

# Whittier could have weathered the storm

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The recent announcement by Whittier College that it was shuttering its half century old law school came as a shock but not a surprise. Demand for legal education has declined significantly over the past several years despite expanding employment opportunities and incomes for lawyers.

But the school could have weathered this storm. Whittier's trustees rejected its own faculty's conclusion that keeping the school could "strengthen" the college and make it "more distinctive." Perhaps most importantly, the closure may have a significant negative impact on diversity in the legal profession.

## The Perfect Storm

Law schools face an unusual problem. Demand for admission to law school from recent undergraduates can slow as the wider economy recovers, as it has for the last few years. College graduates then hesitate to borrow for law school when they can land at a cool startup. Research by Professor Michael Simkovic of Seton Hall Law School and Professor Frank McIntyre of Rutgers Business School, however, suggests that such "market timing" adds little to lifelong earnings.

On the other hand, demand for law school can rise as the economy slows because college graduates consider it a respite while they invest in their human capital. These students hope that, if lucky, they will graduate just as the economy is turning around.

Recessions are, typically, short lived, but the post-2008 recovery took longer than expected. Unemployed college graduates flooded law school with applications until 2010. As those students emerged over the next few years many, even from elite law schools, did not find high paying law firm jobs waiting for them when they graduated. Their plight, in turn, affected the reputation of law schools and, as the economy improved and jobs were once again available for college graduates, applications to law school fell.

Again, this was likely an overreaction. A second study by Simkovic and McIntyre demonstrates that over a lifetime law school graduates will out earn by a significant margin similar college classmates who do not pursue an advanced degree. This remains true despite the challenges they may face upon graduating, even if these students come out of lower ranked schools and even if they do not practice law. Indeed, the Bureau of

Labor Statistics (BLS) reports that the incomes and employment rates of lawyers (excluding partners and solo practitioners) have grown steadily over the past two decades.

Most law schools have, until now, survived this disconnect between the demonstrable advantage of a J.D. and the slowing demand for it from college graduates. Whittier should have been able to do that, too. It has a longstanding reputation in southern California and demand for lawyers in that area has surged. The BLS reports a 22 percent increase in the number of lawyers employed in Orange County from 2013 to 2016. Whittier's own preliminary jobs data for its 2016 graduates shows a near 40 percent improvement over the prior year.

### **Whittier's Bar Exam Troubles**

Undoubtedly, Whittier faced significant challenges. Its bar passage rate declined dramatically over the last few years, hitting 22 percent for the July 2016 bar, the lowest of California's 21 American Bar Association-accredited law schools. Just a few years earlier the school was close to, or ahead of, the statewide average pass rate of 68 percent.

What happened?

First, it should be kept in mind that these numbers are "first time" passage rates. Many students, particularly those from the disadvantaged backgrounds whom Whittier has welcomed, need more than one chance to pass the bar. In addition, the California exam is scored in an unusually demanding fashion relative to other jurisdictions. Many Whittier graduates who failed last July would likely now be licensed lawyers if their exams had been scored in another state.

There is no denying, however, that recent Whittier graduates have indeed struggled with the bar. As the demand for law school declined, there is some evidence that higher ranked schools poached top students from lower ranked schools. In turn, those schools lowered their admissions standards to attract students who then have had a much tougher time passing the bar and finding work.

But this explanation can begin to sound like an excuse to avoid facing tough pedagogical problems. If Whittier were also facing a financial crisis, what is known in academia as "financial exigency," then closure to avoid such a "race to the bottom" might make sense. Whittier College President Sharon Herzberger, however, confirmed recently that the school was not closed because of financial pressure. The college itself is financially stable with a sizeable endowment, buoyed by a one-time \$13 million profit from a sale-leaseback of the law school's land and buildings.

Herzberger maintains, instead, the school was closed because of "educational considerations." This is the only other justification for closure, besides "financial exigency," that is allowed under the American Association of University Professors' institutional regulations adopted by the college. But those regulations, consistent with the Quaker value of consensus to which Whittier claims allegiance, also require a faculty determination that the school should close without consideration of "cyclical or temporary variations in enrollment." The faculty task force formed last year by Herzberger to evaluate the law school concluded a shutdown "would be highly detrimental to the overall institution." The college's Faculty Executive Council said synergies between the law school and the college could benefit the entire campus.

## **Diversity: Whittier Is the Proverbial Canary in the Coal Mine**

The shutdown of a single law school could be viewed as a matter of only "academic" interest, but there is a final issue of critical social and political importance. Consistent with its Quaker origins, Whittier College has one of the most diverse law schools in the country, as close to 60 percent of its students are minorities, in line with California's ethnic and racial diversity. Whittier has, as well, a particularly large number of Hispanic students. Most of California's other low ranked law schools have similarly large minority student populations. These law schools accept a social responsibility that California's elite schools seem less willing to accept. Stanford; University of California, Berkeley; University of California, Los Angeles and University of Southern California law schools enroll a far lower percentage of minority students, on average 35 percent.

Law school critics claim the closure will rescue minority students from a heavy debt load in a difficult market. But this view ignores the fact that law students are a good investment - they rarely default on their loans. This view ignores, as well, that large financial institutions make these loans in the first place. They are certainly not doing so just to throw money away.

As Noah Feldman of Harvard Law School argues, it is paternalistic to suggest that students who borrow against future earnings are acting irrationally or are being manipulated. In fact, these students are attempting, rationally, to improve their lifetime outcomes as best they can in the face of social, political and economic barriers to more elite institutions.

California is a national leader in the attempt to create a gateway for minorities into the legal profession. We can ill afford to lose a law school like Whittier. It is far from clear that this in fact has to happen. If Whittier faculty are not able to convince a judge to block the shutdown, then an investigation of the closure and its disparate impact on minority students by the California Supreme Court is warranted. The court has ultimate responsibility for the health and integrity of the state's legal profession and their intervention could make a valuable contribution to addressing this issue.