent legal practice.

Lawyers—and others in the professions—recognize that they are only slightly better off than other workers in the modern economy. They cannot presume that their reliance on their brains, rather than their muscles, protects them against the vicissitudes of the marketplace.

Three trends have had, and will continue to have, an adverse effect on law firms.

First and most importantly, corporate clients are smarter consumers than ever before. They have learned to commodify virtually all of the projects that they send to outside counsel. Whether they are deals or disputes, if they are not at the “bet-the-company” level, then it is possible to manage the risk presented by each matter in a reasonable manner.

The difference between the attorney who is good enough and the attorney who is the best is probably not sufficient in the overwhelming number of instances to justify the premium for the superlative choice. (It may not even be possible to determine readily in advance who that happens to be other than by reputation.)

Accordingly, clients have decided they will not pay for training of junior lawyers or excessive overhead. While clients did not want to do that before either, they have the advantage in bargaining now—and it will persist thanks to excess supply and slack demand.

Law firms’ refusal to allow recent graduates to handle their files might be short sighted, because eventually there will not be anyone with sufficient experience in the pipeline. However, clients will not be deterred from shifting the cost of radical restructuring of the business model. Somebody else will be forced to pay for the requisite mentoring.

The acknowledgment that high-quality services can be delivered without a fancy address is made all the easier by the ability to retain people over videoconferencing, email, and telephone. An impressive lobby for a law firm ensures only that the additional rent for that marble veneer will be added to the bill sent to the client. Nowadays, professional relationships can flourish without significant personal interaction. For all the client cares, the lawyer is performing excellent work at home in a bathrobe.

Outside counsel complain that they are being second-guessed by auditors or, worse, computer programs, on how they spend their time. In-house counsel reply that as rates have surpassed the thousand-dollar-per-hour mark, they would be foolish to be any less attentive to what exactly happened in any given six minutes that were charged to them. Through alternative fee arrangements, clients

8. This section is reprinted from Frank H. Wu, *What Threatens Law Firms*, HUFFINGTON POST (updated Apr. 14, 2013, 5:12 AM EDT), http://www.huffingtonpost.com/frank-h-wu/what-threatens-law-firms_b_2672235.html.

can transfer risks to their lawyers. Only a few can still recall, wistfully, the old-fashioned billing statement that said “services rendered” next to a sizable sum.

Second, technology is proving as revolutionary for the bar as it is for everyone else. A generation ago, a new litigator at a major law firm likely would be assigned early on to do pre-trial “discovery”—specifically, “document review.” That meant looking through boxes of paper for certain keywords such as the names of the parties. A squadron of associates would be sent from their nice offices to a windowless lower floor, where they would sit at desks for days, billing for every moment of their consciousness. The least lucky among them might have been shipped out to a warehouse archive that looked like that government storage facility at the end of the first Indiana Jones movie, except there was no Ark of the Covenant to be found inside a dusty container.

Now, millions of email messages can be scanned, converted to text using optical character recognition software, uploaded to a secure location in the cloud, and then searched in literally seconds. A responsible lawyer will be drafted to oversee the process. The labor (and the cost) of a dozen lawyers for a dozen weeks has been reduced to a single lawyer for a day. Even a modest-sized firm can afford the innovation.

What technology giveth, it taketh away. As digital search has become possible, the mass to be searched has increased to keep pace.⁹ Technology also has made legal practice more complex and faster paced. The lawyer of today must be better than the lawyer of yesterday, as the athlete of today must be better than the athlete of yesterday.

Third, legal process outsourcing has been proven feasible. It is transformative. “Outsourcing” is not even the right term. Outsourcing—sending tasks that were carried out by an employee inside a firm to an independent contractor beyond its formal structure (whether overseas or domestic)—is symbolic of much else.

Legal services can be unbundled and repackaged and then performed by people of varying skill levels with permanent specializations and different career trajectories in multiple physical locations. As a consequence, the firm itself can be configured creatively. There is no necessity to set up a system that presents a linear path with lockstep compensation from associate to partner (meaning an actual owner of equity in the operation). Instead, it is possible to plug people into slots as needed.

Competition once was limited by guild rules masquerading as ethical norms—no advertising, etc. There are no constraints anymore.

Even lawyers who have a credible claim to being at the top of the field are pitching for business constantly. Lawyers compete with accountants, consultants, and financial advisors, not to mention do-it-yourself manuals and websites. For high-end legal advice, Anglo-American firms still have an advantage, but there is no reason to suppose that it will be more durable than it has proven with, say, the manufacturing of luxury automobiles.

9. Someone must have come up with a witty formula to express the relationship between our ability to organize data and the increase in its quantity, but ironically I am ignorant of it.

For the individuals willing to adapt, however, there could be no better time to reform the law firm. Boutiques and virtual firms are only the beginning of profound changes to come. There almost certainly always will be the legacy firms who, by virtue of their prestige, earned or otherwise, serve the few who remain willing to pay their fees while offering opportunities to those who wish to play their tournament. For the bulk of the work to be done, a new type of lawyer will evolve to do it.

It is up to us in the academy to prepare our students for the future, no matter what it holds.

IN PRAISE OF “COMMODITY WORK”¹⁰

Last week, I went to the dentist. I enjoy having my teeth cleaned. I have an hour of calm in the most comfortable chair, and I am the focus of attention for everyone who enters the room. I used the occasion to mull over different models for the delivery of legal services.

Perhaps dental care offers a useful comparison. My dentist has an excellent job. She enjoys it—I happen to know her father, who was a dentist to the stars. She controls her own hours, has friendly clientele, makes a good living, enjoys more than a modicum of prestige, and oversees a pleasant office environment.

I spent almost all of my time with the dental hygienist rather than the dentist. The dentist herself said hello at the beginning of the appointment, examined x-rays in the middle, and chatted a bit about the condition of my teeth at the end of my appointment. She had several appointments proceeding simultaneously.

There was a time when the dentist had more significant contact with the typical patient, but there also was a time when drills were manual and anesthesia unavailable. Similar observations have been made about the medical profession. Doctors once drew blood; then nurses; now technicians.

Lawyers in some specialties have adopted a similar setup. The firms dedicated to business immigration, for example, have a lawyer working with multiple paralegals. As some dental offices have a few dentists together, some immigration firms have a few lawyers together. (Law and dentistry are not the same in the numbers of practitioners though; there are many more lawyers than dentists.)

The more important point of the analogy to the dentist’s office is that it engages in commodity work. I mean that it performs routine services such as check-ups and fillings for cavities; more profitable procedures involving orthodontics or cosmetics; as well as, less often, emergencies and root canals.

Patients have approximately the same number of teeth, and they present more or less the same issues. During a day, or even over a career, the variation among patients is not especially great. Dentists rarely face immediately life-

10. This section is reprinted from Frank H. Wu, *The Dentist and the Immigration Lawyer: In Praise of “Commodity” Work*, HUFFINGTON POST (updated June 15, 2013, 5:12 AM EDT), http://www.huffingtonpost.com/frank-h-wu/the-dentist-and-the-immig_b_3089460.html.

threatening situations. Some dentists are better than other dentists, but, so long as one's dentist is competent, there is not enormous variation among them either.

There is nothing wrong with that. The dentist's office fulfills a vital function. At my last dentist's office in a different city, I read the little sheet he had tacked up explaining why dental care was so important. Each time I was there, I learned again that good oral hygiene lowers the risk of a heart attack due to the various bacteria swirling around one's mouth that could affect the rest of one's body.

My dentist provides service at the individual level. She may contribute to modest social change: she encourages all of her patients to take up flossing, and, thanks to her, I have developed that good habit. There is progress in dental care over time: mercury-free amalgams, ultrasonic cleaning, and digital imaging. But dental care has been performed personally and locally, and it likely will continue to be for some time to come.

All of these facts about the dental profession prompted me to realize that the current arguments about the legal profession are based on an assumption: that it represents some sort of profound failure to do commodity work. Critics have belittled commodity work. The label signals what is *déclassé*.

The implication is that lawyers should avoid commodity work; law firms that do it are inferior; and law schools that train people to engage in it should close. All that counts are "bet-the-company" cases and deals. The lawyers deserving respect do that and only that; they would not ever touch commodity work; and they will rid themselves of colleagues who do.

Everyone else should admire them. We should strive to emulate them—even though we cannot attain their status because, by definition, there is only so much premium work to go around.

Ergo, beyond the elite firms, all else is worthless. . . .

This is crazy.

Almost all lawyers work for themselves, small firms, midsize firms, companies, or public entities—but not so-called "BigLaw." Almost all lawyers, like almost all dentists, do commodity work. That is what most work is for most people most of the time. To disparage commodity work is to disparage work itself.

By the way, even at the firm that prides itself on taking only the most significant matters, most of the people at that firm are still doing commodity tasks. The client may be glamorous, the dispute or deal might appear on the news or as gossip, and the bills no doubt are sizable. But the average grunt is still assigned to grunt.

We might bemoan the changes in health care for various reasons. The development of tiers of service providers should not be among them. For the normal patient, efficiency increases and cost decreases.

It is possible, I suppose, that some people who would have become dentists in that alternate universe where there is no recognition of a different tier within the field are consigned unhappily to becoming dental hygienists in our world. More likely, however, there are growing opportunities: the people who want to be dentists, but do not because of the presence of dental hygienists, choose a different livelihood altogether. The people who in fact wish to be dental

hygienists have an option that opens up, one that is better than what they otherwise would have pursued.

Likewise law. Notwithstanding the not-so-good projections for the employment of lawyers, there are good prospects for the employment of legal professionals. That seems contradictory, until you realize that much work that is “legal” is not being done by lawyers.

As dentists no longer are the only professionals providing dental care, lawyers are no longer the only professionals offering legal service. They increasingly work with, even compete against, accountants, consultants, paralegals, technicians, and do-it-yourself alternatives. If they wish to have certain functions reserved exclusively for them, they will need to show society there is a compelling reason for granting that monopoly. The lawyer is better at some tasks, but that does not mean they are better at all tasks, for every client, at any price.

More than fifty years ago, Thomas Kuhn introduced the concept of “paradigm shift.”¹¹ As happens with the popular version of a scientific concept, much was lost in translation. Everyone focuses on Kuhn’s notion that revolutionary ideas come along now and then—the earth revolves around the sun, not vice versa—and forgets his other claim. Kuhn also pointed out that the community within an academic discipline is occupied with “normal science” except in those moments when a great thinker introduces a novel worldview.¹²

A few people turn out to be the geniuses who initiate a “paradigm shift.” For the rest of us, and, as Kuhn observed, even for the genius after that defining moment, life is productive enough between such cataclysmic changes.

We return to the day-to-day work that must be done.

MY FATHER’S WILL¹³

My father recently prepared his will. This is a matter in which I have an interest. . . .

As a law school dean, I asked my father what lawyer he had hired for this important task. He, an engineer with a doctorate, informed me: none. A friend of his, another engineer, had given him a form. His friend had used it, too, and said it could be relied upon. The friend, being alive, has not had an opportunity to test his confidence in the disposition of his estate.

Although I wish my father had retained a professional, I understand why he did not. My father resembles most potential clients for legal services of this nature. He would like the job done well, cheaply, quickly, and in accordance with his instructions. My family is not wealthy. There likely is very little that my parents wish to bequeath to my brothers or me, or anyone else, for that

11. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

12. *Id.* at 10.

13. This section is reprinted from Frank H. Wu, *My Father’s Will: What Lawyers Must Respond To*, HUFFINGTON POST (updated Jan. 23, 2014, 6:58 PM EST), http://www.huffingtonpost.com/frank-h-wu/frank-h-wu_b_4182514.html.

matter, that requires any elaborate provisions. (I suppose there could be some secret I do not know, but I am not much worried.)

As a result of my father and others like him, three trends are underway in the legal services marketplace. First, legal work is becoming stratified in complexity, and, as a corollary, cost. Legal work has always been stratified, but the degree is increasing significantly.

It turns out that white-collar, creative, intellectual professions are subject to the same market forces as blue-collar, low-skilled, manual labor. Actually, it is only a conceit of the professions that there is a great distinction between what they do and what others do: someone in the trades may well possess considerable expertise and be compensated comparably to an individual with a graduate degree. Some, but not most, legal problems demand custom solutions; many of those problems, however, can be resolved with off-the-shelf responses.

The complication with legal analysis, like medical diagnosis, is the initial assessment can turn out to be wrong. What looks simple may turn out to be the opposite. The risks may be invisible to the untrained eye—or the poorly trained eye. Even a full-fledged member of the bar may have difficulty with the Rule Against Perpetuities or other malpractice traps. (The neo-film noir *Body Heat* is the only movie I know of that shows this legal doctrine working to great effect.¹⁴)

What is more, there is not a strict correlation between complexity and cost. Some issues are tricky without being associated with any source of funding that would cover the true costs.

Second, either lawyers will have to adjust their expectations to remain competitive, or they will end up losing opportunities. Some high-end firms have given up on trusts and estates departments altogether because of low profitability.

In some instances, laypeople will try do-it-yourself options. Even if they should not be doing [so], there might be such a mismatch between the fees lawyers wish to charge and the bills clients are willing to pay that a significant segment of the market that would do well to have counsel will do without it.

In other instances, regulators are willing to experiment with limited licenses. As has been true in the medical industry, with technicians drawing blood (their fancy name is “phlebotomist”), the legal industry appears headed toward specialists who, for example, may draw up wills and trusts without being authorized to do anything else.

Third, the very conception of law will be transformed by technology, as virtually all aspects of our lives have been. The uniform law movement is a precursor. Formal codification of the default rules for transactions makes commerce much more efficient.

As a society, we actually would benefit from templates that are sufficient in general but which could be customized if need be. A statute can be turned into a system of checklists, and those then can be implemented digitally as a drop-down menu. Until now, we have proceeded from the rules to the forms. Our comfort with virtual reality suggests we could reverse the sequence: we could start with the form and use it to generate the rules. In the future, we will have law enabled

14. *BODY HEAT* (Warner Bros. 1981).

by technology and influenced by its style of thinking. The drafting of uniform statutes and model codes has been manual, but it can be enhanced with “Big Data.” A legislature could analyze the types of terms and conditions used in a group of contracts, relying on the actual practices in business and commerce, to revise statutes to match, imbuing a standardized set of forms with binding effect.

These possibilities are not limited to the drafting of documents such as my father’s will. Alternatives to marriage, developed in part for same-sex couples, bundle together rights and responsibilities selected a la carte. The concept can be extended from transactions to litigation. Modern intellectual property litigation involving portfolios of rights turns on statistical assessments of the strength of the competing parties; mass tort law likewise incorporates assumptions about aggregation and averages.

My father knows the future. I must heed him.

SHRINKING LAW SCHOOLS¹⁵

Law schools must cut. Enrollment is down. The drop has no end in sight. It might be temporary; it might be permanent. Even if it is the former rather than the latter, there is much more to come: two-year J.D. programs, limited licenses, and various demands for reform.

Most law schools already have cut enrollment. Unless the law school’s dean has made a Faustian bargain, the cut to enrollment calls for a cut to the budget.

Many law schools are facing a structural deficit. It is important to explain what that means. A deficit is a negative balance at the end of a given time period, typically a fiscal year (which may or may not correspond to a calendar year or to an academic year). The expenditures exceed the revenues.

An enterprise might run a one-time deficit because of an extraordinary expense. Say, part of a building burns down in a particular year. It has to be rebuilt.

For an independent law school, such as UC Hastings, covering an extraordinary expense necessitates spending from the reserves that have been accumulated for just such a purpose. For the majority of law schools that are embedded within a larger university structure, it is possible the central administration will offer a temporary subsidy to make up for the loss.

A one-time deficit is not desirable, but it is not likely to be fatal. “One-time” is a crucial adjective. There is no reason to expect that another building will burn down the next year.

A structural deficit is something else altogether. It is inherent. Suppose the school has a payroll that is oversized relative to the money coming in. Human resources are what law schools buy; there is little raw material, as would be purchased by a manufacturing venture; and there is no inventory.

15. This section is an adaptation of Frank H. Wu, *Shrinking Law Schools*, HUFFINGTON POST (updated Dec. 3, 2012, 5:12 AM EST), http://www.huffingtonpost.com/frank-h-wu/shrinking-law-schools_b_1934539.html.

Unlike a building burning down, which one hopes occurs rarely, it is a certainty that employees will wish to be paid regularly. If the payroll cannot be met one year, and nothing is done to change the situation (either laying off some employees, reducing compensation for all employees, or deploying some combination of measures), the deficit will repeat itself the following year. This will continue until the reserves are depleted, or the outside source of funding is exhausted. The institution then is insolvent.

When any leader in higher education announces that there is a problem of this nature, there is a temptation to infer that the leader is the problem. If only the wrongdoers were identified, all would be well. The administration must be incompetent, dishonest, or both.

Or, sometimes observers assume that there is a hidden surplus in the system. They suppose that a thorough search will turn up excess that could take care of everything if it were eliminated. Yet, one person's waste is another person's livelihood.

The extent of the crisis for legal education, however, cannot be denied. It is quite possible that in this application cycle, law schools—not any specific law school, but all accredited law schools taken together—will see a 50% reduction in the applicant pool since the recession set in.¹⁶ There have been 14 consecutive LSAT sittings with fewer takers.¹⁷

“Crisis” is the right term. Industries rarely see such negative change.

Law schools historically have been insulated from economic trends. They actually have been somewhat countercyclical, so an uptick in the economy might not help matters. (This description of the situation does not even take into account the tuition discounting that must be applied to attract the best students.)

With potential revenue at such a low point, expenditures must be brought into line. The alternative is bankruptcy.

People always hope to address the revenue side. There two common suggestions.

The first is to build out non-J.D. programs. LL.M. programs have multiplied. Over the past generation, LL.M. programs have enrolled primarily foreign students or the handful of Americans who took law degrees outside of the country. More recently, these programs also have included LL.M. programs for Americans looking to specialize or add prestige to their pedigree: what once was restricted to the specialty of tax has proliferated to various other fields. In an instant, LL.M programs have begun to encompass non-professional degrees for individuals in cognate fields who could use legal skills to continue advancing in their current occupations.

The second is to raise more money from private sources. Even institutions that once depended on state subsidies for the bulk of their income have set up

16. Clifford Winston & Robert Crandall, Op.-Ed., *To Reduce Lawyers' Drag on Growth, How About a Law Ph.D.?*, FORBES.COM (Mar. 14, 2013, 8:00 AM), <http://www.forbes.com/sites/realspin/2013/03/14/to-reduce-lawyers-drag-on-growth-how-about-a-law-ph-d/>.

17. Jacob Gershman, *Number of LSAT Takers in June Falls to 14-Year Low*, WALL ST. J. LAW BLOG (July 11, 2014, 12:32 PM), <http://blogs.wsj.com/law/2014/07/11/number-of-lsat-test-takers-in-june-falls-to-14-year-low/>.

advancement operations. They chase their alumni for gifts and submit applications to foundations for grants.

These tactics are necessary and commendable. They can compensate for modest shortfalls, but they cannot cover up basic inadequacies with the business model. Unless a law school wishes to transform itself out of the training of lawyers, its core will remain the J.D. program; it is wishful thinking to wager otherwise.

Non-J.D. students are not available in sufficient quantities, and they do not substitute on a one-to-one basis for J.D. students in monetary terms. They are at best a two-for-one proposition; speaking of them in that sense only exposes the troubling tendency to treat them as if they were a financial necessity and little more. If they are not similar in quality to the J.D. students, admitting them trades one set of worries for another.

Fundraising potential is routinely overestimated. An institution with thousands of alumni who have not been accustomed to giving will not become an institution with thousands of donors without a better pitch than its own imperilment. Contributions follow success. There are lawyers who appreciate what their teachers enabled them to do, but, contrary to what legal training might suggest, it is not generally possible to persuade someone they ought to feel generous.

Thus we come to this. Law schools must cut. I embrace radical transparency in making that declaration. What we see when we pull back the curtains is not necessarily pretty. The great and powerful Wizard of Oz asked us not to pay attention to the little man back there.¹⁸

The challenge for us legal educators is to continue inspiring people to care about the law: students, benefactors, the bench and the bar, even the public at large. Inspiration will require innovation. It is time to step out from behind the curtains.

TUITION CUTS?¹⁹

In a recent report on the state of legal education, Moody's, the credit rating service, noted in passing that tuition cuts are not necessarily an effective tactic for improving enrollment. The rationale is important for people to understand.

Tuition cuts might not be all that they appear to be. The reason is virtually all institutions of higher education already discount tuition to a great extent. Almost all of them also are tuition dependent: their operating budget comes from what students pay them.

18. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

19. This section is reprinted from Frank H. Wu, *Tuition Cuts and Tuition "Cuts"*, HUFFINGTON POST (updated July 11, 2014, 5:59 AM EDT), http://www.huffingtonpost.com/frank-h-wu/tuition-cuts-and-tuition_b_5306597.html.

The Moody's report is proprietary and must be purchased from the credit rating service. Media coverage of the Moody's report was extensive. See, e.g., Jacob Gershman, *Tuition Cuts Are a Risky Bet for Law Schools, Moody's Warns*, WALL ST. J. (May 7, 2014, 6:45 PM), <http://blogs.wsj.com/law/2014/05/07/tuition-cuts-are-a-risky-bet-for-law-schools-moody-s-warns/>.

That is the case for the highly regarded and the not-so-reputable. Public institutions and those that value public service typically return a significant amount of their tuition revenue to their students in the form of need-based financial aid. Other schools that wish to recruit highly credentialed students award scholarships on the basis of those metrics. Some of the monies for these purposes may come from endowments, but much of it comes from what students themselves are putting into the coffers.

Whether it is meant to help many students by offering the opportunity for higher education or buy a few of them by rewarding earlier academic records, the budgetary consequence is the same. As with most other ventures, there is a difference between gross and net.

So a tuition cut may well leave many, perhaps most, individuals worse off as compared to the baseline. Here are the consequences of a cut to tuition.

Assume before it publicizes a cut, a school has a program oriented toward need-based grants. It may be giving as many as three-quarters of its students such packages. Only a quarter of them are paying the full sticker price. Three-quarters pay less; the one-quarter makes that possible.

Now after a cut, that school has two choices.²⁰ The first option is a real cut. The school could reduce expenditures in a manner commensurate to its loss of total tuition coming in. To be pointed about what that means: since human resources are the bulk of the budget, such a real cut means faculty, staff, or both, would have to be paid less or be laid off. Savings from the non-personnel share of the budget are not likely to be sufficient to make ends meet.

The second option is the illusion of a "cut." The school could reduce what insiders call the "discount rate" to exactly the amount that makes up for the tuition drop. Again, to be pointed about what that means: given that most students previously received generous grants, most of them end up actually paying more. The students who were not receiving grants prior are the only ones who in fact benefit.

To illustrate it with numbers, consider the simplest possible example. Suppose Acme Law School had two students (in this hypothetical, each of them stands in for hundreds who are treated identically) and a "rack rate" of \$50,000 per year. Alpha, who is impoverished, receives a \$10,000 grant; Bravo, who is well-to-do, receives no grant.

The real cost of attendance for a year (not including living expenses) is as follows. Alpha expends \$40,000 (\$50,000 tuition less a grant); Bravo, \$50,000 (the stated tuition with no break).

Imagine then Acme Law School announces a tuition cut of ten percent or \$5,000. Its new, much-praised "flat rate" is \$45,000.

But the leaders of Acme Law School do not wish to affect its programs. That frames their intentions in the most positive terms. They need to maintain the same overall revenue the school was receiving from Alpha and Bravo

20. We can put to the side the equivalent of money falling from the sky: alternate revenue sources. They exist, but they usually are an order of magnitude less than what would be needed to offset significant tuition decreases.

notwithstanding the cut, which is \$90,000 (the \$40,000 from the former plus the \$50,000 from the latter).

Accordingly, to achieve their goals, they direct that the financial aid program be zeroed out. Alpha and Bravo each pay \$45,000. The school receives \$90,000 as it always has.²¹

Look at what has happened to Alpha and Bravo. They have switched places. Alpha pays more than before, \$45,000 instead of \$40,000; Bravo pays less, \$45,000 instead of \$50,000. Alpha has a subsidy taken away; Bravo benefits.

Note too this is not ideological. If you object to Alpha receiving need-based financial aid to begin with, change the example to a credentials-based scholarship. So, in this variation, Alpha, who has scored at the top of the range on standardized tests and been valedictorian from her undergraduate alma mater, would have been offered a \$10,000 scholarship. That is eliminated with the tuition cut.

Thus, at a school that has announced a tuition cut, there must be, sooner or later, an announcement of the real cut that matches it. Absent that, the inference that can be made is that only the illusion of a cut has been presented. It is marketing, puffery, call it what you will.

The same can be said of flat-rate tuition programs more generally. It is no different than flat-rate taxation proposals. The resulting flat rate may or may not be a better deal than varying rates, depending on a student's individual situation.

All of the above is exacerbated by the lower levels of enrollment at law schools. A school trying to balance its budget, as all of them need to do, can compensate for lower enrollment with higher tuition, or vice versa. But simultaneous downward trends on enrollment and tuition cannot be sustained without even greater real cuts to spending, financial aid, or both.

Whatever people think about the cost of higher education, it is important to understand the choices that decision makers face. Much of what looks like reform may be symbolic.

SALARY CUTS?²²

Critics of higher education ask from time to time why I do not simply reduce faculty compensation by, say, twenty percent. They are right to observe that the payroll is the primary portion of the budget. I am always willing to consider ideas offered in good faith. Here is how an across-the-board salary reduction for professors might play out.

The foreseeable reaction to my hypothetical decree likely would be the calling of a faculty meeting at which I would receive a no-confidence vote. Institutions of higher education practice democracy. The chief executive officer of a college—one hesitates to even borrow that title from the corporate context—

21. Transaction costs are lowered as a side benefit.

22. This section reprinted from Frank H. Wu, *Reducing Faculty Compensation*, HUFFINGTON POST (updated May 5, 2013, 5:12 AM EDT), www.huffingtonpost.com/frank-h-wu/reducing-faculty-compensa_b_2813503.html.

is elected and can be unelected. Professors are my colleagues; I am not their boss.

Although the governing board is actually the authority that appoints me, a strong signal of disapproval from the faculty often, though not always, leads to the exit of the head of any campus. In rare instances, the board opposes the faculty and backs the leader. That, in turn, means a siege will set in, which has various outcomes, none especially happy.

I hasten to add that this is not about self-interest. The point is not to protect my own job. The point is that a search for my successor will be convened sooner rather than later. The faculty will ensure that the most important selection criterion is whether the candidate will reverse my decision posthaste.

Thus, it is not likely that a faculty salary reduction of any magnitude can be maintained permanently. It would merely swap out the person who presides over meetings.

Suppose, though, that I enjoyed sufficient popularity to bring around a majority of my peers to accept this cut. No doubt there would be some who would do so begrudgingly or on the tacit understanding the situation was temporary.

Then the forces of the market would operate on us forthwith. Virtually all of our professors, capable and productive as they are, would look for opportunities elsewhere. The renowned scholars and the best teachers would be recruited away by our rivals.

The reputation of the institution would drop, perhaps irreversibly. The word on the street would be that the school was approaching its demise. (Blogs could be expected to encourage the speculation and exodus.)

Ironically, the group whom we imagine as benefiting from a reduction of faculty compensation—the students—would no longer be interested in attending. They would have no desire to be associated with a place that has such serious problems.

Collusion among schools on compensation is not legal and would not be effective. It violates antitrust policies. But if it could be arranged, maybe by the state legislature as to the public system, there are enough well-endowed private schools that would take the opportunity to raid their competitors.

Finally, what if a magic reset were to occur? We wake up and, by an intervention along the lines of the classical *deus ex machina*, faculty salaries ended up much lower.

The quality of the faculty would suffer, as people chose other pursuits: staying in the lucrative practice of law instead of joining the academy. Anyone a decent law school would consider hiring as a professor could, if she wished, make much more money at a prestigious law firm. Our tenured professors make less than a brand-new associate at such an enterprise.

Without delay, constituents would demand that each school compete against others in rankings, leading straightaway back into the same cycle as each bidder for a star tried to put together the best recruitment deal. Professors are human beings. They respond to the same incentives as anyone else.

Whenever we face difficult decisions, we wish for the cure-all. A moment's reflection on the consequences should suffice to dissuade us in this instance.

There are better alternatives. I admire the professors with whom I am privileged to be affiliated. They value both teaching and scholarship. Reducing compensation is not as good an option as increasing productivity. Our faculty already have agreed to increase their workloads. Tenured professors are teaching more classes than their junior colleagues here and more than their peers at other leading institutions. They also are committed to increased counseling of students. Our strategic plan emphasizes engaged scholarship. The best research applies to the world around us.

Together, but only together, we can change higher education.

THE INTELLECTUAL EQUIVALENT OF SOCIAL CLIMBING²³

I would like to offer a hypothesis as to why law professors have become obsessed with producing scholarly work that most members of the bench and the bar regard as by-and-large useless, verging on absurd.

The lament has been heard before. As early as 1936, Professor Fred Rodell wrote a farewell to law reviews.²⁴ He said about everything that could be said about the matter, declaring there were only two things wrong with almost all legal writing: "One is its style. The other is its content."²⁵

Twenty years ago, the Honorable Harry T. Edwards of the D.C. Circuit Court of Appeals, a former professor himself, criticized the trend of law professors becoming more like professors in other academic disciplines and less like judges and lawyers.²⁶ A symposium was convened to study his complaint.²⁷

Yet, the disapproval has blossomed into resentment of late. Entire books have been published decrying the role of law professors as scholars. We are writers subsidized by our students.

Nowadays, anyone who discusses legal education without urging the prompt destruction of law schools is said to deserve personal attacks. Thus, I would like to open with a disclaimer about my own background. I began my academic career as a clinical professor. For seven years, I supervised student attorneys who did practical work that made them ready to represent clients. Their case files were grandparents in child custody disputes, tenants in eviction cases, indigent individuals who nonetheless needed a will, and so on.

23. This section reprinted from Frank H. Wu, *The Problem with Legal Education*, HUFFINGTON POST (updated Feb. 18, 2013, 5:12 AM EST), http://www.huffingtonpost.com/frank-h-wu/the-problem-with-legal-ed_b_2331698.html.

24. See generally Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

25. *Id.* at 38.

26. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

27. Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

So, I agree with critics. Almost all law schools have done much more than most observers would give them credit for—promoting skills training—but there is still work to be done.²⁸

Here is what has happened. There is a sequence of steps. Each of them appears rational in isolation. But, cumulatively, they lead to consequences that no group of actors foresees, much less intends.

Alumni and students, among others, want their school to be highly ranked. The value of their degree depends on it.

Deans and professors concur. Our career success and satisfaction is measured by progress in this regard. We move our school up, or we move ourselves up.

An important factor in rankings is peer surveys: you are only as good as other professors believe you to be. To impress other professors, we aspire to be like them. Specifically, we as a collective body try to resemble the professors at the most prestigious schools. Either we imitate them, or we hire them. Or, if we cannot afford the famous names, we at least attempt to recruit as new colleagues the students whom they have mentored.²⁹

Colleagues at the most elite schools can afford to undertake whatever scholarship they deem worthwhile. They can do so because their schools are supported by endowments that allow them to pursue projects as they wish. They are in the position to set the standards. Thanks to their reputation and network, their students are sought after regardless of whether they are prepared well—or at all—for a service profession.

The desire to avoid being perceived as a “trade school” becomes a self-perpetuating cycle. Professors have invented a metric for themselves. We assess our influence by “citation count.” It is akin to Googling yourself. We track the number of hits for our names (and our rivals’) in the database of law reviews.

People are rewarded on this basis: promotion, tenure, chairs, prizes, and raises. The number becomes not only a measure for merit but the primary means of defining it.

There is a school that symbolizes all of this: Yale. A handful of law schools produces the majority of law professors. But none more so than Yale. Ironically, Yale was the home of “Legal Realism” long ago.³⁰ That academic movement, as its name suggests, was all about the law as it operates in the “real

28. An additional caveat before proceeding: my intellectual interests are grounded in another sense as well. I would rather describe the world as it is (from an original perspective), than prescribe how it ought to be. What follows is an attempt to do that, not a defense of the situation.

29. A digression. I am reminded of an exchange that writers F. Scott Fitzgerald and Ernest Hemingway are reported to have had. Fitzgerald remarked, “The very rich are different than you and me.” Hemingway replied, “Yes, they have more money.” See Letter to the Editor, *The Rich Are Different*, N.Y. TIMES, Nov. 13, 1988, available at <http://www.nytimes.com/1988/11/13/books/1-the-rich-are-different-907188.html>.

30. See *The Heyday of Legal Realism, 1928-1954*, YALE L. SCH., <http://www.law.yale.edu/cbl/3085.htm> (last visited May 27, 2015) (describing Yale’s notable Legal Realism scholars).

world.” Rodell was a member of that school of thought. He supposedly never became licensed as an attorney.³¹

It is not all the fault of one Ivy League institution. All of the selection mechanisms of faculty members favor geeks. (I know: I am one of them.) These preferences coincide with, if they do not directly cause, a distinctly cerebral orientation of the resulting community. (The corresponding desire to produce the “best” law school by conventional metrics means admitting students who happen to possess the highest test scores and undergraduate grades.)

The effect ratchets. The more sophisticated the work, the more solipsistic it seems. To be sophisticated, one must know what “solipsistic” means. In this enclosed environment, they have an expert who has a Ph.D. in addition to a J.D., and consequently we need a pair with credentials to match.

Lest anyone wonder, I have nothing against Yale or its alumni. Some of my best friends are Yale graduates—just kidding. (For the record, I went to the public law school down the road from where I grew up and would not have considered any other place a rational choice back when “in-state tuition” was meaningful.)

My point is that Yale is Yale. Very few other law schools should try to become a pale Yale. They do not have the financial resources.

It is great to hire a smattering of their graduates, clutching a Ph.D. with their J.D., who emerge into the market each year. But, even in New Haven, they recognize the need to recruit people who were educated elsewhere.

There is another reason for the overwhelming mass of heavily footnoted nonsense. Students at Yale and elsewhere are no less savvy than their teachers. They want to impress prospective employers. They know that a means of distinguishing themselves is that line on one’s resume that says “Editorial Board” of XYZ journal. They have an incentive to found more journals.

Coupled to the boom in law schools (opening at a rate of more than one per year for a generation), the proliferation of student-edited publications, a true anomaly in academe, means an accelerating demand for material. Assuming the ratio of quality work to dreck has remained approximately constant throughout, the absolute quantity of lousy ideas mathematically must have increased. The signal is overwhelmed by the noise.

These dynamics are no accident. You want smart; we will give you smart.

WHY THE CURRICULUM LOOKS AS IT DOES³²

Critics claim the law school course catalog contains too many specialized seminars. They sneer at offerings that seem especially obscure. Their contentions are wrong. They are dangerous.

31. See Charles Alan Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455, 1458 (1980) (stating “Fred was never admitted to the bar, and could not have represented anyone in litigation”).

32. This section is reprinted from Frank H. Wu, *On the Importance of Beetles, or Why the Curriculum Looks Like it Does*, HUFFINGTON POST (updated June 1, 2013, 5:12 AM EDT), http://www.huffingtonpost.com/frank-h-wu/on-the-importance-of-beet_b_2976283.html.

To begin with, laypeople likely misunderstand the usefulness of technical subjects not only within law but also throughout academe. The extraordinary biologist J.B.S. Haldane, when asked what he had learned about religious faith from his scientific investigations, remarked that God (if a creator existed) seemed to be inordinately fond of beetles.³³

He was at least half serious. There are thousands of species of beetle.

A research university that strives to rank among the best will feature much more than an introductory survey course in biology. It may well boast an upper-level class on beetles.

An observer who wonders why the school is so devoted to the order *coleoptera* of the animal kingdom mistakes what the institution is about. Everyone realizes that very few students will become professional entomologists. A few may be inspired, and that is well and good. But a course about beetles in name is about much else as well. Students who are not enamored with bugs will take away research techniques applicable to other specimens.

And a course about beetles is the beginning of the campus commitment. The teacher who is fascinated with the weevil deserves support in order to advance knowledge on behalf of humankind—that is a perforce hyperbolic, corrective to the contempt directed at professors nowadays.

It is easy enough, and perhaps tempting, to make fun of these intellectual pursuits and the intellectuals too. Any observer can beat up the egghead who wants funding to dedicate a lifetime to looking at insects. Everything that has happened since high school should persuade reasonable people that bullying nerds is not commendable.

We need information about insects to control pestilence. Theorists even propose we can comprehend our own behavior from ants and bees, if not beetles. These zoological matters come back to law eventually in the form of sociobiology and evolutionary psychology, which, it is argued, generate recommendations for regulating personal conduct and passing public policy.

On top of that, classes turn out to be practical to a greater extent than people expect. Internet law is the latest example of a field that, when it was initially identified, was ridiculed as more or less a joke, or at best an indulgence. The details of jurisdiction on the web, dispute resolution, privacy, and the other issues that would hardly have been recognized, much less deciphered, a generation ago are doubtless worth studying now and have exploded into glorious complexity. It is not clear a lawyer would even be competent, whatever their practice, if they were unaware that commerce on the internet has its own characteristics.

Many of these “crazy” classes are the direct result of student demands. People want choices. They judge the quality of a school by the breadth of its curriculum. They compare it to competitors.

Some students, or earlier generations of them anyway, sought exactly what other students, or their successors, then disclaim as worthless.

33. See Ben Harder, *Why the World Is Inordinately Fond of Beetles*, U.S. NEWS & WORLD REP. (Dec. 20, 2007, 2:47 PM EST), <http://www.usnews.com/science/blogs/thinking-harder/2007/12/20/why-the-world-is-inordinately-fond-of-beetles>.

Ethnic studies, for example, has typically been established thanks to protest movements. Ethnic studies would be unnecessary if the experiences of everyone in this great democracy had been integrated into its history, but that has not happened without struggle. Animal law similarly is a student favorite. It is not as if university administrators have been eager either to open centers dedicated to empowering minority communities or to liberating laboratory test subjects.

The same element of student interest is often what motivates the addition of Indian law and Islamic finance. Both of those classes lead to areas of practice where supply is not sufficient for demand. It also is true of sports and entertainment law. Neither of those classes lead to realities of practice that will satisfy the expressions of interest.

But some students—as anyone else would—react angrily to administrators who want to dissuade them from their dreams. They may perceive advice about maximizing their job prospects, however well meaning or based on fact, as both disagreeable and patronizing.

The expansionist tendencies are not necessarily restricted in political terms. There can be agitation to bring on courses about the economic analysis of law or the history of gun rights. The reading of the classics has been encouraged to justify the war against terrorism. Western philosophy has been asserted to be the basis for battlefield victory.

Other classes are the indirect consequence of student expectations. People want renowned scholars on the faculty of their school. A customary negotiating point in recruiting a professor is the teaching assignment.

The big names usually want to teach less and to concentrate on their expertise. Almost all professors whose research has a specific emphasis are quite capable of teaching a class that is general in scope, if they must do so. So, to fill the endowed chair in criminal law requires accommodating the occasional class on the culture of dueling.

Ultimately, what is at risk in the hue and cry is the idea that has made American higher education the envy of the world. The Johns Hopkins University, the first modern research university in the nation when it opened in 1876,³⁴ was based on its German peers, which themselves had only recently been set up as such.

The model emphasized, above all, the value of original research in an academic context. It was formal, organized by department, with a hierarchy of credentials. The core of the concept is as vital as ever: practically by definition, developing societies must foster the development of new ideas or at a minimum the new application of old ideas. Education is deficient if it consists solely of the memorization, recitation, and re-interpretation of old ideas; it does not deserve to be designated as “education.”

From its inception, the ideal of the research institution included mentoring. Professors were supposed to share their findings with their pupils. They were expected to enlist them in their endeavors.

34. *Our History*, JOHNS HOPKINS U., <https://apply.jhu.edu/discover/our-history/> (last visited May 27, 2015).

American success in this regard is unrivaled. The most prestigious English institutions, Oxford and Cambridge, collectively “Oxbridge,” were not as enthusiastic about the grimy work of natural philosophers (“scientists” in our modern terminology). The finest Chinese schools, like those throughout Asia, have sought to copy our spirit of free thought and the resulting innovation (ignoring the irony of trying to copy these traits).

What came out of the quantitative fields has inspired the liberal arts. In law, academic research ascended along the lines of two movements. The Realists, who sought to describe the law as it functioned in society, were applying the insights of social scientists. The positivists, who drafted restatements of doctrine, were relying on the scientific method.

The threat to legal education extends beyond an attack on legal educators. It constitutes nothing less than an ideological challenge to the promise of the research university.

THE PRACTICING PROFESSOR³⁵

There are no new debates. The latest argument about the legal academy seems to be whether law schools ought to hire as professors those individuals with established careers in practice instead of intellectuals who boast extraordinary potential for publishing.

This is old, old, old. Jerome Frank, a New Deal official who became a federal judge, proposed, before World War II, that law schools be staffed by practitioners.³⁶ A “Legal Realist” with an academic bent, Judge Frank anticipated clinical education by two generations.³⁷

More importantly, this debate sets up a false dichotomy. Everyone agrees that legal education should prepare people to solve problems in the real world. There are no takers for the proposition that legal education should strive to be useless.

This strange debate misses the crucial point. The most important set of skills for a teacher are possessed inherently by neither practitioners nor scholars. It would seem obvious, but it is obscured by assumptions enveloped in anger. The most important set of skills for a teacher are the skills of teaching. If you insist on a fancy term for it, call it “pedagogy.”

The people who are accomplished teachers are the people who have been trained to teach or who have taught themselves. Lawyers who have practiced for a considerable period of time might well have been gifted mentors—or not. Lawyers span the range in this regard, and the incentives of the modern firm do not favor those who would take time for a protégé. Scholars who have been in school continuously likely had ample opportunity to appear in the classroom, but they may not have had any instruction in instructing before being put behind a

35. This section is reprinted from Frank H. Wu, *The Practicing Professor*, HUFFINGTON POST (updated Apr. 16, 2013, 5:12 AM EDT), http://www.huffingtonpost.com/frank-h-wu/the-practicing-professor_b_2683041.html.

36. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 914 (1933).

37. *Id.*

podium. Their very emphasis on research probably did not lead to enthusiasm for everything else, which constituted a distraction.

The declaration by practicing lawyers who have confidence that they can “retire” into the professoriate is self-interested: essentially, it is the demand, “Hire me!” Or it is self-praise: “People like me are the best!”

Imagine even the most renowned law professors stopping by the managing partner’s office to say that, after twenty-five years in their current job, they wanted to slow down and were ready to make a contribution to their old firm. Supply and demand in the two markets is dissimilar: there are many more lawyers than professors at the top, which operates to the disadvantage of lawyers trying to transition into professors.

Everyone thinks in such egotistical terms. I am no different. I think it is ideal to blend together practical experience and academic orientation, because that is how I happened to have developed as a professor. Although I had only a couple years as an associate at a major firm, I then spent seven years supervising student-attorneys working for real clients on real cases. I would defy anyone who has not worked in such a clinical setting to claim that it is not an authentic version of what lawyers do; if anything, it is all the more so.

For that matter, I never noticed any special correlation between my knowledge of the subject and my effectiveness as a teacher. I am aware that the sample size is not much—that is a problem with the practitioner-as-teacher model, which is over reliance on a personal perspective—but the haphazard research I have done suggests others have the same sense. I do not mean you can teach if you are ignorant of a field. You need at least a minimum level of understanding.

Beyond that, however, I actually noticed some degradation of my performance as I acquired expertise: the more I appreciated about civil procedure, the worse I was as a teacher of it. I became inept at communicating the core of the course.

I suppose that happened for many reasons. My interests became more esoteric. I forgot what it was like to be confronting the baffling concept of procedure for the first time. My preparation was at its most intense at the outset. I became impatient about covering the same material again.

To the extent I was successful with students, which was now and again, it was due to a different set of factors entirely. Rather than being determined by what I knew, it depended on how I presented it. I was not put there to demonstrate my own competence. Simultaneously, I had to inspire and challenge. The bond I formed with the students as a group, and the trust they had that I was trying to help and not humiliate them, were as essential as the arcane data I had at my disposal.

We are prone to a systematic mistake. We want to trust in universal competence, the supposition that if a person is good at one thing then she will be good at another thing, and vice versa. Our conviction is wrong. People are perfectly capable of being good at one thing but bad at another thing even if the tasks are related, to some extent.

There are parallels to other endeavors. I was always puzzled that the best managers in baseball have tended to be journeymen athletes. They had made the

major leagues, which should not be scoffed at, but, by and large, they did not turn out to be superstars. As a corollary, future Hall of Famers, who tried a leadership role after their playing days, often ended up shocking underachievers. Sparky Anderson, the first to win a World Series for each league (Cincinnati Reds and Detroit Tigers) was the former;³⁸ Alan Trammell, one of the preeminent shortstops of all time (Detroit Tigers) was the latter as his successor (managing his team to a 186-300 win-loss record over three seasons).³⁹

I asked my nephew, a sports nut, what might explain these phenomena. His hypothesis, which seems plausible, is that the best managers are concentrating on how to deploy their own merely-very-good raw talent; on the field earlier, their performance meant they had to hustle to make the cut. By contrast, their naturally able competitors felt not as much need to exert themselves to their limits; consequently, they did not call on all their abilities, including of analysis, at least not as constantly.

So I have a wager. The assertion that practitioners make better teachers is an empirical claim. It can be tested. I will bet a nickel that a study of law school professors would find that how a teacher is evaluated by either students or experts is based on many variables, among which years in practice is not the most significant. I also will bet it would show that there are exceptional teachers with extensive backgrounds in practice as well as counterparts with no background in practice, as well as mediocre teachers with every length of prior practice.

Irony runs throughout this discussion. I have never thought there was anything wrong with the trades, and the distinction between a profession (of which law is held up as representative) and a trade (of which plumbing, it appears, is the standard example) is as much snobbery as anything else. I find it more insulting to plumbers than lawyers that people say they do not want law school to be a trade school. The problem is that if law school dispensed with any discussion of justice, ethics, and the purposes of the system, the very same people who attack us for being too theoretical would start to assail us for being too materialistic. I would hope that critics of legal education would want us to instill in students the desire to do more than carry out the wishes of their clients.

I should be clear: I welcome practitioners as professors. But I am not persuaded by the contention that practitioners are the only ones who are qualified to be professors.

My conclusion is that the choice presented to us imposes constraints that are not necessary. In a great law school, the faculty displays diversity. There are professors who have distinguished themselves as trial lawyers, those who have impressed their peers by penning treatises, and more than a few who have both sufficient practice in their past to be credible and enough publications on their curriculum vitae to be respected.

38. See Cindy Thomson, *Sparky Anderson*, SOC'Y FOR AM. BASEBALL RES., <http://sabr.org/bioproj/person/8762afda> (last visited May 27, 2015) (biography of Sparky Anderson).

39. See John Milner, *Alan Trammell*, SOC'Y FOR AM. BASEBALL RES., <http://sabr.org/bioproj/person/5c73bfdf> (last visited May 27, 2015) (biography of Alan Trammell).

THE COSTS OF CHANGE⁴⁰

Law schools have changed. I know, I know: not fast enough. Law school deans are taking a beating in the popular culture. We are alleged to be con artists who, leading some sort of bizarre crew of hyper-theoretical professors, are enticing consumers to purchase a worthless product that ruins their lives.

Law schools must continue to change. Our technology-based culture has proven again and again and again that the only true constant is change. At the same time that Twitter, founded nine years ago,⁴¹ set up its headquarters a few blocks from our campus, the United States Postal Service, which predates the United States, announced it could no longer sustain Saturday service as a business proposition.

I would like to take a moment to talk about what is different now compared to a couple of generations ago. The senior leaders of the bench and the bar were just graduating from law school. They emerged in the era circa 1973 of the anxiety of “stagflation,” the economic combination of stagnation and inflation, and the drama of the Watergate investigation.

A firm with fifty lawyers back then would have been a leading institution; partners did not move over to a rival; and compensation was a private matter and much more modest. Of course, fancy firms had only just ceased to be identifiable as Protestant, Catholic, or Jewish; the only people of color working there probably cleaned the offices; and, if there was a single woman attorney, she likely did trusts and estates.

I would also like to lay out the budgetary effects of change in the academy—and the tuition consequences. As we face demands for revolution, while implementing reform, it would be useful to consider the costs. (I will not even mention that back then public law schools received the bulk of their budget from public sources.)

The greatest change has been the embrace of clinical legal education. By “greatest,” I mean the most sizable and the most worthwhile. Similar to the model of clinical medical education, clinical legal education is the best means by which we prepare students for practice. It has been so successful that we, as a profession, might well be on the cusp of requiring it for every graduate.

The expense of clinical legal education can be calculated in straightforward terms. A professor in a doctrinal class, such as the first-year required curriculum of civil procedure, criminal law, property, contracts, and torts, can lecture to a hundred students at once. That is not ideal, but it is not uncommon. A professor in a clinical class, supervising student attorneys who are representing real people in real cases, cannot train more than ten students at once. That is if she cares about her responsibilities, both as a teacher and a lawyer.

40. This section is reprinted from Frank H. Wu, *Reinventing Legal Education: The Costs of Change*, HUFFINGTON POST (updated Apr. 23, 2013, 5:12 AM EDT), http://www.huffingtonpost.com/frank-h-wu/reinventing-legal-educati_b_2713409.html.

41. See *Milestones*, TWITTER, <https://about.twitter.com/milestones> (last visited May 27, 2015) (stating Twitter was founded in 2006).

It happens that the “podium” professor, as they are called, likely makes more money than her clinical counterpart, though not by much. Thus, the difference is more than an order of magnitude. Once you count the overhead required for an actual legal office, the clinical course requires ten times as much money. There are new technological advances that will alleviate some of that.

Pause for a moment on this math. If we want clinical legal education, we will need to spend much more to provide it. As curmudgeons tell the young, this is called a choice.

Likewise with the student experience. The expectations for legal education in general have become so much higher. Traditionally there was not even lip service paid to “the student experience.” Until recently, legal education has been miserable—ritualistically, proudly so.

My predecessors really did say at orientation, “Look to your right, look to your left. One of you will not be here next year.” Some of them said “two of you,” and then they ensured it came true. Whether they flunked out or dropped out, they were not missed.

I say when I meet the assembled matriculants, “Look to your right, look to your left. These are your future colleagues and clients, the judges before whom you will appear, and, for some of you, your future spouse or partner.” They want us to create a genuine sense of community; we want to do that too, not solely for competitive advantage.

None of this makes me better than those before me. We belong to different periods in history.

Over time, we have added dozens, literally dozens, of professionals for student services that would have been scoffed at. Law school stressing you out? Back in the day, the response would have been, “Well, perhaps law is not for you.” Need a job? Then, you scanned a bulletin board with some index cards tacked onto it advertising openings. Deaf? No interpreter unless you paid yourself.

Today, we have counselors for students and numerous organizations they form for everything from patent law to running, advisors on careers and placement, specialists for disability accommodations, medical personnel for serious issues, and public safety officers. Many of them hold law degrees themselves.

Most recently, we added an office to compile data and address accreditation requirements. Everyone wants us to be transparent, while lowering our costs. Those goals, as is true of many human desires we feel simultaneously, are not highly compatible. Like elegant product design, transparency turns out to be pricey. Specifically it requires that we build an apparatus to find the information, organize it, verify it, submit it, and then track the trends that are revealed.

The other day, I spent the lunch hour in our cafe to chat with students. A nice fellow, a first-year student, came by to meet me. The only subject he wished to bring up was ice cream. He wanted to know if the cafe could install a machine as he recalled from his undergraduate days elsewhere, so he could enjoy soft-serve ice cream.

As I explained to him, I have nothing against ice cream. If we can make a profit as the vendor, then we would be delighted to offer ice cream. But if we cannot do so, then our strategic plan does not call for ice cream.

Our strategic plan is about high-quality legal education. The definition of every aspect of that phrase, “high-quality,” “legal,” and “education” is dynamic, not the same as it was two generations ago. Improvements to each facet require we make expenditures. That forces us to ponder what it is exactly, as a society based on the rule of law, we want to pay for our principles.

THE BUSINESS MODEL OF LAW SCHOOLS⁴²

Everyone is urging law schools to make radical modifications to how they do business, if not demanding that they do so. Indeed, law schools are obligated to rethink the basics of everything from the curriculum to the financing of the degree.

As we discuss much-needed reform of legal education, it might be useful for everyone to have information on where the money comes from to operate law schools. There are basically five sources of revenue for the two hundred or so ABA-accredited institutions. Academic quality can be sustained only if the business model is viable.

First, law schools are what is called “tuition dependent.” With a handful of exceptions, the primary funding derives from students in the form of tuition that is paid. Almost all schools then return significant proportions of what they receive via financial aid.

But that is just the first piece of the pie....

Second, for some schools, an endowment also offers support. The original gifts are not spent. A designated portion of the total return from the investments is available on an annual basis. The rate is typically in the range of five percent.

All schools continue trying to generate further contributions. Donors may wish to set up endowments, or they may give amounts to be spent on a discretionary basis. Philanthropy enables schools to progress from good to great, but it is unlikely to be sufficient to cover recurring deficits—and people typically do not feel the desire to offer their largess for that purpose.

Third, for public schools, state subsidies, which once were significant, fund law schools. As an example, the direct legislative appropriation for UC Hastings, which was once well over 80% of its budget, now accounts for approximately 13%. If you display tuition and the state subsidy on a chart, one line heads up as the other line heads down. Tuition must increase as the state subsidy decreases, assuming all other things remain equal.

Fourth, many campuses have auxiliary operations such as student housing and parking garages. These may produce a modest financial benefit. Programs such as non-J.D. degrees might be deemed auxiliary operations as well. They are useful at the margins.

42. This section is reprinted from Frank H. Wu, *Where Law Schools Get Their Money*, ABOVE THE LAW (Oct. 3, 2013, 3:56 PM), <http://abovethelaw.com/2013/10/where-law-schools-get-their-money/>.

Fifth, for the 90% or so of schools that are embedded within a structure such as a university, the law school may receive resources from the central administration. It might be in the form of services. In the past, there has been lively discussion on some campuses over whether the law school is receiving enough for the overhead it is taxed. But in a time of crisis the money could flow in the opposite direction; other units might provide a subsidy to the law school to offset temporary shortfalls.

The relative importance of these sources of revenue should be emphasized. Imagine a school with 1000 students paying \$50,000 in tuition. Then suppose a benefactor gave \$100 million. These numbers make the math simple. A gift of that scale, by the way, would be transformative and precedent setting.

Now an endowment of \$100 million throws off \$5 million per year—optimistically. Say that was all given out in the form of scholarships. The result is a ten percent discount. Five million dollars divided by 1000 is \$5,000, which is 10%. In other words, even the greatest gift will make legal education only slightly more affordable.

I have embraced change. It is my responsibility to determine how to bring it about.

I note only these facts. Reducing the number of J.D. students who are enrolled, reducing the tuition charged to each of them, or both, will result in significant loss of revenue. Reducing tuition revenue necessitates increasing other revenue or reducing expenditures. People—or critics anyway—may not have contemplated all of the consequences.

BECOMING A LAW SCHOOL DEAN⁴³

Here is my advice about becoming a law school dean.

So the reader can assess my advice for herself, as advice should be more personal than generic, allow me to open with an observation that establishes my worldview. I am a contrarian. Now is a great time to be a dean. I could not imagine circumstances better for someone serious about the prospect.

The reason is that there is an unprecedented opportunity to lead. The bench, the bar, the general public—even the President—are demanding legal education reform. Many of those external observers are attempting to impose their own changes, and some are offering guidance without understanding what they are criticizing.

For all that, it is rare to be given such support for wholesale reinvention of institutions. As never before, a leader who has potentially worthwhile alternatives will find an audience willing to consider her model.

Professors who would shy away from a deanship during downsizing of the entirety of all of legal education likely underestimate the tremendous stresses even during periods of growth. If you intend to last for any significant stint, the

43. This section is reprinted from Frank H. Wu, *Dean Frank Wu: So You Want to be a Law Dean*, LAW DEANS ON LEGAL EDUC. BLOG (Oct. 29, 2013) (posted by Cynthia L. Fountaine), http://lawprofessors.typepad.com/law_deans/2013/10/dean-frank-wu-so-you-want-to-be-a-law-dean.html.

challenge is even greater: it is all too easy to make mistakes in market trending upward that you come to regret when the cycle turns.

First and foremost, have a reason for wanting to be a dean—not any reason, but an irresistible reason. I refer to a private reason, not the public one. You need both.

“I am at a point in my career when I am ready to do this,” is, if I may say so, not sufficiently compelling. It should not persuade you to pursue the opportunity any more than it will convince others to give it to you.

If you consider the proposition, being ready for a task implies you could do it and not that you should do it. An abstract readiness is not enough to sustain you through the real tests of the role. In my experience, feeling ready correlates inversely to actually being ready.

“Because I like to be in charge,” is, however, a good motivation. That cannot be the lead statement in your application. But any individual aspiring to be a leader should be honest with herself. If even to her own secret self she does not like to be in charge, she will not last as a leader.

Being in charge does not mean you boss around others. It is the other way around—they refer the problems to you.

Next, it is crucial to choose the right institution—and for everyone there to choose the right dean. Both must get it right to avoid misery.

If you really want to be a dean and have received an offer, it is highly likely you will be a dean eventually and have other offers, if you like. The better part of judgment is to withdraw from a search at an incompatible school, to compete again another day.

The pool of people who are qualified to be dean is vast relative to the range of persons who will fit the needs of that place and that time. Deans are not fungible, because institutions are not identical. Neither deans nor institutions ought to be easily mistaken for another dean or another institution.

A dean who would be good for a particular school will not necessarily be good for another, and even a dean who would have been good earlier or who might be good later might not be right now. Schools face different problems: the central administration; faculty divisiveness; a structural deficit; lack of identity; rankings; and so on.

Arrow’s Impossibility Theorem should be remembered by all parties.⁴⁴ It is unlikely that all of the stakeholders will agree. Kenneth Arrow received the Nobel Prize for proving that it is logically impossible to democratically aggregate preferences in complex circumstances. The campus that has a fight between the central administration and the law faculty, for example, cannot help but display diametrically opposed objectives in the dean search.

Finally, and perhaps even more importantly than having a reason for wanting to be a dean, make sure your partner or spouse shares your ambition or you have a relationship that will continue to thrive if she has to sacrifice. My wife reminds me, from time to time, that she has a job, and being the dean’s wife is not it. She is right in this as she is with much else.

44. See generally Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950), available at <http://gatton.uky.edu/Faculty/hoytw/751/articles/arrow.pdf>.

The decision to be a dean is a joint decision. Only one person will occupy the office in formal terms. But anyone considering running for the office should appreciate its demands are constrained by neither place nor time—"running for the office" is the right phrasing; being a dean is analogous to being a politician, because of the public nature of the occupation. Although that does not call for your spouse/partner to be standing alongside you at every campaign appearance, it does require you both to have similar expectations.

I love my job. I do not commend it to everyone.