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Review of *Failing Law Schools*

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Failing Law Schools, by Brian Z. Tamanaha: A Review*

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Brian Tamanaha's book *Failing Law Schools* is neither sociology nor a synthesis of social science research. Rather it is social commentary rooted in Tamanaha's experience as a law professor, the literature on legal education, and barely analyzed data on law school costs and student outcomes. Tamanaha cannot be blamed for the absence of sophisticated research on matters that cry out for empirical investigation nor for having to rely on data sources that at best capture only a few bivariate relationships, but these limitations make his causal analyses and proposed solutions less than compelling. Still the book is not without its virtues. Indeed, I advise any sociologist interested in legal education or the legal profession to read it. Just be careful not to read it for more than it is worth.

Tamanaha's thesis is that legal education costs far more than it should because (1) ABA accreditation requirements compel law schools to spend money for purposes that add little to the education of attorneys, including the mandate of an unnecessary third year; (2) law faculty teach too little and, for the most part, are paid too much; (3) too much of a law professor's salary supports research rather than activities that directly benefit students; (4) the high cost of clinical legal education is not justified by value added; (5) law schools spend excessively and misdirect financial aid in order to enhance their *U.S. News* rankings, and (6) when the top-rated Yale Law School increases its tuition, which it can do while still giving value for money, other schools follow suit although their degrees are worth less than Yale degrees and in some cases would cost more than they are worth at half the price. For these reasons, Tamanaha's argument continues, law school tuitions have reached extraordinary heights with the result that many law students graduate deeply in debt, so deeply that the debt loads of many students are likely to be manageable only if they secure high paying corporate law jobs or public service positions that carry with them loan forgiveness after ten years. Corporate law jobs are, however, mainly locked up by graduates of the most prestigious law schools, and these same graduates have a leg up in getting plumb public service positions. Yet the debt loads of students graduating from less selective law schools are often as high or higher than those of graduates of more prestigious institutions. Compounding the problem is that many law graduates will not pass a bar or if they do will not find a job that requires use of their J.D. degrees. This problem is not new but according to Tamanaha has been growing for some time as law school tuition has for decades risen far faster than inflation. It became an obvious crisis, however, only with the 2008 recession. Yet a perked up economy will not alleviate it because the recession, Tamanaha tells us, only hastened an already in-progress restructuring of the legal profession, one result of which is the disappearance of many once high paying law jobs. The core of

Tamanaha's proposed solution is reducing the cost of legal education, primarily by changing ABA accreditation requirements to allow law schools to make do with few if any tenured faculty and to turn out bar-eligible graduates in two rather than three years.

Tamanaha's book can be divided into three parts: a lengthy segment on reasons why law school tuition is so high, a shorter segment on the consequences of high tuition and the indebtedness it engenders and a brief chapter suggesting solutions. The book is clearly argued, and Tamanaha writes with just enough modesty and moderation that it cannot be called a polemic. Most of Tamanaha's arguments have truths at their core, and his proposed solutions are intriguing enough that they merit discussion. Yet the book is lacking in important ways. Readers should not leave this book thinking that Tamanaha has presented a completely fair or adequately nuanced portrait of legal education today or of the sources of the problems that law schools and law students face.

The book's major shortcoming is its tendency to view forces affecting law schools as isolated from the university and the larger society. This is especially true of Tamanaha's explanations for skyrocketing law school tuition, the focus of 9 of the book's 14 chapters. The first culprit he identifies is ABA accreditation, yet the ABA has been accrediting schools for generations and applying much the same standards. During most of this period law school tuition was not greatly out of line with the earnings opportunities law graduates enjoyed. Moreover, it is fair to ask whether law school would be noticeably less costly had ABA accreditation not existed for, say, the last 20 years. Although this would have allowed law schools to educate students more cheaply by using untenured faculty and graduating students in two years, a widespread beneficent effect on tuition levels is not self-evident. The stratification of law schools and the legal profession is such that even a substantial number of low cost law schools at the bottom of the hierarchy would be unlikely to exert much price pressure on schools following the traditional model, especially if those mechanisms that did the most to lower costs would be seen by students and employers as markers of an inferior education. Consider California Western (CW), an accredited law school unranked by *U.S. News* because it is not among their top 145. It resides in a state that allows graduates of unaccredited law schools to take the bar. The mean amount owed by the 88% of CW's 2010 graduates who had educational debts, was \$145,621, highest in the nation. Its reported tuition was \$42,000, and only 25% of its 2011 graduates had full time private sector jobs within nine months of graduation. If CW can charge \$42,000 although it competes with unaccredited law schools for students, why should we expect that relaxing or abolishing current ABA accreditation requirements will change what most law schools choose to charge their students.

Professor Tamanaha barely acknowledges a more important cause of increased law school tuition: the dramatic decrease in many states of subsidies for higher education. My school, the University of Michigan, which Tamanaha criticizes, along with Berkeley Virginia and several other distinguished state schools, for selling out on its role as a public provider of higher education, was, as were these other schools, once a bargain for state residents. Today it functions much like a private law school. Residents get tuition break of only a few thousand dollars because the state today contributes little if anything to the cost of educating them. If state law schools still charged resident students substantially less than they charged non-residents, not only would many of their students graduate with far less debt, but also private law schools, competing with state schools to enroll the best students, would feel pressure to

hold their tuition increases down. Focusing on accreditation requirements, which often lag changes in legal education, as a major cause of higher law school tuition while barely mentioning the dramatic diminution in public support for higher education, makes for poor causal analysis even if it does have the virtue of directing attention toward things legal educators might change.

Turning to the private side, Tamanaha might have paid more attention to the implications of figures he provides. He reports that between 1985 and 2009 tuition increased by 327% at private undergraduate institutions and by 375% at private law schools. This suggests that the null hypothesis that there is little or nothing peculiar to legal education which explains the rise in law school tuition is at least plausible, and it should be rejected before seeking to identify matters peculiar to law schools as the causes of their dramatically increased tuitions. Testing this null hypothesis would have meant comparing changes in the cost of higher education within and outside of law schools on such dimensions as expenditures for health care, energy, regulatory compliance, student services, IT and maintaining and adding to physical infrastructure, all of which involve costs that have increased faster than inflation. One should similarly examine changes in the market for highly educated labor and changes on the demand side as amplified by the greater availability of student loan. Of these factors only the freer availability of loans attracts Tamanaha's sustained attention.

Rejecting the null hypothesis that nothing peculiar to legal education explains the rise in law school tuition is important not just as a matter of good social science but also because it has implications for the likely helpfulness of law-school focused solutions. Had Tamanaha cast a broader net in his effort to explain the escalation of law school tuition, he most likely would still have been able to identify cost magnifiers peculiar to legal education, but they would have appeared responsible for only a portion, perhaps only a small portion, of the tuition increases he deplores. Perhaps he would not have written on the page following his presentation of the tuition inflation statistics, "Law schools have raised their tuition to *obscene* levels because they can." (my emphasis)

Tamanaha considers changes in the legal profession when he discusses the difficulties law graduates encounter in paying their debts, but he ignores the relationship between changes in the profession and law school costs. On a per student basis legal education for many years was among the least expensive instruction universities offered. Much law school teaching occurred, and occurs, in large classes without teaching assistants, resulting in student-teacher ratios that costwise more than made up for the exceptionally high pay law teachers often receive. In the last several decades, however, law schools have seen a proliferation of legal clinics and such other practiced-oriented courses as legal writing, negotiations, mediation, legal research and law office management. Teachers of these courses are often paid less, and sometimes substantially less, than the so-called "stand-up faculty," but because these courses have low student-faculty ratios and in the case of clinics can involve substantial associated expenses, they are a major driver of increased cost. Practice-oriented courses did not proliferate simply because of accreditation requirements or competition among law schools. Rather the demands of the legal profession changed. Corporate law firms that once regarded the first year or two of an Associate's career as a time when some hours would not be billed but would be written off as learning expenses, now start associates at salaries as high as \$160,000 or more and expect annual billings in the range of 2200 hours from the get go. Smaller firms and understaffed prosecutorial and public defender offices

want attorneys who know how to interview a client or examine a witness from day 1. And the decreasing number of lawyers who expect to practice on their own know that if they do not know their way around a courtroom when they start, there may not be a friendly court clerk or more established solo practitioner to give them guidance. So it is not enough to assert, as Tamanaha does, that clinical education is an important contributor to higher law school tuition. One must recognize that practice-oriented offerings have increased in response to student and law firm demands and that these demands have changed with the changing nature of law practice. Moreover, for graduates who practice law the tuition increases these courses fuel may well be worth it.

Tamanaha's portrait of law professors could hardly be less flattering. They are overpaid, do little teaching, spend little time preparing for what they do teach, seldom see students outside of class, feel little pressure to produce once protected by tenure, and rather than write they use the considerable time provided for research to pursue leisure or supplement their income through consulting. The portrait is not totally inaccurate, for there are law professors it fits. Moreover, I agree with Tamanaha that being a law professor is a dream job. The pay is excellent and being largely in control of one's time and activities is even better. But the portrait hardly fits most law professors I know. For starters Tamanaha's catalog of law activities omits the time it takes to keep current on the law. This can be substantial as one may have to relearn the law or redesign a portion of a course with each new important court decisions or legislative or regulatory change. I believe Tamanaha is also mistaken when he interprets studies showing that law professors publish somewhat less after tenure as indicating a slacking off in favor of free time. If senior faculty write a bit less (and many don't), it is often because they find their time increasingly taken up by law school and university committees, assistant deaning, tenure and recruitment responsibilities, bar involvements, invited paper presentations, conference participation and national service of various sorts. Moreover, having taught both law and sociology, I have found that law teaching requires more time and is less satisfying because law classes are often much larger, and law students are less engaged than sociology graduate students and less fun to teach than undergraduates. I also believe Tamanaha is wrong in suggesting that excessive professorial pay is a major cause of high law school tuition. Putting aside the question of what is excessive when many of one's students can earn \$160,000 and more the first year after leaving law school, if the average law professor were overpaid by \$50,000 a year, in a school with 50 full time faculty and 800 students the annual per student cost of excessive pay would be \$3,125. This is not chump change, but it is far from the lion's share of a year's tuition, nor is there anything new in how well law professors are paid.

Tamanaha's two chapters on how the U.S. News rankings affect law school behavior are fascinating and for the most part on the mark, but little he writes will be news to those who have read the work of Wendy Espelend, Michael Sauder and others. His argument that the struggle to maintain position in the U.S. News rankings has been a major contributor to increased law school tuition is accurate but deserves a more nuanced analysis than he provides. Thus he is right that sums spent on scholarship aid, and merit scholarships in particular, have been spurred by rankings concerns, and except perhaps for a few of the best endowed law schools, scholarships mainly redistribute tuition dollars. But scholarships lower the cost of legal education below the sticker price for many students and except to the extent that dollars go to students who could have paid for law school without borrowing,

merit scholarships should not greatly increase average law student indebtedness. What merit aid does do is change the distribution of indebtedness. Students who might have had moderate but manageable debt graduate with little or no debt, while the debt levels of other, often more needy, students sometimes spike to the point where manageable debt becomes unmanageable. Trade-offs are similar when law schools temporarily finance jobs for graduates to enhance the “employed upon graduation” numbers they report to *U.S. News*. This also raises and redistributes tuition dollars, reducing financial burdens on those who benefit. Unlike merit scholarships, a need nexus is likely, and some graduates may find that the temporary support aids in finding permanent positions. For most students, however, including program beneficiaries, debts are driven up because of higher tuition. Law faculty expansion, an important cost driver, has no doubt been encouraged by *U.S. News*, which highlights student-faculty ratios and considers spending more money per student a good thing. But faculty expansion has also been driven by curricular needs, and regardless of the driver tuition increases that pay for faculty may be justified by the educational gains from smaller classes, a richer range of electives and more student-faculty interaction.

Tamanaha’s most compelling chapters are those that discuss the average debt levels of law students, their earnings prospects and the burdens that high debts and moderate incomes can impose. Using data culled from *U.S. News* Tamanaha reports that 2010 law graduates began law school with an average educational debt of \$25,250 and accumulated an additional \$98,500 in debt before graduating. This is estimate is, no doubt, high, for it is inconsistent with other data he mentions, but the exaggeration hardly matters. Many law schools report that 80% or more of their students graduate with some educational debt, and a substantial proportion of these have debts close to six figures or above. Compounding the problem is the difficulty many law school graduates have in finding jobs. Even those who find lawyer jobs are not necessarily well off. A significant proportion will earn \$50,000 to \$70,000 or less and will find paying off six figure debts difficult if not unmanageable.

Tamanaha offers a vivid sketch of the loan repayment difficulties law school graduates should expect to experience, and he argues that many will find their loans manageable only if they stretch their payments out using the federal government’s Income Based Repayment Program. The IBRP is, however, an unattractive alternative because it takes 25 years to achieve loan balance forgiveness, during which time take home pay is diminished and difficulties in accessing credit and other problems may substantially interfere with quality of life. Tamanaha most likely overstates his case since he assumes that the entire burden of loan repayment is on the student borrower. This ignores spousal contributions, parental payment assistance, the generous loan forgiveness programs that some elite law schools offer and inheritances and other windfalls that make loan repayment less daunting. But even if the situation is not as dire as Tamanaha’s simple statistics make it out to be, large numbers of law school graduates will find Tamanaha’s description of their financial woes “on the money.” We don’t, however, know how large the number is or how grievous the woes. The post-graduation impacts of educational debt call out for sociological investigation.

Tamanaha sees the ABA’s requirement of three years of legal education as an important cause of the debt levels he deplores, and he joins the ranks of others who during the past half century have argued for reducing post-baccalaureate legal studies to two years. These proposals raise fundamental

questions about the nature of legal education and the relationship of law schools to their universities that have often been addressed. Here I want to enter different objections.

Putting aside cost concerns, the case for the two year law school is weaker today than it was half a century ago. There is more to teach now than there was then. Fields like contract law which were once ordered by general common law principles with some legislative overlay are in most respects now tightly ordered by codes. Understanding insurance law and the dynamics of negotiations is as important to the tort practitioner as understanding the common law of torts. One-time backwaters of the law, like immigration law and intellectual property, are now important subspecialties with their own complicated jurisprudence. Moreover, this is occurring when time for on the job training and reading law beyond one's specialty is scarce. Educationally speaking it makes more sense to debate whether law school should be four years, with one year devoted to clinical training or a legal internship, than it does to debate whether a third year of law school is necessary.

Moreover, allowing law schools to produce bar-eligible graduates in two years might do little to solve the debt problems that are Tamanaha's great concern. The stratification of legal practice would remain, and the best paying jobs would, no doubt, be reserved for those who had three years of legal education. Even lower ranking schools might hesitate to offer two year degree programs, fearing the loss of both status and tuition. True, paying for two years of law school will cost less than paying for three, but perhaps it will not cost a third less since a two year law school might have more leeway to raise its annual tuition. Add in the possibility that two-year law graduates might be less likely to pass the bar and find decent law jobs than graduates of three year schools, and even if less in debt, they might not come out ahead financially over the longer run. Other possibilities that Tamanaha notes have more potential. Perhaps the best and most likely is correction through market forces, a process that could and should be hastened by greater transparency about school-specific costs of legal education and similarly specific bar and job success rate data. Also potentially helpful are Tamanaha's suggestions regarding educational loans. The goal is to require schools to have enough skin in the game so that they do not benefit from attracting students whose loan repayment prospects are poor.

Law schools, or at least some of them, are in trouble, but Tamanaha claims more. His title, *Failing Law Schools*, could be taken to mean that law schools are failing in their mission because, as he suggests, they are homes to overpaid law professors who care about research and not teaching; they subordinate the goal of providing high quality, low cost legal education to whatever it takes to climb the U.S. News rankings, and they use ABA accreditation requirements to exclude competition and forestall other changes that might threaten their ability to raise tuition to "obscene" levels. The case for these claims is not devoid of facts, but it is insufficiently rooted in sound social science to be close to convincing. Indeed, Tamanaha's never argues that law schools are failing in their primary mission, which is training competent attorneys. Alternatively Tamanaha's title may read as a performative: in writing this book he is giving law schools a failing grade. Reading the title this way raises the question of whether one should care about the grade Tamanaha gives. In 2012 the *National Jurist* magazine released a list of the most influential people in legal education. Number 1 is Brian Tamanaha. I am not on that list.

*An abbreviated version of this review may be found at 43 *Contemporary Sociology* 269 (2014)