

UNIVERSITY OF PITTSBURGH LAW REVIEW

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Vol. 85 • Winter 2023

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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2023.997  
<http://lawreview.law.pitt.edu>



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# THE CASE FOR (AND AGAINST) ABA REGULATION OF NON-J.D. PROGRAMS

Benjamin H. Barton\*

American law schools are entering their second decade of wrenching change following a relative era of prosperity and calm. The decade from 2000 to 2010 was seemingly charmed for law schools. More American Bar Association (ABA) accredited law schools came online, more students took the LSAT, more students enrolled in law school, tuition rose ahead of inflation, and teaching loads went down, as did student-to-faculty ratios.<sup>1</sup> The employment results were worse, and spiking debt levels were hardly good news for students,<sup>2</sup> but ha ha!, those were problems for the *students*, not the schools, so times seemed good. To paraphrase Doonesbury: It was good news all around! No one suffered but the students, and they're used to it!<sup>3</sup>

Nevertheless, if something cannot go on forever, it won't. In 2011, an all-time high 52,488 students entered American law schools, despite a falling number of applicants (the high point for law school applications was actually in 2008), a collapsing job market for law graduates, and increasingly bad press for the value of law degrees.<sup>4</sup> At last, the bill came due. By 2014, first-year enrollment had collapsed to 37,894 and has never really recovered.<sup>5</sup> The high-water mark since 2014 is 41,710

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<sup>1</sup> See BENJAMIN H. BARTON, *FIXING LAW SCHOOLS: FROM COLLAPSE TO THE TRUMP BUMP AND BEYOND* 73–80 (2019).

<sup>2</sup> *Id.* at 77.

<sup>3</sup> See Opinion, *Who Will Pay?*, N.Y. TIMES, Sept. 24, 1981, at A26.

<sup>4</sup> See BARTON, *supra* note 1, at 73, 79–86.

<sup>5</sup> *Id.* at 79–86; see *infra* Figure 7.

in the pandemic-juiced 2020 admissions cycle.<sup>6</sup> Every other year has been stubbornly below 40,000.<sup>7</sup>

These fewer students were also paying less because in their seemingly infinite *U.S. News*-fueled mania, law schools of all stripes shrunk their classes and competed extra hard over the remaining applicants.<sup>8</sup> When fewer customers pay less for a product, revenue falls. When revenue falls, businesses close. Law schools closed and merged. There was an all-time high of 202 ABA-accredited law schools in 2017.<sup>9</sup> Yes, you read that right, we hit the all-time high for law schools in the midst of the biggest slump for law schools since the late 1990s or the Great Depression, depending on how you count it.<sup>10</sup> In 2023, that number fell to 196, and it will fall more with the pending teach-out plans of Florida Coastal, Thomas Jefferson (San Diego), and La Verne.<sup>11</sup> This is the first decline in the number of ABA-accredited law schools since 1997–98 when the count went from 179 to 178.<sup>12</sup> Applications and enrollment have recovered slightly but remain well behind the high points of the 2000–10 period.<sup>13</sup> Tuition increases have slowed and discounting has proliferated.<sup>14</sup> Adjusted for inflation, debt levels declined.<sup>15</sup> Much of this was good news for the students, but law schools faced significant financial and regulatory pressures in this brave new world.

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<sup>6</sup> See *infra* Figure 7.

<sup>7</sup> *Id.*

<sup>8</sup> See BARTON, *supra* note 1, at 84.

<sup>9</sup> See *infra* Figure 4.

<sup>10</sup> See *id.* at 71 Figure 4.

<sup>11</sup> *ABA-Approved Law Schools*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools) (last visited Feb. 27, 2024); *Teach-Out Plans*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/public-notice/teach-out-plans](https://www.americanbar.org/groups/legal_education/public-notice/teach-out-plans) (last visited Feb. 27, 2024).

<sup>12</sup> See *infra* Figure 4.

<sup>13</sup> See *infra* Figure 5.

<sup>14</sup> See BARTON, *supra* note 1, at 84–86.

<sup>15</sup> See *infra* Figure 13.

Before we turn to the law schools, a word of closure on my 2019 book, *Fixing Law Schools*.<sup>16</sup> In that book I described what I called the “lost decade” of 2008–18.<sup>17</sup> In the book I tell a story of the irresponsibility of some law schools, which behaved more as predatory student loan hustles than as honest professional schools that aimed to provide good value for money borrowed.<sup>18</sup> The evidence for this claim abounds. There were a decent number of law schools that were admitting students with a very low chance of passing the bar or gaining legal employment and then asking them to borrow full freight from the U.S. government to pay for it.<sup>19</sup> For the schools this was a low-risk proposition, as the student loans are paid immediately and directly to the educational institution, but the risk for the poor students was far greater, since these loans are functionally non-dischargeable in bankruptcy.<sup>20</sup>

Honestly, I was very hard on these schools in the book, and of course I had some colleagues and deans who were not very happy with me or my analysis. Nevertheless, I stand by it. These schools were taking advantage of the system and saddling students with an unconscionable amount of debt for very little value. The good news I recount here is that the JD programs at law schools are much, much healthier, thanks to a mix of ABA and Department of Education (DOE) closures and tightening up at the law schools that remain. There is a good argument that JD programs have not been this healthy since the 1990s. Job placement is excellent.<sup>21</sup> Bar passage is not fully recovered but has improved a lot.<sup>22</sup> The measurables are, for now, good. This is great news!

That said, the financial pressures that led law schools to become predatory have not disappeared, and there are still a lot of law schools that are struggling to make ends meet. Consider the University of Kentucky J. David Rosenberg College of Law. The University of Kentucky College of Law traces its roots to a law program at

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<sup>16</sup> BARTON, *supra* note 1.

<sup>17</sup> *See id.* at 1–13.

<sup>18</sup> *Id.* at 11–12.

<sup>19</sup> *Id.* at 93–99, 111–20.

<sup>20</sup> *Id.* at 153; Stanley Tate, *Student Loan Bankruptcy Law: How We Got Here*, TATE L. (Jan. 21, 2024), <https://www.tateesq.com/learn/student-loan-bankruptcy-law-history>. Trevor Noah has described student debt as “the new herpes.” Ron Dicker, *Trevor Noah Explains Why Student Loan Debt ‘Is the New Herpes,’* HUFFPOST (July 26, 2019, 5:49 AM), [https://www.huffpost.com/entry/trevor-noah-student-loan-debt\\_n\\_5d3ab6dce4b0a6d6373dd8b1](https://www.huffpost.com/entry/trevor-noah-student-loan-debt_n_5d3ab6dce4b0a6d6373dd8b1).

<sup>21</sup> *See infra* Figures 9, 10.

<sup>22</sup> *See infra* Figure 8.

Transylvania University founded in Kentucky in 1799 and is one of the oldest public law schools in the country.<sup>23</sup> The “great dissenter” Supreme Court Justice John Marshall Harlan was a proud graduate of Transylvania Law School.<sup>24</sup> Founded in 1908, the J. David Rosenberg College of Law established the nation’s first law school trial practice program in 1913, “and its *Kentucky Law Journal* is the tenth-oldest student-run law review in the nation.”<sup>25</sup> Kentucky was ABA accredited in 1925, not quite early enough to join the inaugural class of law schools but still in the very first wave (ABA accreditation started in 1923).<sup>26</sup> The Association of American Law Schools (AALS) was founded in 1900 and Kentucky joined in 1912,<sup>27</sup> again as an early adopter of the Harvard/University-model of law schools. It is the flagship public law school in the state of Kentucky and (if you care for such things) is the state’s highest ranked law school by *U.S. News*.<sup>28</sup> Even if you hate the rankings, I think it’s fair to consider it the best law school in the state, and by a fair amount.

On top of these many strengths, the College seemed to be on a roll recently. In 2019 the College was renamed the J. David Rosenberg College of Law after accepting a \$20 million naming gift, the third largest-ever gift for the University of Kentucky as a whole.<sup>29</sup> The law school also recently completed a \$56 million renovation and expansion of its building.<sup>30</sup>

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<sup>23</sup> *About Us*, UNIV. OF KY. ROSENBERG COLL. OF L., <https://law.uky.edu/about-us> (last visited Feb. 29, 2024).

<sup>24</sup> Alan F. Westin, *The First Justice Harlan: A Self-Portrait from His Private Papers*, 46 KY. L.J. 321, 322–23 (1958).

<sup>25</sup> *About Us*, *supra* note 23.

<sup>26</sup> *ABA-Approved Law Schools by Year*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved) (last visited Feb. 29, 2024).

<sup>27</sup> *History*, ASS’N OF AM. L. SCHS., <https://www.aals.org/about/history> (last visited Feb. 29, 2024); *Member Schools*, ASS’N OF AM. L. SCHS., <https://www.aals.org/member-schools> (last visited Feb. 29, 2024).

<sup>28</sup> Maya Itah, *University of Kentucky College of Law*, TIPPING THE SCALES (Jan. 22, 2014), <https://tippingthescales.com/schools/university-of-kentucky-college-of-law>; *Best Law Schools in Kentucky*, U.S. NEWS, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings/kentucky> [[https://web.archive.org/web/20240229135016/https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings/kentucky?\\_sort=my\\_rankings-asc&\\_mode=table](https://web.archive.org/web/20240229135016/https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings/kentucky?_sort=my_rankings-asc&_mode=table)] (last visited Feb. 29, 2024).

<sup>29</sup> *About J. David Rosenberg*, UNIV. OF KY. ROSENBERG COLL. OF L., <https://law.uky.edu/about-us/about-j-david-rosenberg> (last visited Feb. 29, 2024).

<sup>30</sup> For a description of the renovation project, see *UK Law ‘Raising the Bar’ with \$56 Million Building Project*, UNIV. OF KY. ROSENBERG COLL. OF L. (Sept. 7, 2017), <https://law.uky.edu/news/uk-law-raising->

Nevertheless, on March 7, 2023, the J. David Rosenberg College of Law found itself in the embarrassing position of being found “out of compliance with Standard 202(a), which requires that current and anticipated resources available to a law school are sufficient to carry out a legal education program and operate in compliance with the standards.”<sup>31</sup> The school was required to submit a report by June 30,<sup>32</sup> and if the ABA is satisfied that the law school is funded sufficiently (which is the likeliest result) the ABA issue will fade away. Nevertheless, Kentucky joined Cleveland-Marshall, Western New England, its state-mate Louisville, and the since-closed Florida Coastal, as recent law schools the ABA found in dangerous financial straits.<sup>33</sup>

What caused this recent spate of financial notices? Many law schools are still running at a deficit.<sup>34</sup> These notices were reminiscent of the very public budgetary problems at the University of Minnesota Law School in 2018.<sup>35</sup> Applications to the school fell by more than half after 2010, and in an effort to maintain student quality

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bar-56-million-building-project. For some lovely photographs of the completed building, see Univ. of Ky. Coll., *Fall 2019–Spring 2020 Building Photos*, ISSUU (Jan. 8, 2020), [https://issuu.com/universityofkentuckycol/docs/fall\\_2019\\_-\\_spring\\_2020\\_building\\_photos\\_pptx](https://issuu.com/universityofkentuckycol/docs/fall_2019_-_spring_2020_building_photos_pptx).

<sup>31</sup> Stephanie Francis Ward, *Finance-Related Notice for Kentucky Law School Posted by ABA Legal Ed Section*, ABA J. (Mar. 28, 2023, 1:35 PM), <https://www.abajournal.com/web/article/legal-ed-posts-finance-related-notice-for-kentucky-law-school>.

<sup>32</sup> *Id.*

<sup>33</sup> For Cleveland-Marshall, see Stephanie Francis Ward, *Law School Dinged for Noncompliance with ABA Standard Addressing Financial Conditions*, ABA J. (Sept. 7, 2021, 11:02 AM), <https://www.abajournal.com/news/article/law-school-dinged-for-noncompliance-with-aba-standard-addressing-financial-conditions>; for Western New England, see Lyle Moran, *2 Law Schools Found to Be Out of Compliance with ABA’s Bar Passage Standard*, ABA J. (Dec. 20, 2021, 12:43 PM), <https://www.abajournal.com/news/article/two-law-schools-found-to-be-out-compliance-with-abas-bar-passage-standard>; for Louisville, see Paul Caron, *ABA Finds Louisville Law School Out of Compliance with Accreditation Standards*, TAXPROF BLOG (Dec. 12, 2019), [https://taxprof.typepad.com/taxprof\\_blog/2019/12/aba-finds-louisville-law-school-out-of-compliance-with-accreditation-standards.html](https://taxprof.typepad.com/taxprof_blog/2019/12/aba-finds-louisville-law-school-out-of-compliance-with-accreditation-standards.html); for Florida Coastal, see Max Marbut, *Florida Coastal School of Law Found in Compliance with ABA Financial Standards*, JACKSONVILLE DAILY REC. (Feb. 28, 2020, 1:55 PM), <https://www.jaxdailyrecord.com/news/2020/feb/28/florida-coastal-school-of-law-found-in-compliance-with-aba-financial-standards>.

<sup>34</sup> Katherine Mangan, *Law Schools Cut Back to Counter Tough Financial Times*, CHRON. OF HIGHER EDUC. (July 1, 2016), <https://www.chronicle.com/article/law-schools-cut-back-to-counter-tough-financial-times/>.

<sup>35</sup> Paul Caron, *University of Minnesota Increases Law School’s Annual Subsidy to \$12 Million Amidst Declining Applications, Enrollment (On Top of \$40 Million Subsidy Since 2012–13)*, TAXPROF BLOG (May 11, 2018), [https://taxprof.typepad.com/taxprof\\_blog/2018/05/university-of-minnesota-increases-law-schools-annual-subsidy-to-12-million-amidst-declining-applicat.html](https://taxprof.typepad.com/taxprof_blog/2018/05/university-of-minnesota-increases-law-schools-annual-subsidy-to-12-million-amidst-declining-applicat.html) [<https://perma.cc/V53G-9UFR>].

(and rankings, naturally) the law school cut enrollment by a third.<sup>36</sup> From 2012 through 2018, the university gave the law school an unimaginably large subsidy of \$39.9 million to cover budget shortfalls.<sup>37</sup> The law school eventually cut faculty by 21% and staff by 14% in an effort to balance the budget.<sup>38</sup>

Former Minnesota Law Dean Garry Jenkins was interviewed by Bloomberg Law in 2022 in an article highlighting the budgetary crunch at American law schools and how deans had successfully addressed the challenges, including at Minnesota.<sup>39</sup> Jenkins noted the key role that new programs played in solvency at Minnesota, “including a master’s program for students looking to become patent agents and a popular law minor for undergraduates.”<sup>40</sup> In the same article, Pepperdine Dean Paul Caron noted a similar strategy for balancing his school’s budget: “develop[ing] online and master’s programs to keep tuition money coming in.”<sup>41</sup> Nor are Pepperdine and Minnesota alone. The “proliferation of non-JD programs at law schools,” in the words of former Northwestern University Dean Daniel Rodriguez, has become a key strategic move towards riding out ongoing budget crunches.<sup>42</sup>

The available ABA data makes clear that Rodriguez is correct. Non-JD enrollment in American law schools hit an all-time high of 24,158 in 2022.<sup>43</sup> There were just 7,667 such students in 2006 before the Great Recession and recent law school struggles, meaning that there has been a 215% increase in these students in the last two decades.<sup>44</sup> Non-JD students have not just grown in absolute numbers: they have also become a much larger percentage of total enrollment at American law

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<sup>36</sup> *Id.*

<sup>37</sup> Josh Verges, *UMN Subsidy for Law School Soars as Applications Suffer a Steep Drop*, TWIN CITIES PIONEER PRESS (May 10, 2018, 5:56 PM), <https://www.twincities.com/2018/05/10/umn-subsidy-for-law-school-soars-as-applications-suffer-a-steep-drop>.

<sup>38</sup> Caron, *supra* note 35.

<sup>39</sup> Elizabeth Olson, *Tweedy Law School Deans Break Out Calculators (Correct)*, BLOOMBERG L. (Oct. 7, 2022, 6:30 PM), <https://news.bloomberglaw.com/business-and-practice/tweedy-law-school-deans-break-out-calculators-as-role-shifts>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See infra* Figure 14.

<sup>44</sup> *See id.*

schools. In 2006, non-JD enrollment was just 5% of total enrollment.<sup>45</sup> In 2022, it shot up to 17%, a 340% increase.<sup>46</sup>

This Article addresses the causes for these changes, including the regulatory and financial environment for law schools. The Article then turns to the current regulation of these programs and presents the case for and against ABA regulation of non-JD programs in law schools.

## I. THE HIGH POINT

At first, the Great Recession of 2008 was a boon for law schools. Law school applications have traditionally risen in a recession because job prospects for college graduates are less rosy, and law school seems like a wise place to ride out a downturn.<sup>47</sup> The Great Recession followed the pattern. In 2010, the *New York Times* reported that the recession “spurred a jump in applications to law schools.”<sup>48</sup> As noted above, 2011 was a peak period for American law schools.<sup>49</sup> Law schools hit an all-time high in 1L enrollment (52,488) and total enrollment (147,525).<sup>50</sup> Total

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<sup>45</sup> See *infra* Figure 15.

<sup>46</sup> See *id.*

<sup>47</sup> RIAZ TEJANI, LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS 88–89 (2017).

<sup>48</sup> Rebecca R. Ruiz, *Recession Spurs Interest in Graduate, Law Schools*, N.Y. TIMES (Jan. 9, 2010), <https://www.nytimes.com/2010/01/10/education/10grad.html>.

<sup>49</sup> See *supra* note 4 and accompanying text.

<sup>50</sup> See *infra* Figure 1.



enrollment includes JD and non-JD enrollment. Figure 1 shows the growth in total enrollment from 1948–2011:

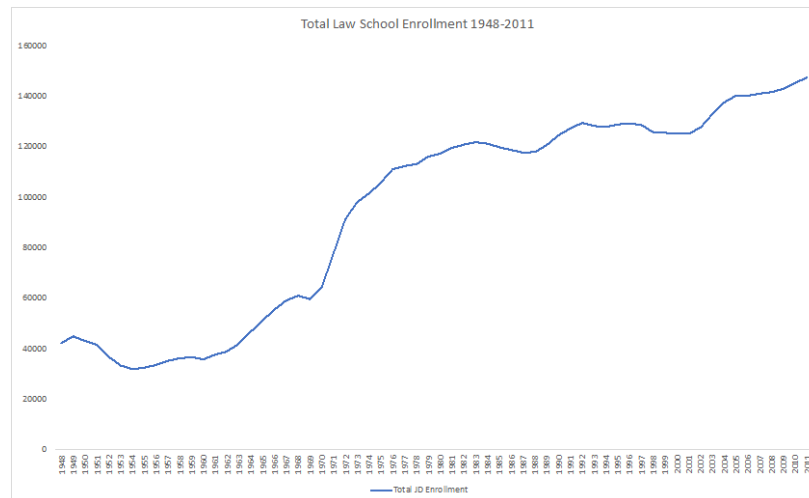


Figure 1. Law School Enrollment Through 2011<sup>51</sup>

<sup>51</sup> Raw data on file with the author.

Figure 2 shows that the cost of attending law school grew substantially as well:

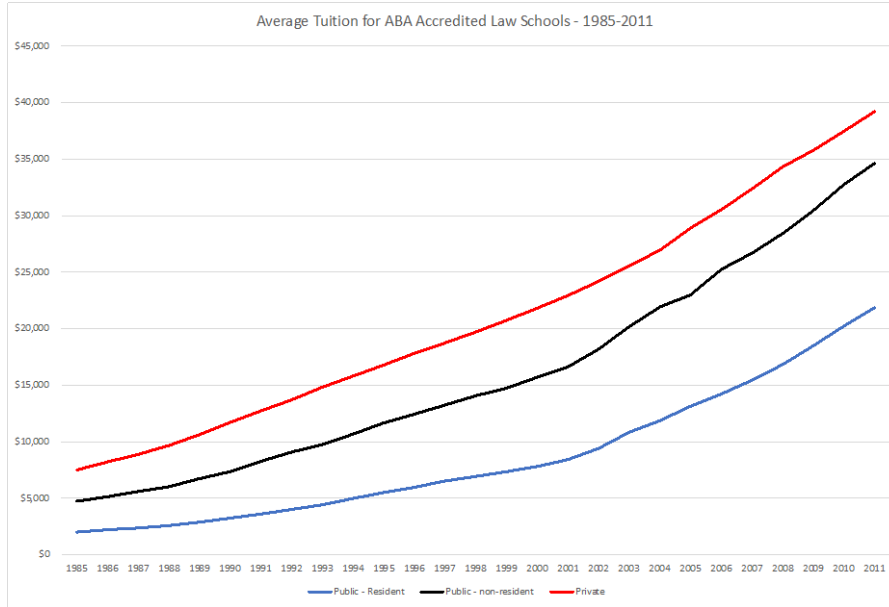


Figure 2. Average Tuition for ABA-Accredited Schools, 1985–2011<sup>52</sup>

This rise in tuition had the unfortunate, but very predictable, effect of greatly increasing student debt levels, as Figure 3 establishes:

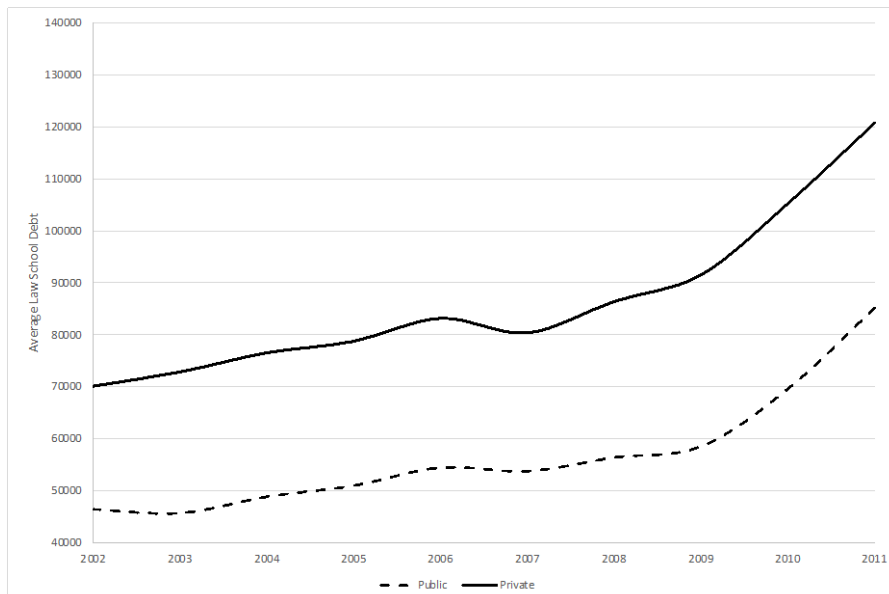


Figure 3. Average Law School Debt, 2002–11<sup>53</sup>

These flush times drew more entrants to the market, and there was a boomlet in new law schools, including for-profit law schools, as Figure 4 reflects:

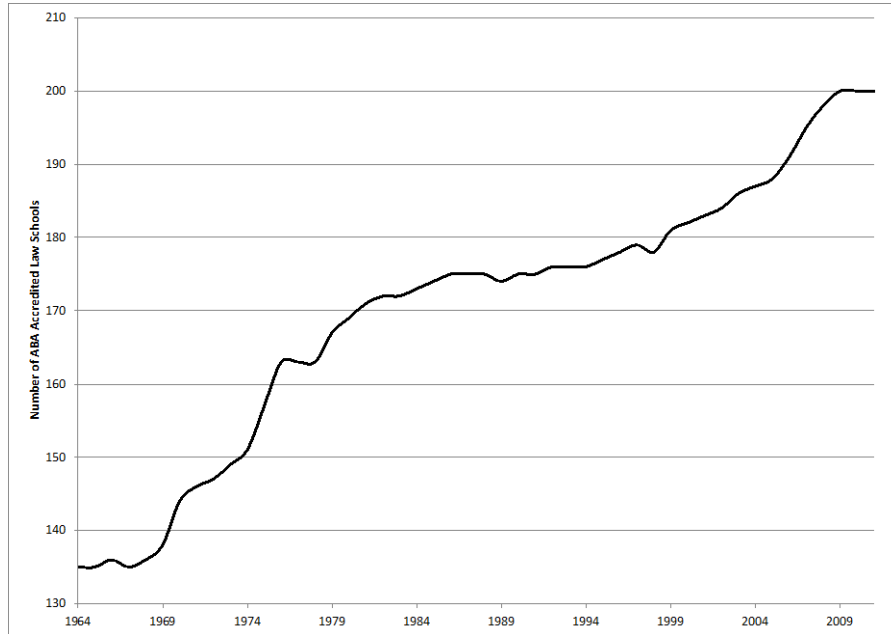


Figure 4. Number of ABA-Accredited Law Schools<sup>54</sup>

## II. THE CRASH

The good times for law schools were not destined to last, especially with tuition, enrollment, and debt outstripping employment results. While the rest of the country was getting back on their feet from the Great Recession, the bill was coming due for law schools.

Figure 5 shows the extent of the damage and also shows one of the initial law school strategies for staying afloat in a collapsing market; some schools moved to the equivalent of open admissions. The top line in Figure 5 is the number of LSAT takers, starting in 2001–02 with 143,251. The high point in the new millennium was 171,514 in 2009–10. That number fell to 101,689 by 2014–15, a 40% decrease in

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<sup>52</sup> Raw data on file with the author.

<sup>53</sup> Raw data on file with the author.

<sup>54</sup> Raw data on file with the author.

just a half decade. The numbers rallied from 2017–21 (and especially in the pandemic boosted 2020–21 cycle) but are still below earlier peaks.

The second line shows the number of applicants who signed up for the Credential Assembly Service (CAS) from 2001 to 2022. Almost every ABA-accredited school requires the CAS, so it is a good proxy for applicants.<sup>55</sup> Like the LSAT administrations, CAS registrations saw a collapse in this period. The high point for CAS registrations was 2009–10 with 85,400. CAS registrations fell to 48,800 in 2014–15, a 42% decrease.

The last two lines show admitted applicants and 1L enrollment. 2010–11 was the highpoint for admittees at 60,400, and 2011–12 was the highpoint for enrollment at 52,488. These fell to 42,300 admittees and 37,058 1Ls in 2015–16.

Figure 5 demonstrates these trends:

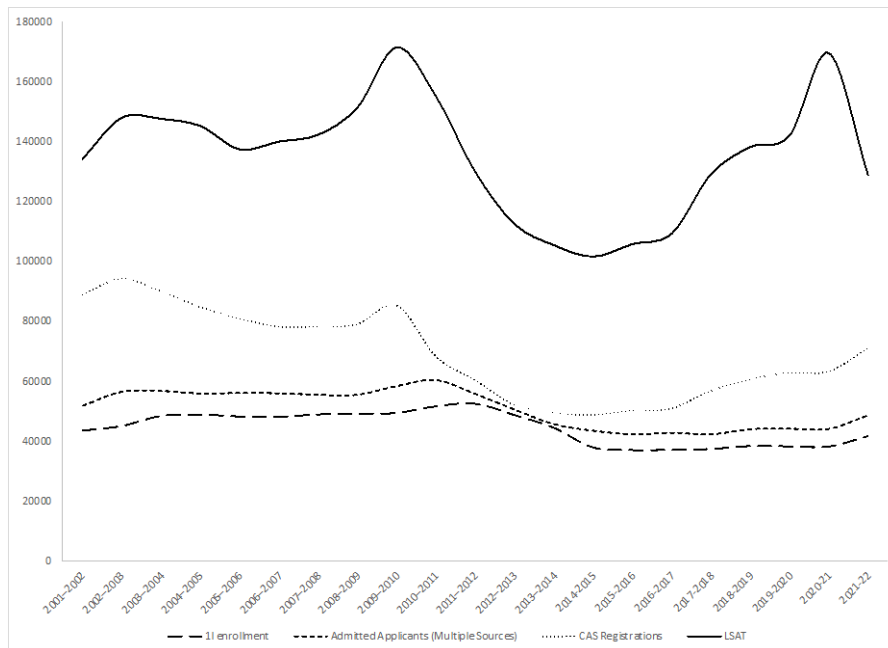


Figure 5. LSAT, CAS Registrations, and 1L Enrollment<sup>56</sup>

If you doubt my claim that some law schools were running an open admissions policy, look at how closely the CAS registrations, the admittances, and the enrollees

<sup>55</sup> What is CAS? (Formerly LSDAS), POWERSCORE, <https://www.powerscore.com/lsat/help/lstdas> (last visited Feb. 29, 2024).

<sup>56</sup> Raw data on file with the author.

are from 2011–15. This is why you see a 42% decrease in applications but only a 29% decrease in enrollees; almost anyone who applied and was willing to take out loans was admitted and enrolled at some law school.

Figure 6 shows the dramatic rise in the admissions rate for law schools over the same 2011–15 period, and then a later fall:

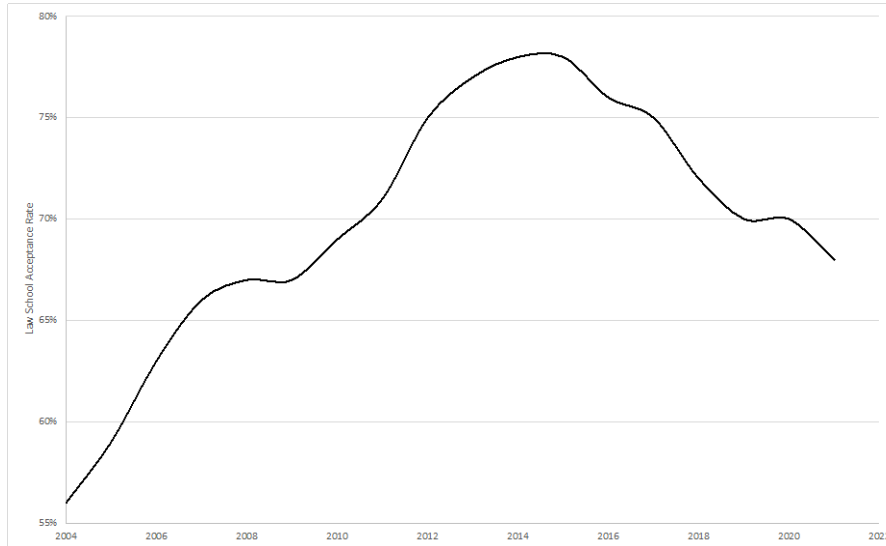


Figure 6. Law School Acceptance Rates<sup>57</sup>

Traditionally, the law school acceptance rate was much closer to 60% than 80%.<sup>58</sup> In 2014 and 2015, admissions rates peaked at 78%, and even with the recent decline, admissions rates remained above 70% until 2021, as seen in Figure 6. Why did rates spike? So that law schools, especially lower ranked law schools and for-profit law schools, could put butts in seats and pay their bills.

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<sup>57</sup> Raw data on file with the author.

<sup>58</sup> William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 12 (2000) (showing admissions rate in the 60% range in the mid-1990s).

Even with very loose admissions, law schools struggled to maintain enrollment. Figure 7 is the rest of the story from Figure 1, which showed basically uninterrupted growth in JD enrollment from 1953 to 2011.<sup>59</sup> Despite law schools' best efforts, overall enrollment took a significant hit:

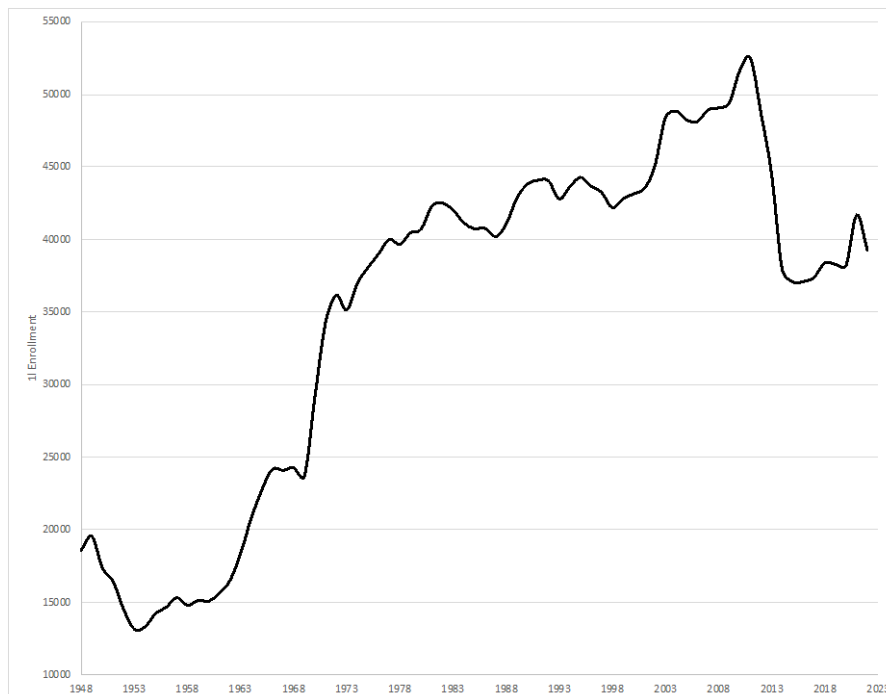


Figure 7. Law School Enrollment, 1953–2023<sup>60</sup>

Nevertheless, the open admissions did float most law schools. Cutting costs via faculty and staff and opening up admissions helped avoid what I call a market-based closure, meaning a situation where a law school can't make payroll and has to close.<sup>61</sup> There were a few market-based closures in this time, notably Whittier, Valparaiso, Indiana Tech, Concordia, and the branch locations of Savannah Law School, a branch of John Marshall (Atlanta), and Cooley Law School's Ann Arbor

<sup>59</sup> See *supra* Figure 1.

<sup>60</sup> Raw data on file with the author.

<sup>61</sup> BARTON, *supra* note 1, at 87–127.

location.<sup>62</sup> The mergers of William Mitchell and Hamline, and the two Rutgers campuses into one law school,<sup>63</sup> were likely also financially motivated. That said, most law schools survived financially, even some of the most endangered.

But the cost cutting and loose admissions raised a different risk, what I call a regulatory closure: losing ABA accreditation and/or losing access to federal loans via the DOE.<sup>64</sup> Taking this risk was very understandable for any American law dean. Why close today when you could roll the dice on regulatory closure years down the line? This strategy seemed especially wise at the time because the ABA had hardly been in the business of closing American law schools before 2018. In my 2015 book *Glass Half Full*, I noted that the ABA had, to that point, never discredited an American law school, and it was unclear if they would have the incentive/spine to do so.<sup>65</sup> So struggling American law schools rolled the dice. Maybe the market would improve drastically? Maybe open admissions would not harm job placement or bar passage? Maybe the ABA would rattle some cages, but stop short of closing underperforming law schools?

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<sup>62</sup> *Id.* at 9–10. For Concordia, see *Concordia Law School in Boise to Close*, KTVB (June 25, 2020, 3:58 PM), <https://www.ktvb.com/article/news/education/concordia-school-of-law-in-boise-to-close-by-the-end-of-summer/277-a483c89d-f6ac-4285-bc29-ffa6a213d3c9>.

<sup>63</sup> BARTON, *supra* note 1, at 70.

<sup>64</sup> *Id.* at 128–59.

<sup>65</sup> BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 166–67 (2015).

Figure 8 shows that the gamble proved costly in the one area that open admissions were most likely to harm bar passage rates:

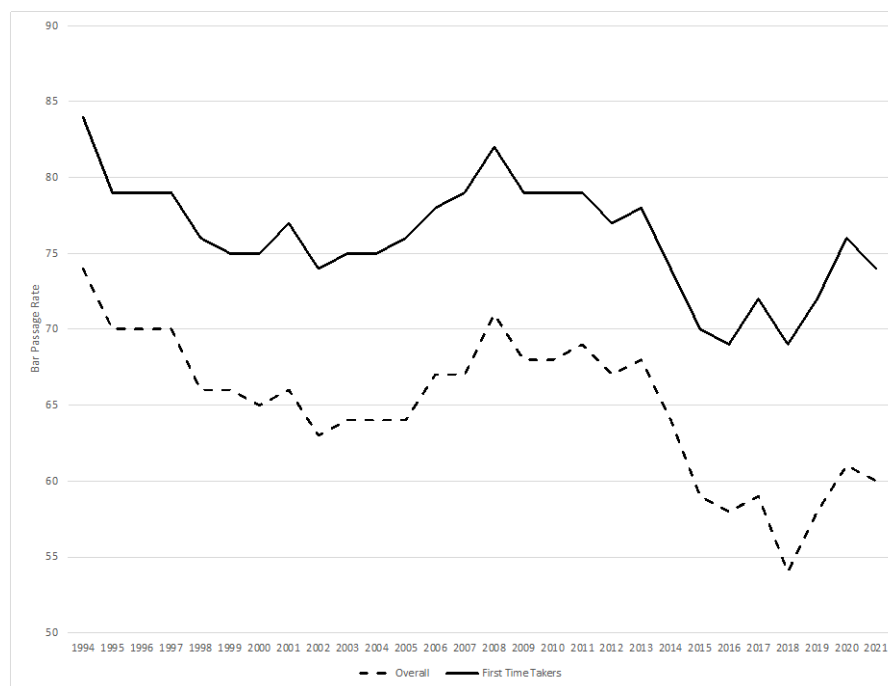


Figure 8. Bar Passage Rates, 1994-2021<sup>66</sup>

If you look back at Figure 6, you can see that trend towards looser admissions actually started in 2004–15.<sup>67</sup> Unfortunately, as Figure 8 demonstrates, you can see that the bar passage rate starts to slide from a peak in 2008—at first gently—and then, as the open admissions regime came online in 2014 and forward, bar passage fell precipitously into 2018. This should not have been a surprise three years after the acceptance rate rose to almost 80%.<sup>68</sup>

I won't belabor how awful it is for law school graduates to fail the bar, even once, let alone to never be admitted to the bar. A 2010 review of data showed heartbreakingly bad life results for law graduates who never pass the bar: "Five to ten years out of law school, they lag well behind lawyers on every measure—

<sup>66</sup> Raw data on file with the author.

<sup>67</sup> See *supra* Figure 6.

<sup>68</sup> See *supra* Figure 6.



earnings, employment stability, even marriage and divorce rates. Moreover, as a group, they fare worse than college graduates, despite their better-than-average undergraduate grades.”<sup>69</sup> This cohort rallies somewhat after a rough first decade, but “never catch up with their lawyer peers.”<sup>70</sup> This result is especially disastrous given the crushing debt burden of modern law graduates. In 2018, the average public law school graduate carried \$91,803 in debt, and the average private law school graduate had \$130,373.<sup>71</sup>

The other canary in the coal mine was employment numbers. Figures 9 and 10 show the National Association for Law Placement (NALP) data from 2000 to 2021 for law graduates who were able to obtain full-time, long-term work that required a JD (the highest value work for law graduates and, of course, the kind of work that most students want when they decide to attend law school).

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<sup>69</sup> Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 4 (2010).

<sup>70</sup> *Id.*

<sup>71</sup> *See supra* Figure 3.

Figure 9 shows the absolute number of such graduates:

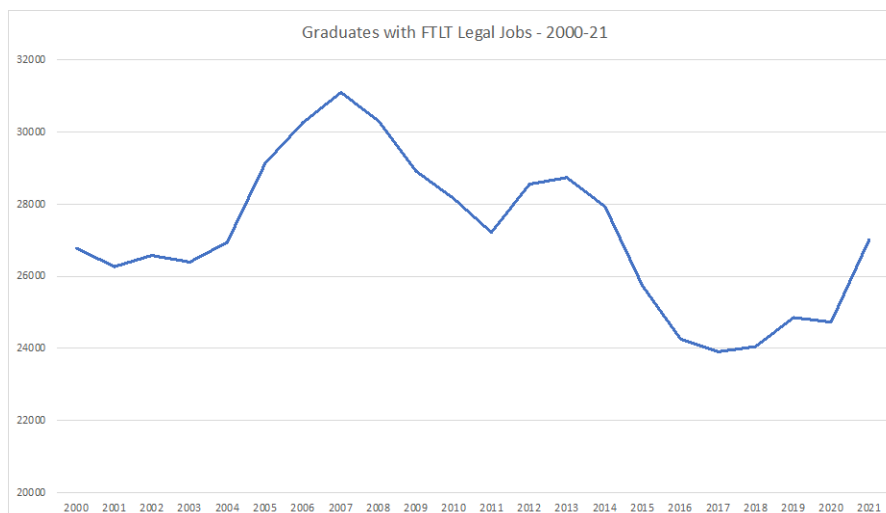


Figure 9. Graduates with Full-Time, Long-Term Legal Jobs, 2000–21<sup>72</sup>

There are a couple of things to note here. First, note that the peak for employment was in 2007 and that law grads were suffering pretty significantly for a few years *before* the peak of enrollment in 2010–11 and well before the collapse around 2015.<sup>73</sup> Insofar as you feel any pity for American law schools, remember that they kept enrolling bigger and bigger classes in the teeth of collapsing job placement.

This graph also helps explain why law school applications dropped precipitously; it was an awful market for law grads, and very publicly so.<sup>74</sup> Second, note that despite the “recovery” in placement since 2015, the actual number of lawyer jobs did not really recover until 2021, when we hit a post-2014 high of 27,019.<sup>75</sup> This result was celebrated but note that it is actually below average for the years 2000–21. The average of these jobs in the new millennium is 27,172.<sup>76</sup>

<sup>72</sup> Raw data on file with the author.

<sup>73</sup> See *supra* Figure 7.

<sup>74</sup> BARTON, *supra* note 1, at 77–80.

<sup>75</sup> Raw data on file with the author.

<sup>76</sup> Raw data on file with the author.

Figure 10 shows the same data, as a percentage of the graduating classes, which looks much rosier recently. This is because law school classes have been so much smaller since 2011, so even as the absolute number of the desired jobs has been relatively flat, their share among graduates has grown as enrollment shrank:

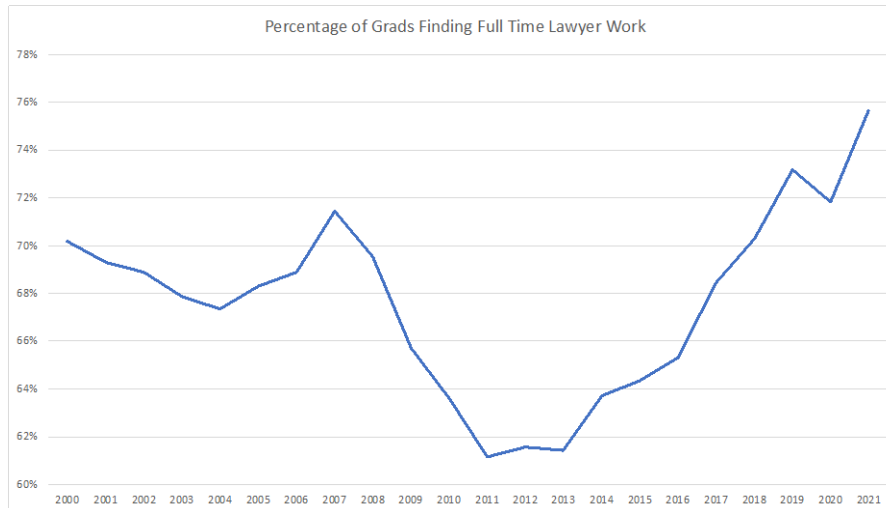


Figure 10. Percentage of Graduates Finding Full-Time Lawyer Work<sup>77</sup>

2021's 76% is the best number on record as far back as 1994 and is, indeed, *excellent* news for law students. The larger entering classes of the last few years may dent that percentage, but given the long desert of job placement we've crawled through, let's celebrate good news where we can find it.

### III. KITTEN'S GOT CLAWS—REGULATORS AWAKEN (AND A WORD ON LAW SCHOOL REGULATION)

Before we turn back to the recent history of law schools, permit a slight digression on the larger structure of regulation within which law schools operate. The federal government had very little to do with higher education before World War II.<sup>78</sup> The federal involvement in higher education started with the G.I. Bill after World War II.<sup>79</sup> For the first time, the government offered tuition assistance to

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<sup>77</sup> Raw data on file with the author.

<sup>78</sup> PAUL J. OLSCAMP, MORAL LEADERSHIP: ETHICS AND THE COLLEGE PRESIDENCY 58 (2003).

<sup>79</sup> See GLENN C. ALTSCHULER & STUART M. BLUMIN, THE G.I. BILL: A NEW DEAL FOR VETERANS 51–83 (2009).

returning veterans.<sup>80</sup> The program was widely considered a massive success,<sup>81</sup> and from 1958 forward Congress built upon this success by creating various guaranteed student loan programs (the Perkins and Stafford) as well as grant programs (like the Pell grant).<sup>82</sup>

The flood of federal money into higher education raised a new issue: making sure that the money was well spent. After 1952, the new loan and grant programs were only available to properly accredited institutions as governed by the DOE.<sup>83</sup> Rather than create accreditation standards from scratch, the DOE decided to team up with the existing private accreditation bodies. Thus, DOE approved the accreditors, and the accreditors approved the institutions. But, because the accreditors were generally paid by the accredited institutions,<sup>84</sup> there were some obvious issues with incentive structures. Accreditation bodies that denied accreditation would lose customers by putting them out of business or encouraging them to use a looser accrediting body. This meant that the DOE had to oversee the accreditors, so in 1968, the Commissioner of Education created the National Advisory Committee on Institutional Quality and Integrity (NACIQI).<sup>85</sup> The NACIQI puts accrediting agencies through what they call a “recognition process” every five years,<sup>86</sup> essentially where the DOE ensures that the accreditation agencies are sufficiently

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<sup>80</sup> *Id.* at 54–56, 71.

<sup>81</sup> *See id.* at 2 (noting that by the 1990s, “praise for the GI Bill was widespread and partook of the increasing respect and nostalgia among the vast majority of Americans for what the journalist Tom Brokaw would soon call ‘the Greatest Generation’”).

<sup>82</sup> Mary P. McKeown-Moak, *Financing Higher Education in the New Century*, in *EDUCATION FINANCE IN THE NEW MILLENNIUM* 80, 85–86 (Stephen Chaikind & William J. Fowler eds.) (Routledge 2013) (2001).

<sup>83</sup> Press Release, Lamar Alexander, Chairman, U.S. Senate Comm. on Health, Educ., Lab., & Pensions, Alexander: Accreditation Must Improve, Because Neither Congress nor Department of Education Are Up to the Task of Monitoring Quality (June 17, 2015), <https://www.help.senate.gov/chair/newsroom/press/alexander-accreditation-must-improve-because-neither-congress-nor-department-of-education-are-up-to-the-task-of-monitoring-quality-> [<https://perma.cc/9QSN-KK3J>] [hereinafter Press Release].

<sup>84</sup> ALEXANDRA HEGJI, CONG. RSCH. SERV., R43826, AN OVERVIEW OF ACCREDITATION OF HIGHER EDUCATION IN THE UNITED STATES 4 (Oct. 16, 2020).

<sup>85</sup> *Higher Education Accreditation*, NEW AM.: POST SECONDARY NAT’L POL’Y INST. (Mar. 1, 2013), <https://www.newamerica.org/post-secondary-national-policy-institute/our-blog/higher-education-accreditation>.

<sup>86</sup> *Id.* at 22.

strict.<sup>87</sup> Remember that the accreditation process is the gateway to the federal loans and grants that are now the lifeblood of many higher education programs,<sup>88</sup> so the NACIQI looks after the accreditors, and the accreditors greenlight institutions for federal funds.

If you're wondering whether access to federal funds is as big a deal as I say, consider Charlotte School of Law. In December 2016 the DOE announced that it would cut off Charlotte School of Law from access to federal loans and grants.<sup>89</sup> The school was closed by 2017.<sup>90</sup>

The DOE uses the ABA as the accrediting agency for American law schools and has since 1952.<sup>91</sup> Nevertheless, the NACIQI recognition process for the ABA grew increasingly rocky from 2006–16. In 2007, the NACIQI raised issues of consistency and transparency but allowed the ABA to continue as an accreditor.<sup>92</sup>

In 2011, the NACIQI upped the ante, finding seventeen different instances where the ABA had failed to comply with DOE regulations, including failing to consider job placement or loan default rates as part of the accreditation process.<sup>93</sup> The NACIQI was so mad that a majority of its members “expressed frustration that

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<sup>87</sup> U.S. Department of Education e-Recognition, OMB No. 840-0788, OFF. OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., <https://surveys.ope.ed.gov/erecognition/#/> (last visited Mar. 3, 2024) (“An agency’s application for recognition consists of a narrative addressing the agency’s compliance with each of the subparts of the criteria for recognition and evidence of the agency’s compliance with each of the criteria for recognition by appending supporting documentation.”).

<sup>88</sup> BARTON, *supra* note 1, at 165.

<sup>89</sup> *Id.* at 168–75.

<sup>90</sup> *Id.*

<sup>91</sup> SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS & RULES OF PROC. FOR APPROVAL OF LAW SCHOOLS, 2023–2024, at v (2023) [hereinafter ABA STANDARDS]. Note that DOE “recognition criteria require an accrediting agency within a professional association to operate separately and independently of the association of which it is a part” and so technically, it is the Council of the American Bar Association Section of Legal Education and Admissions to the Bar that is “the formally recognized accreditor,” but I follow common practice here by referring to “law schools accredited by the Council . . . as ‘ABA-approved.’” *Id.*

<sup>92</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-314, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL ACCREDITATION 1–3 (2007).

<sup>93</sup> Elie Mystal, *American Bar Association Gets Smacked Around by Accreditation Committee, But Keeps Its Power*, ABOVE THE L. (June 10, 2011, 2:28 PM), <https://abovethelaw.com/2011/06/american-bar-association-gets-smacked-around-by-accreditation-committee-but-keeps-its-power> [https://perma.cc/L96S-G2JU].

they could not take stronger actions or at least state their concerns with stronger language.”<sup>94</sup> Meow! These findings resulted in a sternly worded letter from a ranking member of the Senate Judiciary Committee to the ABA.<sup>95</sup> Nevertheless, the ABA continued on in relative quiescence as the law school crisis bloomed between 2011–16.

By 2016, the NACIQI was done kidding around. The NACIQI noted significant unaddressed issues with the ABA’s accreditation process,<sup>96</sup> to the point that it ultimately recommended a one-year suspension of the ABA as America’s law school regulator.<sup>97</sup> Pause for a minute to contemplate the severity of this proposed sanction and the potential humiliation for the august and proud ABA. The NACIQI noted some well-worn problems: law schools publishing misleading job statistics, enrolling high-risk students who were unlikely to graduate or pass the bar, and sky-high debt loads.<sup>98</sup> This was a very aggressive step by the NACIQI and caused an earthquake at the ABA.<sup>99</sup> The DOE eventually decided not to follow the NACIQI recommendation and declined to suspend the ABA, but the entire process certainly sent a stern and frightening message to the ABA: tighten up accreditation or face the possibility of losing accreditation power altogether.<sup>100</sup>

Unsurprisingly, the ABA sprang to attention following this near-death experience. From 2016 to 2020, the ABA imposed various levels of suspensions on and warnings against the following law schools: Appalachian, Arizona Summit, Ave

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<sup>94</sup> Eric Kelderman, *American Bar Association Takes Heat from Advisory Panel on Accreditation*, CHRON. OF HIGHER EDUC. (June 9, 2011), <https://www.chronicle.com/article/american-bar-association-takes-heat-from-advisory-panel-on-accreditation>.

<sup>95</sup> Letter from Charles E. Grassley, Sen., Comm. on the Judiciary, to Stephen N. Zack, President, Am. Bar Ass’n (July 11, 2011), <https://www.lawschooltransparency.com/documents/2011-07-11-Grassley-to-ABA.pdf> [<https://perma.cc/6JXN-AMUQ>].

<sup>96</sup> *Staff Report to the Senior Department Official on Recognition Compliance Issues*, U.S. DEP’T OF EDUC. (2016), <https://perma.cc/XZ6S-8Z7B>.

<sup>97</sup> Paul Fain, *Accreditor on Life Support*, INSIDE HIGHER ED (June 23, 2016), <https://www.insidehighered.com/news/2016/06/24/federal-panel-votes-terminate-acics-and-tightens-screws-other-accreditors>.

<sup>98</sup> Kyle McEntee, *Transcript Reveals Debate Over ABA’s Accrediting Power*, BLOOMBERG L. (Aug. 3, 2016, 5:26 PM), <https://news.bloomberglaw.com/business-and-practice/transcript-reveals-debate-over-abas-accrediting-power>.

<sup>99</sup> Karen Halverson Cross, *Deregulation and the ‘Gig Academy,’* 67 WAYNE L. REV. 151, 187–88 (2022).

<sup>100</sup> *Id.*; Stephanie Francis Ward, *ABA Won’t Be Suspended from Accrediting New Law Schools*, ABA J. (Sept. 23, 2016, 8:22 AM), [https://www.abajournal.com/news/article/aba\\_wont\\_be\\_suspended\\_from\\_accrediting\\_new\\_law\\_schools](https://www.abajournal.com/news/article/aba_wont_be_suspended_from_accrediting_new_law_schools).

Maria, Charleston, Charlotte, Florida A&M University College of Law, Florida Coastal School of Law, Golden Gate, Inter American University of Puerto Rico School of Law, John Marshall (Atlanta), Mississippi College School of Law, North Carolina Central, Pontifical Catholic University of Puerto Rico School of Law, University of South Dakota School of Law, Thomas Jefferson, Texas Southern University Thurgood Marshall School of Law, University of the District of Columbia David A. Clarke School of Law, University of Louisville, Valparaiso University School of Law, and Western Michigan University Thomas M. Cooley Law School.<sup>101</sup> The bulk of these schools faced violations for bar passage, job placement, or loose admissions.<sup>102</sup>

Nor did the ABA let these schools' skate. Along with the market-based closures listed above, the ABA added a few regulatory pelts to the wall. The following law schools closed or are currently on teach-out programs: Charlotte, Florida Coastal, Arizona Summit, La Verne and Thomas Jefferson (both still operating as non-ABA, California-only law schools).<sup>103</sup> Here's the full "law school graveyard" and how the schools closed:

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<sup>101</sup> See *Sanctions, Remedial Action, and Significant Noncompliance Under Rule 11(a)(4)*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/public-notice/sanctions-remedial-action-noncompliance](https://www.americanbar.org/groups/legal_education/public-notice/sanctions-remedial-action-noncompliance) (last visited Mar. 5, 2024); *Accreditation Archive: Accreditation Notices*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/public-notice/Archive](https://www.americanbar.org/groups/legal_education/public-notice/Archive) (last visited Mar. 5, 2024).

<sup>102</sup> See *Sanctions, Remedial Action, and Significant Noncompliance under Rule 11(a)(4)*, *supra* note 101; *Accreditation Archive: Accreditation Notices*, *supra* note 101.

<sup>103</sup> *Id.*

- Whittier (Market)<sup>104</sup>
- Valparaiso (Market)<sup>105</sup>
- Indiana Tech (Market)<sup>106</sup>
- Concordia (Market)<sup>107</sup>
- Charlotte (Regulatory DOE)<sup>108</sup>
- Florida Coastal (Regulatory ABA)<sup>109</sup>
- Arizona Summit (Regulatory ABA)<sup>110</sup>
- La Verne (Regulatory ABA) (still CA accredited)<sup>111</sup>

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<sup>104</sup> Elizabeth Olson, *Whittier Law School Says It Will Shut Down*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/business/dealbook/whittier-law-school-to-close.html>.

<sup>105</sup> Emma Whitford, *Another Law School Will Close*, INSIDE HIGHER ED (Oct. 30, 2018), <https://www.insidehighered.com/news/2018/10/31/valparaiso-law-school-will-close-following-unsuccessful-attempt-transfer-middle>.

<sup>106</sup> See *Indiana Tech Law School to Close in June 2017*, IND. TECH (Oct. 31, 2016), <https://www.indianatech.edu/news/indiana-tech-law-school-to-close-in-june-2017>.

<sup>107</sup> Lindsay McKenzie, *Concordia University School of Law Closing*, INSIDE HIGHER ED (June 25, 2020), <https://www.insidehighered.com/quicktakes/2020/06/26/concordia-university-school-law-closing>.

<sup>108</sup> Letter from Susan D. Crim, Dir., Admin. Actions and Appeals Serv. Grp., U.S. Dep't of Educ., to Chidi Ogene, President, Charlotte Sch. of L. (Dec. 19, 2016), <https://studentaid.gov/sites/default/files/csl-recert-denial.pdf>; Memorandum from Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Am. Bar Ass'n, to Bar Admission Auths. (Feb. 14, 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/PublicNoticeAnnouncements/2018\\_feb\\_council\\_notice\\_re\\_charlotte.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/PublicNoticeAnnouncements/2018_feb_council_notice_re_charlotte.pdf).

<sup>109</sup> Stephanie Francis Ward, *As Florida Coastal Tries to Get Student Loan Funds Reinstated, ABA Seeks Teach-Out Plan*, ABA J. (Apr. 6, 2021, 12:51 PM), <https://www.abajournal.com/news/article/as-florida-coastal-tries-to-get-student-loan-funds-reinstated-aba-seeks-teach-out-plan>; Stephanie Francis Ward, *Teach-Out Plan for Florida Coastal Approved; Classes Will End After Summer Term*, ABA J. (June 9, 2021, 11:40 AM), <https://www.abajournal.com/news/article/teach-out-plan-for-florida-coastal-approved-classes-end-after-summer-term>.

<sup>110</sup> Stephanie Francis Ward, *No Fall Classes at Arizona Summit, School Says, and a Teach-Out Plan Is Being Negotiated*, ABA J. (Aug. 14, 2018, 2:20 PM), [https://www.abajournal.com/news/article/no\\_fall\\_classes\\_at\\_arizona\\_summit\\_school\\_says\\_and\\_a\\_teach-out\\_plan\\_is\\_being](https://www.abajournal.com/news/article/no_fall_classes_at_arizona_summit_school_says_and_a_teach-out_plan_is_being).

<sup>111</sup> Karen Sloan, *LA-Area Law School to Remain Open, but Parts Ways with the ABA*, LAW.COM: THE RECORDER (Nov. 21, 2019, 1:02 PM), <https://www.law.com/therecorder/2019/11/21/la-area-law-school-to-remain-open-but-parts-ways-with-the-aba>; *Law Schools*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools> (last visited Mar. 5, 2024).



- Thomas Jefferson (Regulatory ABA) (still CA accredited)<sup>112</sup>
- Savannah Law School (Market) (a branch of John Marshall (Atlanta))<sup>113</sup>
- Cooley Law School's Ann Arbor and Auburn Hills locations (Market)<sup>114</sup>
- Merger of William Mitchell and Hamline (Market)<sup>115</sup>
- Merger of the two Rutgers Law Schools (Market)<sup>116</sup>

#### IV. THE CONTINUING SQUEEZE

With the change in the regulatory atmosphere, the ABA called the bluff of the lowest performing law schools, and the days of open admissions were essentially over.<sup>117</sup> But the financial woes endured and possibly worsened, and not just for lower-ranked law schools. Why? Because law schools in every segment of the market reacted to the collapsing application pool in the mid-2010s by shrinking their classes, either in a salutary effort to maintain student quality or in a desperate attempt not to lose ground in the *U.S. News* rankings, or both. Between 2011 and 2016, roughly four in five ABA-accredited law schools shrank. Figure 11 shows the percentage of the change in 1L classes from 2011 to 2016, with the largest percentage

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<sup>112</sup> Rick Seltzer, *ABA Yanks Thomas Jefferson Accreditation*, INSIDE HIGHER ED (June 11, 2019), <https://www.insidehighered.com/quicktakes/2019/06/12/aba-yanks-thomas-jefferson-accreditation>; see also *Law Schools*, *supra* note 111.

<sup>113</sup> Debra Cassens Weiss, *Savannah Law School Will Close, Students and Faculty Are Told*, ABA J. (Mar. 22, 2018, 12:13 PM), [https://www.abajournal.com/news/article/savannah\\_law\\_school\\_will\\_close\\_students\\_and\\_faculty\\_are\\_told](https://www.abajournal.com/news/article/savannah_law_school_will_close_students_and_faculty_are_told).

<sup>114</sup> Jennifer Smith, *Cooley Law Plans to Shutter Ann Arbor Campus*, WALL ST. J. (Oct. 8, 2014, 11:43 AM), <https://www.wsj.com/articles/BL-LB-49467>; Karen Sloan, *Once the Nation's Largest Law School, Cooley Set to Close a Campus and Slash Tuition*, LAW.COM (Aug. 30, 2019, 1:08 PM), <https://www.law.com/2019/08/30/once-the-nations-largest-law-school-cooley-set-to-close-a-campus-and-slash-tuition>.

<sup>115</sup> Memorandum from Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Am. Bar Ass'n, to Deans of Am. Bar Ass'n-Approved L. Schs. (Dec. 8, 2015), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/December2015CouncilMeeting/2015\\_december\\_memo\\_re\\_mitchell\\_hamline\\_merger.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/December2015CouncilMeeting/2015_december_memo_re_mitchell_hamline_merger.pdf).

<sup>116</sup> *American Bar Association Approves Merger Creating Rutgers Law School*, RUTGERS: RUTGERS TODAY (July 31, 2015), <https://www.rutgers.edu/news/american-bar-association-approves-merger-creating-rutgers-law-school>.

<sup>117</sup> See *supra* Figure 6.

decline on the left (Appalachian) and the largest percentage increases (Irvine and La Verne) on the far right.<sup>118</sup>

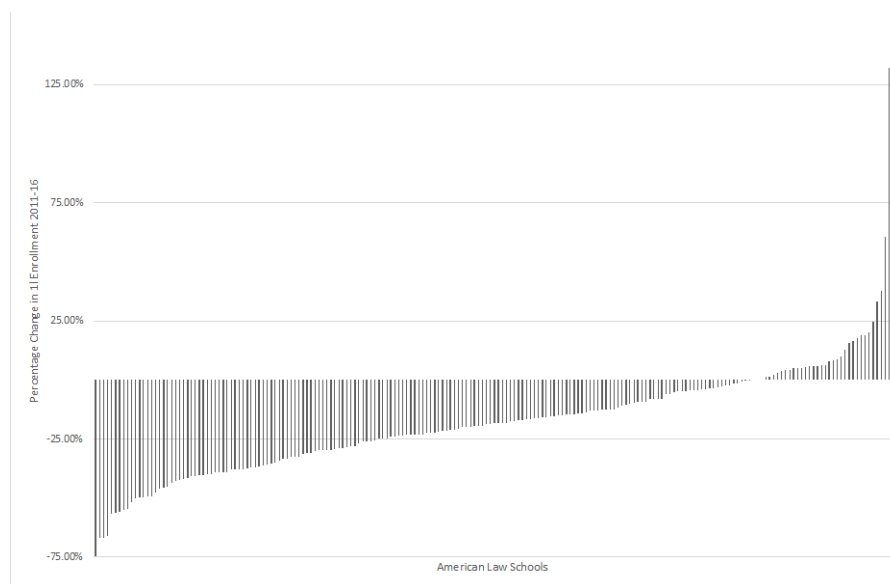


Figure 11. Percentage Change in 1L Enrollment, 2011–16<sup>119</sup>

The median law school shrunk by 19% over this period. This meant that there were fewer paying students at almost every law school, spreading the financial stress across law schools of all stripes.

Worse yet for bottom lines (but *way* better for some law students), law schools have been increasingly involved in a discounting/merit scholarship war, again likely in a desperate attempt to improve or stay stationary in the *U.S. News* rankings.

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<sup>118</sup> And yes, LaVerne *grew* during this period and then was later discredited for bar passage. Who could have foreseen it?

<sup>119</sup> Raw data on file with the author; BARTON, *supra* note 1, at 80.

Figure 12 shows the percentage of students receiving a scholarship from 2011 to 2019:

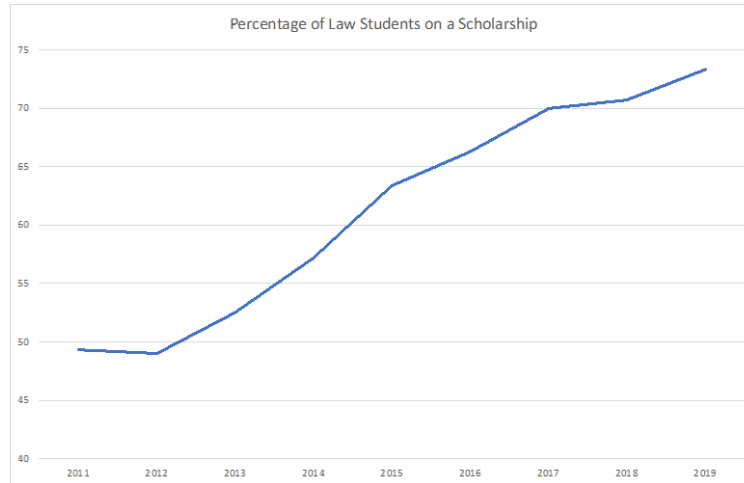


Figure 12. Percentage of Law Students on a Scholarship<sup>120</sup>

In 2021, the *National Jurist* reported that twenty-six law schools had tuition discount rates over 50%, meaning that these law schools discounted their tuition by between 50% and 71%.<sup>121</sup> Net tuition at private law schools actually fell 8.5% between 2015 and 2020, accounting for inflation.<sup>122</sup> In 2022, Paul Caron pointed out some stunning numbers on law school scholarships in the top fifty law schools.<sup>123</sup> Eighty-three percent of the JD students at the University of Arizona received a scholarship of at least half their tuition.<sup>124</sup> Eighteen different schools provided at least a half-tuition scholarship to more than half of their enrollment.<sup>125</sup> A third of the students at Ohio

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<sup>120</sup> This graph comes from Mike Spivey, *An In-Depth Analysis of the 2019 Law School Admissions & Entering Class Data*, SPIVEY CONSULTING (Dec. 15, 2019), <https://www.spiveyconsulting.com/blog-post/aba-2019-data>.

<sup>121</sup> Mike Stetz, *The Scholarship Game*, NAT'L JURIST, Fall 2021, at 15, 16.

<sup>122</sup> *Id.* at 15.

<sup>123</sup> Paul Caron, *Top 50 Law Schools: Percentage of Students Receiving at Least 50% Tuition Scholarships*, TAXPROF BLOG (Sept. 7, 2022), [https://taxprof.typepad.com/taxprof\\_blog/2022/09/top-50-law-schools-students-receiving-at-least-50-percent-tuition-scholarships.html](https://taxprof.typepad.com/taxprof_blog/2022/09/top-50-law-schools-students-receiving-at-least-50-percent-tuition-scholarships.html).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

State are on a full-tuition scholarship, and nearly a quarter of BYU students are on a full-tuition scholarship with a stipend.<sup>126</sup>

So fewer students are attending law schools, and they are paying less in tuition once they are there. This means there's a *lot* of lost revenue. Bernard Burk, Jerome Organ, and Emma Raisel crunched the numbers and concluded that American law schools had lost \$1.5 billion in revenue between 2010 and 2017.<sup>127</sup>

Again, let's not cry *too* hard for America's law schools. I add Figure 13 here, which includes the more recent law school student debt figures:

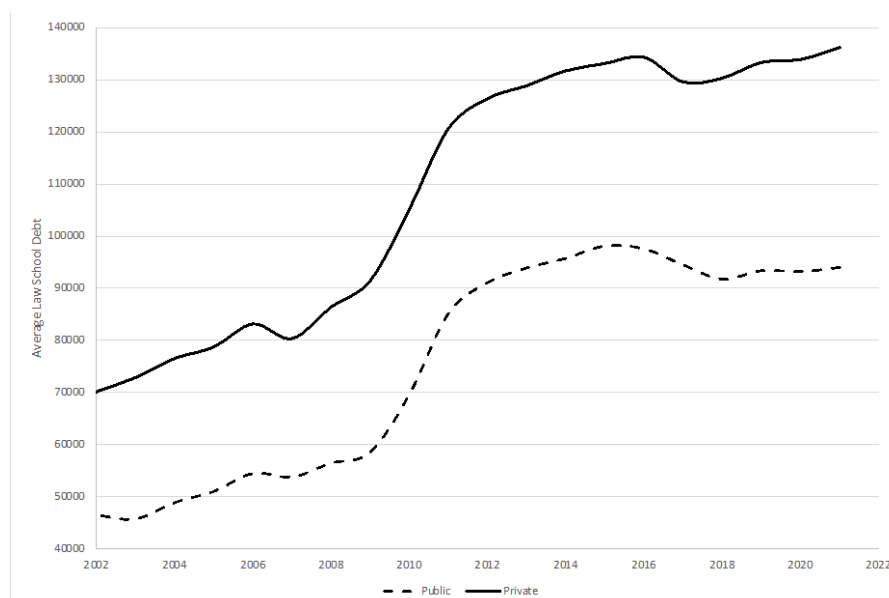


Figure 13. Law School Student Debt<sup>128</sup>

The relative flatlining of student debt from 2016 to 2021 (and this chart is not adjusted for inflation, so debt levels are actually falling in spots during this period) is another sign of worsening finances for law schools. But for students it is *excellent* and welcome news and is a sure sign of the relative health of America's JD programs.

<sup>126</sup> *Id.*

<sup>127</sup> Bernard A. Burk, Jerome M. Organ & Emma B. Raisel, *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. 583, 586–87 (2018).

<sup>128</sup> Raw data on file with the author.

Students are borrowing less and getting better results in bar passage and job placement.

## V. THE NON-JD BOOM

Hopefully by now you are convinced that law schools of all stripes are facing tough economic times and pressure to boost revenues. One answer has been the growth in what the ABA calls “non-JD programs.”<sup>129</sup> This definition is both clear and murky. It is clear what is not included, and that’s the JD program at any law school. The “non-JD” programs, by contrast, are pretty diverse. This category includes the traditional, oldest version of the non-JD degree, the LLM degree that has been aimed at American or foreign law graduates/lawyers for decades.<sup>130</sup> It also includes the newer “Master of Legal Studies” (MLS) degree, some law school “certificate” programs, and undergraduate programs in law.<sup>131</sup> This Article is about non-JD programs as a whole, but in spots, it will focus more on the newest and fastest-growing programs—the MLSs—and especially the boom in online MLSs.<sup>132</sup> This is because these are the trendiest programs and also the most worrisome in terms of a value proposition for the students.

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<sup>129</sup> *Alternative Non-JD Programming for Law Schools*, HANOVER RSCH. (June 16, 2013), <https://www.hanoverresearch.com/insights-blog/alternative-non-jd-programming-for-law-schools>.

<sup>130</sup> *Post-J.D. & Non-J.D.*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d](https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d) (last visited Mar. 5, 2024); Matthew S. Parker, *The Origin of LL.M. Programs: A Case Study of the University of Pennsylvania Law School*, 39 U. PA. J. INT’L L. 825, 855–68 (2018).

<sup>131</sup> *Post-J.D. & Non-J.D.*, *supra* note 130.

<sup>132</sup> *First-Year-Enrollment/Total Enrollment/Degrees Awarded 1963–2013*, AM. BAR ASS’N (2014), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.xls](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.xls) (tracking non-JD enrollment data from fewer than 3,000 in 1963 to 11,000 in 2012); *ABA Law School Data: JD and Non-JD Enrollment Data*, AM. BAR ASS’N (2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2023/2022-jd-non-jd-enrollment.xlsx](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2023/2022-jd-non-jd-enrollment.xlsx) (tracking non-JD enrollment data from 11,000 in 2013 to 24,000 in 2022).

The data on non-JD programs is actually relatively limited, but we do know that there's been meteoric growth over the last fifteen years. Figure 14 shows the ABA data on non-JD enrollment from 1963–2021:

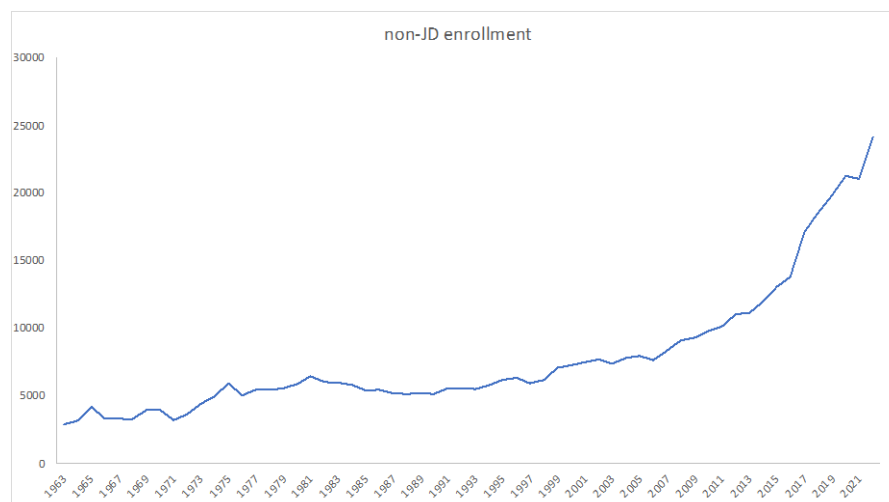


Figure 14. Non-JD Enrollment<sup>133</sup>

You can see three different eras of growth in this data. From 1963 to 1983, non-JD enrollment roughly doubled from 2,886 to 5,994. From 1983 to 2003, growth was slower, at 25%, with a change from 5,994 to 7,412, but please do note the arbitrariness of these dates and focus on the overall trends. For example, if we just chose the decade from 1983 to 1993, the number of non-JD students actually shrank from 5,994 to 5,537. In fact, this period was rough enough for non-JD programs that, in 2000, the St. Louis University School of Law Dean Jeffrey Lewis predicted that “advanced” legal education (meaning LL.M.s, then the dominant type of non-JD program) would “soon fall victim to a confluence of academic, professional, and related economic forces.”<sup>134</sup>

Despite this prediction, from 2003 to 2022 growth accelerated and we’re still apparently in the very steep part of the growth curve. We grew from 7,412 (2013) to

<sup>133</sup> Raw data on file with the author.

<sup>134</sup> Jeffrey E. Lewis, “Advanced” Legal Education in the Twenty-First Century: A Prediction of Change, 31 U. TOL. L. REV. 655, 655 (2000). Lest you think I’m cherry-picking an outlier prediction, then-Dean of William Mitchell Law School Harry Haynsworth agreed with this prognosis in 2002. See Harry J. Haynsworth, *Post-Graduate Legal Education in the United States*, 43 S. TEX. L. REV. 403, 408 (2002).

24,158 (2021),<sup>135</sup> a 225% increase over two decades. It's helpful here to refer back to Figure 7, which showed a dramatic collapse in JD enrollment after 2011.<sup>136</sup> Look at Figure 14, and you can see that the exponential growth in these programs really begins in 2011. Ha ha, that is not a coincidence, the boom in non-JD programs is a direct response to the collapse in JD programs.

The comparison between JD and non-JD enrollment is more clearly seen by calculating the percentage of non-JD enrollment of total law school enrollment. Figure 15 shows a steep growth since 2011:

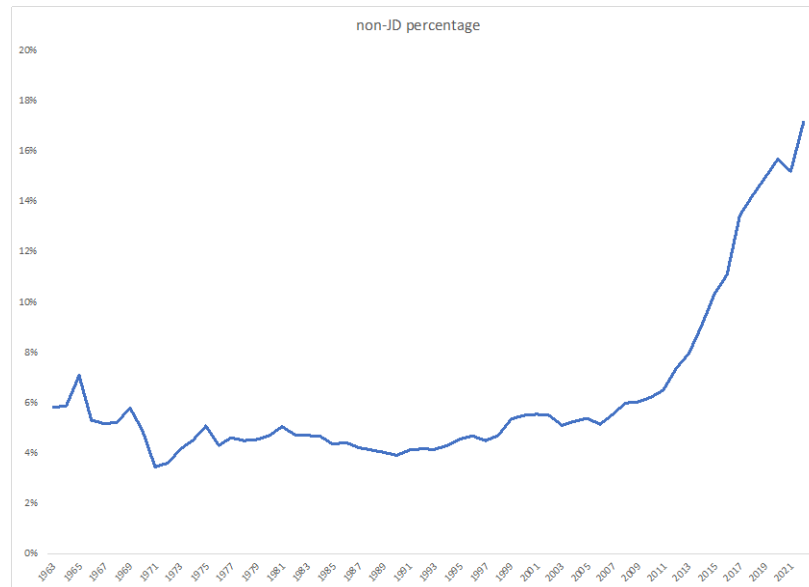


Figure 15. Percentage of Non-JD Enrollment in Law School<sup>137</sup>

I love this graph. In 1965 non-JD programs were 7% of total law school enrollment, a peak for years. The next time that non-JD enrollment hit 7% was in 2011. If you look at the trend in Figure 15, you can see that it's mostly flat from 1963 to 2012. The average percentage over that period is 5% and it mostly bounces around between 4% and 6%, with a very slight increase in the new millennium. The real boom comes from 2013 forward, as the percentages go from 8% to 17% in less than a decade.

Another way to consider the growth in non-JD programs is to look at the law schools that have the most non-JD students. Table 1 displays the top forty-seven

<sup>135</sup> See *supra* Figure 14.

<sup>136</sup> See *supra* Figure 7.

<sup>137</sup> Raw data on file with the author.

schools for non-JD enrollment in fall 2022. The eight schools where non-JD enrollment constitutes more than half of the total enrollment are in bold and italics; another thirty-one schools are in non-bolded italics where the number of non-JD students is larger than the incoming 1L class. I highlight these benchmarks because they show how prevalent these programs have become at a lot of schools. The entering 1L class has traditionally been the measure of the size and prospects of a law school, so having *more* non-JD students than 1Ls says a lot. There are eight American law schools that are not really JD schools anymore: more than half of their students are non-JD students. Then there are another thirty-one that certainly rely *a lot* on non-JD students.

Law School	Non-JD Enrollment	JD Enrollment	1L Enrollment
<b><i>ARIZONA, UNIVERSITY OF</i></b>	2175	369	135
<i>GEORGETOWN UNIVERSITY</i>	989	2053	593
<b><i>TEXAS A&amp;M UNIVERSITY</i></b>	931	473	127
<b><i>SOUTHERN CALIFORNIA, UNIVERSITY OF</i></b>	890	631	223
<i>NEW YORK UNIVERSITY</i>	778	1358	375
<i>ARIZONA STATE U. COLLEGE OF LAW</i>	766	853	289
<b><i>FLORIDA STATE UNIVERSITY</i></b>	726	498	114
<b><i>OKLAHOMA, UNIVERSITY OF</i></b>	709	541	173
<i>WASHINGTON UNIVERSITY</i>	693	780	260
<b><i>PEPPERDINE UNIVERSITY</i></b>	671	551	196
<i>NORTHWESTERN UNIVERSITY</i>	591	763	238
<b><i>LIBERTY UNIVERSITY</i></b>	584	332	125
<b><i>REGENT UNIVERSITY LAW SCHOOL</i></b>	519	325	115
<i>COLUMBIA UNIVERSITY</i>	426	1357	409
<i>BOSTON UNIVERSITY</i>	392	759	216
<i>CORNELL UNIVERSITY</i>	379	585	213
<i>UNIVERSITY AT BUFFALO-SUNY</i>	366	462	141
<i>CALIFORNIA-BERKELEY, UNIVERSITY OF</i>	330	1019	278
<i>CALIFORNIA-LOS ANGELES, UNIVERSITY OF</i>	329	1006	308
<i>SETON HALL UNIVERSITY</i>	327	822	222
<i>TEMPLE UNIVERSITY</i>	313	659	201
<i>LOYOLA UNIVERSITY-CHICAGO</i>	294	905	274
<i>AMERICAN UNIVERSITY</i>	290	1167	403
<i>PENNSYLVANIA, UNIVERSITY OF</i>	280	808	246
<i>GEORGE WASHINGTON UNIVERSITY</i>	276	1692	514
<i>HARVARD UNIVERSITY</i>	271	1758	563
<i>VILLANOVA UNIVERSITY</i>	271	562	181
<i>TULANE UNIVERSITY</i>	269	652	215
<i>CASE WESTERN RESERVE UNIVERSITY</i>	264	436	156
<i>DREXEL UNIVERSITY</i>	244	418	136
<i>FORDHAM UNIVERSITY</i>	230	1339	423
<i>GEORGE MASON UNIVERSITY</i>	230	607	159



Law School	Non-JD Enrollment	JD Enrollment	1L Enrollment
<i>PENNSYLVANIA STATE-PENN STATE LAW</i>	230	402	146
<i>WAKE FOREST UNIVERSITY</i>	217	402	158
<i>MIAMI, UNIVERSITY OF</i>	213	1176	361
<i>WASHINGTON, UNIVERSITY OF</i>	208	522	181
<i>SAN FRANCISCO, UNIVERSITY OF</i>	205	353	135
<i>ILLINOIS, UNIVERSITY OF</i>	194	524	163
<i>NORTHEASTERN U. SCHOOL OF LAW</i>	172	660	248
<i>GEORGIA, UNIVERSITY OF</i>	166	537	171
<i>CHICAGO - KENT COLLEGE OF LAW-IIT</i>	161	716	236
<i>PITTSBURGH, UNIVERSITY OF</i>	148	381	121
<i>DUKE UNIVERSITY</i>	143	755	233
<i>DAYTON, UNIVERSITY OF</i>	142	383	136
<i>NOVA SOUTHEASTERN UNIVERSITY</i>	140	620	234
<i>DEPAUL UNIVERSITY</i>	131	533	195
<i>MONTANA, UNIVERSITY OF</i>	123	251	90

Table 1. Law School Enrollment Comparison<sup>138</sup>

This is a very interesting list of law schools. First, it's worth noting that thirty-nine American law schools have more non-JD students than 1Ls. Thirty-nine law schools are roughly 20% of the total number of ABA-accredited law schools. Second, the list includes law schools of all types and sizes, from flagship public law schools to small religious private law schools to T-14 law schools to everything else in between. The non-JD phenomenon (like the struggles of law schools) is not isolated in one part of the market; lots of different law schools are giving it a try. Last, roughly 12% of the entire nation's non-JD students attend a public law school in the State of Arizona! This shows that while the rise of non-JD programs is happening in all sorts of law schools, it is still very unevenly distributed. Fifty-two law schools (more than a quarter of ABA-accredited law schools) have *no* non-JD enrollment, so you have 20% that are highly invested in this path and a bottom quarter that haven't even dipped their toes in the water.

The ABA has been quite consistent about collecting the raw numbers of these students, but other data has been hard to come by. Nevertheless, as discussed below, there are two additional sets of data on these programs, which the ABA collected for a few years before stopping. The ABA's data collection from law schools and then their public dissemination of the information is truly exceptional and very helpful to

<sup>138</sup> ABA Law School Data: JD and Non-JD Enrollment Data, *supra* note 132.

researchers like me, but more importantly for potential law students. The ABA collects a ton of useful information from every school under Standard 509 and then just publishes it all.<sup>139</sup> The website has a *ton* of information from 2011 to 2022. No one can complain that they lack the data to decide whether it is a good idea to attend any ABA-accredited law school. Nevertheless, when the ABA starts collecting information and then stops, I always get paranoid and assume they stopped collecting the information because they didn't like what they were learning. That is certainly the case here.

From 2013 to 2019, the ABA collected the numbers of non-JD students who were online versus in person. Figure 16 shows the growth of the percentage of these students who were online over that seven-year period:

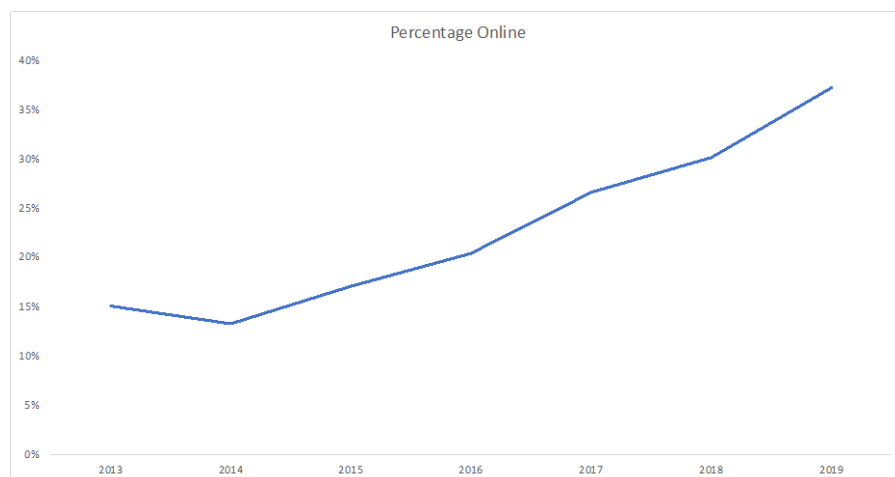


Figure 16. Percentage of Non-JD Students Online<sup>140</sup>

The percentage fell to 13% in 2014 and was 37% in 2019, the last pre-pandemic year. As an absolute number of students, 1,677 students were online in 2013 and 7,378 in 2019, a 340% increase in just seven years.<sup>141</sup> The ABA has stopped gathering this data, but I would bet any amount of money that the absolute number and the percentages of online non-JD students have risen further, and probably a lot further,

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<sup>139</sup> See *Section of Legal Education—ABA Required Disclosures*, AM. BAR ASS'N: LEGAL EDUC. & ADMISSIONS TO THE BAR, <https://www.abarequireddisclosures.org/disclosure509.aspx> (last visited Mar. 8, 2024).

<sup>140</sup> Raw data on file with the author.

<sup>141</sup> Supporting data on file with the author.

from 2020 to today. Faculty and students are just much more comfortable with online learning after the pandemic,<sup>142</sup> and online programs are an obvious and easy moneymaker in comparison with in-person degrees.<sup>143</sup>

The other data we have is only from 2013 to 2016 and shows the growth in post-baccalaureate programs in comparison to post-JD programs. For many years, the LLM was the dominant and traditional non-JD program.<sup>144</sup> If you look back at the data in Figure 14, you can assume that the great bulk of the non-JD students from 1963 into this millennium were LLM students, either foreign or domestic. The 2013–16 ABA data, however, shows a rapid growth in post-bac programs and a much slower growth in LLM post-JD programs. In 2013 there were 9,401 post-JD students.<sup>145</sup> In 2016, post-JD numbers had risen to just 9,939, an increase of only 6%.<sup>146</sup> Over the same period, post-baccalaureate enrollment shot up from 1,738 to 3,162, an 82% increase.<sup>147</sup>

Why might the ABA have stopped collecting this data? Because it does not regulate these post-baccalaureate programs and does not want to have any data that suggests that they might be growing at an unhealthy pace or direction.

## VI. WAIT, WHO REGULATES THESE PROGRAMS?

You will recall, hopefully, that the ABA has been the primary DOE approved regulators of law schools since 1952.<sup>148</sup> That might lead one to believe that they regulate any program offered at an ABA-accredited law school. Nope! The ABA

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<sup>142</sup> See, e.g., <https://www.insidehighered.com/news/2022/07/13/law-school-gaps-between-online-and-person-learning-narrow#>. But see GALLUP, LAW SCHOOL IN A PANDEMIC: STUDENT PERSPECTIVES ON DISTANCE LEARNING AND LESSONS FOR THE FUTURE 2 (2021) (noting that law students who took online classes during the pandemic were markedly less pleased with their courses, with 43% calling it “‘excellent’ or ‘good,’ compared with 88% when asked about their pre-pandemic education”).

<sup>143</sup> James DeVaney & John Katzman, *A Better Way to Address Revenue-Sharing and Online Marketing*, INSIDE HIGHER ED (Apr. 4, 2023), <https://www.insidehighered.com/views/2023/04/04/better-way-address-revenue-sharing-and-online-marketing-letter> (“Online learning . . . has given colleges and universities unlimited capacity, even as college enrollment has dropped by 10 percent [from 2012 to 2023].”).

<sup>144</sup> See *supra* note 130.

<sup>145</sup> Supporting data on file with the author.

<sup>146</sup> See *supra* Figure 14.

<sup>147</sup> *Id.*

<sup>148</sup> ABA STANDARDS, *supra* note 91.

standards make absolutely crystal clear the *very* limited role the ABA plays in these programs.

As the primary document describing the regulation of American law schools, and as the work product of a group of very smart and hard-working lawyers, the *ABA Standards and Rules of Procedure for Approval of Law Schools* are lengthy and very detailed. Standard 105 (the standards begin with 101) describes what the ABA calls the “acquiescence” process for any “substantive change” in a law school’s “program of legal education or organizational structure.”<sup>149</sup> Subheading 105(a) lists eighteen different categories of changes that are considered “substantive,” including Standard 105(a)(12)(iii): “establishing a new or different program leading to a degree other than a J.D. degree.”<sup>150</sup>

Standard 105(b) briskly describes how the ABA is to make its decision: “The Council shall grant acquiescence only if the law school demonstrates that the change will not detract from the law school’s ability to remain in compliance with the Standards.”<sup>151</sup> The ABA builds upon this general statement in Standard 313 and its interpretation. Standard 313 in its entirety reads:

**Standard 313. DEGREE PROGRAMS IN ADDITION TO J.D.**

A law school may not offer a degree program other than its J.D. degree program unless:

- (a) the law school is fully approved;
- (b) the Council has granted acquiescence in the program; and
- (c) the degree program will not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education.

***Interpretation 313-1***

*Acquiescence in a degree program other than the J.D. degree is not Council approval of the program itself and, therefore, a school may not announce that the program is approved by the Council. This acquiescence solely denotes the Council’s assent to the addition of one or more non-J.D. degree programs meeting the requirements of Standard 313(c).*<sup>152</sup>

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<sup>149</sup> *Id.* at Standard 105(a).

<sup>150</sup> *Id.* at Standard 105(a)(12)(iii).

<sup>151</sup> *Id.* at Standard 105(b).

<sup>152</sup> *Id.* at Standard 313, Interpretation 313-1.

As you have surely noted, Standard 313 does not say much more than Standard 105 does, but its rewording and reiteration makes clear that the *only* ABA requirement for a fully ABA-accredited law school to launch a non-JD program is that the school demonstrate that the new program will not interfere with the JD program.

Standard 506 covers the enrollment of non-JD students in JD classes and again, you guessed it, allowing non-JD students into JD classes is allowed if “such enrollment does not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education.”<sup>153</sup> That’s it and that’s all. That does *not* mean, however, that these programs are ABA-accredited. No law school is allowed to try to spin ABA “acquiescence” as any kind of approval.<sup>154</sup> To the contrary, the ABA will only look at these programs as a possible hindrance to the JD program.<sup>155</sup> If it doesn’t harm the JD program, it’s green light go.

So, who actually accredits these programs? Remember that in order to qualify for federal loans (the lifeblood of any program besides short certificate programs), the degree must be accredited by a DOE-approved accreditor.<sup>156</sup> As far as I am aware, neither the ABA nor any other body collects this information in aggregate, so the answer to who regulates any of these programs is: it depends. Certificate programs may not be accredited at all if the students are not seeking federal loans or subsidies (and most certificate programs are short and relatively inexpensive<sup>157</sup>). The accreditation of LLM, MLS, or undergraduate programs is relatively straightforward for law schools that are part of a larger university; these non-JD programs can be accredited by whomever accredits the other non-professional undergraduate or graduate programs. For example, the University of Tennessee-Knoxville’s MLS program is accredited by the Southern Association of Colleges and Schools

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<sup>153</sup> *Id.* at Standard 506.

<sup>154</sup> *Id.* at Interpretation 313-1 (“Acquiescence in a degree program other than the J.D. degree is not Council approval of the program itself and, therefore, a school may not announce that the program is approved by the Council.”).

<sup>155</sup> *See id.* at Standard 313(c).

<sup>156</sup> HEGJI, *supra* note 84, at 6.

<sup>157</sup> *What Are Certificate Programs? A 2024 Guide*, COURSEERA, <https://www.coursera.org/articles/certificate-programs> (Jan. 17, 2024) (noting that certificate programs “tend to be less expensive compared to a degree, costing anywhere from \$50 per month (for several months) to \$6,000”).

Commission on Colleges (snappily shortened to SACSCOC accreditation. Rolls off the tongue, no?).<sup>158</sup>

It's a little trickier for freestanding law schools, but they can just get a non-ABA (but otherwise DOE-approved accreditor) to accredit the non-JD programs. For example, what many readers will remember as Vermont Law School is now called Vermont Law & Graduate School.<sup>159</sup> Its "accreditation" page lists two different accreditors, presumably one for the "law school" (the ABA) and one for the "graduate school" (the New England Association of Schools and Colleges, Inc.).<sup>160</sup> Other universities are much more opaque in terms of who accredits their non-JD programs, but are quite clear that you can apply for federal loans or grants and so these programs must be accredited by someone.<sup>161</sup>

Or maybe not! The Department of Education recently announced a settlement with five freestanding law schools—Albany Law School, Atlanta's John Marshall Law School, Brooklyn Law School, New England Law|Boston, and New York Law School—for giving students in unaccredited non-JD programs access to \$2.9 million in federal loans.<sup>162</sup>

It should be clear by now that the regulation of JD programs is quite robust, but the regulation of non-JD programs is at best patchwork and, at worst, very limited. There is also evidence that as a general non-law school-specific matter, this patchwork of regulation for master's programs has some pretty significant gaps. Kevin Carey, director of the education policy program at the think tank New

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<sup>158</sup> Letter from Belle S. Wheelan, President, S. Ass'n of Colls. & Schs. Comm'n on Colls., to Heather G. Hartman, Assistant Vice Provost & Accreditation Liaison, Univ. of Tenn.-Knoxville (Feb. 15, 2019), [https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1085&context=utk\\_sacscoc](https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1085&context=utk_sacscoc).

<sup>159</sup> *History & Mission*, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/community/about-vls/history-mission> (last visited Mar. 11, 2024).

<sup>160</sup> *Accreditations & Memberships*, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/community/about-vls/accreditations-memberships> (last visited Mar. 11, 2024).

<sup>161</sup> Vanderbilt is a great example. The MLS "program overview" page says nothing about accreditation. *See Online Master of Legal Studies: Legal Knowledge for Professionals in Any Field*, VAND. L. SCH., <https://law.vanderbilt.edu/master-legal-studies/online-mls-b> (last visited Mar. 11, 2024). There is a financial aid and tuition page, however, that makes clear federal loans and grants are available. *See Online Master of Legal Studies: Tuition & Financial Aid*, VAND. L. SCH., <https://law.vanderbilt.edu/master-legal-studies/admissions/tuition-financial-aid> (last visited Mar. 11, 2024).

<sup>162</sup> Paul Caron, *U.S. Department of Education Takes Action Against Five Law Schools for Disbursing \$2.9 Million in Federal Financial Aid to Students in Unaccredited LL.M. Programs*, TAXPROF BLOG (Aug. 26, 2023), [https://taxprof.typepad.com/taxprof\\_blog/2023/08/takes-action-against-five-schools-for-disbursing-federal-student-aid-to-students-enrolled-in-unaccre.html](https://taxprof.typepad.com/taxprof_blog/2023/08/takes-action-against-five-schools-for-disbursing-federal-student-aid-to-students-enrolled-in-unaccre.html).

America, argues (quite persuasively) that “[u]niversities see master’s degree programs as largely unregulated cash cows that help shore up their bottom line.”<sup>163</sup> The rise of the online master’s has “supercharged the problem, by allowing universities to parlay their brands nationally and internationally in order to enroll students at an industrial scale.”<sup>164</sup> Carey makes special note of the loose regulatory environment:

We need a stronger regulatory hand in the master’s degree market. . . . We need more transparency around how selective [these programs are], how effective are they in helping people get jobs in their field and pay their loans back, and we need to regulate programs around their effectiveness.

. . . I think it’s completely reasonable to say that if a master’s degree program consistently induces students to borrow far more money than they can ever afford to pay back, the federal government should not be in the business of lending those students money.<sup>165</sup>

A recent study showed that as many as 40% of master’s programs in the United States do not offer a positive return on investment counting tuition and time.<sup>166</sup> James Murphy, senior policy analyst at the advocacy group Education Reform Now, describes many master’s programs as scams, where if “you take in the cost of attending and the time spent not working, what you get out of that master’s degree doesn’t even pay for itself.”<sup>167</sup> Master’s degrees have exploded in recent years:

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<sup>163</sup> Kevin Carey, *Is the Master’s Degree an Expensive Anachronism?*, WASH. MONTHLY, Sept.–Oct. 2014, at 48, 50.

<sup>164</sup> Jordan Weissmann, *Master’s Degrees Are the Second Biggest Scam in Higher Education*, SLATE: MONEYBOX (July 16, 2021, 12:57 PM), <https://slate.com/business/2021/07/masters-degrees-debt-loans-worth-it.html>.

<sup>165</sup> *Id.*

<sup>166</sup> Preston Cooper, *Is Grad School Worth It? A Comprehensive Return on Investment Analysis*, MEDIUM: FOUND. FOR RSCH. ON EQUAL OPPORTUNITY (Feb. 24, 2022), <https://freopp.org/is-graduate-school-worth-it-a-comprehensive-return-on-investment-analysis-a84644f29f9>.

<sup>167</sup> Megan Cerullo, *Many Graduate Programs are “Scams,” According to Higher Education Policy Analyst*, CBS NEWS (May 23, 2022, 6:01 PM), <https://www.cbsnews.com/news/graduate-programs-masters-degree-scams-negative-return-on-investment>.

“[m]ore than 16 million people in the US—about 8% of the population—now have a master’s, a 43% increase since 2002.”<sup>168</sup>

This trend has accelerated with the creation of online master’s programs, which pose special challenges and dangers. Part of the issue with online master’s programs is that many of them are run by for-profit companies called “online program managers” (“OPMs”), which design and run the online master’s programs but also collect much or most of the revenue.<sup>169</sup> This works out great for the underlying university or college, because they gain a new revenue stream while doing minimal work. It also works great for the OPMs, because they can attach themselves to the prestige and name of the university while operating somewhat or maybe wholly separately. OPMs can set up one online master’s program after another with very limited oversight or quality control; the main expense of an online program is the startup tech costs, and the OPMs have already done that work.<sup>170</sup> It works out great for the tenured faculty because they often do nothing in these new programs.<sup>171</sup> Moreover, the profits are locked in because the universities get paid upfront because of how federal loans work. The only parties who may get hurt are the students who borrow the non-dischargeable federal loan debt to finance their educations. Sounds alarmingly similar to the law students of the 2010 era, eh?

It is hard to gather much data about MLS programs because the patchwork of regulators and the ABA’s decision to focus solely on JD programs means we have no easily found central source for information. What information we have is somewhat worrisome though. The *Occupational Outlook Handbook* (“OOH”) of the Department of Labor has an information page for “Field of Degree: Law and Legal Studies.”<sup>172</sup> The “degree” here is an undergraduate degree only, so this information

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<sup>168</sup> Libby Nelson, *Master’s Degrees Are as Common Now as Bachelor’s Degrees Were in the ’60s*, VOX (Feb. 7, 2015, 2:50 PM), <https://www.vox.com/2014/5/20/5734816/masters-degrees-are-as-common-now-as-bachelors-degrees-were-in-the-60s>.

<sup>169</sup> See generally Kevin Carey, *The Creeping Capitalist Takeover of Higher Education*, HUFFPOST: HIGHLINE (Apr. 1, 2019), <https://www.huffpost.com/highline/article/capitalist-takeover-college/>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (noting that online courses are often “staffed by adjuncts, most working far from the campus and much cheaper to employ”).

<sup>172</sup> BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., *Field of Degree: Law and Legal Studies*, in OCCUPATIONAL OUTLOOK HANDBOOK (Sept. 6, 2023), <https://www.bls.gov/ooh/field-of-degree/law-and-legal-studies/law-and-legal-studies-field-of-degree.htm> [<https://web.archive.org/web/20240312125353/https://www.bls.gov/ooh/field-of-degree/law-and-legal-studies/law-and-legal-studies-field-of-degree.htm#maj>] [hereinafter *Field of Degree: Law and Legal Studies*].



is not fully applicable to an MLS graduate, but it certainly applies to new undergraduate law majors, as well as to MLS graduates by analogy.<sup>173</sup>

Regardless, the data does not suggest that a non-JD law degree is very valuable. The 2021 data from the Census Bureau's American Community Survey found 127,370 people with an undergraduate degree in law and legal studies; they earned a median wage of \$60,000 a year, below the reported \$63,000 a year for "all fields."<sup>174</sup> Just 52% of these individuals are employed in a job that requires a bachelor's degree and 37% have an advanced degree, which includes "master's, doctoral, or professional degrees."<sup>175</sup>

The OOH page for "Legal Occupations" sheds some more light on the work these folks may be engaged in.<sup>176</sup> The 2022 median earnings for lawyers was \$135,740; for judges and hearing officers, \$128,610.<sup>177</sup> By comparison, the other workers in the legal field make much less. Here are the median 2022 earnings for the three other employment categories in law: mediators, arbitrators, and conciliators earn \$64,030; court reporters and simultaneous captioners earn \$63,560; and paralegals and legal assistants earn \$59,200.<sup>178</sup> Borrowing a year or more of tuition to earn a master's degree to try to enter one of these fields seems unwise.

Nor is there much other consumer data about the strengths or weaknesses of any individual program. Law professors and deans have long decried the *U.S. News* rankings of law schools as unfair and misleading.<sup>179</sup> Nevertheless, those rankings have a relatively clear list of criteria<sup>180</sup>—and, most importantly, encourage students to dig deeper into publicly available data (thanks to the ABA) like job placement results or bar passage rates. They have also inspired multiple other rankings, so

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<sup>173</sup> See Email from Elka Torpey, Economist, U.S. BUREAU OF LAB. STAT., to Benjamin H. Barton (May 5, 2023, May 5, 2023 at 12:03:31 PM EDT) (on file with author).

<sup>174</sup> *Field of Degree: Law and Legal Studies*, *supra* note 172.

<sup>175</sup> *Id.*

<sup>176</sup> BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., *Legal Occupations*, in OCCUPATIONAL OUTLOOK HANDBOOK (Sept. 6, 2023), <https://www.bls.gov/ooh/legal/home.htm> [<https://web.archive.org/web/20240312125633/https://www.bls.gov/ooh/legal/home.htm>] [hereinafter *Legal Occupations*].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> For a long collection of such articles, see Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 493 n.1 (2007).

<sup>180</sup> See generally *id.* at 496.

students can pick which ranking system they prefer or just average them.<sup>181</sup> Because non-JD programs are new and/or relatively niche, there are no equivalent rankings for an MLS or LLM degree.

On May 4, 2023, I did a Google search for “ranking best online master’s law programs.” The first sponsored result was an ad from a company named edX (a subsidiary of 2U, Inc., one of the larger OPMs described above).<sup>182</sup> The page listed the four law schools that apparently used 2U as their online platform for master’s degrees: Pepperdine, American, Washington University at St. Louis, and Fordham.<sup>183</sup> Probably not coincidentally, two of these schools (Pepperdine and Washington University) are in the top ten for non-JD enrollment, and all four are in the top thirty-five.<sup>184</sup> The site also contains some reasons why one might pursue an online master’s in law, including an explicit reference to the OOH data noted above describing the projected growth in paralegal and mediator jobs with no information about the projected *salaries* for those jobs.<sup>185</sup> Here’s the text from edX:

The U.S. Bureau of Labor Statistics expects that employment for non-lawyers in the legal field will grow at a rate faster than average in the coming years. Law firms and companies across sectors are expected to hire more paralegals and legal assistants to increase efficiency, and today’s increasingly complex challenges require dedicated assistance and expertise.

Paralegal and legal assistant jobs are projected to grow 10% between 2019 and 2029.

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<sup>181</sup> See Karen Sloan, *Bored with the US News Law School Rankings? Check Out These Alternatives*, LAW.COM (Aug. 29, 2019, 2:33 PM), <https://www.law.com/2019/08/29/bored-with-the-u-s-news-law-school-rankings-check-out-these-alternatives>.

<sup>182</sup> *About edX, a 2U Company*, EDX, <https://onlinemasteroflegalstudies.com/about-us> (last visited Mar. 12, 2024).

<sup>183</sup> *Move Up in the Legal Field: Explore Top Online MLS Programs*, EDX, <https://web.archive.org/web/20230331212253/https://onlinemasteroflegalstudies.com/online-masters-legal-studies/> (archived Mar. 31, 2023). Less than a year later, as of March 2024, Washington University at St. Louis apparently dropped edX/2U and only the other three universities appear. See *Move Up in the Legal Field: Explore Top Online MLS Programs*, EDX, <https://onlinemasteroflegalstudies.com/online-masters-legal-studies/> (last visited Mar. 12, 2024) [hereinafter *Move Up*].

<sup>184</sup> See *supra* Table 1.

<sup>185</sup> See *Move Up*, *supra* note 183.

Arbitrator, mediator, and conciliator jobs are projected to grow 8% between 2019 and 2029.<sup>186</sup>

In tort law we would call this a true but misleading use of facts. Here's the tuition at these four schools for an online Master of Legal Studies:

- American: \$2,294 per credit for the 30-credit online MLS program equals \$68,820.<sup>187</sup>
- Fordham: \$2,074 per credit and each “track” comprising 25 credits equals \$51,850.<sup>188</sup>
- Pepperdine: \$79,360 (provided “approximate total cost”).<sup>189</sup>
- Wash U.: \$67,008.<sup>190</sup>

Forgive a reminder: the median earnings for mediators/arbitrators in 2022 was \$64,030.<sup>191</sup> Paralegals averaged \$59,200.<sup>192</sup>

The tuition cost is the real tell as to whether these programs are making an honest effort to provide value for the money.<sup>193</sup> Online programs do face some large

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<sup>186</sup> *Id.* (citations omitted).

<sup>187</sup> *Tuition and Financial Aid*, AM. UNIV. WASH. COLL. OF L., <https://onlinelaw.wcl.american.edu/admissions/tuition-and-financial-aid> (last visited Mar. 12, 2024).

<sup>188</sup> *Tuition and Financial Aid*, FORDHAM UNIV.: THE SCH. OF L., <https://onlinelaw.fordham.edu/admissions/tuition-and-financial-aid> (last visited Mar. 12, 2024); *Curriculum*, FORDHAM UNIV.: THE SCH. OF L., <https://onlinelaw.fordham.edu/master-studies-law/curriculum> (last visited Mar. 12, 2024).

<sup>189</sup> *Tuition and Financial Aid*, PEPP. UNIV.: ONLINE PROGRAMS, <https://onlinegrad.pepperdine.edu/law/admissions/tuition-and-financial-aid> (last visited Mar. 12, 2024).

<sup>190</sup> *Tuition & Financial Aid*, WASH. UNIV. IN ST. LOUIS SCH. OF L., <https://law.wustl.edu/admissions/tuition-financial-aid/> (last visited Mar. 2, 2024). This figure is especially notable as it seems to be a baseline tuition for the MLS, LLM, and JD program at Wash. U, but until recently, the website made clear that this number is indeed the correct tuition. *Tuition and Financial Aid*, WASH. UNIV. IN ST. LOUIS SCH. OF L., <https://web.archive.org/web/20230923080653/https://onlinelaw.wustl.edu/admissions/tuition-and-financial-aid/> (archived Sept. 23, 2023) (“Tuition for the Master of Legal Studies, the Master of Legal Studies in Taxation, the Master of Laws in Taxation, and the Master of Laws in U.S. Law programs for the 2023–2024 academic year is . . . US \$67,008.”).

<sup>191</sup> *See Legal Occupations*, *supra* note 176.

<sup>192</sup> *Id.*

<sup>193</sup> *See Carey*, *supra* note 169 (noting that online programs are much cheaper to run but are still priced the same as in-person education).

startup costs, but once they are established, they are typically much less expensive to run than in-person education, especially in-person education staffed by expensive tenured or tenure-track professors like JD programs.<sup>194</sup> Whenever I have faced an argument about the relative benefits of an online-only JD program, my first retort is “wake me up when it’s cheaper.” This response goes double for online MLS programs.

On May 4, 2023, the first non-sponsored (i.e., the first non-ad) result from Google was the *Princeton Review*’s “ranking” of the “Best Online Master of Studies in Law Programs for 2023.” But the site itself is not a ranking: it had two “featured” programs listed first (presumably because they paid *Princeton Review* to be listed first): Washington University and American.<sup>195</sup> Then, an alphabetical list of another thirty-one law schools offering such programs is presented.<sup>196</sup> It’s not a ranking at all, and it’s unclear how the programs were chosen. There are schools with online MLS programs that are not listed.<sup>197</sup> If you click through for more information on any particular school, the results appear to describe *all* of the post-baccalaureate programs rather than the online MLS program alone.<sup>198</sup>

I also struggled to find any qualitative LLM rankings, despite their earlier provenance. There is a website called Go-LLM.com that sells “admissions consulting” for LLM programs.<sup>199</sup> In their “About the LLM” section they have an “LLM Rankings” page that ironically has no rankings, but rather an explanation of

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<sup>194</sup> *See id.* (noting that online courses are often taught by adjuncts at a much cheaper rate than professors).

<sup>195</sup> *See Best Online Master of Studies in Law Programs for 2023*, THE PRINCETON REV., <https://web.archive.org/web/20230923001213/https://www.princetonreview.com/law-school-rankings?rankings=best-online-master-studies-in-law-programs> (archived Sept. 23, 2023).

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g., Master of Legal Studies*, UCLA SCH. OF L., <https://law.ucla.edu/academics/degrees/master-legal-studies> (last visited Mar. 13, 2024); *Juris Master Online Program*, FLA. ST. UNIV. COLL. OF L., <https://law.fsu.edu/academics/academic-programs/juris-master-online-program> (last visited Mar. 13, 2024); *Master of Studies in Law Online Program*, UNIV. OF PITT. SCH. OF L., <https://online.law.pitt.edu/msl> (last visited Mar. 13, 2024).

<sup>198</sup> For example, the Arizona State University page lists “11,958” as the “Total Post-Bac Enrollment” and there is no mention of the enrollment in their MLS programs. *Arizona State University-Tempe*, THE PRINCETON REV., <https://www.princetonreview.com/grad/arizona-state-university-tempe-9104151> (last visited Mar. 13, 2024).

<sup>199</sup> “*The Experts in LLM. Application Support*,” GOLLM ADMISSIONS CONSULTANTS, <https://www.go-llm.com> (last visited Mar. 14, 2024).

the fact that few rankings exist.<sup>200</sup> The site points to a one-time *National Law Journal* ranking of specialty LLM programs from 2013 and another ranking of tax programs from a 2010 article, but when pressed on how to sort LLM programs, the site seems to default to suggesting that prospective students use the *U.S. News* rankings of JD programs, even though “these rankings do not include LL.M. programs or other graduate programs such as the S.J.D.”<sup>201</sup>

The long and short of it is that in comparison to any given JD program, there is very limited information online about these programs, their costs, or efficacy. This is partially due to the lack of uniform regulation of these programs. Schools will not provide information unless required and, in comparison to the JD market, the non-JD market is the wild wild west of regulation.

## VII. WHAT COULD POSSIBLY GO WRONG?: TWO MODELS OF HIGHER ED PROFITABILITY

The lack of public information on these non-JD programs shows their dangers. Students are drawn to a non-JD program based on the brand name of the law school or advertising or both. How else would they find information about any program? But the brand of any given law school is based on the JD program, not any non-JD programs. As of now there isn’t even really a place where information (bad or good) can be gathered or found about these programs. So, if a law school were to create a substandard MLS or other non-JD program, it seems unlikely it would tarnish the brand of the law school overall, barring some kind of catastrophic, Trump University style flameout. The incentives are there to sell short on the existing brand, with little downside risk to that brand and significant upside in profitability.

Broadly speaking, there are two models of making money in higher education. The first is the traditional model—students pay tuition to learn things and earn a degree that boosts their future income. Employers hire graduates with that credential because it has proven over time to be helpful in the job they are hiring for. Historically, this has been the great bulk of American high education. The vast

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<sup>200</sup> *LLM Rankings*, GOLLAM ADMISSIONS CONSULTANTS, <https://www.go-llm.com/why-llm/llm-rankings> (last visited Mar. 14, 2024).

<sup>201</sup> *Id.*; *National Law Journal LLM Rankings 2013*, GOLLAM ADMISSIONS CONSULTANTS, <https://www.go-llm.com/national-law-journal-llm-rankings-2013> (last visited Mar. 14, 2024); Paul L. Caron, Jennifer M. Kowal, Katherine Pratt & Theodore P. Seto, *Pursuing a Tax LLM Degree: Where?* (Univ. of Cincinnati—Coll. of L., Public Law & Legal Theory Research Paper No. 10-18, 2010; Loyola L. Sch. L.A., Legal Studies Research Paper No. 2010-18, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1597337](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597337).

majority of public community colleges and universities provide good value for the money (although some degrees like the master's in fine arts may be notable exceptions).<sup>202</sup> This is the model of most current JD programs, even after years of escalating tuition and student debt.<sup>203</sup> While law school may not be as good a deal as it once was, there are still decent arguments that a lot of law graduates will go on to earn enough to justify their costs in tuition, debt, and lost time.<sup>204</sup>

Please note that it is, in fact, pretty hard to run a profitable university on this model. How do we know? Because the bulk of the for-profit higher education institutions in the United States run on the second, “scam” model. This less likable model tries to confuse students into borrowing tuition from the federal government to attend a school that is expensive and not necessarily (and often not) worth it. This model is made much, much easier to run because of the existence of guaranteed federal loans for higher education. Recall our discussion of the G.I. Bill and later federal laws creating the federal student loan program.<sup>205</sup> These programs were created because Congress believed that the return on higher education was positive and that it should not be limited to only students whose families could afford it.<sup>206</sup> If Congress made the loans available, students of all means could afford college or an advanced degree and then reap the later benefits in earnings, paying the government back.

Private loans would be hard to provide in this market, especially to poorer students, because typically student loans have no collateral: they are not attached to

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<sup>202</sup> For a discussion of the traditional return on investment (ROI) for an undergraduate degree, see Melanie Hanson, *College Degree Return on Investment*, EDUC. DATA INITIATIVE (Nov. 19, 2021), <https://educationdata.org/college-degree-roi>. Different majors have different ROIs, naturally, and as many as a quarter are actually negative. See Preston Cooper, *Is College Worth It? A Comprehensive Return on Investment Analysis*, MEDIUM: FOUND. FOR RSCH. ON EQUAL OPPORTUNITY (Oct. 19, 2021), <https://freopp.org/is-college-worth-it-a-comprehensive-return-on-investment-analysis-1b2ad17f84c8>. For the typical ROI on an advanced degree, see Cooper, *supra* note 166. Again, field of study makes a big difference. *Id.* For the potentially negative value of an MFA degree, see Melissa Korn & Andrea Fuller, ‘Financially Hobbled for Life’: *The Elite Master’s Degrees That Don’t Pay Off*, WALL ST. J. (July 8, 2021, 9:59 AM), <https://www.wsj.com/articles/financially-hobbled-for-life-the-elite-masters-degrees-that-dont-pay-off-11625752773#>.

<sup>203</sup> BARTON, *supra* note 1, at 74.

<sup>204</sup> Paul Caron, *Law School is Usually a Good Bet: 93% Have Positive Returns, 24% have ROI > \$1 Million*, TAXPROF BLOG (Mar. 7, 2022), [https://taxprof.typepad.com/taxprof\\_blog/2022/03/law-school-is-usually-a-good-bet-93-percent-have-positive-returns-24-percent-have-1-million-roi.html](https://taxprof.typepad.com/taxprof_blog/2022/03/law-school-is-usually-a-good-bet-93-percent-have-positive-returns-24-percent-have-1-million-roi.html).

<sup>205</sup> See *supra* text accompanying notes 79–82.

<sup>206</sup> McKeown-Moak, *supra* note 82, at 83–87.

a house or a car that can be repossessed.<sup>207</sup> Thus, their terms for a private education loan are always worse than those of a government loan, and a lot of borrowers would be frozen out altogether.

Congress doubled down on this thinking in passing the Higher Education Reconciliation Act of 2005.<sup>208</sup> The Act created Grad PLUS loans, which allowed students to borrow the entire cost of the graduate school education (including living expenses and books) directly from the U.S. government.<sup>209</sup> Previous versions of the law capped loan amounts, which meant that as the cost of tuition in higher education outstripped inflation some poorer students were forced to rely more and more on commercial loans or face being priced out of higher ed.<sup>210</sup> Under the new program a student can borrow the entire cost of higher education from the government.<sup>211</sup> Who sets the cost? The schools themselves! There is some light regulation of tuition and other costs,<sup>212</sup> but generally speaking, the schools can set those numbers and the federal government will loan students 100% of the cost.<sup>213</sup> The schools get paid upfront by the government, but the students carry the debt until they repay it, and since student loan debt is generally non-dischargeable in bankruptcy,<sup>214</sup> students just carry it until they repay it or die, a condition that has been described as “financial herpes,” because you can never get rid of it.<sup>215</sup>

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<sup>207</sup> Courtney Nagle, *How Student Loans Are Different From Other Types of Debt*, U.S. NEWS & WORLD REP. (Dec. 26, 2018), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2018-12-26/how-student-loan-debt-is-different-from-other-types-of-debt>.

<sup>208</sup> Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, §§ 8001–8024, 120 Stat. 4, 158–60 (2006) (codified as amended in scattered sections of 20 U.S.C.).

<sup>209</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-392R, GRADUATE PLUS LOANS 1 (Apr. 17, 2018), <https://www.gao.gov/assets/gao-18-392r.pdf>.

<sup>210</sup> See Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 33 (2007).

<sup>211</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 209.

<sup>212</sup> *50-State Comparison: State Policies on Postsecondary Tuition Setting, Capping, and Freezing*, EDUC. COMM'N OF THE STATES, <https://www.ecs.org/50-state-comparison-state-policies-on-postsecondary-tuition> (last visited Mar. 14, 2024).

<sup>213</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 209.

<sup>214</sup> Nagle, *supra* note 207.

<sup>215</sup> Charlie Sorrel, *What Would Happen if 40 Million Americans Defaulted on Their Student Loans?*, FAST CO. (June 2, 2016), <https://www.fastcompany.com/3060400/what-would-happen-if-40-million-americans-defaulted-on-their-student-lo>.

The existence of these loans supercharges the opportunities to run the “scam” version of higher education, especially for graduate schools. This explains the sudden emergence of a sea of for-profit institutions basically organized around confusing students into paying no money upfront for attractive-looking educational programs only to discover later that their degrees were not very valuable, but their debt certainly was. The Obama DOE’s (largely successful) crackdown on for-profit schools was based on stopping the worst examples of this behavior.<sup>216</sup>

Same with the ABA’s crackdown. Take, for example, Arizona Summit Law School, a for-profit law school in Arizona that gained ABA accreditation in 2010.<sup>217</sup> At the time, Arizona Summit looked like it was going to be operating a school on the traditional model. In fact, its bar passage rate of over 96% on the July 2008 Arizona bar exam was the best in the state, better than both the University of Arizona and Arizona State.<sup>218</sup>

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<sup>216</sup> See, e.g., Priyanka Boghani, *Another For-Profit College Chain Closes Its Doors*, WQED (Sept. 7, 2016), <https://www.pbs.org/wgbh/frontline/article/another-for-profit-college-chain-closes-its-doors> (reviewing the closures of Corinthian Colleges and ITT Technical Institute).

<sup>217</sup> *The Rise and Fall of For-Profit Law Schools*, NAT’L JURIST, Spring 2022, at 8, 8.

<sup>218</sup> Anne Ryman, *Arizona Summit Aimed to Redefine Law School Through Diversity. What Went Wrong?*, AZCENTRAL (May 16, 2018, 5:30 AM), <https://www.azcentral.com/story/news/local/arizona-education/2018/05/16/summit-law-school-rankings-diversity-bar-passage-lawyers/513280002>; T.S. Jarmusz, *B-CU Partners with Troubled Law School*, DAYTONA BEACH NEWS-J. (Apr. 8, 2017, 6:29 PM), <https://www.news-journalonline.com/story/news/education/campus/2017/04/08/b-cu-partners-with-troubled-law-school/21450071007>.



The school did not best University of Arizona or Arizona State University again but remained respectable in bar passage with a 76.6% rate on the July 2012 exam.<sup>219</sup> After that, the wages of sin, as demonstrated by exceedingly loose admissions standards, kicked in.<sup>220</sup> Paul Caron created a graph (Figure 17) that covers the July bar passage rate at all three Arizona law schools:

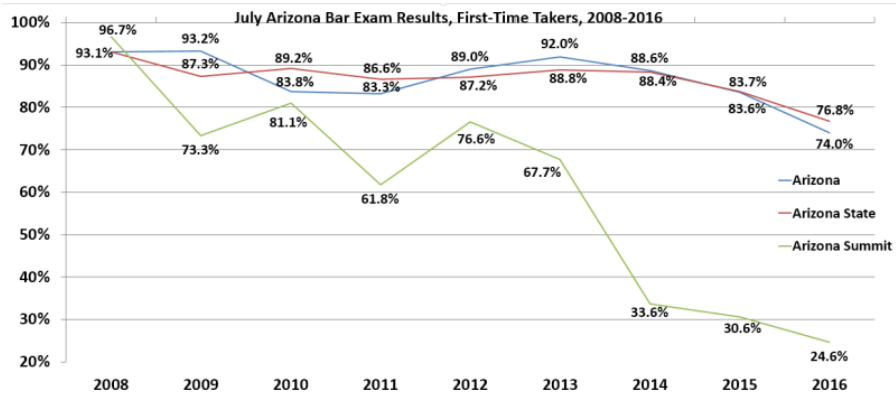


Figure 17. July Arizona Bar Passage Rates for First-Time Test Takers<sup>221</sup>

As a longtime critic of American legal education, I approached the rise of the for-profit law school cautiously, but with some optimism. Anyone who has studied American law schools knows there's some fat to be cut in the recipe and that there should be room for an innovative model that stresses teaching the practice of law, passing the bar, and acquiring gainful employment. I will leave it to my able readers to figure out what's missing from a traditional law school in that recipe, but, suffice it to say, it shouldn't have been impossible to create an Arizona Summit-like school that focused on the basics and succeeded. So, when Arizona Summit came out of the gate, guns blazing, as the best bar passage school in the state of Arizona, for a moment I wondered, "Could this be it? Are we actually seeing a better mousetrap?" Sadly, no. The initial good results were to procure accreditation. Once accredited,

<sup>219</sup> Paul Caron, *Arizona Summit Law School's Bar Passage Rate Plummets to Shocking 24.6% (Down From 96.7% in 2008)*, TAXPROF BLOG (Oct. 21, 2016), [https://taxprof.typepad.com/taxprof\\_blog/2016/10/arizona-summit-law-schools-bar-passage-rate-plummets-to-shocking-246.html](https://taxprof.typepad.com/taxprof_blog/2016/10/arizona-summit-law-schools-bar-passage-rate-plummets-to-shocking-246.html).

<sup>220</sup> The loose admissions standards can be seen in the entering GPA and LSAT scores collected by Paul Caron. See Paul Caron, *ABA Pulls Arizona Summit Law School's Accreditation*, TAXPROF BLOG (June 11, 2018), [https://taxprof.typepad.com/taxprof\\_blog/2018/06/aba-pulls-arizona-summit-law-schools-accreditation.html](https://taxprof.typepad.com/taxprof_blog/2018/06/aba-pulls-arizona-summit-law-schools-accreditation.html).

<sup>221</sup> Caron, *supra* note 219.

Arizona Summit steered *hard* into the scam model, much to my and, more importantly, their students' chagrin.

Of course, it was not *only* the for-profit law schools that ran the “scam” model of law schools. Paul Campos famously argued that most or all law schools are a scam of one flavor or another.<sup>222</sup> That's probably too rich for my blood, but a bunch of nonprofit law schools (like Arizona Summit and its for-profit brethren) were put on ABA probation and/or squeezed out by the market,<sup>223</sup> so there was a group of nonprofit law schools willing to trade on the good reputation of a JD degree and the availability of federal loans regardless of whether their school offered much value.

This is another key pillar of the “scam” version of higher education. Higher education generally, has (had?) an excellent reputation among Americans of a certain age.<sup>224</sup> Baby boomers were under the impression that going to law school especially was an excellent investment and that most or all lawyers make an upper-middle class living at the least.<sup>225</sup> For their age cohort that was pretty much true!<sup>226</sup> As tuition rose and the employment market saturated (and then over-saturated),<sup>227</sup> it became less and less true.

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<sup>222</sup> Campos created an anonymous blog on which he argued that “for a very large proportion of my students, law school has become something very much like a scam.” *Welcome to My Nightmare*, INSIDE THE L. SCH. SCAM (Aug. 7, 2011), <http://insidethelawschoolscam.blogspot.com/2011/08/welcome-to-my-nightmare.html>. He laid the blame squarely on law professors, describing the bulk of his colleagues as overpaid, lazy, uninformed, and bad teachers. Campos was eventually unmasked, and he actually stopped posting on the site in 2015, but it is still all online. INSIDE THE L. SCH. SCAM, <http://insidethelawschoolscam.blogspot.com> (last visited Mar. 14, 2024).

<sup>223</sup> See *supra* notes 104–16 and accompanying text.

<sup>224</sup> *An Investment That Pays Off for Society*, TCHRS. COLL. COLUM. UNIV. (July 14, 2018), <https://www.tc.columbia.edu/articles/2018/july/americans-believe-in-higher-education-as-a-public-good-a-new-survey-finds>. But see Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLUP (July 11, 2023), <https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx>.

<sup>225</sup> See Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215, 215, 219 (1992) (noting the high price of lawyers' time in the mid-1980s, and that lawyers doubled in numbers between 1967 and 1979 and increased again by almost half 1979–87).

<sup>226</sup> Mark J. Green, *The High Cost of Lawyers*, N.Y. TIMES (Aug. 10, 1975), <https://www.nytimes.com/1975/08/10/archives/the-high-cost-of-lawyers-the-rich-dont-notice-and-some-of-the-poor.html> (“In 1960, the average solo practitioner in America earned \$7,080, and the average law-firm partner 517,181—more than the average citizen, to be sure, but hardly enough to cover a second car, three weeks in Gstaad, or a Piping Rock membership.”).

<sup>227</sup> See Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth- (Nineteenth-) Century Straightjacket [sic]: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 420 (noting that in

The bimodal nature of the market for legal services was also a factor. Many Americans think that lawyers work in large corporate law firms and earn six- or seven-figure salaries. That is, in fact, true for a small percentage of lawyers.<sup>228</sup> The great bulk of lawyers, however, work as solo practitioners, in less profitable small firms, or for the government or nonprofits, earning much less.<sup>229</sup> It is (in my opinion) abhorrent and immoral for Harvard and Yale Law School to raise their tuition rates year after year well above inflation, despite their massive endowments, but at least those schools are very likely a good deal for their graduates at the currently inflated price. As you move down the food chain, the tuition and debt levels grow less defensible.

This leads us naturally to the “what could go wrong” part of the entertainment. Some or many law schools are in desperate need of funds,<sup>230</sup> and they’ve already stretched their JD programs as much as they care to, and/or as much as the ABA will allow. Some or many law schools have shown a propensity to sell their reputations short already. They’re just looking for another, more attractive route than the JD program. This leads us to the growth in non-JD programming, which is lightly regulated and compared against other master’s programs rather than other JD programs.<sup>231</sup> Because there are already a lot of scam-like master’s programs, new law school programs are easier to get accredited and also stand out less in the market.

All the ingredients are there for another embarrassing black eye for American law schools. More importantly, the ingredients are there for law schools to once again sell a bad product to unsuspecting students. I hope readers will remember the dark days of the law school “scamblogs” and the reams of bad coverage on the value of a

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1900, the United States had one lawyer for every 696 people; in 1940, one for every 733; and by 1971, one for every 572, but in the ensuing “four decades, the lawyer population grew at a rate much faster than the general population, and by 2008, there were approximately 1.8 million lawyers at a ratio of 1 to 261”).

<sup>228</sup> *Id.* at 440; Joshua Holt, *Lawyer Salaries Are Weird*, BIGLAW INV. (Apr. 1, 2023), <https://www.biglawinvestor.com/bimodal-salary-distribution-curve/>.

<sup>229</sup> See Shaira Escuzar, *Lowest Paid Legal Jobs: Why Should You Consider Them*, LAW CROSSING (May 25, 2023), <https://www.lawcrossing.com/article/900053005/Public-Defenders-Immigration-Lawyers-Perks-and-Salaries-Abound>.

<sup>230</sup> Paul Campos, *80% to 85% of ABA Law Schools Are Currently Losing Money*, LAWS., GUNS & MONEY (Nov. 12, 2013, 9:42 AM), <https://www.lawyersgunsmoneyblog.com/2013/11/80-to-85-of-aba-law-schools-are-currently-losing-money>.

<sup>231</sup> BARTON, *supra* note 1, at 241.

law degree. I hope no one wants to go there again on the backs of new non-JD programs.

### VIII. THE CASE FOR ABA REGULATION OF NON-JD PROGRAMS

To describe the problem as I have above is to make the case for ABA regulation. The temptation to run non-JD programming as a hustle rather than a value proposition may prove overwhelming to most or all American law schools. Leaving the regulation up to a patchwork of regulators who are used to dealing with very different sorts of higher education institutions is a recipe for disaster for current students and, eventually, for the law schools themselves when the inevitable bad news comes out.

The ABA would also be in the best position to compare non-JD programs with JD programs, and, in particular, to see if the non-JD programs are harming employment results in the JD program. How so? For years, law schools have pitched the idea of the JD-Advantage job as a decent replacement for work as a lawyer.<sup>232</sup> There is a heap of data suggesting that law graduates who end up in jobs that do not require a JD are less happy in their careers and less happy in their decision to go to law school than other law graduates. There is a heap of data suggesting that many more law graduates who end up in jobs that do not require a JD hold positions that are temporary, part-time, and lower paying than are other law graduates.<sup>233</sup> But what if MLS graduates are not competing with paralegal degrees, but with JD holders unable to get a job as a lawyer after graduation? Competition in that market could be devastating to the JD earners who are already the worst off. Yes, I know this sounds like protectionism for law graduates, but it is actually just a straightforward economic proposition: why should law schools create a new pool of competitors with the students in the bottom half of their graduating class? Those students are already struggling.

Further, assume that the problem here is that law schools are selling their institutional capital short for a quick, near-term profit. The sales pitch that “you make a good living in law whether or not you’re a lawyer” strongly suggests that law schools are again profiting off of the general impression that law school is a good investment. The ABA is an excellent regulator to address this problem, because if

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<sup>232</sup> See *What is a J.D. Advantage Job?*, COLLS. OF L. (Aug. 11, 2021), <https://www.collegesoflaw.edu/blog/2021/08/11/what-is-a-j-d-advantage-job>; *Detailed Analysis of JD Advantage Jobs*, NAT’L ASS’N FOR L. PLACEMENT (May 2013), [https://www.nalp.org/jd\\_advantage\\_jobs\\_detail\\_may2013](https://www.nalp.org/jd_advantage_jobs_detail_may2013).

<sup>233</sup> Deborah J. Merritt, *NALP and the JD Advantage*, LAW SCH. CAFE (Apr. 7, 2013), <https://www.lawschoolcafe.org/2013/04/07/nalp-and-the-jd-advantage>. See also BARTON, *supra* note 1, at 43–45.

there is any regulatory body that cares about the institutional reputation of law school writ large, it is the ABA. Imagine how different the non-JD market would be if the ABA even just required the public disclosures it requires of the JD program. Students would know debt levels and employment results, and actual rankings based on actual data could be created. It seems likely that such information might also crush a lot of these programs under indefensible employment, earnings, and/or debt information. But that would be good news!

I'll also note a strong disagreement with the argument that these students are adults and do not require the protection of intrusive regulation of higher education. I would be *much* more sympathetic to this argument if the federal government weren't guaranteeing the loans. This is *not* a functioning free market: the existence of the government loans changes the entire nature of the market and makes it much, much easier for schools to draw unsuspecting students in. There's almost no downside risk to the school, and the incentives are all backwards, especially in terms of the temptation to run the hustle.

### IX. THE CASE AGAINST ABA REGULATION

Ha, ha okay, I'm suggesting expanded ABA regulation. If there is a single unifying theme of my work in this area, it is attacking ABA regulation as self-interested, ineffective, and self-defeating. I stand by those opinions, so why should ABA regulation of non-JD programming be any better?

In the conclusion to *Fixing Law Schools*, I noted the wisdom of letting a thousand flowers bloom in the non-JD space and noted that ABA regulation has choked off innovation in American law schools.<sup>234</sup> The brutal sameness of law school curricula and faculty is not solely the fault of the ABA, but the ABA certainly contributed. Allowing (pushing?) law schools into an unregulated and competitive field like non-JD programs may allow schools to try new things and then let them bleed back into the JD curricula. If it is possible to run an inexpensive and effective online MLS or LLM program, perhaps we can take those lessons and apply them to JD programs.

Further, as noted above, not all non-JD programs are made the same. Creating undergraduate law majors or minors seems less fraught than squeezing future paralegals in a \$140,000 online MLS program. Sure, a law major may not be particularly lucrative, but neither is majoring in music or communications or a dozen other disciplines. Assuming the students learn some things, undergraduate majors are likely fine.

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<sup>234</sup> BARTON, *supra* note 1, at 239–43, 130.

Similarly, many non-JD programs are legacy LLM programs that exclusively target individuals who already have a law degree and often are in practice. It is one thing to hustle students who do not know the meaning of *caveat emptor*. Law graduates should know better and should be less likely to fall for a hustle.

Likewise, some certificate programs are not accredited and do not qualify for federal loan assistance, so again, if employers or customers want to spend their own hard-earned money to learn something, I'll trust the market to decide whether those programs are worth it or not. I'll note that here the market appears to be functioning well. Certificate/executive education programs are a booming business in MBA programs all over the country, while similar programs at law schools are rarer, suggesting that one program provides value and the other does not.<sup>235</sup>

The likeliest “scam” programs are thus the online MLS programs, and maybe they aren't even that bad in a market flooded with bad actors. And maybe the overall master's degree situation will get bad enough that non-ABA regulation will come around and tighten. There have been some rumblings in think tanks and in the press on that front.<sup>236</sup>

## X. CONCLUSION—LET'S CALL IT A DRAW

I make predictions all the time, and yes, they are often wrong, and sometimes spectacularly so. For example, in my book *Glass Half Full* I predicted that the law schools that survived the existential crisis of the mid-2010s would wise up, the iron grip of rankings would lessen, and we would see a return to some sanity.<sup>237</sup> Er, I'm pretty sure that did not happen. Although the recent trend towards boycotting *U.S. News* offers some light support that did not carry much outside of the top twenty, and even some of the schools that boycotted have apparently objected vociferously to the most recent version of the rankings,<sup>238</sup> hardly a sign of diminishing interest.

Nevertheless, I feel very confident in my prediction that the explosion in non-JD programming carries a significant risk of predatory and unfortunate behavior by some or many law schools. I put the over/under on the number of years before a spate of “is the online MLS the biggest scam since the JD boom of 2010?” articles at seven years, and I'd probably take the under.

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<sup>235</sup> Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 249–50 (2008).

<sup>236</sup> See Weissmann, *supra* note 164.

<sup>237</sup> BARTON, *supra* note 65, at 226.

<sup>238</sup> Anemona Hartocollis, *Elite Law Schools Boycotted the U.S. News Rankings. Now, They May be Paying a Price.*, N.Y. TIMES (Apr. 21, 2023), <https://www.nytimes.com/2023/04/21/us/21nat-us-news-rankings-law-medical-school.html>.

The harder question is how to address this oncoming train wreck. Push for ABA regulation? Push existing regulators and the DOE to tighten up regulation of master's degrees and especially online master's degrees? Or just wait for the market to catch up, giving schools that offer a cheaper and better product an advantage over the others? Predicting the best path forward, unlike predicting a future mess is, sadly, much harder.