
**SUSTAINING THE CANARY IN TOXIC TIMES:
PARABLES ABOUT SURVIVAL FOR LEGAL
EDUCATION**

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INTRODUCTION

The work of Richard Matasar is fueled and enlivened by metaphors.¹ From a dean’s vantage point, however, one Matasarian metaphor is particularly ominous: he asks whether “law schools—with high cost, massive student debt burdens, worsening legal employment prospects, decreasing student demand, and angry students” might be the proverbial “canary in the coal mine” of higher education.² The problem with Matasar’s metaphor, of course, is that the canary must die to be of use. Nothing in the lore of mining suggests that anyone paid attention to a canary’s respiratory distress, performed CPR, removed it to a wholesome environment, or otherwise sought to keep the canary as safe as the miners it protected. Matasar’s metaphor is arresting, however, because law schools do seem to be working in a potentially toxic

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1. See, e.g., Richard Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEG. ISSUES 67 (2008) (law professors as “fiduciaries”); Richard Matasar, *The Canary in the Coal Mine: What the University Can Learn from Legal Education*, 45 MCGEORGE L. REV. 161, 165 (2013) [hereinafter *Canary in the Coal Mine*] (“frills” in legal education).

2. *Canary in the Coal Mine*, *supra* note 1, at 162.

environment—or at least one in which fresh air is in low supply. Revenue (our oxygen) does not flow to our institutions as it did in the past. Enrollments are at an historic low, resources are constrained, and many law schools have seen a resulting slippage in their clout within universities. We have gone from cash cows³ to gasping canaries, and many of us are running deficit budgets, relying on our larger institutions to sustain us in tough times.

Clearly, universities are not waiting until their law schools die to notice the conditions that are producing stress. Indeed, many universities are metaphorically administering oxygen and performing CPR to keep their law school canaries alive. Thus, law schools may be breathing hard but we're "not yet dead."⁴ Under these circumstances, "the canary in the coal mine" is a misleading metaphor.

If we want to focus on the well-being of law schools as well as the lessons higher education can extract from law school distress, we need to shift metaphors. Let us consider alternative narratives, or better yet, parables. Parables may offer inspiration and guidance, suggesting ways that law schools can survive and even thrive in a low-oxygen environment. I will offer three such parables: the woman who survives a near-drowning, the Sherpas who carry heavy loads at high altitude, and the long-distance runner who trains at high altitude. So, on to our parables.

3. The cash cow metaphor is also interesting, as it shifts our attention from mining to farming. The cash cow on most farms was a dairy cow, which a farmer could acquire for a small outlay of cash and then milk for a steady revenue stream with relatively little maintenance and modest inputs. The term is often used to suggest exploitation, as one unit in a business entity is "milked" to support activities outside that unit, but the origins of the metaphor suggest something less sinister and more cooperative. A farmer who begrudges his cow the feed and care she requires will find she produces little milk.

4. At the conference connected to this symposium, a little ditty from Monty Python's *Spamalot* started flitting through my head as I considered the canary metaphor applied to my own law school, so for entertainment's sake I share it here:

I am not dead yet
I can dance and I can sing
I am not dead yet
I can do the Highland Fling

I am not dead yet
No need to go to bed
No need to call the doctor
Cause I'm not yet dead.

ERIC IDLE & JOHN DU PREZ, *Monks Chant/He Is Not Dead Yet*, on MONTY PYTHON'S *SPAMALOT* 0:34–0:46 (Decca Records 2005).

I. SURVIVING A NEAR-DROWNING

A law school surviving the crisis in legal education is like a woman who survives a near-drowning accident.⁵ As every physician and graduate of a red-cross lifesaving course knows, people can sometimes survive long periods without oxygen, but only if they go down in icy waters. The cold temperatures effectively shut down portions of the body, reducing the need for oxygen. A rescued individual may lack a heartbeat and respiration, appearing to be dead, but as emergency medical teams administer CPR and bring core body temperature back to normal, the apparent drowning victim may revive, sometimes with no long term injury.⁶ Such stories support the medical adage that “you’re not dead until you’re warm and dead.” Scientists like Mark Roth at the Hutchings Institute are discovering that in extremely low concentrations, some lethal compounds can mimic the cold and send small mammals into a kind of suspended animation, where demand for oxygen is temporarily eliminated. Especially when a toxic agent is followed by a very cold environment, mice can shut down (with no respiration or heartbeat) but remain alive for reanimation—even hours later.⁷ These findings are important and potentially game-changing for treating heart attacks and trauma wounds.

How might law schools learn from the paradoxically life-saving combination of cold and poison as they suspend an organism’s need for oxygen?

Like the metaphor of the canary in the mineshaft, the parable of the drowning survivor is not perfect. Law schools cannot completely suspend animation. Education is the heart of the law school, and it must keep beating. Rather than calling this strategy “suspended animation,”

5. See Mads Gilbert et al., *Resuscitation from Accidental Hypothermia of 13.7°C with Circulatory Arrest*, 355 LANCET 375, 375 (2000) (Anna Bågenholm survived a skiing accident in 1999 that trapped her under a layer of ice for approximately eighty minutes in freezing water).

6. For news articles about survivors of near-drownings, see Jason Blevins, *Watery Tragedy Averted as Lakewood Toddler’s Life “Miraculously” Revived*, DENVER POST (Dec. 14, 2010, 1:00 AM), http://www.denverpost.com/news/ci_16852219; Sonya Colberg, *Against All Odds, Toddler Gore Otteson Survives a Near-Drowning and an Hour With No Heartbeat*, NEWSOK (Sept. 19, 2010), <http://newsok.com/against-all-odds-toddler-gore-otteson-survives-a-near-drowning-and-an-hour-with-no-heartbeat/article/3496460>; Lawrence K. Altman, *The Doctor’s World; Ingenuity and a ‘Miraculous’ Revival*, N.Y. TIMES (July 26, 1988), <http://www.nytimes.com/1988/07/26/science/the-doctor-s-world-ingenuity-and-a-miraculous-revival.html?pagewanted=all> (resuscitation of a 2.5-year-old girl submerged in an icy creek for more than an hour).

7. For a great summary of this research, watch Roth’s Ted Talk. Mark Roth, *Suspended Animation Is Within Our Grasp*, TED (Feb. 2010), http://www.ted.com/talks/mark_roth_suspended_animation?language=en.

then, I'll call it "subdued animation." Some law schools will survive the current crisis by temporarily reducing their need for resources. They will do this by shutting down non-essential programs and activities. The schools may be absent from the Association of American Law Schools (AALS) Faculty Recruitment Conference for a few years. They may become very quiet and somewhat internally focused, hosting fewer conferences and reducing travel budgets for faculty. As older professors retire, these schools may leave the spots vacant or refill the teaching slots with visitors, adjuncts, or retiring practitioners who take up residence at the school. This is subdued animation. Whether the outward signs of life are sufficient to impress accreditors, ranking entities, or competitors, many of these schools will remain inwardly vital. To go into subdued animation requires discipline, and it cuts hard against the desire, especially during *U.S. News* ranking season, to send out materials touting impressive hires and new programs. But the suspension of resource-intensive activity need not be permanent; if higher enrollments or other resource infusions later make it safe to increase consumption, outside activities may resume and the school may become more visible. Nor is subdued animation necessarily harmful in the long term. As I'll explain below, the tough choices it requires can be clarifying, and may help schools to discover and strengthen their essential missions.

This state of subdued animation is not fun. It may de-emphasize the most alluring aspects of the job, for deans and faculty alike. Faculty may mourn the halcyon days of their early academic careers, when research stipends and travel budgets were generous, schools could count on hiring someone new every year or two, and if faculty had a good idea for a project or conference, a dean could generously fund the initiatives. At schools following the strategy of subdued animation, deans will say "no" more frequently, as resources are channeled into the essentials.

And this is clarifying, because it forces schools to identify and then preserve their core functions. In a twist on the scriptural adage that "where your treasure is, there will your heart be also,"⁸ nothing helps to make clear the "heart" of a law school like a demand from a provost or university president that the law school reduce its "treasure" (a.k.a. operating budget) by twenty percent or more. What can be eliminated, what can be reduced, and what must be held inviolate? I have asked myself just these questions as I have sought to steward resources carefully. One thing is clear at my law school: students are the heart of the institution; everything exists to serve them. Therefore, my goal has

8. *Matthew* 6:21 (King James).

been to make budgetary reductions as invisible to students as possible. This makes the offices of student services and career development inviolate. I am fortunate to serve as dean at a school where faculty are very much in alignment with these choices, and are willing to sacrifice some of their own time, energy, and resources to insure that a high quality student experience is preserved even with reduced resources. If personnel reductions have been necessary to save money, someone—perhaps faculty or administrative staff taking on unfamiliar and onerous responsibilities, if necessary—has covered the teaching and services provided to students, so that they would feel the least possible impact of the staffing cut. In this way, with time, attention, and resources focused on the heart of the mission, some schools survive by subdued animation.

II. SHERPA GUIDES

Another law school surviving the crisis in legal education is like a Sherpa guide in the Himalayas. Skillful mountaineers and stalwart porters for climbing expeditions, Sherpas are legendary for extremely high levels of activity and exertion in conditions where oxygen and atmospheric pressure are very low. High altitudes and “thin air” that would sicken most people have no adverse effect on Sherpas. Research has shown that Sherpas’ ability to maintain high exertion in low-oxygen conditions is not the result of conditioning alone.⁹ Genetic changes in the systems that regulate respiration and circulation allow Sherpas’ lungs to synthesize larger amounts of nitric oxide from the air than the lungs of typical lowland humans do. The nitric oxide dilates blood vessels and increases circulation to compensate for the lower oxygen levels at high altitudes. The ability to survive and thrive in low-oxygen environments is thus built into the DNA of the Sherpa people, and research suggests this is a relatively recent adaptation.¹⁰ Natural selection has worked with extraordinary speed to help the Sherpa people adapt to a hostile environment as they live and work at high altitudes.

Some law schools will have a similar predisposition to do well in times of limited resources. This is the way they have always operated. The external and internal changes that have rocked other faculties seem

9. See Cynthia M. Beall, *Human Adaptability Studies at High Altitude: Research Designs and Major Concepts During Fifty Years of Discovery*, 25 AM. J. HUM. BIOLOGY 141, 143 (2013); see also Hillary Mayell, *Three High-Altitude Peoples, Three Adaptations to Thin Air*, NAT’L GEOGRAPHIC NEWS (Feb. 25, 2004), http://news.nationalgeographic.com/news/2004/02/0224_040225_evolution.html.

10. Recent research has even identified the particular gene responsible for this adaptation to high altitude. See Emilia Huerta-Sanchez, et al., *Altitudinal Adaptation in Tibetans Caused by Introgression of Denisovan-Like DNA*, 512 NATURE 194, 194 (2014).

more like business as usual for these schools. Yes, large firms have severely curtailed hiring, but few of their graduates took those jobs even in the best of times. Yes, teaching and committee work increase as colleagues retire and slots remain vacant, but faculty have always carried a four (or even five) course load, and if the committee work is important they'll see to it. Yes, resources to support research are limited, but at these schools, summer research grants were always modest—faculty write for love of the subject and engagement in an intellectual community, not for a hefty summer grant. Yes, the dean needs to reduce the size of payroll to balance a lower enrollment, but faculty members understand how lucky they are to have the jobs they love, and they endure a pay cut for the good of the school. These schools are Sherpas, where working hard for lower pay, less prestige, and fewer perks, simply because they love the work and they love the students, is “baked into the DNA” of the faculty. When enrollments rebound, the increased resources might fund a junior hire to bring new energy and perspective to the school. The school might reduce tuition or increase scholarships. But even (or especially) with higher enrollments, the faculty will continue to write and teach full loads at the same relatively modest pay they have always received—because that is the culture of the school.

III. LONG-DISTANCE RUNNERS

Yet another law school surviving the crisis in legal education is like a long-distance runner who travels to a high-altitude location to train for a race. When he trains at high altitudes or in a state of mild oxygen deprivation, he grows stronger and can perform even more impressively when he returns to normal altitude for a race. Altitude training can also be simulated by creating environments with lower oxygen content, such as altitude tents and hypobaric chambers. The body responds to the low-oxygen environment by changing muscle metabolism and/or increasing the mass of red blood cells and hemoglobin.¹¹ This is an example of the “antifragile” quality of living organisms.¹² As Nassim Taleb has explained, the opposite of fragility in machines is resilience; they continue to perform at constant levels under stress. For some organisms, in contrast, the opposite of fragility is more

11. *See generally* STEPHEN R. MUZA, CHARLES S. FULCO & ALLEN CYMERMAN, THERMAL & MOUNTAIN MED. DIV., U.S. ARMY RESEARCH INST. OF ENVTL. MED., ALTITUDE ACCLIMATIZATION GUIDE (2004), <http://archive.rubicon-foundation.org/xmlui/bitstream/handle/123456789/7616/ADA423388.pdf?sequence=1>.

12. *See generally* NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER (2014).

than consistent performance—adversity actually creates strength. “Antifragility is beyond resilience or robustness. The resilient resists shocks and stays the same; the antifragile gets better.”¹³

I am not the first to suggest that some law schools could emerge from the crisis in legal education better, stronger, more efficient and more innovative than they were in cushier times. But how might this happen? Some have suggested that cost saving is key: delivering a larger number of credits online or shortening the period of time to completion of the J.D. through so called “two-year” programs could certainly help some students to reduce the cost of their degrees. But does it actually improve the quality of the education? If we take seriously the parable of the long-distance runner, we should remember that the runner still runs, after all; altitude does not change the basic movements. The parable suggests that the current crisis will improve some law schools not because they find totally new and different means to deliver legal education, but because the increased competition forces them to pay closer attention to quality from a student’s perspective. Students want their professors’ time, attention, feedback, and guidance.

For some law schools, the subdued animation described above (especially as manifest in reduced support for travel and research) will turn faculty attention inward, giving them even more time and energy to devote to their students. What might they do with this time? Some will redouble their efforts to administer and give detailed feedback on practice exams for first year students, so those students need not operate in the dark for a full semester, awaiting with great anxiety that first set of exams in December. Although it is time-consuming for faculty to collaborate with members of the bar, devise prompts, and read the papers, some syllabi will include more writing projects—especially ones that replicate the sort of writing lawyers might do in areas of practice related to the courses. In anticipation of the American Bar Association’s requirement that schools articulate learning objectives and means of assessment, some faculties will take the time and political risk to have probing, meaningful conversations about just what it is we’re trying to achieve with our students in the brief time we have with them. This is hard, time-consuming work, but it just might improve a school’s “circulatory” system—the teaching and mentoring of students that is the heart of legal education.

13. *Id.* at 3.

IV. MATASAR'S MODELS

Richard Matasar has devoted considerable thought to the missions and strategies that will enable schools to survive and thrive when other “canaries” are struggling. He sets forth a three-part taxonomy of law school business models, and then analyzes the way each type of school will survive the crisis in legal education.¹⁴ Matasar sees “three archetypes that might succeed”: “high prestige” schools offering face to face residential education at a high price (think Ivy League); “no frills” education delivered in the most efficient and inexpensive way possible (think land grant universities in the early 1980’s); and schools offering “value-high quality at a lower price,” partly by leveraging technology (a new model yet to be fully deployed, given ABA limits on distance education).¹⁵ Matasar’s archetypes are helpful and may, as a matter of first order, do a pretty good job of sorting schools. But the parables set forth above suggest that we’ll see a variety of personalities and practices that will create some outliers, or at the very least allow a diversity of law schools to survive and thrive, even within each of these categories. Already, in the current crisis, we have seen several examples of tuition-discounting—and not just from schools that Matasar would characterize as “no frills.” Moreover, even now resource-constrained law schools are finding creative and pedagogically sound ways to dramatically reduce costs, and not just through the use of technology. On-ground staffing plans can maintain a diverse and fulsome curriculum even as full-time research faculty shrinks. The parables I’ve spun above suggest a fourth way, one that emphasizes personalized, on ground, residential education in a community focused environment, using part-time, practicing lawyers as well as full-time retired lawyers to compliment tenured and tenure-track research faculty.

Matasar takes law schools to task for their “never ending, internal wish list of ways to ‘improve’ . . . constructing new buildings, growing their faculty, reducing teaching loads, increasing summer research grants, funding research leaves and sabbaticals, creating clinics, developing specialty programs, marketing programs far and wide, offering boutique courses, and saying ‘yes’ whenever possible.”¹⁶ Matasar contrasts this quest for improvement to the relatively “bare bones” approach law schools took “in leaner times.”¹⁷ Matasar attributes much of law school expansion to the desire to emulate Yale and other

14. *Canary in the Coal Mine*, *supra* note 1, at 201.

15. *Id.*

16. *Id.* at 164.

17. *Id.*

elite law schools, particularly by joining the “law and” movement, which looks to disciplines other than law—such as history, economics, and psychology—to better understand the law and increase students’ capability to “think like a lawyer.”¹⁸

When Matasar notes that “some have wondered whether the frills should be abandoned,” he leaves unstated just which of these developments in legal education he considers to be the frills and which are part of the basic garment (another metaphorical puzzle). It is possible that his version of legal education’s growth reflects an elitist bias; the truth is that not all law schools have tried to emulate Yale. Indeed, a decidedly practical, practice-focused curriculum more typical of the non-elite law schools can also prove expensive.

So let’s review Matasar’s list of improvement tactics.

A. New Construction

Should we construct new law buildings? No, if we’re simply replicating the old spaces and structures, spending lots of money to surround our students with finer appointments and a glitzier, glassier shell. But many of us say “yes” to new law buildings if we need different spaces in which to teach law students practical skills, such as trial advocacy, negotiation, and mediation. We say “yes” if we need student offices, meeting rooms, or practice spaces to facilitate group work and empower students as leaders and project managers in co-curricular activities. We say “yes” to new construction if we desire the sort of sustained interactions between students, faculty, and the practicing bar that a beautiful auditorium and convenient conference center can spark. We say “yes” if our old location fails to take advantage of interdisciplinary opportunities, externship sites, or other work opportunities that will enhance our students’ legal education.

B. Offering “Boutique” Courses

Should we expand our curriculum beyond the “bare bones” of “leaner times?” Certainly, the “law and” courses have deepened our understanding and may be great for the schools that can afford to hire experts in economics, philosophy, critical theory, and psychology. But the sort of curriculum expansion Matasar describes¹⁹ is skewed to the approaches of the elite and “wannabe” elite law schools. Many schools already say “no” to such hires. Nonetheless, some non-elite schools say “yes” to a diverse array of upper level courses. This array is not

18. *Id.* at 165.

19. *Canary in the Coal Mine*, *supra* note 1, at 164–65.

necessarily informed by faculty research agendas. Instead, it is driven by dialogue with the bar about what our students need to know to be effective and ethical lawyers. We should acknowledge that at many schools, the expansion of the curriculum is in response to the profession's demand for more "practice ready" graduates in a market that seeks more specialized preparation for the practice of law.

C. Research Support

Should faculty receive research leaves, sabbaticals, and summer grants? Probably not, if the purpose is only to support esoteric projects in exotic locales. But obviously, support for research goes far beyond such goals. Many law schools say "yes" to faculty research that includes students, enriches teaching, contributes to law and policymaking, and promotes legal reform and social change. At my own small law school, recent summer grants have supported work that includes death penalty abolition, the freedom to marry, "second chance" statutes in juvenile sentencing, inter-professional collaboration in public health, greater flexibility and discretion for estate trustees, clearer understanding of the visual cues that inform and persuade juries, and quite a bit of writing about pedagogy in legal education. At schools with larger faculties, the list must be even more impressive and transformative.

D. Creating Legal Clinics

Should law schools create and maintain clinics that deliver legal services to people who cannot afford lawyers, while simultaneously giving students the opportunity to gain practice skills under the supervision of full-time attorney professors? We all say "yes" to this one, despite its expense, for a variety of reasons. For some schools, the focus is on public service. At others, this benefit is augmented by the sense that many of our students are not "ready for prime time" and need a safe, more supervised environment in which to practice client interviewing, problem solving, and advocacy. Many of us say "yes" to clinics despite the fact that externships and field placements (also valuable "hands on" experiences) present a cheaper (and to students, more alluring) model of clinical legal education.

E. Specialties

Should law schools develop specialty programs? Matasar is right to critique the “rankings game,”²⁰ and it is probably true that the ability to be ranked separately for certain specialties, however a school might fare in the *U.S. News* rankings overall, has created incentives to “specialize” in particular fields.²¹ Based on the experience of my own school, however, I can affirm that specialties often arise from perfectly authentic origins. Sometimes schools find a critical mass of teaching, scholarship, and practice having already evolved internally, and they wisely say “yes” to creating a center to organize and publicize the investments they have made in a field. Other law schools might say “yes” to specialties as part of their universities’ larger strategic plans. At my own school, centers founded more than fifteen years ago in dispute resolution and health law and policy create containers for students and faculty to work across the boundaries between schools, bringing us into collaboration with the schools of business, medicine, nursing, and health sciences, including programs in public health and social work.

When law students work across these boundaries, they can better put their legal education into context and more keenly understand how problems are experienced from the perspective of other professions. This sort of contextualized understanding is not a “frill”; it is fundamental to ethical and effective legal practice.

CONCLUSION

Thus we should expect to see a wide variety of law schools saying “yes” to many of the “improvements” that Matasar lists, but not necessarily in pursuit of the “Be Like Yale” strategy that Matasar attributes to the schools. This is not to say that all of Matasar’s improvements will be embraced by schools uniformly. I suspect that schools emulating our parables’ drowning survivors, Sherpas, and high-altitude athletes will say “no” to several of the improvements he lists.

For now, we may say “no” to expanding the faculty. In the case of my own school, we cut the size of our incoming class in the early 2000s—several years before the national applicant pool contracted so dramatically. Recognizing that our student body was smaller, and

20. *Id.* at 165–66.

21. The *U.S. News* specialty rankings include: Clinical Training, Dispute Resolution, Environmental Law, Health Care, Intellectual Property, International Law, Tax, Trial Advocacy, and Legal Writing. *Top Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools> (last visited Mar. 22, 2016).

notwithstanding occasional and strategic hiring of some excellent junior faculty, our faculty had been shrinking for about a decade even before recent retirements accelerated that trend. I suspect that we are not alone in this.

We also say “no” to shrinking teaching loads. At my school, teaching loads have effectively increased in recent years, when we consider developments in upper level, supervised writing; advising for seven “concentrations” in tax, health, dispute resolution, employment, criminal, family, and IP law; a push for first-year courses to include mid-semester practice exams; and a “Day One” mentoring program that matches incoming 1Ls with faculty mentors before the students even show up for orientation. All of these programs, designed to increase the frequency and quality of student-faculty interaction, impose heavier teaching burdens on faculty, even if the number of courses they teach remains constant.

Thus, I think Matasar is wrong that the quest for improvement leads law schools to say “yes” whenever possible. The antifragile dynamic suggests that saying “no” can lead to improved legal education in the long term. For me, the big question is whether our accrediting and membership organizations, the ABA and the AALS, will give law schools the leeway to experiment with alternative staffing models in this time of constrained resources. Increasing our partnership with part-time faculty who continue to practice law and working with retiring attorneys who take up full or nearly full-time residence in the law school—even as we maintain a smaller but strong cadre of tenured and tenure-track faculty covering the core curriculum and pursuing scholarship—may conserve resources while we continue to deliver a thoughtful, demanding, and relevant legal education to our students.

Richard Matasar delivers a final portentous metaphor in his advice to law schools: “if they are not among either the handful of elite schools or the no-frills schools, they must become a value-driven school or become dead meat.”²² See what I mean about vivid Matasarian metaphors? Still, his suggestions about the ways law schools might become more “value-driven” are helpful. I see my own school experimenting with programs that implement his advice, such as “hybrid education consisting of highly concentrated periods of in-person study, followed by extensive time away learning practical skills or working as interns,” and becoming “fully interdisciplinary, with courses for students from many places in the university.”²³ Time will

22. *Canary in the Coal Mine*, *supra* note 1, at 201.

23. *Id.* at 202.

tell whether “value-oriented” schools can identify and exploit their strengths in ways that resonate with prospective students, employers, and potential donors. In the meantime, law schools (and the universities that support them) should forget about canaries in the coal mine and think instead of drowning survivors, Sherpas, and elite runners. Whether by subdued animation, a tradition of austerity, or anti-fragile improvement, some schools will emerge from this crisis intact, so long as they preserve the heart of their work: the student experience.