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# ACADEMIC SUPPORT AT THE CROSSROADS: FROM MINORITY RETENTION TO BAR PREP AND BEYOND—WILL ACADEMIC SUPPORT CHANGE LEGAL EDUCATION OR ITSELF BE FUNDAMENTALLY CHANGED?

Ellen Yankiver Suni\*

## I. INTRODUCTION

In 1982, Duncan Kennedy's essay on hierarchies in legal education appeared in the *Journal of Legal Education* and publicly recognized what many had acknowledged to be problems and gaps in contemporary legal education.<sup>1</sup> At the time the article was written, academic support<sup>2</sup> as an institution in legal education was in its infancy.<sup>3</sup> Looking back at the development of the academic support movement demonstrates that, in many respects, it was designed to address at least some of the issues raised by Kennedy.<sup>4</sup> This essay looks at the emergence of academic support in legal education in the context of Kennedy's article, examining the genesis of academic support programs, their development in the last two decades, possible future directions, and their implications for legal education and the broader legal profession.<sup>5</sup>

## II. HISTORY OF ACADEMIC SUPPORT PROGRAMS

Academic support as a concept emerged in the 1980's, largely as an outgrowth of the influx of minorities into law school and the desire to diversify

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<sup>1</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

<sup>2</sup> As used throughout this essay, the term "academic support" encompasses the broad array of programs offered by law schools designed to supplement traditional law school learning. These include summer start programs, classes and workshops during the academic year, support groups to address isolation and non-cognitive student needs, one-on-one counseling and bar preparation assistance. *See infra* note 11. A school may offer one or more of these programs, either as an independent service to students or as part of a more coordinated effort.

<sup>3</sup> *See* Kennedy, *supra* note 1.

<sup>4</sup> *See, e.g., id.* at 596 (noting the need for students to understand their own learning processes); *id.* at 600 (observing the need for students to learn practice skills, obtain feedback and develop systematic skills training); *id.* at 601 (suggesting that a "more rational system [of legal education] would emphasize the way to learn law rather than rules, and skills rather than answers").

<sup>5</sup> I address these questions from what may be a somewhat unique perspective, as the director of an academic support program who is involved in the national academic support community, while at the same time serving as a tenured faculty member and, most recently, as dean. Some of the statements made in this essay that do not have citations are based on observations, conversations and personal experiences that cannot be cited to a printed source.

the legal profession and legal education.<sup>6</sup> Many of these efforts started with individuals working with the Black Law Students Association (“BLSA”) and similar groups,<sup>7</sup> while other efforts grew out of legal writing programs or small section courses. Academic support as a “movement” began in earnest with the Boulder conference sponsored by the Law School Admissions Council (“LSAC”) in 1992.<sup>8</sup> Many people attending that conference had been, up to that time, working in isolation at their schools.<sup>9</sup> As a result of networking and information-sharing at that conference, a movement emerged.<sup>10</sup> That movement was fostered by financial support from LSAC.<sup>11</sup> Today, virtually all law schools report having academic support programs,<sup>12</sup> although the structure,<sup>13</sup> pervasiveness, and success of these programs is extremely varied.<sup>14</sup>

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<sup>6</sup> See, e.g., Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 252 (1996); see *infra* notes 27-29 and accompanying text.

<sup>7</sup> One of the pioneers of what is now known as academic support was CLEO, the Council on Legal Educational Opportunity. For a history and description of that program, which made (and continues to make) an important contribution to the recruitment and retention of minority students, see Leslie Yalof Garfield & Kelly Koenig Levi, *Finding Success in the "Cauldron of Competition": The Effectiveness of Academic Support Programs*, 2004 BYU EDUC. & L.J. 1, 2 n.8 (2004); Cerminara, *supra* note 6, at 262-63.

<sup>8</sup> Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 844 n.17 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> See Sheila Vance, *Should the Academic Support Professional Look to Counseling Theory and Practice to Help Students Achieve?* 69 UMKC L. REV. 499, 502 n.24 (2001) (detailing the history of the academic support movement).

<sup>11</sup> LSAC, through its Minority Affairs Committee, has contributed to academic support in a variety of ways, including publication of LSAC’s *A Practical Guide for Law School Academic Assistance Programs*. Perhaps most importantly, however, it has sponsored national workshops (Boulder in 1992, William & Mary in 1993, Hofstra in 1997, Kansas City in 2000, Seattle in 2002, and Las Vegas, scheduled for 2005), as well as regional workshops in the intervening years. See Lustbader, *supra* note 8, at 845. These workshops have been instrumental in fostering a sense of community among academic support professionals and in facilitating the sharing of ideas.

<sup>12</sup> Richard Cabrera & Stephanie Zeman, *Law School Academic Support Programs – A Survey of Available Academic Support Programs for the New Century*, 26 WM. MITCHELL L. REV. 205, 208 (2000) (survey demonstrated that over 90% of responding schools offered some type of academic support program); Kevin H. Smith, *Program Evaluation: Defining And Measuring "Success" In Academic Support Programs*, 2003 L. REV. MICH. ST. U. DET. C.L. 177, 178 (2003) (“The number of law schools with academic support programs increased dramatically over the past decade. The vast majority of ABA-accredited law schools now offer some form of academic support program”).

<sup>13</sup> “Academic support programs take many forms.” Kristine Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 159 (1995). Programs vary considerably, but elements common to many programs are summer pre-start classes, academic year workshops, first-year and upper-level classes, and one-on-one support. See Garfield & Levi, *supra* note 7, at 7-15; see generally Lustbader, *supra* note 8, at 841, n.11.

<sup>14</sup> There has not been a comprehensive survey of academic support programs since the William Mitchell survey in 1998, see *supra* note 12, although LSAC is planning to conduct one in 2005. Information about current programs at law schools can be obtained from their admissions materials

### III. TENSION BETWEEN TRADITIONAL LAW SCHOOL PEDAGOGY AND THE TEACHING PHILOSOPHY OF ACADEMIC SUPPORT

One might expect that academic support programs would be embraced by law schools, since these programs contribute to academic success.<sup>15</sup> However, at its core, academic support has the potential to threaten existing hierarchies in legal education.<sup>16</sup> For the most part, legal education is structured on a “sage on the stage”<sup>17</sup> model with an expert at the front of the room.<sup>18</sup> Although students are encouraged to participate in the classroom experience, the traditional role of professor and student is fairly clear.<sup>19</sup> This structure reinforces and maintains existing hierarchies in legal education and, arguably, in law practice.<sup>20</sup> However, serious questions arise concerning the soundness of this model, given the current thinking and research regarding education in general and adult education in particular.<sup>21</sup>

Academic support departs from the established structure, both in format and philosophy. Relying on sound principles of education and learning theory<sup>22</sup>

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and websites as well as from the LSAC Guide. Much of the information mentioned in this article about academic support programs comes from the author’s exposure to those programs through attendance at national and regional workshops, as a co-chair of the regional and national workshops, from her involvement in the AALS Section on Academic Support, and from responses to a posting on the national academic support list-serve requesting information about ASP programs. (Results on file with the author).

<sup>15</sup> Evaluations of academic support programs show some success at improving student performance. *See, e.g.*, Garfield & Levi, *supra* note 7, at 5, 49 (after a comprehensive study, the authors found the data to suggest that, at the school studied, “an ASP significantly enhances an academically at-risk student’s ability to succeed in law school: and that “ASP services do, indeed, offer a benefit to students who regularly participate in such services”); *see also* Knaplund & Sander, *supra* note 13, at 161, 172, 202-206 (“Our analysis of seven distinct academic support initiatives . . . shows that support can substantially and demonstrably improve both short-term and long-term academic performance, but the effects vary markedly across . . . programs”). *But see* Chris K. Iijima, *Separating Support From Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 *IND. L. REV.* 737, 761 (2000) (doubting the benefits of ASP even within traditional standards of success).

<sup>16</sup> *See, e.g.*, Knaplund & Sander, *supra* note 13.

<sup>17</sup> *See* Vernellia R. Randall, *Increasing Retention And Improving Performance: Practical Advice On Using Cooperative Learning In Law Schools*, 16 *T.M. COOLEY L. REV.* 201, 205 n.7 (1999) (citing Alison King, *From Sage on the Stage to Guide on the Side*, 41 *C. TEACHING* 30, 30-31 (1993) and Lani Guinier, *Reframing the Affirmative Action Debate*, 86 *KY. L.J.* 505, 520-21 (1997-1998)); *see also* B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 *GONZ. L. REV.* 89, 124 (2002-2003).

<sup>18</sup> Randall, *supra* note 17, at 205.

<sup>19</sup> *Id.*

<sup>20</sup> *See* Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 *U. CIN. L. REV.* 137, 150-51 (2001) (comparing the classroom relationship of professor and student to courtroom practice).

<sup>21</sup> *See, e.g.*, NATIONAL RESEARCH COUNCIL, *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE AND SCHOOL* (John D. Bransford et al. eds., 2000).

<sup>22</sup> *See, e.g.*, Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progress of Law Students*, 33 *WILLAMETTE L. REV.* 315, 319-30 (1997)

academic support assists students to develop as learners, serving as “guides on the side.”<sup>23</sup> Traditional legal education assumes that a student is capable of figuring out what is required in legal coursework and making the transition from the deconstruction of cases in the classroom to the development of effective problem solving skills required on exams and in practice. Academic support assumes these skills must be taught more explicitly and that a crucial component of effective legal education is teaching students with varied learning styles and needs to become lifetime learners of the law.<sup>24</sup> While overlap exists between the goals and methods of traditional legal education and academic support, the two models present significant differences in philosophy and approach. Furthermore,

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(perhaps the premiere example of applying learning theory, including learning progression, metacognition, schema theory, expert/novice theory, and instructional theory to legal education in the context of academic support); Martha M. Peters, *Bridging Troubled Waters: Academic Support's Role in Teaching and Modeling "Helping" in Legal Education*, 31 U.S.F. L. REV. 861, 870 (1997).

By recognizing the diversity within students and responding to this diversity, academic support professionals have, by necessity, gone beyond traditional law teaching to apply theories of learning from educational psychology and other related fields. This focus on learning rather than teaching led academic support professionals to new understandings of law students' educational needs.

*Id.* Cathaleen A. Roach, *A River Runs Through It: Tapping Into The Informational Stream To Move Students From Isolation To Autonomy*, 36 ARIZ. L. REV. 667, 679-99 (1994) (extensive discussion of the use of learning theory to create a context of pedagogy in academic support efforts); Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory And Instructional Design Can Inform And Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 365-440 (2001) (applying behaviorism, cognitivism and constructivism to legal education); Ruta K. Stropus, *Mend It, Bend It, And Extend It: The Fate Of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 485 n.229 (1996) (“[Academic support programs (“ASPs”)] draw upon learning theory, an examination of how people learn, in an effort to develop individual learning strategies”); Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771, 786-94 (1989) (applying learning theory to support efforts); *see also* Adam G. Todd, *Academic Support Programs: Effective Support Through a Systemic Approach*, 38 GONZ. L. REV. 187, 189 (2002-2003) (“[A]cademic support has brought learning theory, individualized instruction, compassion, and diverse teaching methods into the law school.”).

<sup>23</sup> *See* Knaplund & Sander, *supra* note 13.

<sup>24</sup> *See* Michael Hunter Schwartz, *Teaching Law Students to Be Self Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447, 469-71 (2003) (citing Gerald F. Hess, *Monographs on Teaching and Learning for Legal Educators*, 35 GONZ. L. REV. 63, 79-80 (2000) (explaining how students can become lifelong learners using principles of self-regulated learning)). In the course of urging that law schools teach students to be self-regulated learners, Professor Schwartz notes that “[w]hat is primarily missing in law school is an educational environment that provides students with the resources and the situations with which they can best learn.” *Id.* at 451 (quoting Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 896-97 (1985)). He urges promoting self-regulated learning “to help students assume responsibility for their own learning.” *Id.* at 505. This approach directly addresses a criticism leveled by Kennedy in his *Hierarchies* article, where he observes that law schools currently teach so incompetently that students are locked into the existing professional hierarchy because “skills training” is embedded in “mystificatory nonsense.” Kennedy argues that a “more rational system would emphasize the way to learn law, rather than rules, and skills rather than answers.” Kennedy, *supra* note 1, at 601.

in many respects, academic support directly challenges the soundness of much of the pedagogy of traditional legal education<sup>25</sup> as well as the fairness and propriety of making students adapt to one fairly standard model of teaching.<sup>26</sup>

If academic support programs pose a potential threat to existing hierarchies in legal education, why have they become increasingly institutionalized in modern law schools? Initially, these programs were established to address the particular needs of the growing number of minority students entering law school.<sup>27</sup> Law schools committed to increasing recruitment and retention of minority students believed academic support programs to be an important component of that effort.<sup>28</sup> However, since minority enrollment was much lower at that time, initial academic support programs were small and relatively hidden.<sup>29</sup> As these programs became successful, or were perceived as making law school easier for students who participated in them, the competitive environment of law schools demanded that the programs be made available to a

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<sup>25</sup> For example, academic support professionals recognize the importance of fairly immediate feedback, yet traditional legal education provides little or no direct feedback to students. See Kennedy, *supra* note 1, at 600.

<sup>26</sup> "Academic support programs . . . represent a shift from the implicit practices of legal education that rewarded predominant learning contexts thus sorting membership in the profession by those who conformed in learning style, cultural experiences, and personal meanings to an unspoken traditional standard." Peters, *supra* note 22, at 871. "Students who work with academic support programs learn to value differences by acknowledging their own need to make adaptations to accomplish their academic and personal goals." *Id.* Those involved in academic support believe students must be empowered as learners on their own terms. With minority and disadvantaged students in particular, this empowerment may require seriously questioning the very institution of legal education itself, and certainly the assumptions implicit in that system. Iijima, *supra* note 15, at 741, 769, 771-72. In fact, it has been suggested that an important role for academic support is "to be explicit' about how law schools represent reality from a particular perspective" and to help students develop "multiple consciousness" that permits them to better confront law school on their own terms. *Id.* at 778-80 (discussing Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 298-99 (1992)).

<sup>27</sup> See Garfield & Levi, *supra* note 7, at 2-3.

In the late 1970s and early 1980s, partly in response to affirmative action admissions policies, law schools recognized both the moral and the practical dilemma of admitting students whose LSAT scores and undergraduate grade point averages (GPAs) were not competitive when compared with the scores of the rest of the entering class. It was felt that students with lower credentials were unable to compete academically; indeed, many students failed out of school, causing schools to lose the additional two years of revenue they had anticipated receiving from the matriculating student. More importantly, many administrators were left wondering whether it was fair to admit students who were unlikely to succeed in law school. These concerns gave birth to the academic support movement among law schools.

*Id.*

<sup>28</sup> See Lustbader, *supra* note 8, at 839-42 (discussing the role of academic support in recruitment and retention of minority students).

<sup>29</sup> *Id.*

broader base of students.<sup>30</sup> Additionally, as the constitutionality of affirmative action efforts by law schools was challenged,<sup>31</sup> administrators became more concerned about minority-only programs, leading to the expansion of academic support programs beyond their original audiences.<sup>32</sup>

As academic support programs matured with their success, they became increasingly sophisticated, drawing support from educational and learning theories.<sup>33</sup> Many schools expanded their staffs and created discrete academic support positions.<sup>34</sup> Academic support became more institutionalized, as the demand for such programs grew and their successes were touted in the recruitment and admissions process.<sup>35</sup> However, as these programs expanded, they became more diffused and less able to meet the unique needs of minority and disadvantaged students.<sup>36</sup> The very institutionalization the original creators of these programs had hoped for had occurred, but brought with it a departure from the original purposes of the program and greater difficulties in serving what was once its primary constituency.<sup>37</sup>

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<sup>30</sup> Stigma is frequently viewed as a serious problem for minority students. See Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 781-83 (1996). Backlash often becomes an equally serious problem, especially when minority programs have had visible positive results. See Cerminara, *supra* note 6, at 257.

<sup>31</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (holding the 14<sup>th</sup> Amendment does not permit racial preferences in law school admissions), cert. denied, 518 U.S. 1033 (1996). The holding in *Hopwood* was later abrogated by *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>32</sup> See Cerminara, *supra* note 6, at 252 n.9. This trend will likely continue as evidence of the success of ASP grows. See, e.g., Garfield & Levi, *supra* note 7, at 44 (arguing that ASP should not be limited to minorities because all students can benefit).

<sup>33</sup> See *supra* note 22.

<sup>34</sup> *Id.*

<sup>35</sup> As more schools developed and advertised their programs, students began to ask about these programs as part of their selection of a law school. In the competitive admissions environment, this questioning led to greater funding and support, and eventually true institutionalization, of such programs at many schools.

<sup>36</sup> This diffusion occurred because programs began to focus more on academic skills and less on issues unique to minority students. In minority-only programs, academic support faculty could directly address issues of particular concern to minority students and problems such as isolation or cultural barriers that are known to negatively impact academic success. See Hunt, *supra* note 30 at 773-77 (discussing alienation and the hostile learning environment for students of color); Iijima, *supra* note 15, at 754-57 (discussing subjectification and objectification experiences by students of color as well as isolation and alienation); Roach, *supra* note 22, at 668, 675-77 (discussing isolation experienced by minority students). Academic support faculty's ability to address minority-specific issues in programs that included a mix of minority and majority students was significantly impaired. Having frank discussions about these issues was difficult in integrated groups, especially when the majority of participants were seeking an academic focus. Whether minority-only programs were a good or bad approach is subject to serious dispute, as the intense and often heated discussion at the National Academic Assistance Training Workshop in Seattle demonstrated. Clearly minority-only programs pose risks of stigmatization and reinforcement of feelings of inadequacy. See Todd, *supra* note 22, at 192-93; Hunt, *supra* note 30, at 782-83. However, Hunt suggests it is not necessary that it be that way. *Id.* at 783.

<sup>37</sup> See *supra* note 36.

With this institutionalization and increased backing, academic support programs became a more significant part of law schools, but they never became a real part of mainstream legal education.<sup>38</sup> This occurred for several reasons. First, academic support focuses on teaching, and teaching in law schools, while viewed as important, has often played a back seat to scholarship both with regard to rewards and prestige. Further, academic support, which is often perceived as involving teaching geared toward the lower end student,<sup>39</sup> is, as a result, even more marginalized. In fact, in many respects, academic support personnel are, like clinicians<sup>40</sup> and legal writing staff,<sup>41</sup> on the periphery of law school teaching,<sup>42</sup> which is itself fairly low in the hierarchy of what is rewarded in legal education.<sup>43</sup>

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<sup>38</sup> It is unclear how hard they have tried. As my colleague Barbara Glesner Fines has suggested in reviewing this essay, there has been some pressure from within to "rise up" in the ranks, reflected in the number of LSAC-sponsored conferences and AALS programs that included discussions of how to publish an article or gain status or get buy-in from faculty. Yet these have, in my view, been somewhat limited attempts and are not pervasive. This may be an outgrowth of the commitment of ASP professionals to teaching, learning and their students, but perhaps it also reflects a realization that, by trying to climb within the hierarchy themselves, they would be reinforcing it as well.

<sup>39</sup> Even though many, and perhaps most, academic support programs these days are designed to help all students maximize their potential as learners and are attended by students across the spectrum of ability and motivation, colleagues at many schools cannot break out of their perceptions that academic support is remedial and designed to retain weaker students.

<sup>40</sup> See, e.g., Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 41-49 (1993).

<sup>41</sup> See, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Jan M. Levine, *Voices in The Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530 (1995) (discussing the status of legal writing professionals).

<sup>42</sup> See Todd, *supra* note 22, at 197 ("The status of ASP professionals is usually not equal to the doctrinal faculty and may be rather unclear.")

<sup>43</sup> Susan B. Apel, *Principle 1: Good Practice Encourages Student-Faculty Contact*, 49 J. LEGAL EDUC. 371, 376 (1999).

[D]espite some changes in the last two decades, [legal academics] have had difficulty in affording teaching a respectable place in the hierarchy of faculty activities. Few if any law teachers would challenge the statement that, within legal academia, scholarship is still viewed as the most important thing that professors do.

*Id.* As Professor Apel notes, "[s]cholarship, not teaching, has become the currency of our profession, the coin of the realm, the preeminent faculty value, the be-all and end-all in academia." *Id.* (quoting Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 749 (1998)) (internal quotes omitted). See also Marin Roger Scordato, *The Dualist Mode of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 373 (1990) (In legal education, "scholarship does not simply share a co-equal position with classroom teaching in the dualist model, but has come to dominate the equation"). For a comprehensive yet critical discussion of the role of teaching in legal education, with reference to the Kennedy article, see Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J. L. & PUB. POL'Y 267, 275-76 (2000).



In light of its place in the academy, academic support, although it has become extensively institutionalized,<sup>44</sup> has been largely left to its own devices.<sup>45</sup> At most schools, programs are run and taught by non-tenure track individuals.<sup>46</sup> In some cases, schools hire directors of academic support who are non-regular faculty.<sup>47</sup> In other schools, the legal writing program handles academic support.<sup>48</sup> In a few schools, those teaching or running academic support programs are tenured or tenure track faculty,<sup>49</sup> but these schools are the minority.<sup>50</sup> While regular faculty occasionally assist in such programs, for the most part, they are not core participants.<sup>51</sup> Regular faculty members often tolerate such programs and occasionally support them.<sup>52</sup> However, academic support professionals

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<sup>44</sup> As my research assistant, Josh Coffman, has pointed out, there may be a difference between “institutionalization” meaning fundamental incorporation and acceptance, and “institutionalization” simply meaning the physical and actual existence of the programs. Another potential dichotomy regarding institutionalization is reflected in the dictionary definition. The first definition is “[t]o make into, treat as, or give the character of an institution to” whereas the second is “[t]o make part of a structured and usually well-established system.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). The very question in the title, whether academic support will change legal education or itself be fundamentally changed, is integrally tied up in this issue of institutionalization. See generally Todd, *supra* note 22, at 212 (discussing the lack of institutionalization at his school).

<sup>45</sup> Unlike clinicians and legal writing teachers, for whom there is generally one identifiable place within the institution, ASP professionals can be found in diverse positions. My informal survey reflects that directors and teachers of academic support may be doctrinal faculty (either tenured/tenure track or not), directors of legal writing, assistant or associate deans, student services personnel, or other administrative staff. In some cases, people wear a variety of hats and are best characterized as hybrids. (Results on file with the author).

<sup>46</sup> Of forty-one respondents to an informal survey conducted on the ASP list-serve who indicated whether their academic support staff had tenure or tenure track status, thirty-one, or 76%, indicated they did not. (Results on file with the author).

<sup>47</sup> Although use of different terminology makes calculation difficult, it appears that non-regular faculty comprise 36% to 44% of respondents. This group includes those who characterize themselves in some way as “faculty” but who are not tenured or tenure track. (Results on file with the author).

<sup>48</sup> Twenty-two percent of the respondents were also involved in the Legal Writing Program. Of this 22%, 5% were tenured/tenure track and 15% were not. (Results on file with the author).

<sup>49</sup> Ten of forty-one, or 24%, of the respondents were tenured or tenure track faculty. Of these, four appeared to be “doctrinal” faculty, three were Legal Writing directors or teachers, one was an Associate Dean and two characterized themselves merely as Directors. (Results on file with the author).

<sup>50</sup> There is anecdotal evidence from conversations with academic support personnel nationwide, job postings on the Academic Support list-serve and comments in the surveys, that there has been a modest increase in the number of tenure track faculty involved in academic support and the number of academic support positions that are on the tenure track.

<sup>51</sup> The academic support movement has made efforts to bring its philosophy, theory and methodology to the doctrinal faculty through creation of an Academic Support Section at the AALS. This effort has been somewhat successful, and the annual section programs, which are designed to appeal to a broader faculty constituency, have been well attended.

<sup>52</sup> See generally Todd, *supra* note 22; Lustbader, *supra* note 8, at 844-47.

know they must be careful not to appear as if they are encroaching into the domain of the doctrinal faculty,<sup>53</sup> especially avoiding being viewed as attempting to interfere with the classroom of the doctrinal faculty.<sup>54</sup>

There are those who urge that academic support professionals must play a greater role in changing legal education itself.<sup>55</sup> While long-term institutional change may be desirable, it is unlikely that academic support professionals, themselves among the most marginalized constituencies at many schools,<sup>56</sup> can have a significant impact by confronting doctrinal faculty and challenging the effectiveness or propriety of their methodologies. More likely, if they were to do so, they would risk losing the very gains that academic support has made over the years.<sup>57</sup> While collaborative efforts with willing faculty can be effective,<sup>58</sup> and some doctrinal faculty have adopted methods urged by academic support,<sup>59</sup>

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<sup>53</sup> In conversations at conferences and meetings, many directors of academic support programs report that faculty ignore such programs until students claim to have been told something in the program that conflicts with what the professor perceives he or she has taught. At that point, the faculty member will often confront the academic support director, expressing concern that the program is teaching law and encroaching on faculty prerogative. As a result, many directors are careful not to state law and caution their teaching assistants to avoid doing so as well.

<sup>54</sup> Many of those involved in academic support programs report that the subtle message they get from faculty is: "Do what you need to help students, but don't interfere with my teaching." One potential solution to achieve better integration between ASP and the doctrinal faculty is to have an ASP director teach or co-teach substantive classes. See Todd, *supra* note 22, at 200-201 (citing to the Knaplund & Sander study at UCLA). However this is not generally possible at most schools. See generally Todd, *supra* note 22.

<sup>55</sup> For example, Iijima suggests that academic support professionals have a role in "attempting to change the totality of the law school context and atmosphere" and engaging in "critical analysis of what law and law school is about." Iijima, *supra* note 15, at 771, 778; see also Todd, *supra* note 22, at 189. In his article, Professor Iijima urges academic support personnel to "simultaneously enable students to function in the traditional environment, and yet stand apart from the institution to engage in a critical analysis of what law and law school is about. Iijima, *supra* note 15, at 778. In his presentation at the Academic Assistance Training Workshop in Seattle in the summer of 2002, Professor Iijima more directly suggested that ASP professionals have an obligation to attempt to change legal education and urged them to work within their institutions to do so. Whether Professor Iijima is urging ASP professionals to empower their students to challenge the existing hierarchies, or whether he is suggesting that ASP professionals do so on their own, it is unlikely that these efforts will be successful in the short run, as Professor Iijima himself recognizes. *Id.* at 772 ("[I]ndeed, only the most optimistic of educational visionaries would believe that the project of influencing the legal academy to alter its viewpoint, perspective, composition, and pedagogy will be easy").

<sup>56</sup> See Iijima, *supra* note 15, at 765.

<sup>57</sup> See Todd, *supra* note 22, at 198.

<sup>58</sup> See Lustbader, *supra* note 8, at 844.

<sup>59</sup> For example, meetings of the Academic Support Section at the AALS annual meeting focusing on teaching have been very well attended, and many doctrinal faculty seek out opportunities to improve their teaching at programs such as the annual conference of the Institute for Law School Teaching. See Institute for Law School Teaching, Past Conferences, at <http://law.gonzaga.edu/ilst/conflist.htm>; see also Association of American Law Schools, Conference on New Ideas for Experienced Law Teachers: We Teach But Do They Learn, in Calgary, Alberta, Canada (June 9-13,

actions by academic support professionals are likely to be counterproductive if viewed as an attempt to impose the methods of academic support on unwilling faculty, or if their actions loudly and publicly challenge the methods used by doctrinal faculty.<sup>60</sup>

It appears, then, that by the beginning of the twenty-first century, academic support had become a recognized part of legal education in most schools but occupying a niche role rather than an integral part of the academic program. And although academic support has become more entrenched in legal education, with more resources,<sup>61</sup> those involved in academic support are still largely non-regular faculty without a central role in the institution, and their presence in the school has little impact on the day-to-day teaching by the doctrinal faculty.<sup>62</sup>

Academic support programs are tolerated and supported by law schools because they are necessary to compete in student recruitment, they assist in student retention,<sup>63</sup> and they free the doctrinal faculty from having to assist weaker students. However, the resources provided to these programs varies and in many schools the programs are very much on the fringe. In all likelihood, if academic support moves too far from its accepted place and challenges the existing structures too strongly, its position in the academy might be at risk.<sup>64</sup>

In the last few years, however, academic support has begun to play an important new role in legal education. As bar passage statistics have become more public and more important to law schools, academic support professionals have been recruited to assist in increasing bar passage rates.<sup>65</sup> At most schools,

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2001) available at <http://www.aals.org/profdev/newideas/materials.html> (last visited Oct. 25, 2004).

<sup>60</sup> See Todd, *supra* note 22, at 198. Some faculty have incorporated the philosophy and techniques of academic support into their own doctrinal teaching. See, e.g., Ellen Yankiver Suni, *Breaking Free From the Tyranny of Casebooks: Using the Internet to Deliver a Sequenced-Learning Approach to Criminal Law*, presentation to the Institute for Law School Teaching (July, 2004) (incorporating principles of academic support into doctrinal course); Kevin Hopkins, LSAC Academic Assistance Training Workshop (June 2000) (materials on file with the author).

<sup>61</sup> Support includes salaried academic support personnel as well as teaching assistants. See informal survey (on file with the author).

<sup>62</sup> See *supra* note 47.

<sup>63</sup> Retention is important both because of student perception as well as the financial implications of losing students and the tuition they bring to the school.

<sup>64</sup> See Todd, *supra* note 22, at 198. A critical and certainly more cynical view would be that the legal "hierarchy" is able to not only tolerate ASP, but needs reform efforts like ASP to survive. A specific, but perhaps more moderate version of that argument is Iijima's belief that ASP's, if they only serve to help students cope with, or learn within, the current system, will simply legitimize the institution (including the system of legal education itself) that is the cause of academic problems. Iijima, *supra* note 15, at 761-62. See generally Kissam, *supra* note 20, at 178-80 (arguing that liberal education reforms within the academy, along the lines of ASP, have the potential to legitimate traditional legal education).

<sup>65</sup> See, e.g., Garfield & Levi, *supra* note 7, at 4-5 (recognizing the increased role of academic support in bar passage). This trend is reflected as well in the fact that one of the four LSAC-sponsored regional Academic Assistance Training Workshops in the summer of 2003 focused exclusively on bar passage issues, programs, and strategies. See LSAC Regional Academic

doctrinal faculty do not see assisting with bar passage as an appropriate part of the faculty's responsibility<sup>66</sup> and few doctrinal faculty have either the skills or the inclination to work with students at risk for bar failure. Yet increasingly, law schools are becoming concerned about their bar passage statistics and feel an obligation to do something to address these problems.<sup>67</sup> Academic support professionals, with their understanding of how students learn and their skills at teaching students how to learn, were the logical suspects.

This need to involve academic support professionals in bar pass initiatives is likely to lead to an even greater institutionalization of academic support, with an increase in resources and perhaps added respect within the institution.<sup>68</sup> While these bar pass initiatives will likely assist some minority students in gaining admission to the bar, and to some extent thereby serve the original purposes of academic support, ironically, this new role for academic support is likely to cause it to evolve even further from its original and perhaps "true" purpose — empowering students from diverse backgrounds and with varied learning styles to succeed in law school and develop successful habits as lifetime learners of the law.<sup>69</sup>

Teaching students how to pass the bar, which is exclusively directed and focused on one test, is very different from preparing students for a lifetime of

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Assistance Training Workshop, Bar Prep Programs in Fort Worth, Texas (July 11-12, 2003) (materials on file with author) [hereinafter Fort Worth Workshop].

<sup>66</sup> This view is reinforced by the ABA Standards. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302(f) (2004) ("A law school may offer a bar examination preparation course, but may not grant credit for the course or require it as a condition for graduation.").

<sup>67</sup> The pressure to increase bar passage rates comes from many sources, including applicants who ask for information, alumni who are concerned about bar passage statistics, and *U.S. News and World Report*, which considers bar passage rates as part of its analysis of where in the hierarchy of law schools a particular school falls. See *U.S. News & World Report, Law Methodology*, at [http://www.usnews.com/usnews/edu/grad/rankings/about/05law\\_meth\\_brief.php](http://www.usnews.com/usnews/edu/grad/rankings/about/05law_meth_brief.php) (last visited Oct. 15, 2004) (placement success counts for .20 of the ranking, and bar passage rate counts for .10 of that determination).

<sup>68</sup> While this is a possible outcome, as ASP professionals become more important to achieving observable and measurable outcomes, it is also possible that, as the less desirable and less respected work of bar preparation is passed off onto already marginalized faculty, their place in the hierarchy becomes more rigidly fixed. I owe this insight to my colleague Nancy Levit, who is doing groundbreaking work on the various roles of faculty in the legal academy.

<sup>69</sup> One potential negative development of this "bar pass pressure" for ASP is the risk of off-setting changes within the law school. See Todd, *supra* note 22, at 212.

[O]ther steps have been taken to increase bar passage and increase the rigor of the school that directly undermine ASP goals. At the same time these academic support programs were being put into place, the school: (1) tightened the academic probation and dismissal policy; (2) instituted grade norms; (3) increased the number of required courses; and (4) instituted a required-repeat policy for core courses if a student receives a D or below in certain courses.

*Id.* This tendency to place the blame for bar failure on students, and to impose policies in response that tend to have a punitive effect on them, was recognized and discussed at the LSAC-sponsored Academic Assistance Training Workshop focusing on bar passage held in Fort Worth in July 2003. See Fort Worth Workshop, *supra* note 65.

learning.<sup>70</sup> Moreover, focusing on passing the bar does little to empower students to maximize their potential as lawyers, to have an impact on the profession, and to serve as vehicles for social change.<sup>71</sup> As academic support professionals focus their efforts on bar passage, they will become more important to the institution, but they may be in less of a position to affect the overall academic program, since preparation for the bar exam<sup>72</sup> is even further removed from the mainstream of legal education than assisting students in maximizing their ability to learn in the law school itself.<sup>73</sup>

#### IV. ACADEMIC SUPPORT AND THE HIERARCHY OF THE FUTURE

If these observations represent an accurate assessment of the past and present state of academic support in contemporary legal education, questions remain concerning the present political position of academic support programs and whether their role in the legal academic hierarchy is fixed. Initially, I share

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<sup>70</sup> Lifetime, or continuous, learners of the law become expert in both the general techniques of learning and in the lawyer's own learning style, and are reflective and autonomous. Schwartz, *supra* note 24, at 470 (discussing Feinman & Feldman, *supra* note 24, at 896-97).

<sup>71</sup> See generally Lustbader, *supra* note 8; Iijima, *supra* note 15, at 771. Focus on bar passage is important for these students, especially in light of the disparate bar pass rates for minority students, since without passing the bar these students will not have the opportunity to become lawyers. Hunt, *supra* note 30, at 722 (citing Daniel O. Bernstine, *Minority Law Students and the Bar Examination: Are Law Schools Doing Enough?* B. EXAMINER, Aug. 1989, at 10). However, a focus on bar passage likely requires even greater assimilation to traditional methods of teaching and testing and less time and ability to focus on issues of importance to minority and disadvantaged students.

<sup>72</sup> The bar exam itself may play a role in fostering traditional hierarchies. Certainly, having the main test for entry into the profession be primarily about legal knowledge and analysis, rather than skills, reinforces Kennedy's concern that law school is not about the skills lawyers really need to practice law. See Kennedy, *supra* note 1. Arguably, neither is the Bar exam. See, e.g., Society of American Law Teachers, SALT Statement on Bar Examinations, July 2002, at <http://www.saltlaw.org/positionbarexam.htm>; Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 374-78 (2003), although the addition of the Multistate Performance test, which has been adopted by many jurisdictions, is a step toward remedying this criticism. See National Conference of Board Examiners – Multistate Test, at <http://www.ncbex.org/tests.htm> (last visited Oct 29, 2004). See also, Ellen Yankiver Suni, *Teaching Ethics: The Role of the Law Schools, The Courts and The Bar*, THE PROFESSIONAL LAWYER (1994 Symposium Issue on file with author).

<sup>73</sup> As my colleague Barbara Glesner Fines points out, though, the opposite may actually be true. As she suggests, in comments on an earlier draft of this essay, the hierarchy may actually be turned upside down. To the extent that bar pass problems put more pressure on regular faculty to teach legal doctrine, the ASP programs may become an external "output" measure of their work. ASP professionals have the tools and resources that many faculty feel they want and need, so ASP becomes more important and more in the mainstream of the law school hierarchy. While she recognizes that this may not occur, she does note that there are some faculty who acknowledge that part of the answer to the "bar pass problem" is, from a faculty standpoint, that we may just have to teach better.

the concerns expressed by Todd, Iijima, and others that requiring academic support professionals to bear unilateral responsibility for addressing the needs of students who are not in the mainstream has the potential to insulate the institution itself from change.<sup>74</sup> However, academic support professionals, most of whom do not have a vote at faculty meetings,<sup>75</sup> do not have the institutional clout to successfully confront doctrinal faculty and get them to address larger issues of institutional direction and change. Additionally, it is even less clear that a more politicized approach, along the lines of the Legal Writing movement, will successfully advance the agenda of academic support.<sup>76</sup> That being said, the future of academic support is uncertain but interesting.

Although I do not expect significant change in the immediate future, I believe gradual, positive change will occur in legal education over the next twenty years and academic support will have a role in that change. Legal education over the next two decades will feel pressure from the influx of increased technology into the educational process.<sup>77</sup> While this influx will likely alter some methods of legal education delivery,<sup>78</sup> I do not believe that the

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<sup>74</sup>Todd, *supra* note 22, at 190-91 (“These programs, rather than performing an inclusionary role, can potentially entrench an exclusionary hierarchy. Instead of changing law schools for the better, ASPs can enable the rest of the law school to continue functioning in the traditional manner that has historically caused people of certain social, racial, and economic backgrounds to be excluded from academic success.”). See also Iijima, *supra* note 15, at 771.

<sup>75</sup> See, e.g., Todd, *supra* note 22, at 211.

<sup>76</sup> This is an interesting question that would require research and analysis beyond the scope of this essay. Suffice it to say that, as an “institution,” the academic support “movement” has chosen not to overtly pursue avenues pursued by clinicians and legal writing professionals. Although ASP was established as an AALS Section, to my knowledge, there has been little concerted effort directed primarily at achieving status within the academy, as opposed to getting the resources needed to be effective. If this is correct, it may present interesting political, sociological, and institutional behavior issues that might be worth exploring. For example, to my knowledge, the academic support movement has considered but passed on the suggestion that it adopt a journal, choosing instead to have those who choose to do scholarship publish in mainstream journals. Whether these choices are, in some way, a product of the hierarchies in legal education, and whether these changes will affect them, is worthy of serious study.

<sup>77</sup> See Nicolas P. Terry, *Bricks Plus Bytes: How ‘Click-and-Brick’ Will Define Legal Education*, 46 VILL. L. REV. 95, 96-125 (2001). Terry acknowledges that technology, and in particular the Internet and distance education, will put considerable pressure on law practice in general and legal education in particular. Competition from “pure play” and “click and brick” law schools will force “bricks and mortar” law schools to focus on what they have to offer and will likely lead to significant change. *Id.* at 102-03. While there are competing pressures, most specifically from accreditation requirements and those who hire lawyers, as technology becomes more pervasive, these counter-pressures may be reduced as well. *Id.* at 109. This change may have begun, as evidenced by recent revisions to the ABA Standards for Accreditation of Law Schools with regard to distance learning. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 306 (2002).

<sup>78</sup> For example, the future may involve complex computer programs and games, which may be necessary to appeal to the needs of Gen-X’ers and Millennials. See Tracey L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?* 9 J. LEGAL WRITING INST. 119, 133-36 (2003). New initiatives may also include greater reliance on distance learning to

practice of law will become “virtual.”<sup>79</sup> Rather, in most instances, law will continue to be practiced face-to-face, although it will be technologically assisted as far as information gathering and management is concerned. The “value-added” that brick and mortar law schools can provide beyond virtual law schools is the human dimension of lawyering – the ability to identify and define what it means to be a lawyer in a fast-moving world, how to be an effective problem solver in an increasingly complex environment, and how to deal with a diverse assortment of real people with real needs and problems.<sup>80</sup> Finally, those engaged in academic support, who have developed knowledge and skills about learning and increased cultural sensitivity, will be well positioned to assist law schools in playing this emerging role.<sup>81</sup>

As law schools find they need to better help students learn to integrate management of large amounts of information with a vast array of skills in a culturally sensitive context, they will find a need to use the skills and knowledge currently possessed not only by doctrinal faculty but by clinicians<sup>82</sup> and academic support professionals as well. Although it may appear naïve and utopian to believe law schools will take advantage of these professionals, who have

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deliver primary content using national experts. See Consortium for Distance Education, at <http://codec.cali.org> (site of a new initiative from the Center for Computer-assisted Legal Instruction focused on supporting distance education in legal education).

<sup>79</sup> In fact, I agree with one of the “attacks leveled at the soundness of computer-mediated legal instruction . . . that it fails to deliver (and hence train) the professional face-to-face human interaction and socialization that underpin most of the necessary practice and professional relationship skills.” Terry, *supra* note 77, at 98, nn.17-18; see also Therese Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 GA. L. REV. 895, 902-03 (“[P]art of learning to become a lawyer involves learning how to handle yourself in a face-to-face situation with a client, a judge, or opposing counsel. Can the electronic classroom completely and effectively provide this type of training experience?”). Since I believe this human interaction is essential to lawyering and legal education, I question whether wholly virtual lawyering or legal education will ever occur. Perhaps this is wishful thinking, or the product of having been raised in an era before computerization. Terry suggests it is dangerous to assume the next generation of consumers “will share our interests and values – our belief in the inherent qualities of traditional legal education. In fact, an instant-messaging, multi-tasking applicant likely has a very different set of social and professional patterns, goals and desires.” Terry, *supra* note 77, at 99. But I am not yet convinced that virtual lawyering or virtual learning is the inevitable wave of the future.

<sup>80</sup> See generally Maynard, *supra* note 79, at 901-03. But see Terry, *supra* note 77, at 99 (questioning whether “face-to-face and community interaction any longer defines legal education.”).

<sup>81</sup> Terry suggests we “overestimate the law school time actually devoted to interaction . . . and the quality of the interaction that actually takes place in our classrooms.” Terry, *supra* note 77, at 99. That may well be true with regard to traditional classrooms, but much of that interaction is occurring in the academic support classroom.

<sup>82</sup> “Clinical programs have challenged the consistent cultural and curricular messages of the traditional classroom by presenting and practicing client-centered approaches to lawyering.” Peters, *supra* note 22, at 869. Clinicians already understand the importance of their role in training students at the juncture of substance and skills. They are now working in an organized way to expand that role to the larger arena of law teaching. See CLINICAL LEGAL EDUCATORS ASSOCIATION (“CLEA”), BEST PRACTICES OF LAW SCHOOLS FOR PREPARING STUDENTS TO PRACTICE LAW available at <http://www.cleaweb.org/resources/bp.html> (last visited Feb. 5, 2005).

traditionally been outside the mainstream, the realities of legal education will make doing anything else virtually impossible, at least for those schools that cannot survive as primary purveyors of legal knowledge.<sup>83</sup> As a result, the demands for delivery of legal education in a competitive market and the specialized knowledge that academic support professionals bring to this task provide strong indications that better integration of academic support may not only be possible but likely.<sup>84</sup>

Additionally, subtle changes in legal education have already occurred that make greater integration of academic support more likely, although it is too early to know if these changes will have long term effects. For example, in recent years, more faculty with backgrounds in legal writing, clinical legal education and academic support have become deans,<sup>85</sup> playing leadership roles within their institutions and, eventually, within legal education itself. Moreover, the next generation of law school graduates will include many students who themselves participated in academic support programs. If law faculty tend to teach how they were taught,<sup>86</sup> the presence in the academy of faculty who participated as students in academic support programs should have a positive effect.

## V. CONCLUSION

As law schools adapt to the technological and demographic changes ahead, academic support has an important role to play. Those who can and do focus on learning, on empowering students to develop the skills to practice law in a complex and diverse society while developing positive, meaningful professional identities, will likely become more central to the educational mission of the law school.<sup>87</sup> And, if that change occurs, some of the existing hierarchies in legal

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<sup>83</sup> Some schools will survive because they are primary content providers, but those who do not have content to sell will have greater challenges unless they redefine their primary roles. See Terry, *supra* note 77, at 110-12.

<sup>84</sup> Terry recognizes that, to be successful, a “click-and-brick institution requires vibrant real and virtual spaces. It must offer more small classes and skills courses, maximizing the opportunity for high value (albeit high cost) interaction.” *Id.* at 123. This requires “upgrad[ing] the quality of our real space” into useful “social space. The click-and-brick school will be selling itself . . . as a place of community and interaction, of in-depth analysis and lifetime friendship.” *Id.* This sounds a lot like academic support. The economics of the delivery of this type of legal education, however, may pose a challenge. See Randall, *supra* note 17, at 213 n.36.

<sup>85</sup> To confirm my suspicion that this was so, I made a request on the ABA Law School Deans list-serve asking deans to let me know if they had been involved in legal writing, clinical work or academic support prior to becoming dean. To my surprise, eighteen deans reported having worked in the clinic (some for extensive periods, including stints as clinic director), thirteen had taught legal writing or directed a legal writing program, and five had done academic support. (Surveys on file with the author).

<sup>86</sup> See Hunt, *supra* note 30, at 789-90.

<sup>87</sup> Whether this means academic support as a separate entity will disappear is hard to say. On the one hand, perhaps a goal of academic support is to be so effective at integrating a focus on learning into the law school that academic support as we know it becomes unnecessary and ceases to exist. Alternatively, however, it is possible that, since there will always be students at the bottom of the



education may be challenged and we may actually begin to positively address the issues raised by Duncan Kennedy more than twenty years ago.

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hierarchy who might need additional services to achieve success, there will always be a place for academic support. Only time will tell.