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Megan M. Carpenter

Risk-Taking and Reform: Innovation for a Better Education

DEAN'S FOREWORD

INTRODUCTION

At the beginning of the twentieth century, the United States was in the middle of a Second Industrial Revolution, a technological revolution that saw the invention of the lightbulb, the automobile, aviation, and the assembly line. Cities were becoming hubs of commerce, bustling with activity, but many people still lived in rural areas without easy access to goods sold in stores. Trips into town by horse and buggy could take a day or two.

One company sought to solve this problem by delivering goods from the cities to rural outposts and people's homes. Sears, Roebuck, and Co. launched its first catalog in 1890s.¹ The catalog featured the wide variety of goods sold in stores, from clothing to appliances to building materials. By the early 1900s, the U.S. Postal Service had expanded service beyond cities to rural areas, with economical distribution under Rural Free Delivery.² The catalog was a remarkable innovation in shopping, and by 1909, it was over 500 pages in length.

Throughout the twentieth century Sears became known for coming up with innovative solutions to cultural and consumer challenges. In the early 1900s, the building materials department was lagging, so the company decided to bundle materials into kits, creating Sears Modern Homes, a collection of customizable single-family home models sold and delivered to consumers as do-it-yourself kits.³ Sears took advantage of style trends and packaged the homes in a way that was both affordable and appealed to consumer tastes. Exterior finishes and features were customizable and Sears sold electrical, heating, and plumbing systems as add-ons.

¹ *History of the Sears Catalog*, SEARS ARCHIVES (Mar. 21, 2012), <http://www.searsarchives.com/catalogs/history.htm> [<https://perma.cc/GS6U-XLU4>].

² *Id.*; *Rural Free Delivery*, SMITHSONIAN NAT'L POSTAL MUSEUM, <https://postalmuseum.si.edu/exhibition/behind-the-badge-postal-inspection-service-duties-and-history-history/rural-free-delivery> [<https://perma.cc/SER6-S84Z>] (last visited May 3, 2024).

³ *History of Sears Modern Homes*, SEARS ARCHIVES (Mar. 21, 2012), <http://www.searsarchives.com/homes/history.htm> [<https://perma.cc/WPK9-6NKM>].

This project was wildly successful; the company sold over 75,000 Modern Homes kits in about three decades, shuttering the unit only when building supplies declined at the beginning of World War II. In the coming decades Sears would develop and spin off many other innovations, including Allstate Insurance, Diehard Batteries, Kenmore Appliances, and Coldwell Banker Real Estate.⁴

In an effort to respond to an increasingly lean retail market through the latter part of the twentieth century, Sears halted its catalog business in 1993.⁵ While the Sears catalog had become a cultural icon, the big books were bulky, heavy, and expensive to produce and mail, and had lost money for two decades. The leaner Sears then refocused on its mall stores, but this focus failed to optimize for customer behavior and expectations, including declining traffic in shopping malls across the country. In the beginning of the twenty-first century Sears exacerbated these problems by failing to adapt to the disruption of online shopping and the internet. While Sears had 3,500 stores in 2010, by 2017 the number was down to 695, and the company filed for bankruptcy the following year with eleven billion dollars in debt.⁶

How could a company that was known for its innovative approach miss the mark so significantly? And what lessons can we draw from this for legal education?

In an article published in the MIT Sloan Management Review, authors discuss three signs that an industry is about to be disrupted: difficulties with cost management, failure to optimize for modern customer expectations, and regulatory burdens.⁷ These market signals have been prevalent in legal education for some time. Like the legal services industry generally, legal education is in a time of disruption, bringing both significant challenges and incredible opportunities. Risks are economic, pedagogical, structural and regulatory in nature. There is also a substantial risk if legal education and the legal services industry do not inclusively reflect a diversity of backgrounds, cultures, and perspectives.

A. Economic Risks

Economic risks include rising costs, student debt, and uncertain job markets. The cost of education can be prohibitive. Graduates enter a job market that is uncertain, often saddled with high debt. Scholarships may amount to fifty percent or more, but the cost of tuition is still prohibitive to many. The average cost of

⁴ Kevin Kelleher, *The Rise and Fall of Sears: A Timeline From Its Founding To Its Bankruptcy*, FORTUNE (Oct. 15, 2018), <https://fortune.com/2018/10/15/the-rise-and-fall-of-sears-a-timeline-from-its-founding-to-its-bankruptcy/> [<https://perma.cc/4C2F-N37H>].

⁵ *History of the Sears Catalog*, *supra* note 1.

⁶ Bryan Taylor, *Sears: The Amazon of the Twentieth Century*, GLOB. FIN. DATA (Oct. 19, 2018), <https://globalfinancialdata.com/sears-the-amazon-of-the-twentieth-century> [<https://perma.cc/2V7L-7L86>].

⁷ Megan Beck & Barry Libert, *Three Signals Your Industry Is About to Be Disrupted*, MASS INST. OF TECH. SLOAN MGMT. REV. (June 11, 2018), <https://sloanreview.mit.edu/article/three-signals-your-industry-is-about-to-be-disrupted> [<https://perma.cc/4W63-MBUK>].

attending law school is over \$60,000 per year,⁸ and top-ten law schools, can be more than \$90,000 per year.⁹ Yet, despite the high cost of education, many law schools have a difficult time making ends meet. Stand-alone law schools report significant debt, and law schools that are part of larger universities have to contend with the “demographic cliff” of declining undergraduate enrollment that is expected to last at least ten years.¹⁰ With significantly fewer students than many colleges within a university, law schools are often far from the center of gravity at their respective universities and the priorities of a law school do not drive decision-making at a higher level.

B. Pedagogical Risks

There are also pedagogical risks to legal education, including a mismatch between traditional teaching methods and the skills needed in practice. The model of legal education does not necessarily result in practice-ready graduates, and experiential learning programs can be resource-intensive. The licensing system for lawyers is inadequate and out-of-date. The NextGen bar exam has been a long-time coming, and is still in a state of flux. States are experimenting with alternative forms of licensure, but these are ad hoc and not widespread. Externships at most schools are limited in hours and days of the week, which limits the amount of meaningful work that can be assigned by an employer. In contrast to the majority of graduates of medical degrees and doctoral programs, less than a quarter of law school graduates strongly agree that their education was worth the cost.¹¹ Only twenty percent said that their law school experience prepared them well for life after law school; this is less than any other graduate program in the survey, including Master

⁸ Ke’alohi Wang, *What Does Law School Cost, and Is It Worth It?*, FORBES (Mar. 1, 2023, 12:11 PM), <https://www.forbes.com/advisor/education/law/law-school-cost/> [<https://perma.cc/NF63-JLUM>].

⁹ Zenebou Sylia, *Some New England Universities and Colleges Break \$90,000 Barrier for Total Cost in Upcoming School Year*, CNN (Mar. 27, 2024, 9:01 PM), <https://www.cnn.com/2024/03/27/business/college-tuition-new-england-ninety-thousand/index.html> [<https://perma.cc/W34N-P35R>].

¹⁰ Dan Bauman, *Colleges Were Already Bracing for an ‘Enrollment Cliff.’ Now There Might Be a Second One.*, CHRON. OF HIGHER ED. (Feb. 7, 2024), <https://www.chronicle.com/article/colleges-were-already-bracing-for-an-enrollment-cliff-now-there-might-be-a-second-one#:~:text=By%20now%2C%20you%20no%20doubt,the%20enrollment%20or%20demographic%20cliff> [<https://perma.cc/T824-QD78>] (noting that enrollment is expected to decline up to fifteen percent from 2025 to 2035).

¹¹ Zac Auter, *Few MBA, Law Grads Say Their Degree Prepared Them Well*, GALLUP (Feb. 16, 2018), https://news.gallup.com/poll/227039/few-mba-law-grads-say-degree-prepared.aspx?g_source=link_NEWSV9&g_medium=NEWSFEED&g_campaign=item_&g_content=Few%20MBA,%20Law%20Grads%20Say%20Their%20Degree%20Prepared%20Them%20Well [<https://perma.cc/6H76-SP5U>] (fifty-eight percent of medical school graduates strongly agreed that their degree was worth the cost. Sixty-four percent of doctoral degree graduates strongly agreed that their degree was worth the cost.)

of Arts, Master of Sciences, MBA, Medical School, and Doctoral programs.¹²

C. Structural/Regulatory Risks

Regulatory challenges include accreditation standards that constrain schools and present barriers to innovation. The American Bar Association (ABA) Standards on Legal Education enshrine systems that not only fail to embrace innovation but often create barriers to such efforts.¹³

An outmoded structure and disincentive toward innovation present significant challenges to legal education. Higher education has been isolationist, which does not easily support a legal education based in context and application. In an historical account of the American college, historian Louis Dunn extolled the virtues of the college campus as a thing separate from cities and commerce: “Colleges located in quiet rural towns do accomplish more work and better work . . . large cities, business centers, places where the people congregate . . . should never be chosen”¹⁴ as a location for an institution of higher education. Like a seminary or a convent, college campuses were designed with the intention of separating students from everyday life so they could be immersed in the educational experience.

Within this context, legal education became a sort of extension of undergraduate education, separating students from the real world for the “full law school experience,” immersing them in a classroom environment for three years. Christopher Langdell is often credited as the father of our current model of legal education. Before law schools, aspiring attorneys would train under a lawyer or barrister; in order to become a lawyer one had to work in a law office under the supervision of a practicing attorney. At the turn of the nineteenth century, universities started offering courses in law as an alternative to an apprenticeship. The ABA campaigned for years to establish what has become the norm, where law school is a requirement and bar exams are a regular part of licensure.

The pendulum swung far from skills training for 150 years. The dean of Harvard Law commented in the nineteenth century that “what qualifies a person to teach law is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law,” and the president of Harvard predicted correctly that over time, more law professors would be those “who had never been on the bench or at the bar.”¹⁵ When it comes to legal education this idea is

¹² *Id.*

¹³ See generally, 2023-2024 Standards and Rules of Procedure for Approval of Law Schools, A.B.A., https://www.americanbar.org/groups/legal_education/resources/standards/ [https://perma.cc/UF23-X8X3] (last visited May 3, 2024).

¹⁴ Stephen J. Diner, *Why American College Campuses Were Built to Get Students Out of Cities*, TIME (May 19, 2017, 10:00 AM), <https://time.com/4751301/universities-colleges-history/> [https://perma.cc/KJ9K-GXHD].

¹⁵ JOAN HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING (2022).

misguided. The legal services industry needs lawyers that are grounded in the practical realities of the profession, who know what it is to be immersed in environments that help develop a sense of perspective tethered to reality. Learning takes place best when students are not isolated from the world, but when they are engaging with it.

Beginning with the Carnegie¹⁶ and McCrate¹⁷ reports, law schools began to internalize the understanding that students do not only need to learn to think like lawyers, but also to be lawyers. Market needs now demand that law school graduates have an education that enables them to hit the ground running. Many law schools have robust experiential education programs and all are now required to provide some experiential education to their students as a graduation requirement under the ABA Standards on Legal Education. Changes to legal education have been positive, but incremental and insufficient. Higher education is slow to change. As a former colleague of mine said, “Higher education does not pivot, it evolves.”

D. A Lack of Diversity, Equity, and Inclusion in the Legal Services Industry

There is a desperate need to diversify the legal profession and make it accessible to people who are differently situated; there are people who would be wonderful lawyers who will not be because of the economic, structural, and regulatory risks mentioned above. The legal profession lacks diversity in important and harmful ways. About fifty percent of law degrees are earned by women, and fifty percent of law firm associates are women.¹⁸ However, by the time associates become equity partners, men outnumber women five to one.¹⁹ While thirty-six percent of law students are students of color, ninety percent of equity partners are white.²⁰ This is particularly challenging in the intellectual property (IP) and technology space, in an environment where only about thirty-six percent of STEM degrees are earned by women. Over three-quarters of STEM jobs are held by men. Fewer than twenty percent of registered patent attorneys are women.²¹ Only 6.5% of registered patent attorneys are racially diverse, and just over two percent are racially diverse

¹⁶ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS (2007), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf [<https://perma.cc/AN8Q-2SZD>].

¹⁷ EUGENE E. CLARK, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT— AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

¹⁸ *Women*, A.B.A. PROFILE OF THE LEGAL PRO. 2023, <https://www.abalegalprofile.com/women.html> [<https://perma.cc/35YE-EX67>] (last visited May 3, 2024).

¹⁹ *Id.*

²⁰ Latia Brand & Elaine Spector, *Diversity in Patent Law: A Data Analysis of Diversity in the Patent Practice By Technology Practice and Region*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/sites/default/files/documents/Landslide_Diversity_Article_September.pdf [<https://perma.cc/43FZ-DRYG>] (last visited May 3, 2024).

²¹ *Id.*

women.²² Yet many studies show the benefits of diverse teams, including in innovation and profitability. A McKinsey study demonstrates that companies with diverse executive teams outperformed in areas of profitability and value creation.²³ Executive teams with gender diversity saw a twenty-five percent increase in profitability.²⁴ Companies with high levels of cultural and racial diversity were on average thirty-six percent more profitable.²⁵

The access to justice gap is also a significant issue, especially for minoritized communities, and has reached a near crisis. Approximately sixty-six percent of the population in the U.S. experienced at least one legal issue in the past four years, with only forty-nine percent of those problems having been completely resolved.²⁶

I. UNH FRANKLIN PIERCE SCHOOL OF LAW AS A DISRUPTOR

Disruption occurs when a smaller, less resourced entity is able to challenge more well-established incumbent businesses.²⁷ The product or service usually begins in the bottom of a market and may have a lower reputation when it starts, but eventually becomes more appealing than the incumbent competitors in the industry. A successful disruptor is able to effectively target overlooked segments of a market, deliver better functionality, and move upmarket, causing the incumbents to start doing things a new way.

Franklin Pierce Law Center was founded fifty years ago by people who sought to disrupt legal education. President and Founding Dean Robert Rines was an entrepreneur, inventor, patent attorney, and all-around Renaissance man who played violin with Einstein and searched for the Loch Ness monster. He teamed up with experienced legal educator Robert Viles, who had been a Roots-Tilden Scholar and taught at the University of Kentucky College of Law, to create a law school that would stand in stark contrast to the static and stolid institutions of their contemporaries. Dean Robert Viles commented that “the prospect of starting the Law Center struck [him] as a rare opportunity to stop talking about what’s wrong

²² *Id.*

²³ Dame Vivian Hunt et al., *Diversity Matters Even More: The Case for Holistic Impact*, MCKINSEY & Co. (Dec. 5, 2023), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact> [<https://perma.cc/N6D6-F7EU>].

²⁴ *Id.*

²⁵ *Id.*

²⁶ Zachary Willis & Kelsey Montague, *New Study Reveals the Full Extent of the Access to Justice Crisis in America*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 24, 2021), <https://iaals.du.edu/blog/new-study-reveals-full-extent-access-justice-crisis-america#:~:text=The%20results%20of%20the%20survey,problems%20having%20been%20completely%20resolved> [<https://perma.cc/S9XQ-TX6N>].

²⁷ Clayton Christensen et al., *What Is Disruptive Innovation?*, HARV. BUS. REV. (Dec. 2015), <https://hbr.org/2015/12/what-is-disruptive-innovation> [<https://perma.cc/822Y-ADB2>].

with legal education and start doing something about it.” This ethos is core not just to the founding of this law school but to its present, and is a quote I share with every entering student. Decades after the founding of this law school, my leadership is dedicated to carrying on this spirit—to address the challenges faced by legal education head on, and to do so in a way that benefits students, the legal services industry, and the public we serve.

Throughout the last fifty years, Franklin Pierce has been a pioneer and a powerhouse in legal education. The law school has led the way in a variety of areas. There are three primary innovations, however, that have the power to disrupt legal education. Like the Sears company of the 1900s, Franklin Pierce has recognized risks and challenges, and has responded to them by anticipating both the market needs of the legal services industry, and what is in the best interests of students (customers).

A. Innovation 1: Specialized, Skills-Based Education

For fifty years, the law school has focused on specialized legal education, establishing a niche based on market expectations and an advancing information economy. The law school was founded to be the law school for the information age, long before anyone was calling it an information age. The school was designed to graduate IP specialists, foretelling an economy that would shift from primary industry to an economy based in information and content.

The law school's focus on a specialized curriculum in IP has enabled it to graduate students who hit the ground running in practice. The law school was also designed to incorporate skills-based learning into the curriculum, teaching students not just to think like lawyers but to practice law. Students start their careers as law firm associates, for example, having already drafted patent applications or having a deep understanding of licensing principles. Professors in the IP program often bring extensive practical experience, which contributes to the skills-based curriculum. The school has also taken a global approach, recognizing the international nature of IP practice and having planned for decades for an increasingly global economy. This specialized approach, focused on an emerging area of the law, has been wildly successful. A small law school in New Hampshire became a global powerhouse in IP education, graduating thousands of IP lawyers around the world on both US IP law and international and comparative law. Graduates have gone on to lead IP efforts at some of the world's largest companies, including Samsung, Microsoft, Bayer, LG, Pepsi/Frito Lay, Disney, and Lego. The impact of this unique approach to legal education has not just been in the realm of private practice, but also extends to policy positions around the globe; graduates have led IP policy for national governments in places like Argentina, Nigeria, Japan, Taiwan, and the Philippines.

B. Innovation 2: Alternative, Competency-Based Licensure

About twenty-five years ago, the law school, the New Hampshire Supreme Court, and the New Hampshire Bar Association began work on a first-in-the-nation,

competency-based bar alternative program. The program allows students to graduate without the need to take the traditional two-day bar exam, which is much more an exercise in memorization than competence to practice law. In the Daniel Webster Scholar Honors Program, students take a skills-based variant of the New Hampshire bar exam throughout the last two years of law school, and are sworn into the bar the day before graduation.

The program is recognized nationwide for producing graduates that outperform colleagues who have been licensed to practice law for up to two years.²⁸ The program has been featured in several national media outlets, including the Wall Street Journal and the New York Times, and won the E. Smythe Gambrell Professionalism Award from the ABA in 2015, which honors “excellence and innovation in professionalism programs.” The ABA noted that the program has “an exemplary an extraordinarily innovative approach.” In 2024 the program was recognized by Bloomberg as having one of the most innovative approaches to pedagogy in the nation. As states across the U.S. explore alternative paths to licensure, the UNH Franklin Pierce Daniel Webster Scholar Honors Program remains the gold standard. While other states are now experimenting with alternative licensure programs, most are not competency-based and are still in pilot form.

C. Innovation 3: Using Technology to Build Networks and Diversify the Legal Profession

Most recently, the law school created the first ABA-approved specialized law degree in the country designed to make a top legal education accessible to working professionals. The Hybrid JD in Intellectual Property, Technology, and Information Law transforms the model of legal education. It builds on the law school’s specialized focus on IP, uses the strong global network of leaders to educate students, builds students’ professional networks while they are in school, teaches in context, and utilizes technology to make a top legal education in IP accessible to new communities.

1. Solving for Pedagogical and Structural Risks

The program is designed to incorporate technology thoughtfully—the program is mostly online, with intensive in-person immersions four times per year. Professors in the program are located across the country and around the world, and many are leaders in their field, on the cutting-edge of legal issues in the IP and tech space.

During in-person immersions, students are able to travel to various locations to learn in context from practitioners, policy-makers, and judges on the front lines. The students learn patent litigation in Texas at a court with one of the nation’s largest

²⁸ Alli Gerkman & Elena Harman, *Ahead of the Curve*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL Sys., 20 (Jan. 2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_la_w_students_into_lawyers.pdf [<https://perma.cc/EBE8-8QLW>].

patent dockets. They observe a hearing, and interact with the judge and lawyers involved on the ground. They learn IP policy in Washington, D.C., from lobbyists, legislators, law firm leaders, and members of the civil service. They learn IP Strategies for the Tech Industry from the heads of IP at Apple, Google, Microsoft, Samsung, Dolby, Uber, and Lenovo, among others. They learn Media Law from the General Counsel of Fox Television Stations in Los Angeles, who brings in top media lawyers to be a part of the class. Students are able to engage in skills-based learning from practitioners on the front lines and to develop professional networks that will benefit them throughout their careers.

2. Solving for Diversity and Inclusion Challenges

The program has transformed legal education, changing its very structure in a way that makes a top education in IP accessible to working professionals for the first time. Students can stay in their jobs and stay in their homes while attending school; not unlike the initial innovation of the Sears catalog, taking commerce out of the cities and into people's homes, the Hybrid JD in Intellectual Property, Technology, and Information Law breaks through brick and mortar, reversing the law school/student relationship and bringing a top education to students, wherever they are.

The most recent class is comprised of forty-two percent students of color, substantially underrepresented minorities, and draws people of all ages. The average age of entering students spans thirty-six to thirty-eight, and each of the five entering classes to date has spanned either five or six decades, depending on whether a student is starting in their seventies. Just under eighteen percent of students are veterans or active-duty military. Students are working across a wide spectrum of professions and industries—engineering, marketing, business, medical, financial services, and tech, among others, and their divergent work experience and perspectives are incorporated into classroom discussions in a way that enables substantial peer-to-peer learning.

3. Solving for Economic Risks

The program enables students to stay in their jobs, and stay in their homes, while attending a top program, wherever they live. Law school is expensive, and if we are telling prospective students that they have to not only pay for tuition but also quit their jobs (and possibly relocate) to attend a top program, we are inevitably excluding people who would be excellent attorneys but who are not in a position to do that. We also have developed path-breaking partnerships with law firms, tech companies, and professional organizations that create scholarships to make an education more affordable. The program has enabled the law school to both strengthen its financial position, and to make a top education in IP accessible in ways that are more affordable for students.

4. Solving for Market Risks

By maintaining the focus on specialized legal education that has made Franklin

Pierce so successful and delivering that program in a new way, the school has responded to an increasing demand from law firms to educate students who can hit the ground running and be ready to practice on day one. By maintaining the focus on skills-based education that is such a part of the ethos of this institution—teaching students not just to think like lawyers, but to be lawyers—the program is taking hybrid and online legal education in a new direction. The exposure to dozens of leading practitioners working on cutting-edge IP issues across the country and around the world further builds professional networks that will benefit students throughout the arc of their career, and facilitates relationships that will add value to the students' employers. Like the Sears Modern Homes, the customers are receiving a full-service product for their investment, not just the building materials of classroom learning in isolation. In addition to classroom learning, they are learning in a context that is customized according to their interests, including professional relationships and networks that will benefit them for years to come.

CONCLUSION

Legal education, like the legal services industry, is facing significant risks and is ripe for disruption. The risks are economic, structural, and regulatory in nature. Law schools across the United States are struggling to figure out how to remain sustainable while effectively and thoughtfully providing what students (consumers) and the legal services industry (the market) need.

It is incumbent upon law schools to consider how to deliver an education that teaches students to practice law, not just think like lawyers. This should include skills-based learning and specialized legal education. Law schools should also provide their education in a way that is inclusive and accessible, utilizing technology to overcome geographic, economic, and structural barriers enshrined by an outmoded history. Law schools should embrace technology and use it to help mitigate risks and create new opportunities for students. And it is important for regulators to recognize that institutions need to be able to have the freedom to innovate and experiment toward these ends.

UNH Franklin Pierce School of Law has a history of innovation that can serve as an example for law schools moving forward. A school that is not afraid to eschew popular for principled, a small community in New Hampshire has served as a model for innovation in legal education for fifty years. Programs like the Hybrid JD in Intellectual Property, Technology, and Information Law create a new paradigm for legal education, and can serve as a model for professional graduate education that mitigates risk, benefits students, and serves the public better than ever.