
ENGAGING THE CHALLENGE TO LEGAL AND HIGHER EDUCATION: HOW RICHARD MATASAR CALLS THE QUESTIONS

Hannah R. Arterian[†]

Rick Matasar's vivid voice calls for engagement. That voice is heard in his scholarship on legal education and on higher education, just as it is when he speaks. The invitation is: "talk with me, let's do something, let's engage in a complex 'thought experiment.'"

As a result, you will read in some essays in this Symposium a continuation of a conversation, a challenge to it, a modification of it, a correction of it. Sometimes Rick's writing is so engaging you can easily forget that his manifestos have been in print for a long time. Yet we want to correct because his engagement is fresh. This struck me during the Symposium panels and discussions and continues to strike me in the essays contributed to this Symposium issue of the *Syracuse Law Review*. Yes, things have changed; yes, there are places where those changes should be noted; but, the provocation to think and express is remarkably strong.

As Rick's "press conference" responses from the Symposium demonstrate, it is in all ways an engaged and on-going process with him. So if the thought experiments he pursued in his scholarship took a different turn after they were published, he cares as much as any of us about taking a fresh look, or reconsidering, or even writing another thoughtful paper that begins by saying: I got some of that wrong, so let me work with you from a more evolved perspective, one that has the advantage of life lived after the earlier article. Not trapped by the past, he relishes the continuing challenge of becoming more deeply educated, and turning more engaging thought experiments into carefully provocative published work.

This Symposium is our engagement with the on-going developments in the ever-continuing surprises we confront with legal education and higher education, through a focus and reference to the work of Richard Matasar in those now evidently interrelated areas. What you discover is he has been so engaged in developing and sharing his work in these areas that you can be shocked by the quantity as well as the quality of his writing on subjects that have become a combination of stasis and quicksilver. While many who are mired in these fields can

[†] Professor of Law, Syracuse University College of Law. From 2002 to 2015 she served as Dean of Syracuse University College of Law.

either see one or the other, or feel the shocks when they crash the enterprise, Rick's work demonstrates that this is a worthy scholarly subject, and he has devoted a significant amount of his scholarship to it.¹

While Rick's scholarship has produced many reactions over the years, one thing that has always struck me is his prescience. Not that he is spot-on 100%; but sometimes it is a willingness to conduct the thought experiments out loud or in print—risky business—that advances awareness, particularly if the outcomes are frightening. One vivid example for me is a product of the decision of the federal government during the major economic crises of the latter half of the first decade of the twenty-first century to become *the* lender to students. While the crisis had frozen markets for private lenders, and made securitizing loans in order to actually lend close to or actually impossible, Rick was thinking about what this meant and saying it out loud.

He said publicly that we (law schools and higher education generally) could expect a future of government reach into the world we inhabited on a different scale. His prognosis went along this path: when the government becomes the third-party funding our operations, it will eventually become an entity engaging with law schools and higher education because without the direct loans we wouldn't be able to make a payroll. The government's money, through student loans, will give it power and a lot of levers it can use to change the equation. He said that for years, and said it eloquently and on occasion with more direct examples of what we might consider coming down the road.²

For those of us who heard him say it years ago, it is, like much of his thinking and scholarship, a warning of future unintended complications in an already complicated space. He also articulated the potential effect of federal loan forgiveness programs and variations of federal income-based repayment when they were initiated. He stated that the combination of the federal government as the lender and the

1. Rick Matasar's scholarly output is equally impressive in the doctrinal areas in which he has immersed himself. See Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990); Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense*, 63 S. CAL. L. REV. 637 (1990); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399 (1983).

2. You will read some of this in the transcript of his "press conference" in this Symposium.

forgiver or remediator of loans essentially was the only way law schools would survive with the speedily depressed interest in legal education. For the legal education sector, those were going to be the underpinnings of how prospective law students made the value proposition determination. They would only borrow if they thought they wouldn't have to repay quickly or perhaps ever.³ The fear that they (loan forgiveness and some program of income-based repayment) will eventually be withdrawn⁴ comes up in group conversations in law school related settings. Rick has been willing to say that if that happens, in the current environment, the legal education market would collapse.⁵ And how does that mesh with the fact that legal education is deeply discounted off the stated tuition rate?⁶

Moving the conversation in this direction years ago seemed exhausting and beyond discouraging for institutions surviving in a collapsing market. Does he really have to go on like that? Well he spoke even when the audience would rather not take it in.

As we are years into "crisis" a new normal may emerge, but it won't be an old normal, and my sense is that even individuals who fundamentally disapproved of him, not just disagreed with him, have had a reversal of thinking which some will admit to openly. They now recognize that Rick has been onto things many of us missed or somehow simply couldn't or wouldn't accept.

When you consider the field, Rick has had a very significant impact on the assumptions of legal education as an enterprise. When you read his work, when you consider how long he has been thoughtfully engaging the topic, if you have been attentive to the messages in his speaking as well as in his writing in various settings and contexts, you may continually disagree with some of his analysis and predictions, but you will not be able to push him into a category of some of the "critics" of legal education. He is not a destructive force. He isn't glib. In a time when civility is leached from some of the most noticed

3. This is a hyperbolic statement and summary, but its current can be felt in the financial aid and admissions universe in law schools.

4. I use this term consideredly. While it seems unlikely (some have said impossible) for the government to remove these from individuals who have graduated, there is certainly no legal, and perhaps less political, prohibition to eliminating or capping the programs at lower levels prospectively.

5. If those aren't his precise words, you cannot listen to him speak without seeing the vision of that. Whether that is a supportable prediction, it is hard to disagree with the disruption of such a change on legal education in particular.

6. The references in the Symposium to the quandary that those who need the most financial assistance have to borrow and those who need less have the advantage of the tuition-discount reflect the tension.

occupiers of the legal education criticism platform,⁷ and those occupiers have been able to be categorized as a true voice that has crusted into a deeply cynical assessment of legal education, Rick stands forward. He has never been a cynic about legal education. He believes in change, not in destruction. He worries that when change is so hard, it is easy for demagoguery in the criticism to overwhelm it. And he saw clearly years ago that the crisis in legal education is not independent of the then coming, now arrived, crisis in higher education.

In Rick's professional work he has a generosity of spirit and an always evident intellectual curiosity. He makes connections quickly and works through much engaging others. His clarity makes him a force. His spirit and values, his constant quest to learn and his refreshing admission that he doesn't have the corner on wisdom (and neither do you, whoever you might be) make him a force to contend with. His good humor and optimism make it so much easier to engage and face that force.

Part of the best part of being a dean for me was having an opportunity to connect people to each other, and to find a commonality that was simply not evident on the surface.⁸ Oftentimes this became an opportunity to take an "outside the forum" idea and see if there was a way to engage others on it, or to provide a link to individuals who saw themselves as intellectually completely at odds. In a very limited way, that is evident in a few essays I published as dean: that outside the forum publications or ideas often sparked a connection to the work that engaged me.⁹

7. And some of those who get attention in the popular press are not held as credible in their true grounding of legal education costs.

8. This lesson is one modeled for me by Professor Jeffrie Murphy when he became a member of the College of Law faculty at Arizona State University, having a then dual appointment in the College of Law and the Department of Philosophy. Professor Murphy holds a number of significant academic honors and titles, and during my time as Academic Associate Dean, I observed and experienced the various ways in which he found common threads with others, some like me who were intimidated by his formidable achievements—not the titles, but what he wrote, how he spoke, his breadth and precision. He did that, and he also joined people in discourse who might never have done so. For this and for so much else—including auditing his courses at the College of Law—gave me an education in how you should deeply care about how to find common intellectual ground if not with you, through you.

9. The essays were produced for regular deans' issues of the *University of Toledo Law Review*. One of these essays built on E.I. White's classic, *Charlotte's Web*. Hannah R. Arterian, *The Dean and the Web: Charlotte's Web as a Dean's Parable*, 35 U. TOL. L. REV. 1 (2003). Another was a result of exploring *The Paradox of Choice* by Swarthmore College Professor Barry Schwartz, as it had application to legal education. Hannah R. Arterian, *Legal Education and the Tyrannical "Paradox of Choice: Why Less is More"*, 38 U. TOL. L. REV. 495 (2007). A third essay, *The Hidden Curriculum*, wasn't inspired by one thing, but

During my ten years as Associate Dean at Arizona State University College of Law and my thirteen years as Dean of the College of Law at Syracuse University, things I read in these other spheres were often shared with colleagues on the faculty,¹⁰ usually without commentary, hoping it would create interest and conversation.¹¹

Obviously, this Symposium is an outgrowth of that streak in me, and one that I know I share with so many other deans. The difficulty for deans in tackling interesting and provocative ideas with other deans is hard to describe in this Essay without further hijacking the focus. Over time as a dean you do find individuals who you can talk with about the challenges, and about some questions that might be provocative or even foolish.¹² But those don't happen at open mic night, or in rooms with deans you don't know well. What a major loss for each and all. Over the last several years as dean I dreamed of such an opportunity, and again of an opportunity to people who didn't really all know each other to have time, space, and support for that engagement. How can we connect this idea or "thought experiment" to our enterprise? How can we participate in a conversation that extends our bonds and our boundaries?

When you try that with law school deans it is a challenge. As Rick will attest, speaking as a dean or even when speaking as a dean in ways

rather about my readings on what actually influences students in an educational context and the call for legal educators to be the vehicles for values education. Hannah R. Arterian, *The Hidden Curriculum*, 40 U. TOL. L. REV. 279 (2009). Though these were published and available for members of the Syracuse University College of Law faculty to read, I am not certain anyone did!

10. Or with senior administrators in the College of Law, in other colleges, in central administration, or with faculty members I knew in other colleges. Some of those other insights were Rick Matasar's work. What would be a spark of connection between two faculty members? Or an insight from another that would make us want to talk about how the outside perspective could help us think through the enterprise of legal education.

11. When I first moved from ASU to Syracuse University as Dean of the College of Law, and I began this "sharing," one early response was from a senior faculty member. It came through a true response via email to the "shared" article. The senior faculty member's message went something like this: "Why are you sending this stuff? What are you doing up there? I am sure you aren't just drinking margaritas." . . . If only I had been!

12. The first year or so I was dean and I looked at what the law school budget and financials looked like, I knew something had to be addressed. Once I figured out what seemed to be going on (I strictly credit my years in practice as a corporate tax lawyer at a time when clients wanted as close to 100% predictive certainty on tax consequences and would pay for that), I asked how could I figure out the why and address it. My good fortune was to call deans I knew or had an introduction to. How truly supportive and helpful each was those thirteen years ago. Among those who assisted me in thought process was Chancellor Kent Syverud who was in his first deanship at Vanderbilt University Law School. Another was Dean Brian Bromburgh at Loyola University New Orleans College of Law. His death shortly after he retired was a terrible loss to those who valued good spirit, great camaraderie, and straight talk. The point is, on an individual basis, deans can be very helpful. But straight talk in a group is beyond a challenge with most of them.

that are not fully laudatory of *your* school, engaging in institutional exceptionalism when the difficult questions are put on the table can be dangerous, or feel very “wrong.” Reading from the laudatory exception script is death to conversation, and that is even more so when you commit words to paper. Rick himself has been a pretty spectacular exception (generally) to that rule. And he has borne the consequences; some of which are mentioned in his remarks in response to questions in the opening session of the Symposium.

So a Symposium inspired by Rick’s scholarship on legal and higher education struck a chord. Timing coincided with the opening of Dineen Hall—the new home of Syracuse University College of Law. The old building would not have inspired it or suited it. April 2015 suggested a good window of weather and time for participants to grab a few days to be present and fully participate.

Unlike many symposia, this Symposium had some distinct features that worked very well. First, in addition to the great work we had to engage us, we had Bob Rasmussen who gave being a co-chair a partnership meaning. Ideas, crazy or sane, his were mostly terrific and I was at a loss to improve them. He seemed to be in constant conversation in person and over miles. To work as colleagues both excited by this opportunity to focus on the work, and with a distinguished group of individuals all of whom were or had been law school deans, in two days of almost completely unscripted engagement.

Every dean or former dean we invited wanted to participate; some couldn’t attend, but were interested to know if they could participate in this issue in an essay. Bob and I were both encouraged by the response and felt this was an exceptional opportunity. We didn’t ask for “ready to publish” papers for the April 2015 event. But we did want every person to have thought seriously (again) about Rick’s scholarship on legal education and higher education. And we wanted each participant to produce an essay that took inspiration from Rick’s work. Though that essay would be submitted after the April 2015 event.

We were very fortunate that the then Editor-in-Chief of the *Syracuse Law Review*, who had just taken office, and the members of the Executive Board understood the meaningful opportunity having this Symposium issue could be for the *Law Review*, and communicated full support, understanding that the shepherding would begin with this staff but would then transfer to a yet unknown incoming Executive Board, and publication would occur on the next watch. That happened, and the Editors-in-Chief were leaders and supporters in every way and without their work and the work of the Executive Board, the full effect and purpose of this Symposium would have been lost.

With the publication of essays, and the engagement of the participants who would write those essays, Bob Rasmussen and I would work to create a format for the live event. We agreed that in order for the Symposium to have the effect we all wished for, we needed to have no one present but the invited participants for the sessions. This wasn't an auditorium event; it was a conference room event. We agreed we had to have minimal structure and that sessions would not be programmed "against" each other. It was an all-in event.

Rick offered us a "press conference" opener. Not a "press conference" with the press, but a format he used with his classes. He would have a day in each semester where he would allow the students to ask him questions in a "press conference" format. Bob and I immediately saw the tremendous opportunity Rick was suggesting. We would begin the Symposium with Rick fielding any question the participants wanted to ask him, and we would record that and turn the transcription into a part of the Symposium issue of the *Syracuse Law Review*.

And that is how the Symposium is opened here. We decided it would close with a lunch at which Rick gave a keynote address which he then developed into his article in this issue.

Between the "press conference" and the lunch keynote, we decided that having a series of panels arranged on the basis of the abstracts of essays we received from the participants would provide structure for the engagement. Unsurprisingly (to Bob and me) there was no clear way to do that and we were well aware of it. So, of course, were all the participants. But this allowed each participant to have an opportunity to sketch their current abstract and thinking, but not too much time to do that. The remaining time in each session, with either Bob or I moderating, would be cross talk between the panelists or among them and with the other participants. There was not a dull moment, and the engagement was what we envisioned. After each "session," Rick summarized what he gathered from the panel and the discussion and made comments. Very quickly participants were engaging with each other before panels and during breaks. Many of the participants didn't know each other, all knew Bob or me, and many knew Rick. The sessions moved quickly with always more to discuss than time to discuss it.

One of the reasons for not asking the participants to produce the actual essays to form the basis for the event, in addition to the "yikes" we were likely to hear from a group of deans and university administrators, was more importantly to allow the event to shift and to shape what the ultimate published work would be. We hoped that

interaction in person would have an impact at least for some of the papers written by the participants. Having had the privilege to read each submission, the Symposium did have an effect on what was written by most participants. Listening and engaging with the individuals in the room really did have that mark on the written product.

Reading them and treading Adam Gopnik's essay, *Naked Cities: The Death and Life of Urban America*,¹³ made me see there were significant parts of that review essay which spoke to the topics we were considering. His analysis of crises facing cities holds insights for legal education, or as Rick and two of the essays in this issue directly speak to, higher education.

For example, Gopnik writes:

Yet the social crises that cities face are remarkably consistent, country to country and town to town. Very little that is going on in New York, from plutocratic excess to outlying gentrification, is not also going on, with different emphases and origins in London: the same tales of people who drink wine and lattes buying the property of those who drink whiskey and beer. At the same time, cities are local. Saying that Manhattan and central London share the same problems is like saying that a man dying of drink in London is like one doing the same in Manhattan. It's true, but all the local conditions—what he's drinking, where he drinks it, who takes him home, and what kind of home he goes to—are so different that a story about the drunk in either place becomes a story about the place. Cities are at once the most cosmopolitan and the most particular of subjects; they require and rarely receive, a view sufficiently wide-eyed as to become effectively double.¹⁴

In critiquing some of the approach in a book that forms part of the basis for the essay he states:

Yet one feels impatient as he torturously tries to track concepts of class and *mentalité* onto what are, clearly, the inevitable inner squabbles of fan clubs and interest groups. [The author] illustrates, without quite articulating, the central Trollopean social insight: like-minded people with similar passions typically end up fighting among themselves far more than they do with their class or intellectual opponents. Cyclists fight cyclists, as union leaders fight union leaders.¹⁵

13. Adam Gopnik, *Naked Cities: The Death and Life of Urban America*, NEW YORKER, Oct. 5, 2015, at 80. The essay used several books, some newly published, to develop an analysis.

14. *Id.* at 80–81.

15. *Id.* at 81–82.

While we in legal education suffer the same general system stresses, we are all attuned to the local exceptionalism which allows us to think we have a solution. Our respective environments provide a context that sets us apart and there is the possibility that the local context in which institutions express themselves could in fact be the differentiator—some of this comes through in the essays as the writers take that on and describe approaches that work for their institutions. And certainly Rick in his article develops a categorization of the higher education institutions that creates metaphorical locations by class.

Exceptionalism may save institutions,¹⁶ but are there enough true commonalities that adhering to the exceptionalist mantra obfuscates serious issues that require some basic switch in approach and perspective? Or is it that the switch in perspective is what invigorates the exceptionalist, the local, solution?¹⁷

Another approach to finding what undergirds our major challenges is the perspective of sorting. That is, higher education and (similarly) legal education is the effective “sorting mechanism” that made a B.A. so worth acquiring (which could be extended to a similar analysis to the acquisition of a J.D. degree). This worked very well for a period of time, but now it doesn’t because a greater percentage of the population has one.¹⁸

Rick would say:¹⁹ Let’s conduct this thought experiment: Examine the work of a scholar and public intellectual on the state of legal education and higher education and ask individuals who are serving or have served as dean of law schools to meet to focus and engage in conversation and scholarship on some aspects of that topic. Let’s do this in a time period where leaders are under intense pressure and are publically maligned. What would result?

In essence, the “thought experiment” is reflected in this Symposium issue of the *Syracuse Law Review*. The essays produced by distinguished individuals, all of whom led law schools and are leaders of the legal academy, are as varied as the individuals, and have in common evident engagement with the crisis that frames the thought experiment.

16. Note a full-page ad in the *New York Times* dominated by a photograph of Chicago with text announcing the \$150 million gift to the Northwestern University School of Law and the law-business-technology buzz words.

17. A \$150 million gift to an already well funded law school is certainly exceptional and does drive other opportunities that could be “solutions.”

18. John Cassidy, *College Calculus: What’s the Real Value of Higher Education?*, NEW YORKER, Sept. 7, 2015, at 80, 82–83.

19. And Rick does address this a bit in the “press conference” transcript.

The force is the work of Richard Matasar: law professor, dean of three very different law schools, Vice President for University Enterprise Initiatives and Professor Management at New York University when the Symposium took place, and now Senior Vice President of Strategic Initiatives and Institutional Effectiveness at Tulane University.²⁰

As an academic, Rick unquestionably made the hard questions and thought experiments in the legal education the subject of his clear-eyed analysis and lively style, and saw early on how those hard questions and thought experiments spoke to higher education.

Rick has been characterized from time to time as a provocateur, and has certainly been a lightning rod, in part because of what he produced in print, but also because his status as a public intellectual has created the environment in which what he says draws attention and individuals who don't see complexity draw quick assumptions driving to whatever point they want to make.

It is a truism that Rick's thinking, clarity of expression, and willingness to engage directly in the thought experiments of future consequences made one feel the drive to response. Much of that response took an ad hominem approach. Yet, Richard Matasar's work stands up. It stands up for many reasons, but core is that it invites a response. Rick doesn't simply open doors to discourse. His own work demonstrates directly how his work has evolved over time. For thoughtful academic administrators in legal education, Rick's work challenges and his manner and tone move you to discourse.

This Symposium was a tremendous opportunity to respond, to learn and to work to move the critical conversation forward.

20. Note that NYU was led by a great former dean of NYU School of Law—John Sexton—and Tulane is led by another outstanding former dean of a law school—Michael Fitts—who was at the University of Pennsylvania Law School prior to assuming leadership of Tulane.