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Having it Both Ways. The Challenge of Legal Education Innovation and Reform at UCI and Elsewhere: Against the Grain and/or Aspiring to Be Elite

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Having it Both Ways. The Challenge of Legal Education Innovation and Reform at UCI and Elsewhere: Against the Grain and/or Aspiring to Be Elite

Bryant G. Garth*

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INTRODUCTION

Almost every law school aspires to embody the characteristics of the elite of legal education as much as possible: a leading scholarly faculty; students with high LSAT scores and undergraduate GPAs; graduates coveted by prestigious judges as clerks and as lawyers for the top corporate law firms and the top public interest law firms; and close relationships with corporate partners and their firms that translate into additional resources available to faculty and students. Success in this mix of achievements also means success in U.S. News ranking. The law schools that cannot get those benefits, and an associated high ranking, to be sure, try to make a virtue out of necessity—touting, for example, the accessibility of the law school to the underprivileged and the careers of lawyers who serve mainly people, and not

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businesses.¹ But they also live within the hierarchy, as evidenced especially by their faculty hiring oriented around a limited number of elite schools.²

Yet law schools often seek also to be innovative, fighting the hegemony of the traditional or dominant practices of leading law schools. Our law school at the University of California, Irvine, established a decade ago, emphasized its innovation right from the start. The founding dean, Erwin Chemerinsky, suggested that the University of California, Irvine School of Law (“UCI Law” or “Law School”) would be a uniquely innovative law school. He noted the possibilities for this school: “We have the tremendous opportunity of being a blank slate.”³ He was right to emphasize what was new, and later in this essay I will highlight some of the innovation and the advantages of starting a new law school. But, as he also recognized despite the bold claim, he did not really have a blank slate.⁴ He wanted to succeed according to the elite criteria named in the first paragraph.

This Essay will explore the issue of having it both ways. After ten years in operation, UCI Law has been fairly successful in combining innovation and high status in the law school world. This essay will try to provide some context for what this means, the continuing challenges of reform against the grain, and what UCI Law has been able to achieve.

After this introduction, Section I will examine a “great debate” about UCI’s approach to establishing a new law school between Brian Tamanaha and Erwin Chemerinsky. Tamanaha accused Chemerinsky of a “squandered opportunity” to make a law school that could fix the “broken model” that had produced a crisis of debt and underemployment for law graduates. Chemerinsky made clear that UCI Law aspired to be innovative but also elite. Following Tamanaha’s prescriptions, he stated, would lead to ranking as a “fourth tier” law school at the bottom of the hierarchy, and that would be unacceptable.⁵ The following sections explore what it means to be elite, how that aspiration promotes certain kinds of innovations, and not others, and what happens to those whose innovations lead to an inconsistency with the elite criteria.

1. See generally Christa A. McGill, *Producing Lawyers: The Effects of Institutional Hierarchy on the Social Structure of Law Schools* (Apr. 25, 2002) (unpublished Ph.D. dissertation, Duke University) (on file with the Department of Sociology, Duke University).

2. Daniel Martin Katz, Joshua R. Gubler, Jon Zelner, Michael J. Bommarito II, Eric Provins & Eitan Ingall, *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76, 76–103 n.1 (2011).

3. Karen Dybis, *A Path to Greatness*, NAT’L JURIST (May 27, 2009), <http://www.nationaljurist.com/content/path-greatness> [<https://perma.cc/ZF6E-E84L>].

4. The constraints of the “juridical field” were explored in a different way in the first issue of the *UC Irvine Law Review*. Christopher Tomlins, *What Would Langdell Have Thought? UC Irvine’s New Law School and the Question of History*, 1 U.C. IRVINE L. REV. 187 (2011). David Law shows that the lack of a blank slate applies even when a country outside the United States, Bhutan, tries to make a new law school in a place where none had existed. David S. Law, *Isolation and Globalization: The Dawn of Legal Education in Bhutan*, 9 YONSEI L.J. 1, 25–32 (2018).

5. See *infra* Section I.

Section II provides some history on why law schools tend to try so hard to measure up to the criteria of eliteness listed in the first paragraph. Two potential reasons are the U.S. News rankings and the standards imposed by the ABA and AALS for accreditation, but the situation is more complex and more deeply embedded. Law schools certainly do pay homage to the ranking criteria. A new school can decide to ignore ranking considerations, but that is a choice with very real costs. It is difficult for any law school to avoid promoting all the things that help advancement in the rankings—well-known faculty, students chosen on the basis of their LSAT scores and grades, and low student-faculty ratios, for example. The rankings are therefore typically named as the culprits stifling creativity in legal education. And accreditation standards also appear to limit how far a new or existing law school can innovate. In fact, however, the issue is deeper.

The rankings reflect the status hierarchy that has existed for more than a century,⁶ and the same is true for the standards of accreditation. The U.S. News rankings affect incentives on the margins, but the deeply inscribed “slate” upon which law schools are built is the product of a stronger mix of hierarchical institutions and structures. Similarly, the accreditation criteria come from the practices of the elite schools and indeed originated to challenge the law schools that did not conform—including night law schools, Catholic schools, and YMCA law schools—to what the elite schools demanded.⁷ The importance of this longstanding hierarchy is such that, in fact, the rankings would collapse and accreditation would lose legitimacy if they did not bow to the established hierarchies and make sure that Harvard and Yale, most obviously, are at or near the top and fully accredited. This Essay will look at how these hierarchies came to exist. They are the product of a particular historical period that left enduring marks. Understanding this history is essential to see the powerful influence it has today. It defines the “establishment” model that UCI Law both embraces and seeks to reform.

Section III will seek to provide relevant material on law schools that in recent decades have appeared to challenge the “establishment model” and how that model serves prevailing hierarchies. The research I present is impressionistic, designed only to illustrate some themes rather than provide in depth analyses of these schools. The schools that are discussed are Northeastern Law School in Boston, with its cooperative educational model, which took shape in the early 1970s; CUNY Law School, established in the early 1980s as a public interest law school; George Mason, reformed as a “law and economics” school in 1986; religious law schools exemplified by conservative fundamentalist schools such as Regent and Liberty in Virginia, along with the conservative Roman Catholic school in Florida, Ave Maria; and finally the for-profit law schools, notably those managed by InfiLaw. Other

6. See generally Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941 (2014).

7. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 75–101 (1976).

law schools could certainly be added to the list.⁸ In order to show that this hierarchy is not inevitable, I will conclude Section III with a discussion of law schools in Brazil and India that chose to go against the grain in their countries by establishing U.S. modelled law schools—and the hierarchies that they faced in contrast to the those that law schools face in the United States. Every country has its own hierarchical structure, which relates to external global hierarchies. When Germany was the clear leader in education late in the nineteenth century, U.S. reformers traveled to Germany and sought credibility among academic leaders in the United States for their connections to Germany. Now students outside the United States tend to come to the United States for the same reason, seeking, but, depending on local hierarchies, not always getting recognition for their U.S. expertise.⁹ Global and local hierarchies may change, but the U.S. legal hierarchy in legal education and outside has absorbed or rebuffed challenges for more than a century.

Section IV then looks more at UCI Law's relative success in "having it both ways" in terms of eliteness and innovation. One reason of course is the commitment of the university and community to paying the salaries to attract a top faculty (according to the recognized criteria) and providing the merit scholarships to a top student body (by the numbers). But resources are not enough. The Law School needed to build enough credibility for those offered resources to accept the offers. Leading law professors rarely move to lower ranked schools no matter what the money offered. The credibility came from Dean Chemerinsky, the U.C. system, and the promise that the school would be "innovative" and "different" but still would measure up on elite criteria. This examination of UCI Law suggests areas of innovation and also suggests that the "blank slate" did matter in some respects, for example in encouraging diversity of faculty. It will show also how the major innovations are consistent with what could be seen as the progressive side of elite legal education.¹⁰ That does not mean, of course, that the innovations were not important and worthwhile.

I then conclude with a brief summary and a hint about the difficulty of being innovative, even innovation that is aligned with the views of a good portion of elite education.

8. Antioch Law School, which was taken over by the David A. Clarke School of Law at University of the District of Columbia, would also be worth a longer discussion. For the unique vision, see generally Jean Camper Cahn, *Antioch's Fight Against Neutrality in Legal Education*, 1 LEARNING & L. 4 (1974); Katherine S. Broderick, *The Nation's Urban Land-Grant Law School: Ensuring Justice in the 21st Century*, 40 U. TOL. L. REV. 305 (2009).

9. Swetha Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees?*, 80 FORDHAM L. REV. 2441, 2473 (2012).

10. Tomlins, *supra* note 4.

I. TAMANAHA'S CHALLENGE TO UCI LAW AND CHERMERINSKY'S RESPONSE

Brian Tamanaha, in his book on *Failing Law Schools*, chided the founding dean of UCI Law, Erwin Chemerinsky, for not challenging the “failing” model of law schools.¹¹ The debate helps define how the stakes were viewed in the creation of UCI Law. Tamanaha said the plan was too conventional. He wrote that, “With great fanfare, Irvine was rolled out and justified as a unique institution—one that will train skilled, ethical attorneys and imbue students with the spirit of public service [Dean Chemerinsky] recruited a lineup of professors from top-twenty-five law schools The explicit goal was to create an immediate top-twenty law school, an unprecedented feat.”¹² Instead of innovating, Tamanaha wrote, “[W]hat they ended up doing was chase [sic] a prestige ranking, spending their seed money to recruit top scholars and students with high LSAT scores, following the standard template for all top law schools: a research institution with a heavy dose of clinics.”¹³ The worst part, according to Tamanaha, was the tuition: \$44,347 for residents and \$54,192 for nonresidents.¹⁴ That tuition meant that, “After the initial scholarship classes pass through, Irvine law graduates will duly take their place among graduates with \$100,000 or more in average debt.”¹⁵

In sum, Tamanaha stated: “Avowedly progressive law professors with ample resources and a clean slate, setting out to build a school focused on public service, reproduced an institution that loads students with debt and channels them to the corporate law sector.”¹⁶ It was a “squandered opportunity.”¹⁷ The focus on ranking came at the cost of creating “an excellent law school that trains top-quality lawyers at an *affordable price*—which California lacks.”¹⁸

The alternative, according to Tamanaha, would depend on selling a vision of affordable excellence, recruiting top faculty who were willing to accept less pay (more in line with professors in other departments) to make that vision a reality; professors would have had practice experience as well as have been excellent scholars; they would teach two classes a semester, leaving ample time to write; the entering class would be capped at two hundred students; the third year would entail externships in excellent public-service work settings; tuition would be set below \$20,000; there would be no merit scholarships With the “UC” name, a reasonable price, outstanding professors, and a public-service mission, quality students would have enrolled. And graduates would leave law school with manageable debt levels that would enable them to eschew the corporate

11. BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 182–84 (2013).

12. *Id.* at 182.

13. *Id.*

14. *Id.* at 183.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

law route if they so desired. This would have been the ideal school for the twenty-first century.¹⁹

Tamanaha does acknowledge that there might be a problem “recruiting enough top professors who would teach four courses and accept lower pay.”²⁰ But still he thought his experiment was better suited than having UCI Law, despite its public-spirited ambitions, channel its students into corporate law firms at best and into unsustainable debt burdens otherwise.²¹

Chemerinsky responded in a blog.²² He noted Tamanaha’s criticism of UCI Law “for making the choice to create a top 20 law school.”²³ Chemerinsky also zeroed in on the key issue dividing them: “[Tamanaha] agrees that our tuition is essential to create a top law school, but he says that I have not explained ‘why it was necessary to create a “top 20” law school.’”²⁴

It is interesting to explore why it was necessary to fall in line with the criteria for elite status. Chemerinsky well recognized the dilemma raised at the outset of this Essay. For him, the value of mimicking the characteristics of elite law schools at the top of the legal education field had to be recognized. According to Chemerinsky, “all of the goals that Professor Tamanaha identifies in his book—maximizing the opportunity for jobs for our students, especially jobs that will allow students to pay back any loans, best serving the profession and the community—are best achieved if we succeed in being a top 20 law school.”²⁵

He then pointed out the early achievements of UCI Law according to those characteristics:

Of our initial graduating class from May 2012, 28% secured judicial clerkships, 15 in federal courts around the country and one on a state supreme court. About 40% received offers from major law firms. Some are working at government and public interest jobs. As of this writing, 80% of the Class of 2012 has full time employment. None of this would have been possible if we did not have faculty and students of the caliber of a top 20 law school.²⁶

Note the criteria of success: clerkships and major law firms in the first place. There are reasons for those emphases.

19. *Id.* at 184.

20. *Id.*

21. *Id.* at 182–85.

22. Erwin Chemerinsky, *A Response to Brian Tamanaha*, BALKINIZATION (Aug. 28, 2012), <https://balkin.blogspot.com/2012/08/a-response-to-brian-tamanaha.html> [<https://perma.cc/SMZ3-E2QA>]. This piece was written in response to Tamanaha’s post, Brian Tamanaha, *Where UC Irvine Went Wrong: Chasing Prestige at the Expense of Public Service*, BALKINIZATION (Aug. 27, 2012), <https://balkin.blogspot.com/2012/08/why-uc-irvine-went-wrong-chasing.html> [<https://perma.cc/5U5W-YNGY>].

23. Chemerinsky, *supra* note 22.

24. *Id.*

25. *Id.*

26. *Id.*

Going further, Chemerinsky said that if we followed Tamanaha's advice, all UCI would have created would be "a not very good fourth tier law school."²⁷ Why fourth tier? Because the faculty would not have been high quality according to scholarly reputation if tuition was kept low: "we certainly could not have attracted the kind of faculty who have come to UCI without matching their salaries."²⁸ Finally, he commented on Tamanaha's criticism of the law school's commitment to public service. In addition to referring to pro bono by students, fellowships, and loan forgiveness, he noted that, "Besides, public interest places can be as elitist in their hiring as firms and being a top tier law school is crucial if we are going to get our students public interest jobs."²⁹ He thus noted the importance also of elite public interest law.

The founders of UCI Law wanted to be unique, but they also wanted the students to gain access to the elite positions of corporate law and public interest law—those available almost exclusively to graduates of high status, highly-ranked law schools. As discussed below, UCI Law understandably wanted to have it both ways—elite and innovative. UCI Law played the game according to the established rules for success—full-time faculty, relatively light teaching loads, a strong commitment to scholarly productivity, practice skills taught by a different group than the "scholarly" faculty, and a commitment to getting the most "meritocratic" students according to LSAT scores and undergraduate grades. The commitment to getting the most credentialed students meant mainly merit scholarships, which then also meant that those with the lowest credentials, and likely the lowest grades and job prospects upon graduation, would also have the highest debt. This was Tamanaha's most powerful point, but the pull of elite aspirations was too strong. Success was to be measured by faculty scholarly stature, the credentials of the entering students, bar examination success, judicial clerkships, and access to elite careers in corporate law and public interest law—all reflected in the rankings of U.S. News.

There were innovations too, despite what Tamanaha suggests in his criticisms, and indeed these were at times relatively bold as seen in Section IV. Before examining those innovations, I will first discuss in Section II the making of this taken-for-granted status hierarchy that we largely conform to. Tamanaha portrayed the choice as high tuition or not, corporate careers or more public interest. Chemerinsky argued for the benefits of high status. The next sections of this essay seek to show why he (and law professors, students, and their constituencies) sought taken-for-granted indicia of success, and where that places the Law School, if successful, in relation to the hierarchies of the legal field. The sections also explain why out-of-the-box proposals such as Tamanaha's, however meritorious, almost inevitably mean fourth tier status.

27. *Id.*

28. *Id.*

29. *Id.*

The brief case studies in Section III show how difficult it is to reject the status hierarchy. It is not easy to survive, much less thrive, as an anti-establishment law school based on Tamanaha's effort to fix a broken model or others to embed, for example, social activism or religious conservatism in law school.

II. THE MAKING OF THE STATUS HIERARCHY IN WHICH LEGAL EDUCATION OPERATES

The hierarchy that sets the tone today is not new. The basic structure of legal education in the United States stems from the transformation of Harvard Law School within the social context of the late nineteenth century. At that time, graduation from law school was not required for admission to the bar,³⁰ and the law schools that existed were mostly proprietary and taught by practitioners serving part-time as professors. Harvard Law School was already exceptional, and it attracted children of elites, especially from the South prior to the Civil War.³¹ Harvard Law was established in 1817, but its impact on legal education for the purposes of this essay came especially from the era of Christopher Columbus Langdell, beginning in 1870.³² Harvard Law's nineteenth century transformation was part of the general upgrading of higher education associated with Harvard generally under the influence of German universities, but the specific approach came from Langdell. Well-known features of Langdell's revolution include the case method, full-time professors with little practical experience, and highly formal and abstract analytical tools.³³ Less well-known was the greater emphasis on meritocracy seen in performance on law school essay examinations.³⁴

Rarely discussed is the symbiosis of these developments with the rise of corporate law firms on Wall Street. Langdell had been a successful Wall Street corporate lawyer, and he was critical of the low quality of legal argument and judicial reasoning he had encountered, which he found to be too political in the context of Tammany Hall and New York City.³⁵ He sought to renovate the quality of legal reasoning through rigorous teaching and scholarship at Harvard. From another perspective, the neutral and abstract legal doctrine that Harvard was to produce—especially in legal treatises—coincided with the “classical legal thought”³⁶

30. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 3 (1983).

31. DANIEL R. COUILLETTE & BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY* 6 (2015). This discussion draws largely on Daniel Coquillette and Bruce Kimball's book. *Id.*

32. *See generally id.*

33. *See* COUILLETTE & KIMBALL, *supra* note 31, at 316, 351–60, 385–87; STEVENS, *supra* note 30, at 55–57.

34. *See* COUILLETTE & KIMBALL, *supra* note 31, at 347.

35. *See* Bruce A. Kimball & R. Blake Brown, “The Highest Legal Ability in the Nation”: Langdell on Wall Street, 1855–1870, 29 *LAW & SOC. INQUIRY* 39, 57–58 (2004).

36. For more on the concept of classical legal thought, see generally DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1975).

that enshrined the rights of private property against rising labor and progressive social movements. Harvard's success in this respect could be seen in its ability to produce students skilled in this rigorous legal analysis and able to insist on such analyses within law firms and high courts.

Harvard transformed the legal market. Instead of small firms, family firms, and governmental service, the graduates flocked to the relatively new law firms that grew up to serve the Robber Barons associated with the railroads, steel, and oil.³⁷ The link of the firms to Harvard and other elite law schools, to the “scientific knowledge” claimed for the case method, and to a kind of meritocratic hiring of law graduates helped legitimate Wall Street lawyers as more than just hired guns of the rich. Elite lawyers in the firms also went back and forth to government, writing rules that would serve both to legitimate and regulate their clients.³⁸ The prestigious lawyer-statesperson emerged around this time, building the stature of the firms and their elite partners.³⁹

According to Coquillette and Kimball, the “marketplace of legal education” was transformed.⁴⁰ In their words, “The job market began to favor the strongest students at the most demanding school. Already in the mid-1880s, [Harvard] Law School was ‘unable to fill all the places in lawyers’ offices which have been offered’”⁴¹ As corporate law jobs became the goal of those attending the top law schools, “Students seeking to enter leading firms began to flock to [Harvard] Law School. In the 1890s, . . . bolstered by the emergence of law practices serving large industrial corporations during the economic expansion.”⁴² Harvard and then schools such as Columbia and Yale thus participated as “the corporate law firm rose to the apex of the legal profession in the late nineteenth century.”⁴³ In sum, “The success of case method teaching at [Harvard] Law School was . . . associated with the shift in the nature of the legal expertise and with the hiring criteria of elite law firms.”⁴⁴

The diffusion of the case method taught by full-time scholarly professors is well chronicled by Robert Stevens, among others.⁴⁵ What is rarely noted is that what was diffused was much more than the case method. There was a hierarchy of legal statuses, a hierarchy of professors based on scholarship, and very close relationships between elite law schools and elite corporate law firms—whose partners donated the money that allowed the law schools to thrive, expand, and commit resources to

37. See COQUILLETTE & KIMBALL, *supra* note 31, at 471; Yves Dezalay & Bryant G. Garth, *Law, Lawyers, and Empire*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 718, 722–24 (Michael Grossberg & Christopher Tomlins eds., 2008).

38. See Dezalay & Garth, *supra* note 37, at 723.

39. See generally *id.* at 718–57.

40. COQUILLETTE & KIMBALL, *supra* note 31, at 415.

41. *Id.*

42. *Id.* at 470.

43. *Id.* at 471.

44. *Id.*

45. See STEVENS, *supra* note 30.

scholarship. In turn, the law firms counted on the law schools to send their best talent to the elite corporate firms (who had close links to economic power). No longer were the most prestigious law professors those who were also notable judges, litigators, and politicians. Law professors were hired—after a battle at Harvard that Langdell initially lost—not for their reputation as lawyers but for their academic performance while law students.⁴⁶ Ambitious and well-connected undergraduates, especially at the Ivy Leagues, came naturally to the ideal of a career as a corporate law partner going back and forth to government. Notable examples include Elihu Root, Henry Stimson, John Foster Dulles, John J. McCloy, Elliot Richardson, Cyrus Vance, and Warren Christopher, but there are also many others not as well-known but embodying the same model.

The non-elite law schools, including many Catholic schools and the descendants of the YMCA schools, did not have access to these careers, but they followed the same model—in part because of ABA and AALS accreditation standards built on what the elite law schools did.⁴⁷ Their professors increasingly came from a small handful of elite schools, and the professors sought to mimic the scholarship of their professors from Harvard and Yale. The non-elite schools recognized the hierarchy but also made virtues out of their own necessities—connecting to local courts and governments, and to practices in litigation, public prosecution, and criminal defense. There was a certain comfort in an era of less competition in the general classification used to describe law schools—local, regional, and national—until the advent of U.S. News.⁴⁸ When competition for law students and professors intensified in the 1980s, almost all the law schools sought consciously to compete according to the template that the elite law schools had created in partnership with corporate law firms—meritocratic quality of students, faculty scholarly reputation, and employment in corporate law positions.

There was a new wrinkle that emerged in the 1970s, the advent of public interest law.⁴⁹ Public interest law emerged as a “rival” to corporate law for the souls of the elite law students, but the dichotomy is somewhat misleading. The invention of the elite public interest law, as Laura Kalman shows,⁵⁰ responded to a crisis in the Harvard model,⁵¹ which produced lawyers perfect for the prevailing socio-economic context, but out of step—at least temporarily, when the political

46. COQUILLETTE & KIMBALL, *supra* note 31, at 471.

47. *See* STEVENS, *supra* note 30, at 195.

48. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

49. *See* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE (2013).

50. *See generally* LAURA KALMAN, YALE LAW SCHOOL IN THE SIXTIES: REVOLT AND REVERBERATIONS (2005).

51. Another crisis was the New Deal, which was initially very hostile to lawyers because of the conservatism of Wall Street, RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY 18–19 (1995).

context changed. The attack on the “liberal establishment,”⁵² at first from the left in the Vietnam era and later from the right,⁵³ brought changes. Elite law schools exemplified by Yale were concerned that activists would choose not to apply to law schools too connected to the establishment. Elite public interest law combined moderately progressive philanthropy—mainly funded by the Ford Foundation—with elite law graduates, and they produced public interest litigation supervised by boards composed of the corporate lawyers that Ford required as a condition of receiving a grant. This innovation attracted ambitious students who had moved left back into the elite law schools, and it produced another career connected closely to corporate law firms but linked to progressive reform.⁵⁴ It helped to save the model from a populist challenge.

The legal establishment—despite various populous challenges—thus continued to thrive, and the Harvard model, as amended, along with the professional and academic hierarchies that this model produced, continues to define the “best” law schools. It is this model linking the best law schools to elite corporate firms and elite public interest law firms—which are as hard to get into as elite law firms, as Chemerinsky noted in his response to Tamanaha—that defines excellence according to the hierarchies of the legal establishment. As shown below, it is very difficult to succeed as a “counter-establishment” law school if one does not want to be what Chemerinsky derided as a “fourth tier law school.”⁵⁵

Before proceeding, I should note that my depiction is meant to describe, not judge, the model of excellence that prevails today. That model is thriving today and is very difficult to criticize because it stands for so much that is in opposition to the current presidential administration. Corporate law firms and elite public interest law firms are passionately united in their efforts to maintain the position of law and legal institutions. The counterattack against Trumpism provides a central place for the legal establishment.

It is still worth noting what the elements are that make up the legal establishment as it has existed since the late 19th century. The legal establishment can be in the forefront of defenses of the rule of law, but at times it can also look like the glue that keeps the status quo together. In particular, it can be challenged by populist social movements on the right or the left, as has happened in the past. Those challenges make the legal establishment look like the force opposing change and helping to keep the status quo by embedding it in the law. In short, the model does not well support populist anti-establishment movements whether Trumpism or Occupy unless absorbed into more establishment approaches and agendas linked to the enduring hierarchies of the law and legal education.

52. See generally GEOFFREY KABASERVICE, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT* (2004).

53. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008).

54. And later also to conservative reform.

55. Chemerinsky, *supra* note 22.

III. CHALLENGING THE ESTABLISHMENT LAW SCHOOL MODEL

The challenges of organizational innovation are well-recognized in organizational sociology, and there are well-tested theoretical propositions that can inform the discussion here. The general argument is that success comes from relatively safe and vetted innovations—new but acceptable to enough of the players to win respect and endure.⁵⁶ The seemingly blank slate of a new law school helps because those with the founders' vision can select like-minded individuals to build the project, but there is no blank slate. First, those recruited must be made to believe that the project is likely to boost rather than limit their career trajectories. Second, the novelty needs to be acceptable to the organizations that already exist. This basic framework can be augmented by noting how much it relates to the status hierarchies in the field. Acceptance depends on winning approval, but more is at stake than just assent. Success depends on not threatening the existing hierarchies and what they represent—including ties to economic and political power. It is not all or nothing. Those who start out as angry anti-establishment outsiders become relatively tame insiders if those in power pull them in, and insiders rejected by the establishment may move to a radical stance. And occasionally, the credibility of an establishment may be undermined sufficiently for a significant percentage of ambitious and well-connected individuals to reject it. As discussed in the last section, that threat to the elite law school world was averted in the 1960s and 1970s by providing progressive outlets—notably public interest law.

These themes can be seen in histories of particular law schools. There are a number of law schools that have sought to go against key features of the orthodox model. The best-known challenger during my time in legal education is CUNY in New York City, established by one of the pioneers of elite public interest law, Charles Halpern, in 1986.⁵⁷ It is interesting in part because it seems most like what Tamanaha proposed—an emphasis on public service and relatively low tuition.

56. See generally JOHN F. PADGET & WALTER W. POWELL, *THE EMERGENCE OF ORGANIZATIONS AND MARKETS* (2012); Swethaa Ballakrishnen, *Just Like Global Firms: Unintended Parity and Speculative Isomorphism in India's Elite Professions*, 53 L. & SOC'Y REV. 108 (2019).

57. In Halpern's autobiography, he notes that he hoped to recruit some elite students to CUNY, but that they already were too invested in the existing hierarchies: "I had anticipated admitting some students with more traditional credentials, who could aspire to more established law schools but would choose to come to CUNY because of what we stood for, because they had a deep dedication to a public interest law career. In order to recruit such students, I called on my friend Stan Katz, who taught legal history at Princeton and advised the Pre-Law Club. He invited me to come and give a talk about the Law School and then meet over dinner with some students who he thought might be interested. At the end of dinner, after a polite conversation, one of the students said, 'I want you to understand why none of us is going to apply to your school even though it sounds wonderful. We have been climbing the greasy pole of academic achievement too long to quit now. We are Princeton seniors with excellent records. We couldn't turn down Harvard Law School and accept CUNY; we wouldn't be able to explain it to our parents who have invested in our education, or to our friends.'" CHARLES HALPERN, *MAKING WAVES AND RIDING THE CURRENTS: ACTIVISM AND THE PRACTICE OF WISDOM* 167 (2008).

The web site today says:

CUNY School of Law is the nation's #1 public interest law school; its dual mission to practice law in the service of human needs and transform the teaching, learning, and practice of law to include those it has excluded, marginalized, and oppressed make it a singular institution . . . CUNY Law is built on a tradition of radical lawyering: movements for social change are built with leadership and collaboration from the people and communities who have experienced injustice. The law school's #1 ranking in diversity of the faculty and student body is an example of how its mission is realized through intentional recruitment and its status as a top-three clinical education program is a manifestation of CUNY Law's commitment to partnering with local and grassroots organizations in the field.⁵⁸

CUNY is a public law school and resident tuition in 2018 was \$15,000.⁵⁹ Employment statistics show that none of the graduates of the class of 2017 were in law firms larger than ten lawyers, while about one fourth were in public interest law.⁶⁰ The website media section notes one or two of the prestigious public interest Skadden Fellowships each year. It also provides the entering credentials of the 2018 class: LSAT median of 154 (and top quarter 158), median grades 3.28 and top quarter 3.58.⁶¹ The students are very diverse.⁶² The U.S. News Ranking is currently 108.⁶³ Links to corporate law firms are not really mentioned on the web site, but a couple of large law firm lawyers are on the CUNY Foundation Board.⁶⁴

CUNY's challenges and achievements are the subject of a relatively large literature, although not much has been written in recent years.⁶⁵ Two points emerge

58. *About CUNY*, CUNY SCH. L., <https://www.law.cuny.edu/about/> [<https://perma.cc/D4SA-UNPV>] (last visited Sept. 14, 2019).

59. *Tuition & Fees*, CUNY SCH. L., <https://www.law.cuny.edu/financial-aid/tuition/> [<https://perma.cc/NN2V-FRCH>] (last visited Sept. 14, 2019).

60. THE AM. BAR ASS'N, *Employment Summary for 2017 Graduates*, CUNY SCH. L. (2018), https://www.law.cuny.edu/wp-content/uploads/page-assets/careers/employment-statistics/employment_summary_2017.pdf [<https://perma.cc/7TV7-RG7Q>].

61. *2018 Incoming Class Profile*, CUNY SCH. L., <https://www.law.cuny.edu/wp-content/uploads/page-assets/admissions/2018-Incoming-Class-Profile.pdf> [<https://perma.cc/45N5-EZE5>] (last visited Sept. 24, 2019).

62. Mike Stetz, *Most Diverse Law Schools*, NAT'L JURIST 25 (2010), <https://law.ucdavis.edu/news/files/Most-Diverse-Law-Schools-Article-The-National-Jurist-Winter-2019.pdf> [<https://perma.cc/NBG9-Z66P>].

63. *Best Law Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/PJQ9-X6B4>] (last visited Sept. 24, 2019).

64. *Foundation Board of Directors*, CUNY SCH. L., <https://www.law.cuny.edu/about/foundation-board/> [<https://perma.cc/GX4L-SW8E>] (last visited Sept. 29, 2019).

65. E.g., John Delaney, *Demystifying Legal Pedagogy: Performance-Centered Classroom Teaching at the City University of New York Law School*, 2 SETON HALL L. REV. 1332 (1992); John M. Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986); Kristin Booth Glen, *The Law School in and As Community*, 35 U. TOLEDO L. REV. 63 (2003); Charles Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J., 549 (1986); Charles Halpern, *Creating a New Law School: Inaugural Address*, 3 N.Y.C. L. REV. 233 (2000); Judith Kleimberg & Mark Barnes, *CUNY Law School: Outside Perspectives and Reflections*, 12 NOVA L. REV. 1 (1987); Nancy Zeldis, *Breaking with Tradition: Law School in the Nineties*, 76 ABA J. 60 (1990).

related to this Essay. In particular, low bar passage percentage, after the initial class, brought attention to the innovative curriculum, non-traditional students, and non-traditional faculty. One article particularly associated bar passage with entering credentials and noted the pressures on faculty and students to follow more traditional standards, such as more traditional teaching and scholarship.⁶⁶ A more recent article by a veteran professor at CUNY noted the evolution toward more traditional grading and the establishment of a law review.⁶⁷ The mission has been pushed to accommodate the particular fact of the bar examination, and perhaps the law review is an example of responding to student demand to be a bit more conventional. The ranking of 108, however, is not in the fourth tier, which begins at 146. The school has for the most part opted out of the game to make elite status—close ties to corporate law, for example, and the activist commitment to the “tradition of radical lawyering.”⁶⁸ The spread between the 154 median and the 158 third quartile LSAT scores suggests that there are students attracted to CUNY’s mission and not just to where it is in the pecking order. And the ranking out of the fourth tier may also be a recognition of the mission among U.S. News voters. Insights into current debates, the extent of the pull of the established hierarchies, and the solidarity with the mission, would be essential to say more about how CUNY has indeed succeeded in going against the grain.

Northeastern University School of Law in Boston reopened as a law school in 1968⁶⁹ and began to follow the cooperative approach of Northeastern generally.⁷⁰ According to the website:

Northeastern University Law School in Boston differentiates itself as institution through its long-standing Cooperative Legal Education Program. The law school calendar is yearly, and every quarter, second- and third-year law students alternate between taking classes or completing co-ops at firms, agencies, corporations, and more. (Some experiences are paid, and some are located abroad.) . . . When not completing co-ops, students can still get hands-on legal training in clinical programs, which address civil rights and restorative justice, poverty law and practice, prisoners’ rights, and others.⁷¹

The main innovation is therefore the cooperative approach that focuses on alternate periods of work-study, but this feeds into other innovations.

66. Matthew S. Steffey & Paulette Wunsch, *A Report on CUNY’s Experiment in Humanistic Legal Education: Adrift Toward Mainstream Essay*, 59 UMKCL. REV. 155, 170–72 (1991).

67. Ruthann Robson, *The Politics of the Possible: Personal Reflections on a Decade at the City University of New York School of Law*, 3 N.Y.C. L. REV. 245, 253–54 (2000).

68. Brenna Sharp, *Knowing Where We’ve Been*, 64 GUILD PRACTITIONER 70, 70 (2007).

69. Thomas P. Jr. Campbell, *Experiments in Legal Education*, 57 MASS. L.Q. 67, 67 (1972).

70. Molly T. Geraghty, *A U.S. Experiment: Co-operative Legal Education Mr. Dobbins Goes to Law School*, 1 TRENT L.J. 9, 10 (1977).

71. *Northeastern University Law School Overview*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/northeastern-university-03076> [<https://perma.cc/ZSM8-NYBK>] (last visited Sept. 14, 2019).

Quoting the website again, “Northeastern Law students are not assigned grades; instead, they are given written feedback from both professors and employers. Therefore, there are no class ranks or GPAs, either.”⁷² The website shows also a very strong commitment to diversity and to public interest law. When described in 1972, the curriculum was also quite distinctive:

The first year required courses include taxation and constitutional law, two subjects usually reserved for upperclassmen in law school. Constitutional law is taught in terms of contemporary issues, such as drug control, conscientious objection to the draft and free speech. New courses have also been devised in order to alert students to opportunities in the law for meeting the problems of society and the community.⁷³

The same article noted that “the newly entered class of 1974 possesses composite credentials high enough to rank the school among the most selective law schools in the country.”⁷⁴

Today, Northeastern Law School’s cooperative and experiential program appears to be thriving. The first-year curriculum, however, is more conventional than noted in 1972. As for the student composition, 64% are women and 36% are of color.⁷⁵ The credentials are also solid, even if not among the most selective law schools. The median LSAT is 161 and the median GPA is 3.60.⁷⁶ Tuition is not especially low: first year tuition was \$50,700 in 2018–19.⁷⁷ Bar passage is high, and the class of 2017 employment statistics show that law firms, including some very large ones, hired 34% of the graduates, business and industry 19%, judicial 15%, public interest 17%, and government 13%.⁷⁸ The teaching mission seems today to be the major feature of Northeastern Law’s identity. As noted, the job profile suggests, if anything, that Northeastern over performs its ranking. The faculty description is also now very conventional: “Northeastern University School of Law faculty members have studied at some of the best schools in the nation—Harvard, Yale and even Northeastern. These nationally recognized professors publish in the most prestigious journals and are hands-on participants in a great deal of pro bono legislative and policy work.”⁷⁹ The current U.S. News Ranking is 64.⁸⁰ In 2010 the ranking was 94.⁸¹ The jump from 94 to 64, apparently occurring in 2018, perhaps

72. *Id.*

73. Campbell, *supra* note 69, at 69.

74. *Id.* at 70.

75. *Quick Facts*, NE. U. SCH. L. (Oct. 15, 2018), <https://www.northeastern.edu/law/about/quickfacts.html> [<https://perma.cc/VWJ4-MY3M>].

76. *Id.*

77. *Id.*

78. *Id.*

79. *The Future of Legal Education for 50 Years*, NE. U. SCH. L. (MAY 18, 2019), <https://www.northeastern.edu/law/about/index.html> [<https://perma.cc/FDX7-SNXL>].

80. *Northeastern University Law School Overview*, *supra* note 71.

81. *Official 2010 U.S. News Law School Rankings*, TOP L. SCHS. (Apr. 20, 2009, 2:02 AM), <http://www.top-law-schools.com/forums/viewtopic.php?f=2&t=69263> [<https://perma.cc/6ZY5-GCKS>].

reflected the fact that Northeastern's leadership in experiential learning, once outside the mainstream, now is valued in the world of elite law schools. Northeastern is still not near the top twenty, and the innovation seems mainly limited to the cooperative program, but it has built an identity that is recognized now by U.S. News voters. Northeastern also has evidently opted into—maybe from the start—the quest for elite characteristics in faculty, students, and careers.

The George Mason Law School, now named the Antonin Scalia Law School, provides a different kind of example. From 1986 to 1996, Henry Manne, one of the pioneers of law and economics, made law and economics the overwhelming emphasis of the law school.⁸² The renaming to the Scalia Law School is part of this well-known brand. In 1993 Manne provided an “intellectual history” of the school, linking it to his earlier unsuccessful effort at the University of Rochester to develop a law school that embraced the teachings of Legal Realism and provided a selection of interdisciplinary tracks.⁸³ With George Mason, unlike Rochester, he determined that he should emphasize only one track: law and economics.⁸⁴

Manne detailed the issues in changing the law school under the mandate of the University President. First, the specific orientation

obviously makes [faculty] recruitment a more difficult undertaking than if no such emphasis existed. But at the same time it has also made the school much more attractive to potential recruits who do have this background. A larger problem was what to do with the ten or so professors who remained from before the new program was introduced.⁸⁵

After explaining how any faculty dissention with respect to the mission was minimized, Manne also noted that,

[t]he downside of all this is a certain narrowness of intellectual focus in the [George Mason] Law School . . . that is the inevitable cost of any degree of specialization, and the hard trade-off decision has to be made . . . We believe that the loss is more than compensated for by the additional educational advantage of this degree of specialization. Certainly the purely legal part of the education is much more focused and far more

82. Henry G. Manne, *An Intellectual History of the George Mason University School of Law*, GEORGE MASON U. ANTONIN SCALIA L. SCH. (1993), <https://www.law.gmu.edu/about/history> [<https://perma.cc/CLL2-UYRD>].

83. *Id.*

84. “First, as we have seen, economics has proved to be the most powerful and applicable cross-disciplinary tool to use in collaboration with law. There simply are more fields of law that can use economics profitably than is true of any other discipline. Second, it is more likely that an entire law school can be staffed by law professors with some meaningful background in economics than with those with any other discipline. There has been vastly more serious training of Law and Economics-oriented law professors than is true of any other cross-disciplinary field. Third (and this factor cannot be denied or minimized), Law and Economics was the one field that I was qualified by my own experience to develop, staff and evaluate.” *Id.*

85. *Id.*

sophisticated than if the school attempted, as many do, to be all things to all people.⁸⁶

Finally, he pointed out that instead of teaching Law and Economics, “students find that nearly every course has a Law and Economics flavor that reinforces their instruction in those courses.”⁸⁷

The website mentions this relative specialization but also nods to more conventional features: “Scalia Law is in an exceptional location for student opportunities; Scalia Law is an exceptional community for students, alumni, faculty, and staff; Scalia Law provides exceptional career support services.”⁸⁸ The statement comes that “Scalia Law is home to an exceptional market-oriented faculty, placing us at the center of foundational debates on liberty, private property rights, constitutionally limited government, and the economic analysis of law.”⁸⁹ The curriculum at Scalia Law is mainstream, but the faculty has a strong identity that permeates throughout the school. Tuition for the public law school is relatively low: In-State: \$25,354; Out-of-State: \$40,740.⁹⁰ The credentials of the students are also higher than the other schools profiled here, although not far from Northeastern. The entering class median LSAT is 163 and GPA 3.76.⁹¹ Employment statistics also show a strong number in large law firms.⁹² The U.S. News ranking of 45 is very good for a relatively new law school. Here too, the mission has been rewarded to some extent. The identity as a law and economics school seems to have bolstered the scholarly reputation, especially among more conservative U.S. News voters. The characteristics of ties to corporate law firms, a scholarly law faculty, and relatively high-credentialed students seem to fit what Scalia Law aspires to be.

In some ways, these innovative law schools are combining their missions with relative success in the law school rankings—and varying degrees of success and effort (with CUNY less oriented toward corporate lawyers and conventional scholarship, it seems) at gaining status according to the conventional hierarchies. Because of the perceived value of public interest law, experiential learning, and law and economics, these schools not only are relatively true to their missions but also have at least something that is valued by the legal establishment—and it is reflected in their rankings and reputations. Excellence in another area, such as entertainment

86. *Id.*

87. *Id.*

88. Henry N. Butler, *A Message from the Dean*, GEORGE MASON U. ANTONIN SCALIA L. SCH., <https://www.law.gmu.edu/about/dean/> [<https://perma.cc/745Z-MGAJ>] (last visited Sept. 14, 2019).

89. *Id.*

90. *Tuition and Costs*, GEORGE MASON U. ANTONIN SCALIA L. SCH., <https://www.law.gmu.edu/financing/tuition> [<https://perma.cc/X47H-5EJG>] (last visited Sept. 14, 2019).

91. *Fast Facts About Scalia Law School*, GEORGE MASON U. ANTONIN SCALIA L. SCH., https://www.law.gmu.edu/about/fast_facts [<https://perma.cc/SRL8-KN76>] (last visited Sept. 14, 2019).

92. The Am. Bar Ass’n, *Employment Summary for 2017 Graduates*, GEORGE MASON U. ANTONIN SCALIA L. SCH. (2018), https://www.law.gmu.edu/assets/files/career/ABA_EmploymentSummary2017.pdf [<https://perma.cc/2UZY-7NME>].

law, may not (at this point) serve the same purpose. Indeed, many competitors would like to have some recognized identity that would also give them some stature in this game of rankings. These schools have other advantages also, in particular location in major urban markets, and low tuition for Scalia Law and CUNY. They have gained recognition, but of course they may also be limited by their identities.

The next two groups are the most self-consciously anti-establishment. Amanda Hollis-Brusky and Joshua Wilson's forthcoming study of Christian Law Schools provides fascinating detail on two very conservative Christian schools, Liberty and Regent in Virginia, and the conservative Roman Catholic school in Florida, Ave Maria.⁹³ All these schools reject the way that religiously-affiliated law schools have become, in their opinion, relatively indistinguishable from their non-religious counterparts. They lament the chase for student numbers and faculty prestige more than student and faculty faith. Hollis-Brusky and Wilson compare these schools to Notre Dame as a Catholic School that tries and succeeds according to the hierarchies of legal education and Baylor as a Christian fundamentalist school that also has made peace with the legal education "rules of the game."⁹⁴

These three very conservative law schools that are the focus of the book, in contrast, seek to be distinctive with a faculty homogeneous in their commitment to teaching based on religion, a religiously-oriented teaching approach, and recruitment to the extent possible of "mission students."⁹⁵ One result is that the students have relatively poor numerical credentials. Regent leads with a 154 and 3.55 median; Liberty has a 152 and 3.36; and Ave Maria 148 and 3.05.⁹⁶ There are a number of non-religious schools in the range of these schools, but certainly the commitment to be different here does not fit well with the law school hierarchies. Regent and Liberty graduates, according to some commentators, found positions in the George W. Bush administration because of their conservative faith, and to this extent linked up with anti-establishment groups that were part of the Bush coalition.⁹⁷ One issue is that now there are many conservative lawyers who graduate from the elite law schools.⁹⁸ But the law school placement data do not show entry into the world of large law firms and prestigious public interest law. As with CUNY, low credentials in a given year may raise bar passage issues. It is hard to see these schools rising up in the ranks, since they do not play by the rules.

93. Amanda Hollis-Brusky & Joshua Wilson, *Separate but Faithful: How the Christian Right Is Reshaping Law Through Legal Education* (forthcoming 2020).

94. *Id.*

95. *Id.*

96. *Admissions & Aid*, REGENT U., <https://www.regent.edu/school-of-law/admissions-aid/> [<https://perma.cc/Q83E-NMFA>] (last visited Sept. 24, 2019); *Admissions – Entering Class Profile*, AVE MARIA SCH. L., <https://www.avemarialaw.edu/law-schools/entering-class-profile/> [<https://perma.cc/RM5A-LKHG>] (last visited Sept. 24, 2019); *Class Profiles*, LIBERTY U. SCH. L., <https://www.liberty.edu/law/class-profiles/> [<https://perma.cc/FX4H-JXEF>] (last visited Sept. 24, 2019).

97. Dahlia Lithwick, *Who's the Boss?*, SLATE (Apr. 7, 2007, 6:52 AM), <https://slate.com/news-and-politics/2007/04/how-pat-robertson-s-law-school-is-changing-america.html> [<https://perma.cc/YY2K-CZJG>].

98. See SOUTHWORTH, *supra* note 53.

Finally, the three for-profit law schools led by InfiLaw group, which began in 2003, also make a nice example of truly anti-legal establishment law schools. The woes of these schools in terms of bar passage, debt, and credentials, especially once the legal education “crisis” in applications after 2009 hit them, is well-known, and several have closed. They have had serious problems with the ABA.⁹⁹ A critical participant-observation study of one of them by Riaz Tejani, an anthropologist and lawyer, documents the kinds of debates and approaches associated with the relevant faculty and leadership. He notes that—against the trends toward status and hierarchy that prevail within law schools—the InfiLaw (although not identified as such according to norms to mask identity in anthropology) school “marketed its school early on as antiestablishment and antielitist,” rejecting the rankings of U.S. News “largely on the basis that its student demographic profile emphasizing minority and ‘nontraditional’ students rendered its schools incommensurable with other fourth-tier and regional law programs.”¹⁰⁰ Further, it “encouraged its faculty to view themselves not as mainstream academics with their ‘noses in books’ but as engaged teachers more deeply invested in students.”¹⁰¹ Here was another effort to gain an identity that defies the prevailing hierarchies in the name of access to students underrepresented in law schools.

One trouble is that participants in these schools saw their careers in line with the hierarchies. Among many other problems, most of the faculty understandably did not buy the mission, which seemed to be a cover to bring in students unlikely to succeed. The faculty also included faculty who could not get other positions in the tough academic market, and they wanted to have time to produce the scholarship that might allow faculty to move up in the hierarchy. At the end of the day, after the legal education crisis, the counter-establishment model proffered by the for-profits appears only as a particularly dramatic example of an inability to find a model that can compete and thrive by rejecting the mainstream criteria. It instead becomes a “fourth tier failure” as Chemerinsky feared Tamanaha’s proposed law school would be.

All the law schools discussed in this section exemplify the difficulty of going against the establishment in legal education.¹⁰² Ever since the Harvard model gained

99. *For-Profit Law Schools Sue ABA in Response to Findings of Non-Compliance with Regulatory Admissions Standards*, JAMES HOYER: INVESTIGATIVE L. FIRM (June 21, 2018), <http://www.jameshoyer.com/profit-law-schools-sue-aba-response-non-compliance-findings/> [<https://perma.cc/D3XE-XJSM>].

100. RIAZ TEJANI, *LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS* 80 (2017).

101. *Id.*

102. The Antioch School of Law, operated by Edgar and Jean Cahn and now the University of District of Columbia Law School, is another example worthy of study. Another fascinating one is the New College of California School of Law, founded by one of the leaders of Critical Legal Studies, Peter Gabel. It is “the oldest public interest law school in the United States. Since 1973, New College has offered an innovative program of legal education, combining practical skills training, rigorous classroom work, and supportive services, all in the pursuit of training talented, creative, and compassionate lawyers who will work in the public interest in new and dynamic ways.” *New College of California School of Law*, GRAD PROFILES, <http://www.gradprofiles.com/new-coll-ca-law-mc.html> [<https://perma.cc/N625->

dominance in the late nineteenth century, the “forms of capital” valued in the legal education field have remained pretty stable—now captured more or less in the U.S. News rankings. In varying degrees, CUNY, Northeastern, and Scalia Law have succeeded in using their relatively unique identities to build a place within the prevailing hierarchy. They are not elite law schools, but their mission is recognized by U.S. News voters and students who select them. CUNY seems to have a distinctive public service mission, Northeastern leadership in experiential learning, and Scalia Law a niche in law and economics. Northeastern and Scalia Law, perhaps unlike CUNY, participate more in the elite benefits of jobs and linkages to the corporate law firms, whether by design or by virtue of their place in the hierarchy as measured by rankings.

On the other hand, the schools rejecting the model may be thriving on their own terms, as the religious schools may be (we can guess that there are internal debates as there were in the for-profits), or struggling as the for-profit schools seem to be. But each shows the challenge of finding a counter-establishment niche.

Two non-U.S. examples may seem out of place, but I offer them to give some insight on the more general phenomenon inside the United States and elsewhere. In Brazil, unlike in the United States, corporate lawyers and elite private law schools are not at the top of the hierarchy. The leading figures of the legal profession—the product of a different history than in the United States—are “jurists,” law graduates who occupy multiple elite positions within Brazilian society.¹⁰³ They may be affiliated with a law firm or practice on their own, are typically active in politics, and teach part-time in the leading public faculties of law. The normal scholarly output of these professors is handbooks for particular courses, and their teaching is characterized by formal lectures given often by their assistants. Assistants are picked from among their favored law students who aspire to the same career.

The elite of the profession, connected to politics, business, and to elite legal families, thinks also that full-time professors are “failures,” since all they do is teach and write. Criticisms abound that the students at the most prestigious university law schools are not engaged, that professors give boring lectures, and that academic scholarship is weak. In the past decade or so, reformers seeking a new model inspired in large part from the United States but building on local critiques, created new law faculties such as Fundacion Getulio Vargas (FGV), a private law school, staffed by full-time faculty committed to engaged teaching and scholarship meeting global standards.¹⁰⁴

The school is successful in attracting well-credentialed students who can pay the tuition, but the elite of the profession remains the same—jurists who in fact

XGZR] (last visited Nov. 5, 2019). It is accredited only by the State Bar of California, not the ABA. *Id.*

103. The following discussion is based on research included in Yves Dezalay and Bryant G. Garth, *The Long Story of the Legal One Percent. Cosmopolitan Families, Elite Schools, and Imperial Competition* (work in progress).

104. *See id.*

would not get hired according to the standards of FGV, and the best and most connected students go to the traditional elite public schools, epitomized by the University of Sao Paulo. FGV has had an important impact on the traditional schools in other ways, but the legal establishment—very different than the one in the United States—is not dislodged by importing something like the U.S. model—which is also linked there as in the United States to Brazil’s relatively new and growing corporate bar. Furthermore, as in the United States, there is discussion within FGV about whether the curriculum needs to be more traditional (in part because of a traditional bar exam in Brazil), whether the scholarship requirements coupled with much more intensive teaching—which is generally not valued in Brazilian law schools—are overly burdensome, and whether the pay for a full-time professor is not high enough to sustain them—incentivizing them to write and teach less and move more into outside activities. So far, the FGV faculty is maintaining the mission, but there are pressures to erode its distinctive approach.

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Another example is the National Law Schools in India, beginning with the National Law School in Bangalore, established in 1986 as the “Harvard” of India. Before that reform, faculties of law had part-time professors, unengaged students, and above all were embedded in a familial elite of high court and supreme court advocates—barristers created in an exaggerated form on the British model. The Senior Advocates among this group are essential for important litigation whether domestic or international, and they make their arguments to former Senior Advocates whom they typically know well. One could not make it in that world without being born into an elite legal family able to secure apprenticeships and important cases to build a reputation. Again, this group—not corporate lawyers—defines the top of the legal field.¹⁰⁶

As in Langdell’s era, the National Law Schools sought to upgrade teaching, the status of law professors, legal scholarship, and the quality of legal reasoning inside and outside of the courts. But for the National Law Schools to get enough credibility even to become established in India’s legal context, they had to bring Senior Advocates and Judges into strong positions of power in law school governance. They naturally have little respect for the professors, thinking of them as merely teachers who have no claim to produce scholarship, and professors still have little status generally in India.¹⁰⁷

The new National Law Schools, now numbering about twenty, are by many measures successful. They attract meritocratic students who do have possibilities without family connections, namely in the recently expanded corporate law sector.¹⁰⁸ Yet the power of the elite bar, resisting the new forms of argument and

105. *See id.*

106. *See id.*

107. *See id.*

108. Ballakrishnen, *supra* note 56; Dezalay and Garth, *supra* note 103 (in progress).

promoting on the basis mainly of family capital, remains intact. The model of education for this group and their progeny is attendance at a school such as the Government Law College in Mumbai, where family capital is highly rewarded in admissions, where classes are taught before noon, where attendance is not mandatory for professors or students, and where the students spend almost all of their time working in the chambers of the Mumbai High Court advocates connected to the courts around the Law College. Again, there are changes precipitated by the National Law Schools, but the legal-familial-advocate establishment remains strong. In India and Brazil, as in the United States, there is a legal elite close to political and economic power as well as legal education, and it is very difficult to challenge. But the differences also show that it is the product of history and not natural and inevitable. For the non-U.S. examples, in addition, there is a logic that comes from the fact that they are embedded in global hierarchies. Subversion tends then to be in the context of global hierarchies and stratification—looking at times like the U.S. elite model. As with respect to U.S. domestic reforms, it is a different way to build success on what is expected to be the wave of the future.

IV. UCI LAW'S LARGELY SUCCESSFUL EFFORT TO HAVE IT BOTH WAYS

One lesson of the previous section is that it is difficult to have it both ways in legal educational reform—bringing something new and innovative to legal education and meeting the prevailing criteria of excellence respected by the hierarchies of the legal field. The anti-establishment law school—as Tamanaha in effect recommended for UCI Law—cannot be in the top tier and may indeed become marginal within the legal field, valued within law only by a small number of students and faculty akin to the “mission students” and faculty of Liberty and Regent. Challenges include attracting students, passing the bar, and gaining employment from outside the small social world invested in the project. I am on the faculty, and therefore biased, but I believe that UCI Law has largely been successful at having it both ways.

To review the previous discussion, CUNY, Northeastern, and Scalia Law in the United States—and in fact FGV in Brazil and the National Law Schools in India—all gained enough respect from legal establishments to succeed in the elite world; but they did not affect the hierarchies within their respective legal fields. In the United States that hierarchy means, as noted before, seeking prestigious faculty scholars requiring high salaries, placing graduates at elite jobs especially in corporate law firms but also in elite public interest law, striving for students who gain scholarships because of their relatively high LSAT scores and grades, and building fund-raising ties to the corporate law community as well. Of the three domestic law schools discussed, success in these characteristics is limited. CUNY does pretty well in public interest law but not so well in ties to and jobs within the corporate sector. Faculty scholarship may or may not be “high quality” but certainly faculty are encouraged now to produce scholarly work. The third tier ranking probably comes through various means from the respect afforded to public interest law.

Northeastern's experiential learning is valued, but it also appears that the faculty aspires to elite scholarship standards. And Scalia Law builds on its identity as the law and economics law school—valued enough to gain status reflected in its ranking.

Each of these schools took some risk, but they bet on identities that turned out to give them recognition within the elite hierarchy. UCI Law sought more. As Chemerinsky stated, he wanted to establish a top twenty law school—not yet reached but very close in the U.S. News ranking. He also wanted to make an innovative law school consistent with the top twenty aspiration. He and the founding faculty broadly succeeded in this ambition.

A too simple—but not wrong—answer of what made this possible is resources from Orange County, one of the richest counties in the United States, and above all from University of California, Irvine itself. None of the innovators mentioned so far had the resources to recruit and pay a top tier faculty. Resources were fundamental, but it was also necessary for UCI Law to have enough credibility for leading scholars and highly credentialed students to take the resources. They had to believe that the school, even with resources, could succeed in Chemerinsky's vision. Top professors will not follow the money if they think their own value as scholars will be tarnished by their new affiliation. Chemerinsky's own reputation, his public relations skills, and the reputation of the University of California system provided the credibility to persuade faculty to consider coming. High salaries were necessary but not enough. Consider how difficult it is for, say, a fourth tier law school to find a leading professor to fill an endowed chair that pays very well. Professors steeped in the law school hierarchy system will fear that their value will depreciate in the legal world. UCI Law's credibility within the legal world, in addition, came from the belief that the school would be unique and innovative—and rewarded rather than marginalized in the rankings and informal pecking order for that uniqueness and innovation.

The same mix of resources and credibility was necessary to get students at the level necessary to debut as a highly ranked and respected law school. Other essential resources—again mainly from the university but also from local law firms—were those that enabled enough merit scholarship funds to attract a student body with elite or near elite credentials. Again, the credibility of the venture was also vital to get students to take the offers, since they too had to believe that they would get the rewards of graduation from a “top twenty” law school that was also innovative. The first class had full scholarships, subsequent classes have also obtained a high percentage of scholarship assistance.¹⁰⁹ Chemerinsky insisted on this commitment of resources, because he well-understood that status in the law school and more

109. Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 11 (2011); *University of California - Irvine*, L. SCH. TRANSPARENCY, <https://www.lstreports.com/schools/irvine/> [<https://perma.cc/695Y-RD27>] (last visited Sept. 24, 2018) (noting that 46.9% of UCI Law students receive scholarships of \$25,000 and only 6.2% pay full tuition price).

generally legal world depends on the perceived scholarly quality of the faculty and the perceived caliber of the students. Substantial resources—along with a new vision for a law school—were essential for this success.

These successes also meant, as Tamanaha noted, that the school would have high tuition (necessary to gain the faculty along with university support), almost exclusively merit scholarships, and substantial debt for those with no or small amounts of assistance. Without going into a celebration of UCI Law, success came from these strategies in particular, in the sense that the quality of the faculty was recognized by citations and other indicia.

Having it both ways, as noted, means also being an innovative law school. The pull of the traditional practices aligned with legal hierarchies makes it difficult to go against the grain. This pull is especially apparent in long established law schools. They are typically controlled by a faculty that, given the weight of history, is largely white and male, comes from the same few law schools, tends to look down on clinical and other skills professors, and believes that high quality legal scholarship is what is recognized by the top law reviews. They also value diversity in theory but tend not to find the requisite excellence in women and minority teaching candidates. That summary is of course a caricature, but the weight of those kinds of attitudes is not easy to dismiss.

A founding law faculty brings baggage from where they previously studied and taught, but they also have a commitment to come together and produce something original. They are likely to be individuals who are open to change rather than from the faculty factions typically opposed to any change—who often happen to be the reigning white men. The founding faculty at UCI Law was more like the progressive legal education reformers that one finds in established law schools. This afforded UCI Law more of a blank slate than that which can exist in existing schools trying to change. We can examine some of the innovations of this founding group.

One commitment was to place an emphasis on public service and public interest law. This emphasis is seen in the rather large commitment to pro bono hours by the students in all three classes. The number of in-house clinics also is consistent with this focus. This commitment was not necessarily inconsistent with gaining corporate law firm support to help build the school or with a majority of graduates going into private practice, but all the materials emphasized public service, consistent also with the liberal profile of Chemerinsky. This was a pretty safe commitment in terms of elite sensibilities.

Another commitment was to build an inclusive faculty in terms of gender, sexual identity, race and ethnicity. UCI Law was ahead of the curve here. That did not mean that the hiring moved outside the relatively few elite law schools, nor did it mean that scholarly excellence was exchanged for other criteria such as innovation in teaching. The commitment to traditional criteria of excellence was evident in Chemerinsky's statement that he would hire only from top twenty law schools. Still, the depth of the diversity commitment was definitely a distinguishing feature and actually produced results. Another was to be inclusive by elevating the importance

and status of the clinical and “lawyering skills” faculty. The founding group in my opinion did very well on both fronts,¹¹⁰ and the decisions made by the founders created a group committed to maintaining inclusivity.

The founders sought interdisciplinarity and a concomitant commitment to strong relations with other UCI campus schools and departments. Here too, the Law School was in many respects ahead of the curve—even though, as with diversity, other schools at or near the elite level recognized this value. There is a very strong “law and society” presence on the campus and within the Law School, and this also has meant that a critical mass of faculty members seeks to maintain these characteristics.¹¹¹ Most faculty would define interdisciplinarity and inclusivity as key features of UCI Law.

Diversity of the student body is another commitment. Although diversity in students may not have been emphasized as much in the early years because of the focus on credentials and ranking, at this point the student body is very diverse and recognized as such by the various ranking entities.¹¹²

Curriculum is also notable for a number of variations on the standard curriculum. First, the founders made a clinical experience mandatory for all students in the second or third year, as Annie Lai examines in her article.¹¹³ For the basic courses of the first year, the focus was on modes of legal analysis—procedural analysis: civil procedure, common law analysis: torts, common law analysis: contracts, statutory analysis: criminal law, and constitutional analysis. The idea is to teach these skills rather than simply the standard subject matter, as Jonathan Glater notes in his article in this issue.¹¹⁴ The creation of a lawyering skills program to teach research and writing was also innovative and ambitious, as Rachel Croskery-Roberts shows.¹¹⁵

Finally, the founders added two first year courses: International Legal Analysis¹¹⁶ and Legal Profession. Each has a well-thought out rationale, with the legal profession course in particular consistent with the conclusions of the Carnegie Study of Educating Lawyers.¹¹⁷ It is not my purpose to go into detail about the rationales or innovativeness of the curriculum, but it did depart in certain ways from

110. See generally CARRIE HEMPLE & CARROLL SERON, THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE (Scott L. Cummings ed., 2011); Jonathan Glater, *Statutory Analysis: Criminal Law and an Ever-Evolving Law School*, 10 U.C. IRVINE L. REV. 401 (2020).

111. Tomlins focused on this aspect in his early article about UCI’s identity in the legal field. Tomlins, *supra* note 4, at 243.

112. Glater, *supra* note 110.

113. Annie Lai, *An Evolving Vision for Experiential Education: The Immigrant Rights Clinic at the University of California, Irvine School of Law*, 10 U.C. IRVINE L. REV. 427 (2020).

114. Glater, *supra* note 110.

115. Rachel Croskery-Roberts, *Ten Years In: A Critical View of the Past, Present, and Future of Skills Education at UC Irvine Law School*, 10 U.C. IRVINE L. REV. 469 (2020).

116. For the reasons to add this course, see Carrie Menkle-Meadow, *Why and How to Study Transnational Law*, 1 U.C. IRVINE L. REV. 97 (2011).

117. See ANNE COLBY, JUDITH WELCH WEGNER, LEE SHULMAN, LLOYD BOND & WILLIAM M. SULLIVAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126–61 (2007).

the conventional program. The new content also meant that Property was only available as an elective for second- and third-year students. I teach one of the sections of the legal profession courses, using a casebook by Ann Southworth and Catherine Fisk designed for the goals of the course, which focus more on the profession and practice settings than the Model Rules of Professional Responsibility.¹¹⁸ I am of course a believer that it makes our curriculum better.

It is interesting that the innovations in promoting diversity among faculty and students, public interest law, experiential education, higher status for skills faculty, and interdisciplinarity are all consistent with what we can recognize as the progressive side of the legal establishment, and they have helped the UCI Law reputation and perhaps the school's U.S. News Ranking. They are part of UCI Law's relative success in having it both ways in terms of identifying with the elite of the professional field and the side of innovation and reform. The combination of a faculty open to educationally progressive reform, substantial resources, some notable innovations, and other indicia or credibility, helped produce a nearly top twenty law school noted for innovation.

CONCLUSION: A NOTE ON THE CHALLENGE OF REFORM

My goal in this Essay was to focus on the relationship between innovation in legal education and the aspiration to be—to the extent possible—an elite law school. Part of my ambition was to make explicit what it means to embrace that elite—literally the establishment of the legal field. That legal establishment—a product of the late nineteenth century which is still intact today—orients itself to corporate law firms, elite public interest law firms, the elite of the judiciary, the most respected scholars as recognized by elite law schools, and a “meritocracy” measured by tests and grades that help to entrench the relatively privileged and legitimate their positions.¹¹⁹ UCI Law embraced those characteristics, and is doing well by those criteria. We are progressive but well within the legal elite mainstream.

There are law schools that challenge that mainstream, as Tamanaha wishes UCI Law to do, and I wanted to investigate the difficulties and rewards of doing so. The anti-establishment religious and for-profit law schools exemplify that challenge, and they have experienced particular consequences—including assignment to the fourth tier. Every school that seeks to innovate, moreover, feels pressures to conform to what is assumed to be conventional—reinforced by a bar

118. Ann Southworth, Bryant Garth & Catherine Fisk, *Some Realism About Realism in Teaching About the Legal Profession*, in *THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE* 74, 85 (S. Macaulay, E. Mertz & T. Mitchell eds., 2016).

119. As stated by Daniel Markovitz, “What is conventionally called merit is actually an ideological conceit, constructed to launder a fundamentally unjust allocation of advantage. Meritocracy is merely aristocracy renovated for a world in which the greatest source of prestige, wealth, and power is not land but skill – the human capital of free workers.” Daniel Markovits, *Meritocracy and Its Discontents Lecture Overview*, DARTMOUTH, <https://mals.dartmouth.edu/events/event?event=38349#.XK9k4-hKi70> [<https://perma.cc/H2PH-AZ3Y>] (last visited Sept. 14, 2019).

examination that tests the most traditional curriculum and skills, debts and prestige considerations that lead to efforts to get more graduates into corporate law, and the peer judgments of faculty scholarly quality.

The anti-establishment reformers as well as the more orthodox reformers, such as UCI Law, thus face challenges in maintaining practices that are in many respects still *avant garde*. The pull of a relatively conservative form of legal orthodoxy—opposed to granting an equivalent of faculty status for “skills” instructors, to interdisciplinary work that has not gained the recognition that law and economics has, for example—is inevitably felt. I will list some other examples that in fact are ones that trigger my sensitivities. These examples may multiply as new faculty and students come because of rankings, and, once at UCI Law, focus on the rankings. Faculty who are new and students far from the founding do not necessarily have faith in the decisions that were made a decade ago—especially if legal education has not followed UCI Law.

One place I see this is in criticism of the international legal analysis and/or legal profession courses of the first year. Students in the courses not infrequently complain because they get in the way of a focus on learning what they think is the important part of law (including Property) and the analytical tools that go with those courses. Their friends in law school do not have the same requirements, and many wonder why we need these courses. And some faculty wonder why Property is not required and whether that might affect bar passage statistics.

Another is faculty recruiting, where commitments to interdisciplinary hiring hit resistance. There can be concerns about hiring people whose approach has not been “validated” by publication in top law reviews or recognition by elite law professors. There can be concerns about hiring people whose approach has not been “validated” by publication in top law reviews or recognition by elite law professors. There can also be concerns that, while well-steeped in disciplinary theories and theoretical questions, the candidate’s work is seen to be mainly “descriptive.” Another kind of criticism is that people who teach and research about constitutional law or business, for example, are not “real” business professors because they do not, for example, attend law and economics meetings; not real Intellectual Property scholars because the work crosses boundaries into sociology or journalism; and not real constitutional law scholars because they do not produce doctrinal scholarship in constitutional law.

Other kinds of statements reflect a conservatism in seeking to maintain (or improve) success in ranking—arguing, for example, that we must hire someone because that candidate brings a large number of citations that can replace one or more senior faculty who have left; or saying that we cannot take a risk on someone because we are not secure enough in our rankings and will be punished if we make a mistake. There are also challenges to new methodologies on the grounds that they are not rigorous enough or do not follow traditional disciplinary approaches.

A third concern involves our LLM program, which is relatively new. The traditional approach of elite law schools is to see the LLM programs as cash cows,

and the students mainly a means to an income stream that will support faculty research and merit scholarships for non-LLM students. This approach leads to professors seeing non-U.S. LLM students as students to be shunned rather than integrated into the law school.

Finally, with respect to the diversity of the students, there is sometimes an undercurrent of discussion that we are sacrificing some points in LSAT and GPA, and then later in bar passage, by succeeding—relatively speaking to be sure—in attracting underrepresented minorities into the first-year classes. Increases in need-based scholarships to the extent that they reduce the merit-based ones may run into problems for the same reason. This is not to say that the criticisms are valid, but they reflect a perception that can be heard.

I have my perspective on these issues, but I am not asserting that it is the only or right approach for the future. My main concern, to repeat, is to show the pull back to what demonstrably works (or worked in the past?). And then the question is what about an openness to future innovations that may or may not be the waves of the future for elite law schools and those that aspire to that status. Will we take that risk? The debates that we see are in the mainstream. The pull of eliteness meant a clear grounding in the legal establishment and what that means. Critics may question that decision, as Tamanaha did. But success in rankings along with a reputation for innovation has indeed been an accomplishment for UCI Law School.