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SELF-INTERESTED FIDUCIARIES AND THE INCUBATOR MOVEMENT

Harold J. Krent[†] and Dawn K. Young^{††}

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INTRODUCTION

Fueled by changes in the economy that have led to salary cuts, layoffs, and hiring freezes, the landscape of the legal industry has changed.¹ Law students and recent graduates are facing fewer job opportunities, lower salaries, mounting student loans, and “a sense that their high-priced education has left them unprepared for this new climate.”² Law firms lament that their clients are not willing to pay big bucks for associates who are learning on the job.³ Law schools are also experiencing the effects of the recession, facing scrutiny over the high cost of legal education, lack of legal jobs, and declining applicant pool.

Mainstream media have taken notice of these challenges. For example, in recent years, law schools have become the subject of various news stories, including a spate of negative press from the *New York Times*.⁴ Discussion and debate over the inadequacies of legal education have resurfaced (yet again) more than two decades after the

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1. Hannah Hayes, *Recession Places Law School Reform in the Eye of the Storm*, PERSPECTIVES, Spring 2010, at 8.

2. *Id.*

3. See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=1&r=2>.

4. David Segal is a *New York Times* reporter who has written a series of mainstream news articles criticizing the current state of legal education.

*MacCrate Report*⁵ and nearly a decade after the *Carnegie Report*⁶ and *Best Practices*.⁷ This renewed urgency for reform in legal education has arisen from a confluence of factors mentioned above, including insights about lawyering and professional skills, the increased market demand for practice-ready law graduates, and increased numbers of graduates going into solo and small firm practice.⁸

For more than a decade, Richard A. Matasar, former Dean of New York Law School and now current Senior Vice President of Strategic Initiatives and Institutional Effectiveness at Tulane University, has been one of the legal academy's most outspoken proponents of an overhaul of the current model for American legal education. At the annual meeting of the Association for American Law Schools in 2009, for instance, Matasar chastised law schools for "exploiting" admitted students who don't have "good outcomes"—those students who are trying to take a "lottery shot" at being in the top ten percent of their class for coveted high-paying jobs.⁹

He went on to say:

We should be ashamed of ourselves, . . . We own our students' outcomes. . . . We took them. We took their money. We live on their money. . . . And if they don't have a good outcome in life, we're exploiting them. It's our responsibility to own the outcomes of our institutions. If they're not doing well . . . it's gotta be fixed. Or we should shut the damn place down. And that's a moral responsibility

5. The *MacCrate Report* was a comprehensive effort that sought to bridge the perceived problematic gap between legal education and the practice of law. See ROBERT MACCRATE ET AL., TASK FORCE ON LAW SCH. & THE PROFESSION, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

6. The report from the Carnegie Foundation for the Advancement of Teaching was an influential study of American legal education that issued a call for reform—finding that most law schools paid insufficient attention to the application of legal thinking in the practice of law. See generally WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

7. The report from the Clinical Legal Education Association issued a set of best practices for law schools to improve their programs of legal education in order to better effectively prepare students for practice. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007).

8. Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 10, 11–12 (2014).

9. Debra Cassens Weiss, *Law Dean Says Schools 'Exploiting' Students Who Don't Succeed*, A.B.A. J. (Jan. 20, 2009, 3:27 PM), http://www.abajournal.com/news/article/law_dean_says_schools_exploiting_students_who_dont_succeed/ (citing Richard A. Matasar, New York Law School, Citations, SSRN Downloads, U.S. News, Carnegie, Bar Passage, Careers: Competing Methods of Assessing Law Schools at the Association of American Law Schools 2009 Annual Meeting (Jan. 9, 2009)).

that we bear in the academy.¹⁰

This responsibility goes straight to the crux of Matasar's belief that law schools' self-interested, faculty-centered, commercial or market-driven model (chasing higher *U.S. News* rankings and seeking faculty prestige and fame) largely should be abandoned. Instead, he argues for what he believes to be a more fitting metaphor: a fiduciary model that calls for law schools to manage their institutions not as self-interested actors, but as *fiduciaries* for the benefit of their students. Matasar urges law schools to evolve, innovate, and experiment to create outcomes that *provide value* to their students. His warning is clear: self-interested law schools will become dead meat.¹¹

In this Essay, we suggest in Part I that Matasar's fiduciary model serves as a vital foil in prompting all of us to reassess what we do as law schools. Each expenditure of funds should be traced in some way to the students' benefit, even if indirect. Matasar predicted much of the current malaise in legal education years beforehand, and his refreshing challenge to the status quo aims at reorienting law schools to focus on student welfare. So far, so good. But, we also argue that the fiduciary model too quickly sets itself as a polar opposite to law school self-interest. Put simply, the fiduciary and self-interest models comfortably can coexist, and we posit that law schools should, and often do, try to maximize the overlap between the two. For a noncontroversial example, law schools offer merit scholarships that benefit students by lowering student debt, and those scholarships at the same time help schools in the rankings by increasing student quality.¹² Similarly, schools place students in externships that can help students advance their job prospects while cementing ties between the law school and alumni as well as the greater legal community.¹³ Thus, the fiduciary model alone does not create a sufficient lens with which to assess or filter law school initiatives.

In Part II, we use the relatively new establishment of incubators at law schools to test our hypothesis. Although the incubator concept at

10. *Id.*

11. Richard A. Matasar, *The Canary in the Coal Mine: What the University Can Learn from Legal Education*, 45 MCGEORGE L. REV. 161, 201 (2013) [hereinafter *Canary in the Coal Mine*].

12. See Michael I. Krauss, *The Ethics of Law School Merit Scholarships*, FORBES (Apr. 3, 2014, 11:13 AM), <http://www.forbes.com/sites/michaelkrauss/2014/04/03/the-ethics-of-law-school-merit-scholarships/>.

13. See James H. Backman & Cory S. Clements, *Significant but Unheralded Growth of Large Externship Programs*, 28 BYU J. PUB. L. 144, 146 (2013) (sketching expansion of externship programs).

first blush seems to lie along the continuum closest to the fiduciary model, we conclude that the example supports both the fiduciary *and* self-interest paradigms by guiding students along a path to gainful employment even while boosting employment outcomes at relatively low cost.

Finally, in Part III we use the incubator example to consider whether law schools owe a fiduciary obligation to alumni as well as students. Law schools over time have offered more services to graduates such as career services counseling, CLE programming at little or no cost, and more. This expansion of the fiduciary model may herald further changes in law schools down the road, centering law schools more firmly within their alumni communities. And, this growing sense of obligation to alumni largely dovetails once again with law school self-interest.

I. SELF-INTERESTED FIDUCIARIES

Matasar argues that law schools, as fiduciaries, must place the interest of students first, as opposed to maximizing faculty salaries or central university budgets.¹⁴ Law schools may struggle to justify faculty salary raises from the perspective of student welfare or to draw a connection between conferences on law and philosophy and enhanced student outcomes. Matasar's fiduciary model reminds us that, as stewards for law schools, deans should consider the fiduciary principle as they ask themselves about links between particular expenditures and service to students.

But, even with the above examples, the lines between fiduciary obligation and self-interest are not that clear. Star faculty members who are paid well can bring renown to the law school and enhance students' job prospects, and a fiscally healthy university can also provide law students with the connections and interdisciplinary skills to thrive. The fiduciary model stands tall as an aspiration, but it is not a powerful explanatory variable when assessing many law school initiatives.

Indeed, there is great overlap between the fiduciary and self-interested models. When law schools attract great students, whether through innovative education or generous scholarships, the schools benefit. And, when those same students graduate and make a name for themselves in the profession, the schools benefit as well. Phrased another way, putting students first is how most, if not all, law schools get ahead.

14. See Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 71 (2008).

Moreover, slick marketing by itself does not create a paradox. Law schools do not benefit by attracting students who fail. Law schools may be tempted and have been accused of playing fast and loose with facts when seeking students, but as long as the schools then provide a solid education—which we believe to be the norm—such marketing is not in and of itself a violation of the fiduciary model.¹⁵ Marketing aimed solely at improving *U.S. News* reputation presents a closer case. We suspect that countless thousands of dollars, if not more, are expended annually at each school in that effort. But getting ahead in *U.S. News* also reflects a sound strategy that can help students by raising the value of their degree and their opportunities in the workplace.¹⁶ Only when schools give in to financial need and enroll students who are likely to fail, either in school or in the marketplace, will the divergence between the two models be clear.

Consider, as well, the trend towards accepting foreign nationals in both the LL.M. and J.D. programs. Foreign nationals can and have gained jobs and upward mobility by obtaining U.S. law degrees particularly when they return home.¹⁷ Budget goals explain some of the trend toward proliferation of LL.M. programs, but the presence of foreign nationals creates diversity and can enrich the educational experience for domestic students by introducing different cultures and perspectives. The presence of foreign nationals may impede the pedagogical mission if struggles with English limit the pace of the class. But, with careful selection and extra training, the internationalization of our law schools can benefit both international and domestic students. Examples where the fiduciary and self-interest models are intertwined can be multiplied.

To be sure, not all students once matriculated will perform well, and not all graduates will thrive in the marketplace. Law schools that cut scholarships for nonperforming students¹⁸ or close their career

15. See Martha Neil, *12 More Law Schools Sued Over Reporting of Law Grad Employment and Salary Stats*, A.B.A. J. (Feb. 1, 2012, 10:39 PM), http://www.abajournal.com/news/article/12_more_law_schools_sued_in_consumer-fraud_class_action_re_reported_law/.

16. See generally Ben Taylor, *Why Law School Rankings Matter More Than Any Other Education Rankings*, FORBES (Aug. 14, 2014, 12:19 PM), <http://www.forbes.com/sites/bentaylor/2014/08/14/why-law-school-rankings-matter-more-than-any-other-education-rankings/> (explaining the heightened significance of rankings among law schools as compared to other educational institutions).

17. See, e.g., Lmindie Lazarus Black & Julie Globokar, *Foreign Attorneys in U.S. LL.M. Programs: Who's In, Who's Out, and Who They Are*, 22 IND. J. GLOBAL LEGAL STUD. 3, 46–47 (2015).

18. David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES

services offices to students and/or graduates who are struggling depart from the fiduciary model.

Moreover, although most faculty members plausibly can argue that greater investment in resources in their work will result in overall gains for the law school and its students, at some point the extra conference, research stipend, or salary increase produces little direct benefit to students,¹⁹ at least in any way that can be measured. Investment in faculty is critical, but like so much else in academia, investments lie along a continuum with respect to impact on enhanced education and employment prospects for students. We are not apologetic for everything law schools do, but rather observe that the line between self-interest and student welfare is tenuous.

Our purpose, therefore, is not to create a taxonomy of which law school initiatives lean to the fiduciary side or to the self-interested side. Rather, we believe that, by and large, the fiduciary and self-interested models overlap so significantly because what is good for students turns out, in most cases, to be what is good for the school. The school's reputation among students, after all, is a lynchpin for attracting talented students in the future. Thus, the fiduciary model is not a strong explanatory variable of law school practices, and despite Matasar's implication to the contrary, law schools should endeavor to create policies that maximize the overlap between their fiduciary obligations *and* their self-interest.

II. THE FIDUCIARY MODEL APPLIED TO INCUBATORS

With the increase in experiential programming and challenges in the workplace, over thirty law schools²⁰ have created incubators to provide students and recent graduates with additional training to ease their way into the workforce. Students attracted to incubators typically cannot find work in a traditional law firm, may not be cut out for government work, and therefore struggle in the marketplace. Some participants are entrepreneurial, but others choose incubators more as a default. And, if instead of participating, graduates hung out a shingle

(Apr. 30, 2011), http://www.nytimes.com/2011/05/01/business/law-school-grants.html?_r=0.

19. See *Canary in the Coal Mine*, *supra* note 11, at 164.

20. The ABA provides a comprehensive list of incubator/residency program profiles. See *Incubator/Residency Program Profiles*, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main.html (last visited Mar. 21, 2016). Currently, there are almost fifty incubator and residency programs that include bar associations, legal aid organizations, law schools, and other collaborations. Of the fifty, there are over thirty incubators operating under the auspices of a law school.

immediately after passing the bar, they might be unprepared for the complexities of practice. In a sense, the incubator participants comprise a vulnerable population of graduates, who—under the self-interested model—are not the likely recipients of supplemental law school aid and services.

At first glance, therefore, the fiduciary model best explains the rapid growth of incubators. Schools are devoting scarce resources to ensure that those graduates interested in practicing on their own do so in a responsible way. Moreover, through incubators, schools can add to their historical mission of serving low and moderate income client populations in need. That population best can be reached by recent graduates who typically, unlike more seasoned graduates, charge modest amounts for their services.

Nevertheless, after tracing the movement's growth, we conclude that self-interest as well has led law schools to embrace the incubator movement. Incubators help graduates find jobs while strengthening alumni connections and, in comparison to law schools' bridge-to-practice programs, are far less costly.

A. The Business Incubator

The concept of business incubators has been around since the late 1950s.²¹ Since that time, incubators have emerged as successful programs to help new business owners grow and build their companies. Business incubators have also emerged as successful economic development tools across the United States and throughout the world.²² According to the National Business Incubation Association, there are 1250 incubators in the United States, and 7000 estimated incubators worldwide.²³

Business incubators are programs designed to nurture and accelerate the successful development of entrepreneurial companies.²⁴ The programs aim to help fledging companies survive and grow during the start-up period when they are most vulnerable.²⁵ The goal is to “produce successful [businesses] that will leave the program financially

21. Susan Payton, *How to Choose a Business Incubator*, Small Business Trends (April 17, 2012), <http://smallbiztrends.com/2012/04/choose-startup-business-incubator.html>.

22. DAVID A. LEWIS ET AL., *INCUBATING SUCCESS: INCUBATION BEST PRACTICES THAT LEAD TO SUCCESSFUL NEW VENTURES* (Linda Knopp ed., 2011).

23. *Business Incubation FAQs*, INT'L BUS. INNOVATION ASS'N, <http://www.nbia.org/resources/business-incubation-faq#4> (last visited Mar. 21, 2016).

24. LEWIS ET AL., *supra* note 22, at 15.

25. *Business Incubation FAQs*, *supra* note 23.

viable and freestanding.”²⁶

Participants are provided with an array of targeted business resources, services, and support,²⁷ so that they can get off the ground and become successful enterprises. From the participant’s perspective, the hope is to increase his or her chances of success by taking advantage of the business incubator’s valuable benefits: entrepreneurial training and knowledge, strategic business networks and alliances, and reduced startup and overhead costs. Sponsors of business incubators, such as economic development agencies, local governments, academic institutions, or for-profit businesses, view incubators as a means to boost economic growth, create jobs, and revitalize a community’s entrepreneurial climate.²⁸

Recently, incubators for technology startups have gained popularity by offering mentorship, office space, legal counsel, and sometimes seed money—typically in exchange for a small amount of equity in the startups.²⁹ For example, Paul Graham, an influential computer programmer known for co-founding Viaweb (which eventually became Yahoo! Store),³⁰ is the brain child of Y Combinator.³¹ A firm that provides seed funding, mentorship, product development assistance, and connections for startups, Y Combinator is a modern-day incubator that seeks to “help startups really take off.”³² Since its inception in 2005, it has helped launch over 800 technology startups, including Dropbox, Airbnb, Scribd, Reddit, Disqus, and Stripe, among others.³³

Today’s business incubators, however, are not just for technology startups.³⁴ Non-tech incubators are sprouting up from the

26. LEWIS ET AL., *supra* note 22, at 15.

27. Business incubators may offer the following resources, services, and support: physical working or office space, industry trainings, access to investors or capital, coaching, mentoring, supplies, technical support, administrative support, connections to strategic partners, and other business assistance services.

28. *Business Incubation FAQs*, *supra* note 23.

29. J.J. Colao, *Eight Reasons Startup Incubators Are Better Than Business School*, FORBES (Jan. 12, 2012, 10:46 AM), <http://www.forbes.com/sites/jjcolao/2012/01/12/eight-reasons-startup-incubators-are-better-than-business-school/>.

30. In 1998, Viaweb was sold to Yahoo! for 455,000 shares of Yahoo! stock, valued at \$49 million. *See Yahoo Buys Viaweb for \$49 Million*, CNET.COM (Jan. 2, 2009), <http://www.cnet.com/news/yahoo-buys-viaweb-for-49-million/>.

31. *What Happens at Y Combinator*, Y COMBINATOR (June 2014), <http://www.ycombinator.com/atyc>.

32. *Id.*

33. *Id.*

34. Lana Bortolot, *Incubators Aren’t Only for Tech Startups*, ENTREPRENEUR (Jan. 12, 2015), <http://www.entrepreneur.com/article/241709>.

manufacturing, arts, fashion, and food industries.³⁵ In 2012, the Philadelphia Fashion Incubator at Macy's Center City launched its one-year program to provide emerging fashion designers with resources and support in an effort to help them establish and grow their companies in Philadelphia.³⁶ Designers-in-residence gain access to office and design work space, a showroom, curriculum, industry mentors, and other resources, such as trips to Manhattan for tradeshow and tours of the Garment District.³⁷

Fledge is another non-tech incubator that was launched in 2012 spearheaded by Michael Libes.³⁸ This incubator helps entrepreneurs who want to establish "socially conscious" startups—companies that seek to improve society and make a positive impact on the world. Think "TOM Shoes."³⁹ Twice per year, Fledge invites seven "fledglings" to participate in its ten-week incubator program, which involves a small amount of funding, education, advice, and mentorship. In exchange, Fledge takes a small percentage in equity and a small percentage in future revenues in the startup.⁴⁰ The idea is to provide entrepreneurs with a boost of assistance to get their companies up and running, paying nothing until they succeed.⁴¹

B. Law School Incubators

With more attention on experiential legal education, law schools are exploring novel ways to prepare students and new attorneys better for the challenges and opportunities of the twenty-first century. Creativity, resourcefulness, and innovation have dominated the discussion with a flourish of new programs that provide "hands-on" training, expanded and improved clinical offerings, and post-graduate initiatives.⁴² Out of these new programs, "incubator" and "residency"

35. *Id.*

36. *Curriculum*, PHILA. FASHION INCUBATOR, <http://www.philadelphiafashionincubator.com/curriculum/> (last visited Mar. 21, 2016).

37. Bortolot, *supra* note 34.

38. Curt Woodward, *Fledge, A New Social Enterprise Incubator, Opening in Seattle*, XCONOMY (Apr. 26, 2012), <http://www.xconomy.com/seattle/2012/04/26/fledge-incubator/>.

39. TOM Shoes uses the "One for One" business model: the company will match every pair of TOM shoes purchased with a pair of new shoes for a child in need. Please note TOM's was not a participant in Fledge. The authors are giving an example of a "socially conscious" company. *See* TOMS, <http://www.toms.com/one-for-one-en#expanding-local-production> (last visited Mar. 21, 2016).

40. FLEDGE, <http://fledge.co/about/> (last visited Mar. 21, 2016).

41. *Id.*

42. Last year, IIT Chicago-Kent College of Law launched its 1L Your Way program, to provide first-year students in their second semester the option of creating a more specialized track, introduce flexibility in their first-year curriculum, and provide them with

programs have taken center stage—particularly programs for attorneys seeking to establish solo or small firms. Similar to the business incubation programs mentioned above, law schools and other legal organizations have been using the concept to help new attorneys launch their solo or small practice careers. Participants receive training in managing a law practice and mentoring on how to counsel (and attract) clients and develop their cases. These incubators resemble clinics that students take during law school, except now the graduates can be the “official attorneys of record,” and faculty or outside attorneys instead of being in charge act more like mentors or supervisors. According to the American Bar Association (ABA), there are currently forty-nine incubator programs in the United States and two international programs, with more in the making.⁴³ With the exception of the City University of New York’s (CUNY) Incubator for Justice, virtually all of these programs were launched in the last five years.⁴⁴

Why has there been a sudden emergence of interest in law school incubators? For one, many law schools are responding to the contraction of the legal market spurred by the recession. Due to economic pressure, firms have had to lay off many lawyers and reduce their first-year associate classes.⁴⁵ Law firms are not alone in trimming their ranks of entry-level lawyers. Legal aid, in-house counsel, and government positions have also dropped. As a result, the tightening of the economy has significantly reduced the availability of jobs for recent law

the opportunity to refine their career interests. The program allows students to defer a required first-year course to rotate through three clinics to get a better sense of practice options. Or, if students know their area of intended specialization, they can choose an upper-level elective course. Based on the medical school model, the clinical rotation matches first-year students with a trio of faculty practitioners, allowing them “hands-on” practical experience in several practice areas. *IL Your Way Program*, IIT CHI.-KENT C. L., <http://www.kentlaw.iit.edu/academics/jd-program/11-your-way-program> (last visited Mar. 21, 2016). In addition, the law school recently launched its Praxis Program. The new experiential program is designed for students who are interested in an individualized course of study. Students are trained in a list of core competencies, such as interviewing clients, networking, and understanding the new role of technology in the law. The goal is to train “client-ready” students. *See Praxis Program*, IIT CHI.-KENT C. L., <https://www.kentlaw.iit.edu/academics/jd-program/certificate-programs/praxis-program> (last visited Mar. 21, 2016).

43. *Incubator/Residency Program Profiles*, *supra* note 20.

44. The Incubator for Justice at CUNY School of Law has been operational since 2007. *See CUNY Law Incubator Model Adopted in New Access to Law Initiative*, CUNY SCH. L., <http://www1.cuny.edu/mu/law/2012/08/02/cuny-law-incubator-model-adopted-in-new-access-to-law-initiative/> (last visited Mar. 21, 2016).

45. *See* Margaret A. Suender, *Alternatives to the Partnership Track*, A.B.A. L. PRAC. MAG. (May/June 2013), http://www.americanbar.org/publications/law_practice_magazine/2013/may-june/alternatives-to-the-partnership-track.html.

graduates.⁴⁶ For graduates that have been hit hard by the lack of jobs, law school incubators create a launch pad for self-employment or for work with other recent graduates similarly positioned.

Second, just as the legal landscape has changed, so have the demands and expectations of clients. We are seeing a movement away from the traditional large retainer and high bill-per-hour rate model that law firms have been working with for decades.⁴⁷ Clients now have more bargaining power, and law firms have been forced to rethink their cost structures. Clients desire more control over the billing process, and expect options, such as discounted rates, fixed fees, and other alternative billing arrangements. They also expect firms to provide greater value and efficiency, refusing to pay for new hires who are learning on the job on the client's own dime.⁴⁸ Thus, practitioners are urging law schools to prepare students better for the profession so that they can "hit the ground running." Practitioners want "practice-ready" graduates, and thus, they are urging schools to teach more skills, develop entrepreneurial values, and alter or expand the law school curriculum. As mentioned earlier, extended discussion over curricular innovation has taken place in response to these concerns, with some schools making substantial changes.

However, curricular change can be cumbersome, expensive, and risky.⁴⁹ Law schools seeking significant curriculum reform must overcome a number of hurdles: consensus over the skills necessary for new practitioners, division of responsibility between tenured and clinical faculty (including whether existing professors are even equipped to teach such courses), and whether emphasis in skills

46. According to the National Association for Law Placement, the overall employment rate for recent law graduates for the class of 2013 fell for the sixth year in a row, to 84.5%. *See For Second Year in a Row New Grads Find More Jobs, Starting Salaries Rise—But Overall Unemployment Rate Rises with Historically Large Graduating Class*, NAT'L ASS'N L. PLACEMENT (June 19, 2014), http://www.nalp.org/2013_selected_pr; <http://www.nalp.org/uploads/Classof2013SelectedFindings.pdf>.

47. *See* Basha Rubin, *Big Law, Big Problems: The Bright Future for Small Firms*, FORBES (July 7, 2014, 12:59 PM), <http://www.forbes.com/sites/basharubin/2014/07/07/big-law-big-problems-2/>.

48. *See* Segal, *supra* note 3.

49. *See* MARY LU BILEK ET AL., COMM. ON THE PROF'L EDUC. CONTINUUM, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 7 (2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf.

curriculum will thwart student performance on the bar examination.⁵⁰ As such, the development and implementation of substantive curricular change can be a lengthy and tricky process. Law school incubators offer a solution to the concern over unprepared graduates without a complete overhaul of the current law school model.⁵¹ Viewed as an “add-on” to the existing, long-standing Langdell model from 1870, law school incubators are appealing to law schools seeking to respond quickly to upgraded expectations in the current environment.

Moreover, the weak economy has brought funding shortfalls from state, federal, and private sources that otherwise might be devoted to legal services for the poor. Budget cuts and even the complete elimination of some legal aid programs have sent low-income families to face critical needs on their own.⁵² Unfortunately, as legal aid funding has declined, the need for legal services has significantly increased, especially for vulnerable individuals with limited incomes. Unemployment, evictions, foreclosure, debt collection, bankruptcy, domestic violence, and unpaid wages are legal needs that have been on the rise since the economic downturn.⁵³ Incubator programs nurture new lawyers who can provide critical services to the unmet legal needs of individuals, families, and entities from low- (and even moderate-) income communities. By offering affordable services to these communities, new attorneys from incubators can serve a larger goal of providing greater access to justice even while growing their practices.

Law school incubator models differ, which we sketch below. However, no matter the structure, the law schools’ fiduciary obligation to ensure that graduates are practice- and client-ready and that they are practicing responsibly intersects the law schools’ interest in boosting employment numbers. Put another way, incubators reflect well the overlap between fiduciary obligation and self-interest.

Although the first law school incubator launched in 2007, a vast majority emerged after the recession hit.⁵⁴ Law school incubators can be differentiated principally by the structure and, to a lesser extent, by the

50. *Id.* at 7–8.

51. See Sonal P. Desai, *Law School Firms and Incubators and the Role of the Academic Law Library* (May 28, 2013) (unpublished manuscript), <https://lib.law.washington.edu/lawlibrarianship/CILLPapers/Desai2013.pdf>.

52. See Nabanita Pal, *Cuts Threaten Civil Legal Aid*, N.Y.U.: BRENNAN CTR. JUST. (Apr. 22, 2011), <http://www.brennancenter.org/analysis/cuts-threaten-civil-legal-aid>, for a 2009 to 2010 round up of the recession’s impact on civil legal aid organizations across the United States.

53. *Id.*

54. *The Incubator for Justice*, *supra* note 44.

financial level of the host school's involvement.

A majority of law school incubators in operation incorporate what we call the "traditional model." Similar to the business incubators mentioned above, traditional law school incubators accelerate the development of self-employed lawyers through targeted resources, services, and support. Admission is usually limited to newly admitted lawyers who are recent graduates of the law school offering the program. In addition to an application, applicants are typically required to provide a business plan, references, and a personal statement that demonstrate an aptitude to develop a solo, small firm, or non-profit practice, and a commitment to serve communities in need. Depending on the school, traditional incubators generally accept five to twenty participants who "incubate" their solo or small firm practice for twelve to eighteen months.⁵⁵ Common among traditional incubators are the dual goals of (1) supporting underemployed law school graduates in starting their own independent practices, while (2) helping bridge the justice gap by increasing the delivery of affordable low- or no-cost legal services to underserved client communities. Individuals who cannot afford legal representation, or those poor- or moderate-income individuals who are working but do not qualify for legal aid, benefit from the pro bono or affordable legal services provided by incubator attorneys. At the same time, participants in the program are provided with the infrastructure, training, mentoring, and resources needed to get their practices up and running.

Traditional incubators vary in their organizational structure, as well as their affiliations or partnerships with other organizations. Some provide modest stipends or salary to participants during the duration of their residency. Program requirements, referral mechanisms, office space, and the types of trainings, services, and business support also vary from program to program. Some programs charge a nominal program fee to participate, and others may charge modest rent for office space. Other law schools may provide the entire program and all of its services and amenities free of charge.

In contrast to the traditional incubator model, graduates of some schools can participate in not-for-profit law firms supported by their schools. In 2011, Professors Bradley T. Borden and Robert J. Rhee advocated for establishment of "law school firms."⁵⁶ The basic idea involves a law school establishing a law firm consisting of experienced

55. *Incubator/Residency Program Profiles*, *supra* note 20.

56. See generally Bradley T. Borden & Robert J. Rhee, *The Law School Firm*, 63 S.C. L. REV. 1 (2011).

senior attorneys with business development and management skills who serve as practice group managers, each to manage a different practice group.⁵⁷ These practice group managers in the law school firm would practice law, model best practices for “provisional” or “resident” junior attorneys—the alumni—and help train them so they have the necessary skills to practice on their own.⁵⁸ The law firm would be separate and distinct from the law school, and would be professionally managed to generate revenue, although it would operate as a non-profit.⁵⁹ Any excess revenue generated by the firm could go back to the affiliated law school, or could go towards attorney training at the law firm.⁶⁰

Borden and Rhee’s model stems from the experiential training medical schools provide to their students (through rotations) and graduates (through residency) via teaching hospitals. In a majority of medical schools, students spend the first two years on coursework and classroom instruction, and then in their third and fourth years, they engage in clinical rotations at hospitals affiliated with their school. During clinical rotations, students assist residents in a particular specialty, interact with patients, and perform basic medical procedures. For example, students may spend eight weeks in an internal medicine rotation, four weeks in a neuroscience rotation, six weeks in an obstetrics and gynecology rotation, six weeks in a pediatrics rotation, eight weeks in a surgery rotation, and so forth.⁶¹ Although, rotations do not provide students with enough expertise to practice in a specialty, they provide students with broad knowledge in determining potential career paths. After graduating from medical school through a national matching program, newly graduated M.D.’s enter residency programs in teaching hospitals that provide M.D.’s with additional professional training under the close supervision of senior physician residents as well as attending physicians.⁶² Generally, residency training varies from three to seven years (or more depending on the specialty chosen).⁶³ Residents earn a modest salary while they are trained. After completing residency, the physicians are ready to practice medicine. The law’s

57. *Id.* at 2–3.

58. *Id.* at 5.

59. *Id.* at 2.

60. Desai, *supra* note 51, at 7–8.

61. *Maryland Program Curriculum*, U. WIS. SCH. MED. & PUB. HEALTH, <http://www.med.wisc.edu/education/md/curriculum/years-3-4/clerkships/main/122> (last visited Mar. 21, 2016).

62. *Requirements for Becoming a Physician*, AMA, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician.page>? (last visited Mar. 21, 2016).

63. *Id.*

equivalent of a teaching hospital would provide a training ground for the law school's recent graduates under close supervision of experienced attorneys/educators, keep them employed for a modest salary, provide them with opportunities to build a book of business, and equip them with confidence to practice (either for themselves, or for another legal employer).

To illustrate, Arizona State University's Sandra Day O'Connor College of Law ASU Alumni Law Group is a stand-alone, non-profit law firm, which has been operational as of March 2014.⁶⁴ Modeled after a teaching hospital, ASU Alumni Law Group offers new lawyers the opportunity to continue their legal education with modest compensation at a "teaching law firm"—similar to new physicians pursuing residency programs with modest salary at teaching hospitals. Seasoned attorneys closely supervise new lawyers while providing affordable legal services to the Arizona community. A full service law firm, ASU Alumni Law Group's practice areas cover general civil matters (such as consumer law issues, housing/foreclosure and deficiency actions, landlord-tenant disputes, and employment and small business matters), as well as criminal defense and veterans' services. At the time of this writing, the non-profit law firm consists of one CEO, four supervising attorneys, a director of attorney development, seven associate attorneys, an attorney of counsel, and a consultant in veterans' issues.⁶⁵ ASU Alumni Law Group hires "resident attorneys" who are recent ASU law graduates (Associates) who spend one to three years at the firm learning on-the-job from experienced practitioners (Supervising Attorneys). Associates gain practical experience cycling through different practice areas,⁶⁶ picking up essential lawyering skills, and gaining exposure to client development and retention, while providing legal services at relatively low cost to Arizonans.

Another example of the non-profit law firm model stems from Georgetown University Law Center's DC Affordable Law Firm.⁶⁷ Teaming with DLA Piper LLP and Arent Fox LLP, Georgetown Law's non-profit firm provides civil legal representation to low- and middle-

64. *Incubator/Residency Program Profiles*, *supra* note 20.

65. *Attorneys*, ASU ALUMNI L. GROUP, <http://asualumnilawgroup.org/attorneys-and-professionals/> (last visited Mar. 21, 2016).

66. The cycling is similar to the rotations through different specialties that students go through at medical school.

67. Victor Li, *Georgetown Law Teams Up with 2 Firms to Create 'Low Bono' Law Firm*, A.B.A. J. (Apr. 16, 2015, 9:00 AM), http://www.abajournal.com/lawscribbler/article/georgetown_law_2_firms_team_to_create_low_bono_law_firm/.

income individuals at affordable prices.⁶⁸ Georgetown Law graduates staff the firm with retired DLA Piper partner and Georgetown professor, Sheldon Krantz, serving as the firm's executive director.⁶⁹ The graduates receive fifteen-month fellowships, a cost-free LL.M. in advocacy, free office space, and mentoring and training from the law school, DLA Piper, and Arent Fox.⁷⁰ By partnering with large firms, non-profit law firms can benefit from Big Law connections, such as through additional financial and pro bono support from Big Law volunteer attorneys. Time will tell, but this new non-profit collaborative model may be the wave of the future if the non-profit firm can ultimately be financed through fees instead of donations.⁷¹

Taking a different step, four law schools (Emory University School of Law, University of Miami School of Law, The Ohio State University Moritz College of Law, and Vanderbilt Law School) have teamed up with a third-party legal services vendor called UnitedLex. With in-house counsel becoming more cost-conscious, legal process outsourcers (LPOs) such as UnitedLex, Pangea3, and Qualex are growing in numbers and acceptance in the industry.⁷² Most large firms and corporations outsource e-discovery in litigation, due diligence in mergers and acquisitions, routine patent searches, document review, and the like to LPOs primarily to increase profit margins while decreasing the costs to clients.⁷³ As firms continually evolve to meet the demands of their clients, LPOs are also evolving to develop advanced technologies and systems, including compliance, cybersecurity, and data and risk analytics.⁷⁴

In UnitedLex's two-year "collaborative" residency program, selected recent graduates of the four law schools will learn to use cutting-edge legal technologies and processes to provide legal services

68. *Id.*

69. Ellen Rosen, *Georgetown, DLA and Arent Fox Launch Low-Cost Firm*, BLOOMBERG: BNA (Apr. 14, 2015), <https://bol.bna.com/georgetown-dla-and-arent-fox-launch-low-cost-firm/>.

70. *Id.*

71. *Id.*

72. *See generally* UNITEDLEX, <http://www.unitedlex.com/> (last visited Mar. 21, 2016); PANGEA3, <http://www.pangea3.com/> (last visited Mar. 21, 2016); QUISLEX, <http://www.quislex.com/> (last visited Mar. 21, 2016).

73. William L. Pfeifer Jr., *Privacy and Legal Outsourcing*, 29 GP SOLO, Nov./Dec. 2012, at 30, 30, http://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/November_December_2012/gpsolo_november_december_2012.authcheckdam.pdf.

74. Mark Pasetsky, *Eighty-Seven Percent of In-House Counsel Find It Difficult to Manage Legal Risk & Data, According to New Legal Business/Clutch Group Survey*, PRWEB (Feb. 6, 2014), <http://www.prweb.com/releases/2014/02/prweb11562283.htm>.

to corporate legal departments and top law firms.⁷⁵ Similar to a medical residency, participants get full-time employment (\$55,000 to \$70,000 depending on the city)⁷⁶ coupled with hands-on training and classroom instruction. Since its launch last May, the program has hired approximately 100 residents from its four collaborating schools.⁷⁷ The schools receive fifty percent of the profit from clients that come to UnitedLex through the schools' alumni networks, and those funds are then used for student scholarships.⁷⁸ The program is a win for law schools: a win since UnitedLex acts as an alternative legal career pipeline for the schools' graduates (thereby increasing employment numbers), and because the program creates an additional source of revenue. It is also a win for the schools' graduates: participants get a "taste" of "forward-looking industry practices" and emerging technologies, such as cybersecurity, e-discovery, forensics, analytics; and they get to work not only with attorneys, but with engineers, technologists, and consultants—providing them with a broader training ground.

In essence, the traditional incubator, the alumni non-profit law firm, and the collaborative residency all extend the familiar in-house clinical model to graduates. In these versions, graduates receive training and mentoring while building their practices. Thus, although incubators across the country differ in structure, clients, and investment needed, they have more in common than not. They all focus on recent graduates who are interested in branching out on their own. They all rely as well on alumni and school administrators for mentoring. And, they all generally (with the exception of models such as UnitedLex's residency program) focus their legal efforts on the underserved.

Incubators can be explained by the same overlap of fiduciary obligation and self-interest that characterizes so many other law school initiatives. Law schools can use incubators to attract new students, enhance their reputation in the practice community, and increase employment numbers. Indeed, to the extent schools include primarily students who have graduated within the prior year, *U.S. News* employment numbers will improve. Although schools can accomplish

75. *Four Leading Law Schools Together With UnitedLex Launch Groundbreaking Legal Residency Program*, UNITEDLEX (May 28, 2015), https://www.unitedlex.com/news-and-events/press-releases/2015/pr_052815.php.

76. Debra Cassens Weiss, *Four Law Schools Participate In Residency Program With Legal Tech Firm*, A.B.A. J. (May 29, 2015, 9:28 AM), <http://www.abajournal.com/news/article/four-law-schools-participate-in-residency-program-with-legal-tech-firm>.

77. *Id.*

78. *Id.*

the same goal, as many do, by paying graduates' salary for a year at a "bridge-to-practice" job,⁷⁹ incubators can ensure employment at lower cost to the school. The long-term efficacy of incubators and bridge jobs in helping graduates find permanent work is unknown. What is known is that incubators respond both to the pull of obligation and self-interest.

The incubator example, therefore, helps mold our response to the Matasar challenge: There is nothing wrong about fashioning policies at the intersection of law schools' fiduciary obligation and self-interest. Indeed, it would be surprising and perhaps irresponsible for law schools not to consider related goals when serving their students' needs.

III. FIDUCIARY OBLIGATION TO ALUMNI

The focus on incubators furthers a little remarked trend—law schools are offering more services to their graduates. Law schools for years have prized alumni and curried favor to ensure more jobs for current students and more alumni donations. Alumni receive awards for their service to the school, both in light of their volunteering and philanthropy. But, law schools slowly have increased their outreach to alumni in an effort to create a stronger community. Alumni are invited to CLE events, often for free;⁸⁰ alumni can use law school websites to find referrals;⁸¹ and alumni are invited back to use the career services office.⁸²

In contrast to prior generations, law schools are trying to establish a "matriculation to grave" relationship with students turned alumni.

79. Sara Randazzo, *Law Schools Fight Bar Association over How Graduates' Jobs Are Counted*, WALL ST. J. (July 30, 2015, 3:17 PM), <http://www.wsj.com/articles/law-schools-fight-bar-association-over-how-graduates-jobs-are-counted-1438280235>.

80. Seton Hall Law School offers a Free Alumni Continuing Legal Education (CLE) Program which provides twelve credit hours of free CLE on substantive law topics taught by the school's faculty. See *Continuing Legal Education (CLE) for Seton Hall Law Alumni*, SETON HALL L., <http://38.113.83.202/Alumni/events/CLE.cfm> (last visited Mar. 21, 2016).

81. Notre Dame Law School provides myNotreDame—a secure online community for its alumni and students, where members can find alumni in various fields of law, firms, and companies, as well as different geographic regions. See *Find Alumni*, MYNOTREDAME, my.nd.edu/s/1210/mynd/interior-2col.aspx?sid=1210&gid=1&pgid=6&cid=41 (last visited Mar. 21, 2016). Stanford Law School also has a similar online community network for their alumni called SLSCONnect. See *Login for Alumni Pages*, SLSCONNECT, https://alumni-law.stanford.edu/get/page/login?pg=yes&am=tpartyFA&nu=https:**alumni-law.stanford.edu/get/page/directory/search/ (last visited Mar. 21, 2016).

82. Georgetown University Law Center invites their alumni to use their Office of Career Services. Alumni have access to a dedicated alumni career counselor who provides individual consultations, resume and cover letter critiques, interview strategies, and networking techniques. See *Alumni Career Services*, GEO. UNIV. L. CTR., <https://www.law.georgetown.edu/alumni/alumni-programs-services/alumni-career-services.cfm> (last visited Mar. 21, 2016).

And, this new relationship may cause tension in terms of the obligation to students. Offering assistance to alumni in career services, for example, can divert resources from students. Undoubtedly, alumni often face employment challenges that are more complex than the advice sought by students. CLE events targeted at alumni may expend administrative resources that could be used instead on student programming or faculty conferences. Reunions take time away from focusing on alumni who either can be most helpful to students or who have the greatest capacity to give. What is emerging, therefore, is a fiduciary obligation to alumni.

We can only speculate as to the direction of this trend and its import. Many law schools now host legal blogs⁸³ that alumni and others scour to keep up with legal news. Other schools have or at least considered offering programs in retirement strategies.⁸⁴ Others have invited alumni back for programs on managing stress and dealing with substance abuse.⁸⁵ Alumni trips have been offered that include a CLE component.⁸⁶ Some schools in addition have offered musical and dramatic performances that touch on legal themes. Law schools, in other words, are now competing to a certain extent with bar associations to become the institution most relevant to their alumni's vocational lives.

Yet, here as well, we suspect a healthy dose of self-interest. As student enrollment has dwindled, law schools are sensitive to the need to build their ties elsewhere, whether with other academic departments or non-lawyer markets. The enhanced relationship with alumni communities might not be readily monetizable, but might yield positive results down the road in greater philanthropy, help with students, or

83. Valparaiso University Law School has a blog that provides legal analysis of various areas of law within the Seventh Circuit Court of Appeals of the United States. *See generally* VALPOLAWBLOG, <https://blogs.valpo.edu/law/> (last visited Mar. 21, 2016).

84. Yale Law School has an alumni breakfast program for its New York City alumni. Alumni Breakfasts provide panel discussions on current legal issues and other areas of interest for alumni, including business topics and retirement investment strategies. *See Alumni Breakfasts*, YALE L. SCH., <http://www.law.yale.edu/cbl/alumnibreakfasts.htm> (last visited Mar. 21, 2016).

85. Northeastern University School of Law's parent institution offers free interactive online webinars exclusively for the alumni community on a variety of life-navigating topics such as health and wellness, stress reduction, tackling student loan debt, and preventing professional burnout. *See Online: Live Webinars*, NE. UNIV. OFF. ALUMNI REL., <http://www.alumni.northeastern.edu/s/1386/hybrid/index.aspx?sid=1386&gid=1&pgid=5031> (last visited Mar. 21, 2016).

86. Harvard's Alumni Association offers over fifty travel programs a year to all seven continents. *See Harvard Alumni Association Travels*, HARV. ALUMNI, <http://alumni.harvard.edu/travel> (last visited Mar. 21, 2016).

willingness to pay for services. Law schools' greater outreach to alumni, therefore, reflects a comparable mix of fiduciary obligation and self-interest as in incubators and so many other legal educational contexts.

Law school initiatives cannot be neatly separated into student-centered and self-interested categories. Examination of the incubator movement reinforces that law schools preeminently should consider student welfare at every step, but that the key is maximizing the overlap between that fiduciary obligation with the self-interest of the school, however defined. Often there is a strong overlap between student welfare and self-interest, and when law schools pursue other goals—maximizing revenue, bolstering faculty morale, helping the other academic departments or whatever—they should try to accommodate those subsidiary goals with student welfare to the extent possible. The Matasar mantra of fiduciary obligation, therefore, tells only part of the story.

CONCLUSION

Matasar's insistence that law schools refocus their energies on student development outcomes is critical. The period after the 2008 recession, which Matasar was prescient to predict, has illustrated that students will only matriculate if both the legal education is first-rate and the prospect of jobs is strong. But, for the most part, Matasar's fiduciary obligation model ignores that law school self-interest is not the polar opposite of a student-centered law school. Law students benefit whenever the standing of the law school in the community improves, whether due to faculty quality, student quality, or public interest efforts. The emergence of law school incubators reflects the same mix of self-interest and fiduciary obligation that marks so many law school initiatives—for the interests of law schools and their students and graduates generally are aligned.