

SPECIAL REPORT

## **Barriers to adaptation in legal education and the critical importance of simply caring**

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**Abstract** In her provocative book *Rules for a Flat World*, Professor Gillian Hadfield makes the important point that our ossified legal system does not meet the needs of our dynamic society. And she rightly notes that legal education is not an ally in meeting this challenge. To move forward, then, legal education must innovate. This essay offers the modest hunch that non-profit higher education can innovate at lower cost by mimicking the successes of their for-profit peers, in effect leveraging for-profit higher education as a form of research and development. Even if this hunch has some validity, though, it does not say what shape that innovation will take, and whether it can promote the needed change that Professor Hadfield urges.

**Keywords:** legal education, for-profit universities, non-profit universities

Much is written about the impending demise of higher education generally, and legal education specifically. My sense – and it is only that – is that the handwringing is overwrought. This is because traditional higher educational institutions, as non-profit organizations, have a critical competitive advantage: we are freer from the profit motive to care deeply (and, at times, extravagantly) about the education and well-being of our students. Innovation is surely needed, but it will come – as it always does – when the advances of the current generation of faculty and administrators are taken in new directions by the next. Situated in our time – and knowing only this moment – it may feel as if innovations will not continue, and that existential threats will close in before the turning of the age. But I believe that won't happen because we as faculty deeply care about our students, and as non-profit entities we can indulge that passion more freely than our for-profit peers.

Traditional higher education consists of colleges and universities that are organized as non-profit organizations. Without shareholders or owners with a claim on any surplus of revenues over costs, our organizations are free to reinvest such funds in their mission. For the non-profit college or university, this mission is the care and concern for the education and formation of our students. And so, we would expect non-profit higher education to reinvest in the quality of education.

Conversely, for-profit institutions exist to maximize the short and long-term returns of their owners. These organizations face two market pressures. First, managers must take all reasonable actions to maximize the excess of revenues over profits. This is why we see reports of for-profit colleges and universities engaging in questionable actions to boost enrollment (thus increasing revenues) and skimp on student support (thus reducing costs). Second, owners of for-profit institutions will prefer the return of a significant portion of the organization's financial surplus, rather than re-investing that amount in the education of students. This is why we read reports of financially troubled for-profit educational institutions left bereft of funds while owners have enjoyed sizable returns. These twin pressures bake into the DNA of for-profit higher education a relative apathy to student success beyond its impact on maximizing profits.

Another important implication of the for-profit motive is critical for the future of non-profit higher education. To overcome the reputational advantage of traditional non-profit higher education institutions, for-profit colleges and universities must find students not currently served by their non-profit peers. They can do so in at least two ways: first, by offering programs not currently provided by non-profit higher education; and second, by offering programs in a manner – such as online or distance education – that is not currently provided by non-profit higher education. For-profit higher education, then, must identify new markets and educational methods that serve new students.

The entrepreneurship of for-profit institutions can spur innovation and creativity in their non-profit peers. Non-profit colleges and universities have not traditionally been good at such action, for good reason. We are naturally risk-averse given significant fixed costs, including a tenured workforce and a substantial physical plant. Given the need to service these substantial fixed costs and annual increases, and the difficulty of reducing costs in the short-term, non-profit colleges and universities properly avoid entrepreneurial actions that pose significant risk to annual revenues. In short, we are risk averse.

And here is where for-profit institutions can be of service, if non-profit institutions pay attention. For-profit institutions can serve as an unofficial research and development operation for non-profit higher education. As for-profit institutions create new programs and educational methods, non-profit institutions can pay attention to which innovations find market success. Non-profit institutions can then coopt and adapt these innovations to provide similar offerings coupled with a traditional strength in student support, alumni networks, reputation, and the like. This is a potential low risk strategy for non-profit higher education to innovate.

We are seeing this play out among a small number of non-profit law schools that recently created hybrid and online JD programs. The rules of the American Bar Association, which is the national accrediting body for law schools in the United States, have long prohibited online legal education. And so it is not surprising that it took Concord University, a for-profit institution, to experiment with the format by seeking state-level accreditation. While Concord has been looked down upon by traditional academics, and a member of the United States Supreme Court has disparaged its method of legal education, it more than survived for about two decades before being subsumed into Purdue University Global. Indeed, the institution boasts over 2,300 graduates. In doing so, a for-profit institution experimented with online legal education and showed that it could work. The competitive pressures on law schools due to the dramatic drop in applications then spurred a small handful of traditional non-profit law schools to seek and receive allowances from the ABA to build on that success.

In sum, the market realities of modern higher education may offer a competitive advantage to non-profit institutions. Our non-profit model provides protection from profit-focused owners, allowing us to re-invest surplus in service of our deep care and concern for our students. Our for-profit peers, driven by the need to continually boost revenues to meet their owners' desire for increased returns, will continue to explore new programs and educational methods that serve new students. As they do so, our institutions should pay careful attention. When we see for-profit successes, we should shamelessly move to adopt those that allow us to serve more students consistent with our student-centered mission. In the end, it pays to care.