

## BANKRUPTCY AND BAD BEHAVIOR THE REAL MORAL HAZARD: LAW SCHOOLS EXPLOITING MARKET DYSFUNCTION

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Law schools have become poster children for market dysfunction. The headlines are ubiquitous: Too many law graduates; too much debt; too few legal jobs. Dig a little deeper and the puzzle becomes more intriguing. Pricing is irrational; differences based on product quality do not exist. Students at schools with the least success in placing their graduates in full-time J.D.-required jobs incur the most debt for their degrees.

The story has been years in the making. Since 1985, tuition at private law schools has nearly doubled every decade; at public law schools the rate of increase has been even greater.<sup>1</sup> From 1988 to 2008, law school tuition grew at a rate exceeding all other sectors of higher education.<sup>2</sup> Even during the Great Recession, the cost of a J.D. rose at virtually every school.

Perhaps most remarkably, the rising law school tuition tide has lifted all boats. As a consequence, student debt has soared. Median debt for the 86% of law graduates who borrow to obtain their undergraduate and J.D. degrees is just over \$140,000.<sup>3</sup> Of that total, \$120,000 is for law school.<sup>4</sup> At the seventy-fifth percentile of borrowers, student debt totals more than \$190,000; a staggering \$150,000 is for law school alone.<sup>5</sup> Recent law graduates owe a disproportionately large share of the \$1.11 trillion in educational loans, which now surpass debt incurred for automobiles (\$875 billion) and credit cards (\$659 billion).<sup>6</sup>

The dynamic has been perverse. Even in the face of collapsing demand for new attorneys, the price of attending law school increased along with enrollments. As the Great Recession deepened and attorney positions vanished from 2008 to 2010, the first-

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<sup>1</sup> See *Law School Tuition*, STAT. SEC. LEGAL EDUC. & ADMISSIONS TO B. (2014), [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited Oct. 10, 2014) (reporting ABA approved law school tuition history from 1985 to 2013).

<sup>2</sup> See Matt Leichter, *At Last, a Rational Explanation for Why Law School Tuition Keeps Rising*, AM LAW DAILY (Mar. 1, 2012, 7:01 PM), <http://amlawdaily.typepad.com/amlawdaily/2012/03/at-last-a-rational-explanation-for-why-law-school-tuition-keeps-rising.html> (reporting steady rise in average cost for private or public professional degrees from 1990–2008).

<sup>3</sup> See Jason Delisle, *The Graduate Student Debt Review: The State of Graduate Student Borrowing*, NEW AM. EDUC. POL'Y PROGRAM 9 (Mar. 2014), <http://newamerica.net/sites/newamerica.net/files/policydocs/GradStudentDebtReview-Delisle-Final.pdf>.

<sup>4</sup> See *id.* at 12, 14 (calculating law school debt by subtracting outstanding undergraduate debt and demonstrating amount borrowers owe for graduate programs alone).

<sup>5</sup> See *id.* at 12, 16.

<sup>6</sup> See Press Release, *Household Debt Grows for Third Consecutive Quarter*, FED. RES. BANK N.Y. (May 13, 2014), <http://www.newyorkfed.org/newsevents/news/research/2014/rp140513.html> (reporting consumer debt totals in United States broken down into sub-categories).

year class still grew—from roughly 49,000 to 52,000.<sup>7</sup> Although the number of law school *applicants* dropped dramatically after 2010, the reduction in total first-year *enrollment* was much smaller.<sup>8</sup> Ten years ago, a little more than half of all law school applicants secured admission.<sup>9</sup> Today, more than three-fourths find a law school willing to accept them.<sup>10</sup>

At the macroeconomic level, a functional law school market would have produced different results: (1) price and supply would have decreased in response to falling demand; (2) a school's tuition costs and resulting student debt would bear a reasonable relationship to the legal employment prospects for that school's graduates; (3) new law schools would not have entered an already glutted market; and (4) existing schools unable to place the vast majority of their graduates in law jobs would have been closing their doors.

But the microeconomic level is even more interesting. Most of the academic discussion about post-graduate employment outcomes, as well as predictions of future financial opportunities for law graduates generally, ignores a key point: individual law schools operate in different submarkets. Conflating them serves the interests of schools in the weakest submarket, namely, those whose graduates have little prospect of obtaining a job that requires a J.D. It also obfuscates a meaningful analysis of the problems plaguing legal education.

A recent example of that imprecision comes from Professor Theodore Seto, of Loyola Marymount University Law School, who writes: "[B]eginning in fall 2015 and intensifying into 2016 employers are likely to experience an undersupply of law grads, provided that the economic recovery continues."<sup>11</sup> Likewise, Professors Michael Simkovic (Seton Hall University School of Law) and Frank McIntyre (Rutgers Business School) posit that the average lifetime added value of a J.D. is \$1 million, but bury this disclaimer near the end of their analysis: "We also cannot determine the earnings premium associated with attending a specific law school."<sup>12</sup> Professor René Reich-Graefe (Western New England School of Law) urges everyone in charge of legal education to "Keep Calm and Carry On" because "recent law school graduates and current and future law students are standing at the threshold of the most robust legal

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<sup>7</sup> See *Enrollment and Degrees Awarded 1963-2012 Academic Years*, ABA STAT. FIN. INFO. 1, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (last visited Oct. 9, 2014) (comparing yearly ABA data from 1963 through 2012).

<sup>8</sup> See LSAC, *End of Year Summary: ABA (Applicants, Applications, Admissions), Enrollment, LSATS, CAS*, LSAC.ORG, <http://www.lsac.org/lsacresources/data/lsac-volume-summary> (last visited Oct. 9, 2014) (demonstrating drop in ABA applicants was approximately 19,000 compared to a drop in ABA first-year enrollment of approximately 9,000 for same period).

<sup>9</sup> See *id.* (showing in 2004 out of approximately 100,600 applicants, 55,900 were admitted).

<sup>10</sup> See *id.* (contrasting 2004 rejection rates with increased likelihood law applicant will be accepted to law school in 2013, 45,700 admitted applicants out of 59,600 applicants).

<sup>11</sup> Theodore P. Seto, *JD Job Prospects as Predicted by JD Degrees Per Capita*, TAXPROF BLOG (June 5, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/06/seto-.html](http://taxprof.typepad.com/taxprof_blog/2013/06/seto-.html).

<sup>12</sup> Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 285 (2014) (explaining sample used was comprised of law degree holders from various law schools, thereby preventing study from determining earning premiums associated with law school ranking and geography).

market that ever existed in this country—a legal market which will grow, exist for, and coincide with, their entire professional career."<sup>13</sup>

Alternatively, Professors Herwig Schlunk<sup>14</sup> (Vanderbilt University Law School), Brian Tamanaha<sup>15</sup> (Washington University School of Law), and William Henderson<sup>16</sup> (Indiana University, Maurer School of Law) are among a few who have urged a more nuanced approach. Part I builds on this idea and proposes specific criteria by which to identify three distinct law school submarkets. The underlying theme is that any effort to distinguish among law schools should relate a student's cost of obtaining a J.D. to the employment outcomes he or she can reasonably expect to achieve upon graduation. More specifically, law school is specialized training for a particular occupation: working as a lawyer. Properly identified, the differences across law school submarkets have important implications for prospective students, law schools, and policymakers. At least, they should. Combining all law schools together to talk about a single legal education market is worse than imprecise. It is misleading.

Part II begins a search for the culprits responsible for the dysfunctional law school submarkets. One key suspect is the federal student loan program and its interaction with evolving bankruptcy law.

Part III describes the moral hazard resulting from the current system of financing legal education.

Part IV proposes ways to eliminate some of the obstacles to a functional market.

## I. IDENTIFYING THE VARIOUS LAW SCHOOL MARKETS

For the past several years, all of the law school submarkets have been glutted. At the beginning of the Great Recession, the demand for new lawyers plummeted. Since then, it has remained flat.<sup>17</sup> However anemic the jobs recovery has been for other sectors of the economy, new law school graduates as a group have fared even worse. In no submarket has the number of jobs requiring a legal degree returned to pre-2008 levels. For all submarkets combined, the full-time long-term J.D.-required employment rate for the class of 2013 was just over 50%—where it has been since 2011 when the American Bar Association began requiring law schools to disclose more completely

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<sup>13</sup> René Reich-Graefe, *Keep Calm and Carry On*, 27 GEO. J. LEGAL ETHICS 55, 66 (2014) (arguing regulatory and tax compliance and more pervasive, transaction-cost efficient documentation has increased in last five years and will continue to grow, elevating volume of most aspects of legal services in coming years).

<sup>14</sup> See Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?*, 36 J. LEGAL PROF. 301, 303–04, 327 (2011) (arguing each potential law school applicant should determine if law school is right investment using multifaceted approach).

<sup>15</sup> See Brian Z. Tamanaha, *Is Law School Worth the Cost?*, 63 J. LEGAL EDUC. 173, 179 (2013) (proposing students engage in cost-benefit analysis based on actual information, rather than "mere[] declarations of faith").

<sup>16</sup> See Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 1002–09 (2014) (examining troubled state of legal education and the impact law school rankings have on law school hierarchies).

<sup>17</sup> See Press Release, *For Second Year in a Row New Grads Find More Jobs, Starting Salaries Rise—But Overall Unemployment Rate Rises with Historically Large Graduating Class*, NALP 2 (June 19, 2014), <http://www.nalp.org/uploads/PressReleases/Classof2013SelectedFindingsPressRelease.pdf> [hereinafter NALP Press Release] (explaining "[i]n general, the legal sector is best described as mostly flat," meaning slow growth in some areas is blended with continued shrinking and downsizing in other areas).

their graduates' outcomes.<sup>18</sup> The median starting salary for attorneys able to get law jobs likewise dropped dramatically and has not recovered.<sup>19</sup> Informed observers are not predicting significant improvement any time soon.<sup>20</sup>

Yet even as the Great Recession deepened in 2009, virtually all law schools raised prices and many of them increased output in the face of declining demand for their product, namely, new lawyers. From the pre-law student side of the equation, demand was dropping precipitously—from roughly 87,500 applicants for the fall 2010 entering class to 59,400 applicants for fall 2013.<sup>21</sup> As a group, law school deans may argue that the recent drop in first-year enrollments shows that they are reacting to market forces. But for the vast majority of schools, the first response was to fight those forces with rising acceptance rates. Errant bankruptcy policy and unlimited federal student loans isolated schools from any accountability for their graduates' outcomes, thereby providing welcome ammunition.

But the dismal aggregate results mask important differences among law schools and the submarkets in which they operate. This Article suggests three criteria for identifying distinct law school submarkets:

- (1) The success of a school's graduates in obtaining full-time long-term jobs that require a J.D.;
- (2) The starting salaries of graduates who obtain such jobs; and
- (3) The geographic dispersion of graduates who find employment.

The first criterion emerges from a simple assumption: the vast majority of people who decide to attend law school plan to practice law. There are exceptions, and many attorneys wind up doing productive things other than practicing law. The mantra that "getting a law degree is good training for lots of other activities" is true. In fact, the *U.S. News & World Report* rankings methodology counts all "JD-Advantage" jobs equally with J.D.-degree required positions.<sup>22</sup> *U.S. News* rankings also give partial

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<sup>18</sup> See 2013 Law Graduate Employment Data, ABA SEC. LEGAL EDUC. & ADMISSIONS TO B. 1 (2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2013\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduate_employment_data.authcheckdam.pdf) (last visited Jan. 17, 2015) (reporting employment rate for class of 2013 in terms of long term, full-time jobs for which bar passage is required). Beginning with the class of 2014, the ABA extended the reporting period. Rather than February 15 (nine months after graduation), schools now report their most recent graduates' employment status as of March 15 (ten months after graduation). When this Article went to press, the impact of that extension on reported employment rates was unknown. Many law schools argued strenuously for the change, which the ABA Council for the Section on Legal Education and Admissions to the Bar approved on a ten-to-nine vote. See Karen Sloan, *ABA Changes Graduate Data Collection Timeline*, NAT'L L.J. (Aug. 9, 2013), <http://www.nationallawjournal.com/id=1202614712187/ABA-Changes-Graduate-Data-Collection-Timeline?slreturn=20150103181827>.

<sup>19</sup> See NALP Press Release, *supra* note 17, at 3–4 (describing declining median starting salary for law jobs); see also NALP, *Trends in Median Reported Salaries - Class of 2012*, NALP.ORG (Sept. 2013), [http://www.nalp.org/trends\\_in\\_median\\_reported\\_salaries\\_class\\_of\\_2012](http://www.nalp.org/trends_in_median_reported_salaries_class_of_2012) (reporting median salary trends for full-time jobs obtained by law school graduates between 1985 and 2012).

<sup>20</sup> See NALP Press Release, *supra* note 17, at 2, 5–6 (asserting market for large firms seeking "equity-track new associates" is not likely to return to pre-recession numbers).

<sup>21</sup> See *End of Year Summary: ABA Applicants, Applications, Admissions, Enrollment, LSATS, CAS*, *supra* note 8.

<sup>22</sup> Sam Flanigan & Robert Morse, *Methodology: 2015 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 10, 2014), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/03/10/methodology-2015-best-law-schools-rankings?page=2> (articulating methodology behind *U.S. News* law school rankings, which besides employment statistics, includes factors like peer and

employment rate credit to professional, nonprofessional, part-time, and short-term jobs.<sup>23</sup>

That is a mistake. Including a hodgepodge of full-time, part-time, and short-term jobs, regardless of whether they require a J.D., is misleading. For starters, the ABA's broad definition of "JD-Advantage" permits law schools to abuse it.<sup>24</sup> Likewise, giving schools a *U.S. News*-determined partial credit for all limited-term non-legal positions improperly cedes even more power over the profession to the non-lawyer architect of a ranking methodology that suffers from numerous other flaws.<sup>25</sup>

Similarly, viewing the degree as a form of risk insurance that invariably confers value on its recipients is misguided. Professor Bernard Burk's insightful analogy to the purchase of a used car is apt:

The used-car salesman is touting the value and utility of the car, assuring you that it has everything you need to take you where you want to go. . . . We generally don't buy cars for their salvage value, especially when *any* car you buy will have salvage value if it can't serve the purpose you actually bought it for.<sup>26</sup>

Like medical schools, law schools train lawyers for a specific occupation. It is reasonable to hold them accountable for the inability of their graduates to find jobs that require the specialized training they offer.

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professional quality assessment; admissions selectivity and acceptance rate; bar passage rate; faculty resources; student-faculty ratio; and library resources).

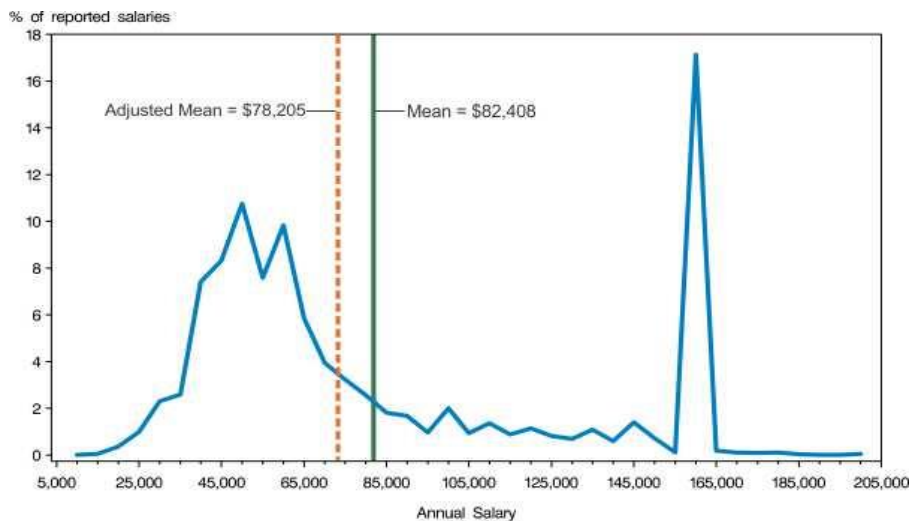
<sup>23</sup> See *id.*

<sup>24</sup> See 2014 *Employment Questionnaire (For 2013 Graduates): Definitions and Instructions*, ABA SEC. LEGAL EDUC. & ADMISSIONS TO B. 2 (2014), available at <http://employmentsummary.abaquestionnaire.org/> (defining JD advantage category as "a position . . . for which the employer sought an individual with a JD, and perhaps even required a JD, or for which the JD provided a demonstrable advantage in obtaining or performing the job, but itself does not require bar passage or an active law license").

<sup>25</sup> See, e.g., STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* 15–42 (2013) (discussing role *U.S. News* rankings has on law schools and students choosing a law school).

<sup>26</sup> Bernie Burk, *Still More Thoughts on Self-Delusion in the Legal Academy; Or, Accepting the Difference Between a Smokin' Bucketful of Awesome and a Smoking Pile of Scrap*, FACULTY LOUNGE (June 30, 2014, 5:00 PM), <http://www.thefacultylounge.org/2014/06/still-more-thoughts-on-self-delusion-in-the-legal-academy-or-accepting-the-difference-between-a-smok.html>.

The second criterion, starting salaries, begins with their bimodal distribution:<sup>27</sup>



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Each year, relatively few law graduates (17% in 2013) begin their careers in big firms at starting salaries of \$160,000.<sup>28</sup> But more than half of all graduates in full-time jobs who report their salaries earn far less—between \$40,000 and \$65,000 a year.<sup>29</sup> Even more pointedly, one-half of all recent graduates are not included on the graph at all, either because they did not secure full-time employment within nine months of graduation, or because they declined to provide their salary information.<sup>30</sup> As the NALP survey reported for the class of 2013, "[s]alary information was reported for two-thirds of the jobs reported as full-time and lasting at least a year."<sup>31</sup> It seems likely that some graduates fail to report their salaries because they are working at low-paying jobs or as unpaid interns.

The third criterion—geographic dispersion of new graduates—provides additional insight into the employer constituency that a school serves. Some schools have a national constituency of potential employers for their graduates; the vast majority does not. That, in turn, has implications for graduates' compensation.

<sup>27</sup> See NALP, *Class of 2013 Bimodal Salary Curve*, NALP – ASS'N FOR LEGAL CAREER PROFS. (2014), [http://www.nalp.org/class\\_of\\_2013\\_bimodal\\_salary\\_curve](http://www.nalp.org/class_of_2013_bimodal_salary_curve). The "adjusted mean" takes into account the more complete salary information available for graduates in large law firms where salaries are highest.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* (demonstrating "unadjusted mean" overstates average starting salary for law graduates).

<sup>30</sup> See *Employment Report & Salary Survey (ERSS) Info*, Link to *Methodology for Calculating Graduate Employment Data*, NALP.ORG, <http://www.nalp.org/erssinfo> (explaining employment rate for law school graduates is calculated by "[n]umber employed divided by the number whose status is known") (emphasis added).

<sup>31</sup> See NALP Press Release, *supra* note 17.

Two caveats are crucial. First, this exercise of identifying different law school submarkets is not an effort to assess the relative merit of any particular legal career. The fact that big firms generally offer the highest financial compensation does not make such jobs more satisfying, the work more important, or the lifestyle of their lawyers more pleasant. In fact, surveys suggest that lawyers in large firms generally have lower levels of personal and professional satisfaction than attorneys in all other practice settings.<sup>32</sup> More money does not assure job satisfaction. The goal here is to identify the various law school submarkets, not to judge them.

Second, the groupings offered are not an effort to rank law schools. Even within each group, the approach here does not consider differences in admissions selectivity, faculty scholarship, curriculum, or other factors that bear on the educational or reputational quality of the schools.

Applying the three stated criteria yields three submarkets. Admittedly, the approach is arbitrary insofar as it sets numerical thresholds for a school's inclusion in a particular submarket. Others might draw lines in different places. Some may suggest that more distinctions within each submarket are appropriate. What appears below is merely a first step in identifying the various law school submarkets, not necessarily a final collection of all possibilities.

The first submarket is National Schools. It includes only the twenty-four schools that placed at least 60% of their 2013 graduates in full-time long-term (FTLT) jobs requiring a J.D. and at least 20% in *National Law Journal* 250 law firms where starting compensation is the highest.<sup>33</sup> The alphabetical list identifies the top three states in which each school's graduates accepted employment.<sup>34</sup> For ten schools, the *National Law Journal* reported a slightly different number of 2013 J.D.'s awarded than that shown on the school's ABA questionnaire, but the differences were relatively minor and did not affect any school's placement in the National Submarket. "FTLT-JD" includes full-time long-term jobs for which admission to the bar is a prerequisite.<sup>35</sup>

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<sup>32</sup> See Stephanie Francis Ward, *Pulse of the Legal Profession*, A.B.A. J. (Oct. 1, 2007, 6:12 PM), [http://www.abajournal.com/magazine/article/pulse\\_of\\_the\\_legal\\_profession/](http://www.abajournal.com/magazine/article/pulse_of_the_legal_profession/) (noting lawyers in public sector have been reported as most satisfied with careers); see also Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers*, NALP FOUND. FOR L. CAREER RES. & EDUC. & AM. B. FOUND. 47–48 (2004), <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf> (finding while lawyers at large firms may have "power track" satisfaction, they are less satisfied in their work compared to lawyers at small firms); see also Ronit Dinovitzer et al., *After the JD II: Second Results from a National Study of Legal Careers*, NALP FOUND. FOR L. CAREER RES. & EDUC. & AM. B. FOUND. 49 (2009) (indicating law graduates that work in small firms or government are more satisfied than those in larger firms in regards to balance and control); see also HARPER, *supra* note 25, at 57–64 (discussing declining associate satisfaction in large firms).

<sup>33</sup> For each school, the denominator (total graduates) is taken from the school's ABA questionnaire responses for the class of 2013; the numerator is from the *National Law Journal's* 2014 list of the Top 50 "Go-To Law Schools." See *Compilation—All Schools Data*, SEC. LEGAL EDUC. — EMP. SUMMARY REP. (2014), <http://employmentsummary.abaqquestionnaire.org/>; see also *Ranking the Go-To Law Schools*, NAT'L L.J. (Feb. 24, 2014), <http://www.nationallawjournal.com/id=1202644140760/The-GoTo-LawSchools?slreturn=20140912112159>.

<sup>34</sup> See *Ranking the Go-To Law Schools*, *supra* note 33.

<sup>35</sup> The other ABA categories—"JD-Advantage," "Professional," "Non-professional," and all part-time, and short-term positions—are not included. The calculated FTLT-JD percentage also excludes all "Law School-funded" positions, but that adjustment did not eliminate any school from this submarket.

<u>School</u>	<u>FTLT-JD (%)</u>	<u>NLJ 250 (%)</u>	<u>Top Placement States</u>
BC	64	21	MA, NY, RI
BU	61	20	MA, NY, CA
UC Berkeley	78	45	CA, NY, DC
UCLA	67	30	CA, NY, DC
U-Chicago	87	55	IL, CA, NY
Columbia	88	65	NY, CA, DC
Cornell	81	45	NY, CA, DC
Duke	85	49	NY, DC, NC
Fordham	63	25	NY, NJ, FL
Georgetown	72	37	DC, NY, CA
George Washington	63	20	DC, NY, VA
Harvard	85	53	NY, CA, DC
U-IL	64	21	IL, NY, CA
U-MI	81	41	NY, IL, MI
NYU	86	55	NY, CA, DC
Northwestern	78	51	IL, NY, CA
Norte Dame	71	24	IL, CA, IN
U-PA	86	53	NY, DC, PA
USC	61	27	CA, DC, NY
Stanford	85	46	CA, NY, TX
U-TX	75	32	TX, NY, CA
Vanderbilt	78	32	TN, NY, DC
U-VA	80	44	DC, NY, VA
Yale	74	39	NY, DC, CA

The second submarket is Regional Schools—88 law schools that placed at least 55% of their 2013 graduates in FTLT-JD jobs (i.e., the overall average for all law schools, excluding law school-funded positions), but fewer than 20% in *National Law Journal* 250 law firms. At every Regional School, the top geographic placement for graduates was the state in which it was located.

<u>School</u>	<u>FTLT-JD (%)</u>	<u>NLJ 250 (%)</u>	<u>Top Placement States</u>
U-AL	72	10	AL, TN, TX
Albany	60		NY, NJ, FL
Arizona State	62		AZ, CA, TX
U-AZ	59		AR, TX, GA
U-AR-Fayetteville	68		AZ, CO, CA
Baylor	70		TX, MI, OK
BYU	65		UT, TX, CA
Brooklyn	57		NY, NJ, CA
U-Buffalo-SUNY	62		NY, TX, VA



UC-Davis	65	9	CA, TX, DC
UC-Irvine	64	17	CA, UST, AZ
Campbell	56		NC, SC, DC
Case Western	60		OH, DC, NY
Chicago-Kent	56		IL, NY, CA
U-CO	67		CO, CA, DC
Creighton	55		NE, IA, MO
Dayton	64		OH, IL, IN
U-Denver	56		CO, TX, IL
Drake	60		IA, MN, MO
Emory	62	14	GA, NY, CA
Faulkner	59		AL, TN, FL
FIU	60		FL, NY, CO
FSU	70		FL, GA, DC
U-FL	66		FL, NY, DC
GA State	66		GA, PA, DC
U-GA	69		GA, DC, FL
Gonzaga	64		WA, UT, CO
U-Houston	64	15	TX, CA, NY
U-ID	62		ID, WA, UT
IU-Bloomington	65	10	IN, IL, DC
U-IA	76	11	IA, IL, MN
U-KS	64	9	KS, MO, CO
U-KY	74		KY, TN, DC
LSU	67		LA, TX, GA
Louisville	65		KY, IN, FL
Memphis	61		TN, AR, VA
Mercer	66		GA, AL, DC
U-Miami	61		FL, NY, IL
U-MN	68	9	MN, NY, CA
MS College	59		MS, LA, TN
U-MS	63		MS, AL, TN
U-MO/Columbia	61		MO, IL, CA
U-MT	69		MT, CO, UT
U-NE	66		NE, CO, UT
U-N-LV	64		NV, CA, UT
U-NH	69		NH, MA, DC
U-NM	74		NM, AZ, CA
U-NC	69	15	NC, NY, DC
U-ND	60		ND, MN, GA
Nova	61		FL, NY, DC
OH Northern	67		OH, IN, PA
Ohio State	61	12	OH, CA, NY
OK City U	67		OK, TX, MO
U-OK	66		OK, TX, CO
U-Pittsburgh	55		PA, DC, NY

Regent	58		VA, FL, TX
U-Richmond	58		VA, DC, NY
Rutgers-Camden	63		NJ, PA, NY
Samford	60		AL, GA, FL
Seton Hall	69		NJ, NY, DC
U-South Carolina	68		SC, NC, GA
U-South Dakota	62		SD, NE, IA
S. Texas College of Law	67		TX, FL, WA
SIU	72		IL, MO, CA
SMU	71	18	TX, GA, VA
St. John's U	56		NY, NJ, CT
St. Louis U	56		MO, IL, DC
St. Mary's	62		TX, MD, CA
Stetson	62		FL, CA, GA
Syracuse	55		NY, DC, PA
Temple	59	9	PA, NJ, NY
U-TN	65	11	TN, FL, GA
Texas Tech	59		TX, NM, CA
U-Tulsa	58		OK, TX, CO
U-UT	63		UT, NV, OR
Vermont	55		VT, CO, DC
Wake Forest	59	12	NC, VA, DC
Washburn	63		KS, MO, CO
Washington & Lee	57	14	VA, NY, DC
Washington Univ./St. Louis	66	18	MO, IL, NY
U-WA	68	12	WA, CA, DC
WVA	58		WVA, PA, VA
Widener	55		PA, MD, NJ
William & Mary	57	16	VA, DC, NY
Willamette	62		OR, WA, CA
Wm. Mitchell	59		MN, WS, VA
U-WI	60		WI, IL, NY
U-WY	67		WY, CO, NV

Collectively, the schools in the National and Regional Submarkets account for 112 of 201 accredited law schools in the ABA's employment database of 2013 graduates. The remaining eighty-nine law schools comprise the Problematic Submarket. To varying degrees, graduates of these schools have difficulty finding employment for which they are being trained. Among the weakest competitors in this submarket are thirty-four schools that placed fewer than 40% of graduates in FTLT-JD jobs; thirteen

of those schools placed less than one-third of their graduates in such positions.<sup>36</sup> The differing employment prospects for new graduates should be producing different economic consequences across the law school submarkets. For example, from the strongest schools in the National Submarket to the weakest ones in the Problematic Submarket, the cost of a legal degree should vary dramatically. Likewise, significant differences *within* the Problematic Submarket should emerge based upon the wide range of those individual schools' employment outcomes. As shown in Part III, that expected market response has not happened. But first, Part II describes the evolution of existing bankruptcy rules that share some of the blame for that failure.

## II. THE HISTORY OF A STRANGE EXCEPTION TO BANKRUPTCY POLICY

More than fifty years ago, economist Milton Friedman advocated direct federal loans for higher education; his idea became law in 1958.<sup>37</sup> Congress expanded the system in 1965 to add federal guarantees because budget rules treated them as costless to the federal government.<sup>38</sup> It was a political "win-win": a benefit to students and bankers without any recordable cost to the federal balance sheet. Congress revised the budget rules in 1990, but the guarantees have remained.<sup>39</sup>

Meanwhile, in the early 1970s, the U.S. Department of Health, Education, and Welfare sought to avoid any negative image that might tarnish the relatively new system, such as recent graduates defaulting on their loans.<sup>40</sup> Toward that end, the agency proposed making student loans non-dischargeable in bankruptcy unless a borrower had been in default for at least five years *or* could prove "undue hardship."<sup>41</sup> No empirical evidence supported any suggestion of a student loan default problem. But anecdotal media reports of isolated abuse were sufficient to pass the first limits on dischargeability in 1976.

In 1990, Congress extended the requisite five-year default period for discharge to seven years.<sup>42</sup> When the Bankruptcy Reform Commission took another look at the issue

<sup>36</sup> Seven schools that fell into the Problematic Submarket by virtue of their below average overall FTLT-JD job placement results for the class of 2013 nevertheless qualified for the *National Law Journal* list of "Go-To Law Schools": UC-Hastings (12%), Tulane (12%), Loyola-Chicago (11%), Benjamin Cardozo (10%), Santa Clara (10%), Howard (9%), and Villanova (9%). See *Ranking the Go-To Law Schools*, *supra* note 33.

<sup>37</sup> See Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended at 20 U.S.C. §§ 401-602 (1988)); see also Fed. Educ. Budget Project, *Federal Student Loan Programs-History*, NEW AM. FOUND. (Mar. 28, 2012 7:47 PM), <http://febp.newamerica.net/background-analysis/federal-student-loan-programs-history> (explaining first federal student loans were provided under the National Defense Education Act of 1958, following Milton Friedman's recommendation).

<sup>38</sup> See Robert Shireman, *Straight Talk on Student Loans*, CTR. FOR STUDIES IN HIGHER EDUC., UNIV. OF CAL., BERKELEY, RES. & OCCASIONAL PAPER SERIES 5 (Oct. 2004), available at <https://escholarship.org/uc/item/1vq388vv>.

<sup>39</sup> See *id.* (discussing effect of Credit Reform Act on government loan programs).

<sup>40</sup> See Deanne Loonin, *No Way Out: Student Loans, Financial Distress, and the Need for Policy Reform*, NAT'L CONSUMER L. CTR., 27-28 (June 2006), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/nowayout.pdf> (describing reasons students default on debt and possible reforms to college loan system).

<sup>41</sup> See *id.* at 28.

<sup>42</sup> See DUKE CHEN, CONG. RESEARCH SERV., RS22699, STUDENT LOANS IN BANKRUPTCY 4 (2007) (noting congressional intent behind amending 11 U.S.C. § 523(a)(8) in 1990 was "to further curtail governmental student loan dischargeability").

in 1997, it still found no evidence to support earlier assertions of systematic abuse, that is, graduates on the threshold of lucrative careers declaring bankruptcy to avoid repaying loans. But Congress amended the statute to eliminate the possibility that any period of default alone would render educational debt dischargeable.<sup>43</sup>

Continuing a legislative response to a problem that never existed, in 2005 Congress extended non-dischargeability to private lenders as well, although, as the Democratic whip, Senator Dick Durbin, asked publicly in 2012, "How in the world did that provision get into the law? . . . It was a mystery amendment. We can't find out who offered it."<sup>44</sup>

With the elimination of the seven-year default period as a potential escape hatch, "undue hardship" remains the sole justification for discharging educational loans in bankruptcy. That places it in the same category as child support, alimony, court restitution orders, criminal fines, and certain taxes. Although the federal appellate courts disagree on the interpretation of the "undue hardship" standard, every formulation is daunting.<sup>45</sup>

In short, the evolution of the current legislative rules and judicial gloss that allows most educational debt to survive a bankruptcy filing developed in the absence of meaningful data and without systematic consideration of all potential policy implications. Emotional rhetoric about moral hazard led to an approach that produced a different moral hazard: law school behavior that helped put legal education in its current unfortunate place.

### III. LAW SCHOOL MISBEHAVIOR AND THE CURRENT CRISIS

Milton Friedman would probably be astonished at what his laudable idea for encouraging individuals to invest in their futures hath wrought. The system of virtually unlimited federal loans for a legal education has allowed deans to operate without meaningful long-term financial accountability for their actions. As higher education has followed America's broader societal impulse toward short-term profit-maximizing business models, law schools have not escaped the associated pressures.

The *U.S. News* rankings add incentives for schools to spend more money because higher expenditures per student enhance a ranking.<sup>46</sup> More is better, regardless of whether the money improves a student's educational experience or employment prospects.

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<sup>43</sup> See *id.* at 5 (stating "[section] 523(a)(8) was once again amended in 1998; the seven-year bar was eliminated so that governmental student loans could never be discharged, absent a showing of undue hardship").

<sup>44</sup> See Todd Ruger, *Private Student Loans Should Be Dischargeable in Bankruptcy Courts, Senator Says*, BLT: THE BLOG OF LEGAL TIMES (Mar. 20, 2012, 11:48 AM), <http://legaltimes.typepad.com/blt/2012/03/private-student-loans-should-be-dischargeable-in-bankruptcy-courts-senator-says.html> (quoting Sen. Dick Durbin).

<sup>45</sup> Compare *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (applying three-part test to determine "undue hardship"), with *Krieger v. Educ.Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013) (reiterating court's earlier description of *Brunner* criteria as an impermissible "certainty of hopelessness" standard).

<sup>46</sup> See Sam Flanigan & Robert Morse, *supra* note 22 (including "average instruction, library and supporting services" among expenditures per student in calculations).

In recent years, most graduate and professional school students have funded their tuition and living expenses with federal loans at interest rates ranging from 5.4% to 8.5%.<sup>47</sup> Law schools have no financial skin in that game because repaying those loans is solely the student's problem. If graduates default, going after them becomes the government's problem. If they opt into Income-Based Repayment (IBR), Pay as You Earn (PAYE), or Income-Contingent Repayment (ICR), any adverse consequences become both students' and the government's problem. During reduced repayment periods, outstanding loan balances continue to accrue interest. Those who leave the program early often find their debts larger than when they graduated. Participants who stay to the end (ten years for public service; otherwise it is twenty or twenty-five years, depending on the borrowing date) will get big tax bills based on income attributed to forgiven debt.<sup>48</sup> Meanwhile, schools in the Problematic Submarket remain a comfortable distance from financial risk—a moral hazard that has produced bad behavior.

An unimpeded market response to the collapsing demand for lawyers—a response that economist Joseph Schumpeter might have called "creative destruction"<sup>49</sup>—would have required the weakest competitors in the Problematic Submarket to innovate dramatically, slash tuition, and/or close their doors. But even the price consequences have been perverse. Schools unable to place graduates in decent legal positions should have difficulty charging tuition comparable to those who do. Likewise, the disparity in graduates' employment prospects across the law school submarkets should have produced varying degrees of student willingness to incur educational debt.<sup>50</sup>

Students share some of the blame for the market's failure because they indulge their own confirmation bias. For too many of them, bad things happen only to someone else. Even worse, the easy process of securing federally guaranteed loans encourages price insensitivity. As students sign their promissory notes, the huge amounts they will owe do not seem to matter. Perhaps that is because they trust their elders to act as fiduciaries. Surely, law schools would not recruit and train students for a profession in which they will not find good jobs.

Unfortunately, the law school funding mechanism pushes law schools the wrong way. It encourages schools to recruit students and produce lawyers indiscriminately. Schools whose graduates experience the worst employment outcomes produce some of the highest levels of student debt. An ignominious top-ten list—schools with the highest average law school indebtedness for 2013 graduates—includes eight members of the Problematic Submarket.<sup>51</sup>

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<sup>47</sup> See *Interest Rates & Fees*, FED. STUDENT AID: AN OFFICE OF THE U.S. DEPT OF EDUC., <https://studentaid.ed.gov/types/loans/interest-rates> (last visited Jan. 1, 2015).

<sup>48</sup> For indebted graduates, IBR/PAYE/ICR are still better than nothing.

<sup>49</sup> JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 83 (3d ed. 1942).

<sup>50</sup> Rather than calculating net tuition after scholarships and other discounts for individual schools, I used average law school debt at graduation to measure the financial burden of a legal degree.

<sup>51</sup> See *Which Law School Graduates Have the Most Debt?*, U.S. NEWS & WORLD REP. (2014), <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings>; see also *Gainful Employment and ABA Required Disclosures*, ARIZ. SUMMIT LAW SCH., <http://www.azsummitlaw.edu/gainful-employment-and-aba-required-disclosures> (summarizing data pertaining to average student loan debt of attendees as well as student employment statistics); see also *Compilation-All Schools Data*, *supra* note 33 (providing detailed list of all U.S. law schools' employment statistics). As previously noted,

School	Average Debt (2013 grads)	FTLT-JD (2013 grads)
Arizona Summit	\$184,825	44%
Thomas Jefferson	\$180,665	29%
New York Law School	\$164,739	45%
American University	\$158,636	38%
California Western	\$157,748	35%
Northwestern	\$155,777	78%
Whittier	\$154,267	27%
University of Chicago	\$153,753	87%
Florida Coastal	\$150,360	31%
St. Thomas (FL)	\$150,166	48%

Only two schools in the National Submarket appeared on the 2013 top-ten list: Northwestern and the University of Chicago. Of the eight Problematic Submarket schools that made the list, three placed *less than one-third* of their students in FTLT-JD positions. Of the twenty law schools with the highest average student debt, nine had FTLT-JD placement rates *below 40%*.

Examples of schools at the low end of FTLT-JD employment outcomes and near the high end of student law school debt include:

School	Average Debt (2013 grads)	FTLT-JD (2013 grads)	% with debt (2013 grads)
Thomas Jefferson	\$180,665	29%	92%
Whittier	\$154,267	27%	92%
Florida Coastal	\$150,360	31%	91%
Golden Gate	\$144,269	23%	96%

Compare those results to schools in the National and Regional Submarkets that have *fewer* students with debt, *lower* average student debt, and dramatically *higher* FTLT-JD employment outcomes, including:

School	Average Debt (2013 grads)	FTLT-JD (2013 grads)	% with debt (2013 grads)
University of Va.	\$132,601	80%	82%
Duke	\$124,549	85%	60%
Vanderbilt	\$114,411	78%	72%
Yale	\$111,961	74%	80%

"FTLT-JD" excludes all "JD-Advantage," "Professional," "Non-professional," "Law School-funded," part-time, and short-term positions.

Existing bankruptcy rules have insulated all schools from the financial risk that their students will fail to obtain employment for which they are supposedly training them. The weakest schools in the Problematic Submarket are the biggest beneficiaries of this protective cover; their students and federal taxpayers are the biggest victims.

#### IV. A STEP TOWARD LAW SCHOOL ACCOUNTABILITY

Since the Great Recession began to decimate the employment prospects for new law graduates in 2008, the ABA has approved eight new law schools.<sup>52</sup> Four of those schools are weak members of the Problematic Submarket: their FTLT-JD rates range from 25% to 37% and their students' average law school debt at graduation exceeds \$100,000.<sup>53</sup> At these and many other schools, the high price of a legal education bears little or no relationship to graduates' poor employment outcomes. What can be done?

It is easy to see what has not worked: law school self-restraint. Although acceptance into a top law school remains difficult, the weakest schools are now admitting almost anyone who applies. For example, Thomas M. Cooley Law School with its 27% FTLT-JD employment rate for 2013 graduates admitted 79% of applicants to its fall 2013 entering class.<sup>54</sup> Florida Coastal School of Law (31% FTLT-JD employment rate) accepted 75% of 2013 applicants.<sup>55</sup> Thomas Jefferson School of Law (29% FTLT-JD employment rate) accepted more than 80% of 2013 applicants.<sup>56</sup> Many law school deans, administrators, and faculty have become unapologetic salespeople for schools offering a degree of dubious value. The ABA and state bar associations have done nothing.

An approach that Milton Friedman might have endorsed—private lawsuits to keep law schools honest—has not solved the problem either. Starting in 2011, recent graduates filed consumer fraud litigation alleging that their schools had manipulated job and salary data to lure students. Courts have dismissed most of the complaints; a handful of survivors are making their way through the system but have little chance of success.<sup>57</sup>

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<sup>52</sup> See *ABA-Approved Law Schools by Year*, AMERICANBAR.ORG (2014), [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html) (showing year in which each law school was approved by ABA).

<sup>53</sup> See *Compilation-All Schools Data*, *supra* note 33 (ranking law schools via percent of FTLT-JD rates); see also *Which Law School Graduates Have the Most Debt?*, *supra* note 51 (ranking law schools via their students' average debt upon graduation and listing average indebtedness).

<sup>54</sup> See *Other Schools to Consider*, U.S. NEWS & WORLD REPORT: BEST GRAD SCHOOLS, 2015 ed., at 88.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See, e.g., *MacDonald v. Thomas M. Cooley Law Sch.*, 724 F.3d 654, 663 (6th Cir. 2013) (holding law school graduates could not prove the school "committed fraudulent misrepresentations based on the 'percentage of graduates employed' because the graduates [could not] prove" the statistic was false); see also Paul L. Caron, *Three Chicago Law Schools Prevail in Fraud Lawsuits Brought by Alumni Over Placement Data*, TAXPROF BLOG (Sept. 30, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/09/three-chicago-law-schools-.html](http://taxprof.typepad.com/taxprof_blog/2014/09/three-chicago-law-schools-.html) (quoting Marc Karlinsky, *Law Schools Prevail in Suit Over Job Stats*, CHICAGO DAILY LAW BULLETIN (Sept. 26, 2014), <http://www.chicagolawbulletin.com/Archives/2014/09/26/Law-Schools-Statistics-9-26-14.aspx>) (noting three separate cases dismissed on grounds that former students did not show data was deceptive or caused their injuries); Joan C. Rogers, *Law Graduates' Consumer Fraud Claims Squeak Past Alma Mater's Motion to Dismiss*,

New ABA rules requiring schools to provide better information about their recent graduates' employment outcomes have reduced the number of first-year applicants, but they have not eliminated law school moral hazard resulting from the federal funding mechanism for legal education.

Professor Tamanaha is among those proposing that private loans be eligible for discharge in bankruptcy.<sup>58</sup> That is a good start; however, private loans comprise less than 15% of all outstanding student debt.<sup>59</sup> Extending dischargeability to all loans would shift individual student losses to the federal government lender/guarantor, but would not increase law school accountability. Even adopting a process whereby the government recouped defaulting amounts from law schools would delay consequences of law school misbehavior to a time that is too far from two critical economic decisions: (1) schools abusing the present regime, and (2) students burdening themselves with what could become unmanageable debt.<sup>60</sup>

The U.S. Department of Education's recent efforts to hold some for-profit colleges accountable for their poor student outcomes may provide a way to counteract the moral hazard that encourages many law schools to exploit student idealism and naïveté. In 2011, the Secretary of Education proposed regulations tying the availability of student loans to debt-to-income ratios and loan repayment rates for the school's graduates.<sup>61</sup> In June 2012, a District of Columbia federal court vacated the regulations because the debt repayment standard "was not based upon any facts at all."<sup>62</sup> However, the court upheld generally the agency's power to link a school's participation in the federal student loan program to its students' outcomes.<sup>63</sup>

Applying that lesson to law school funding, the government should be able to adjust the guaranteed amount of a student's loan according to the school's JD-required employment results. Congress never intended federal student loan guarantees to enable unsuccessful law schools to keep tuition high or, in some cases, their doors open. To the contrary, the statute provides that federal loans are available only for institutions that "prepare students for gainful employment in a recognized occupation."<sup>64</sup> Law schools exist to prepare their students for gainful employment as attorneys. Insofar as a school fails to accomplish that task for, say, half of its graduates, a federal loan funding

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BLOOMBERG BNA (Apr. 10, 2013), <http://www.bna.com/law-graduates-consumer-n17179873307/> (discussing lawsuits against law schools alleging manipulated employment and salary data in various states).

<sup>58</sup> See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 180 (2012) ("[T]here must be no federal guarantee of private loans to attend law school, and any such private loans must be eligible for discharge in bankruptcy.").

<sup>59</sup> See Mark Kantrowitz, *Government Report Reviews Private Student Loans and Recommends Statutory Changes*, FASTWEB (July 19, 2012), <http://www.fastweb.com/financial-aid/articles/3613-government-report-reviews-private-student-loans-and-recommends-statutory-changes>.

<sup>60</sup> Other worthwhile proposals, including income-based repayment in the "Earnings Contingent Education Loans (ExCEL) Act," and interest rate reductions in the "Bank on Students Emergency Refinancing Act," likewise fail to address the underlying law school moral hazard issue at a time that would most influence decision-makers.

<sup>61</sup> See Program Integrity: Gainful Employment, 75 Fed. Reg. 43616, 43618 (July 26, 2010) (to be codified at 34 C.F.R. pt. 668) (considering some evidence that "some students attending for-profit institutions have not been well served" and the need to protect taxpayers "against wasteful spending . . . that also lead to high indebtedness for students").

<sup>62</sup> See *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 154 (D.D.C. 2012).

<sup>63</sup> See *id.* at 151–52 (finding the Department's consideration of debt repayment was "rational" and permissible).

<sup>64</sup> Higher Education Act, 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A) (2012).



formula tied to individual schools' FTLT JD-required employment rates would honor the statute's language and purposes.

Implementation would be straightforward. The average annual tuition and estimated living expenses for all law schools in the National Submarket could become the baseline federal guarantee amount. For example, assume that average is \$80,000, consisting of \$55,000 in tuition and \$25,000 in estimated living expenses.

The next step would be to determine the FTLT-JD employment outcome required for a school to receive 100% of the federal guarantee benefit for its students' loans. For illustrative purposes, assume that threshold rate is 55%—the current FTLT-JD average (excluding law school-funded jobs) for all schools and the cutoff for inclusion in the Regional Submarket. If at least 55% of a school's most recent class found FTLT-JD employment within nine months graduation, then all of its entering students' loans for tuition and living expenses—100%—would qualify for the guarantee.

Below that 55% threshold the guarantee percentage would adjust downward dramatically according to a sliding scale. For example, if only 45% percent of a school's graduates obtained FTLT-JD positions, the federal guarantee would cover only half of the baseline amount—or \$40,000—of its students' loans for annual tuition and living expenses. For schools below a 40% placement rate, the federally guaranteed amount would be only 25%, or \$20,000 a year. Schools with FTLT-JD rates below 33% should not qualify for any guarantee. Importantly, if a school or private lender provided loans to fill the gap between the school's reduced guarantee amount and its students' actual tuition/living expenses (as the troubled for-profit Corinthian Colleges did), those loans would be dischargeable in bankruptcy without the current "undue hardship" requirement.<sup>65</sup>

Although not recommended, evaluating individual law school results based on a more generous definition of positive outcomes would require appropriate adjustments to the federal guarantee scale. Whittier College Law School illustrates that point. Nine months after graduation, Whittier reported to the ABA that its 2012 FTLT-JD employment rate was 35%, but *U.S. News'* methodology awarding full credit for "JD-Advantage" jobs jumped Whittier's employment rate to 46%.<sup>66</sup>

Unleashing market forces that enhance law school accountability should create more meaningful price differences across submarkets and within the Problematic Submarket. One thing is clear: current outcomes are irrational. In California, the class

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<sup>65</sup> This approach is neutral with respect to the type of legal job pursued or the salary earned. The only criterion for determining a school's federal guarantee level would be its FTLT-JD employment rate. Once set, the threshold percentage needed to qualify for 100% of the federal guarantee amount (here, 55%) should remain fixed because linking the threshold to each subsequent year's overall FTLT JD-rate could create perverse dynamic consequences. For example, a period of declining demand for new law graduates would produce a lower overall FTLT-JD average for all law schools. If that lower FTLT-JD average became the new threshold for federal loan guarantee qualification, weak schools in the Problematic Market would find it easier to qualify for a larger percentage of the federal guarantee, even as demand for their graduates fell. Likewise, a period of increasing demand for new graduates would raise the overall FTLT JD-average for all law schools. Allowing a comparable rise in the federal guarantee threshold could penalize some schools in the Regional and Problematic Submarkets at a time when the prospects for their graduates were improving. Setting a fixed threshold FTLT-JD rate avoids those difficulties. Once all schools achieved that threshold, the overall law school market would have achieved something more closely resembling supply/demand equilibrium than presently exists.

<sup>66</sup> See *Other Schools to Consider*, *supra* note 54, at 88.

of 2013 graduates from Golden Gate University, Whittier, and California Western School of Law incurred debt exceeding that of their counterparts at Stanford and UC-Berkeley.<sup>67</sup> In Boston, the 2013 graduates of Suffolk University incurred debt almost identical to that of students at Harvard and more than students at Boston College and Boston University.<sup>68</sup> In New York, 44% of the 2013 graduates of New York Law School found FTLT-JD employment, but average student debt at graduation was \$164,739—more than Columbia, NYU, and Yale.<sup>69</sup>

Beyond the potential for creating meaningful value-driven price differences, an outcome-based approach to student loan guarantees should produce other benefits over time. Some weak schools in the Problematic Submarket might innovate in ways that improved the job prospects of their graduates. Others might reduce enrollments to increase their FTLT JD-required employment rates. Schools that could not deal with the pressures of a more functional market might close—a completely appropriate consequence of the quest for equilibrium.

A common defense of schools in the Problematic Market is that they admit disproportionately more students from less privileged backgrounds: "That's part of why their LSATs and UGPAs are lower, part of why their educational debts are higher, and part of why they can't get jobs as easily as their more socially-connected peers."<sup>70</sup> Accordingly, the argument goes, anything that limits educational loans will encourage schools to abandon such prospective students in favor of "children of rich parents."<sup>71</sup>

Requiring need-blind admissions as a condition of participation in the federal loan program should ameliorate those concerns. More importantly, 86% of current law graduates leave school with average law school indebtedness exceeding \$100,000, so the pool of wealthy pre-law prospects seems limited.<sup>72</sup> Finally, if parents of affluent students are willing to overpay for a degree that is not likely to result in a JD-required job for their children, who loses? Less privileged students who avoid staggering debt for a degree that will not lead to the type of employment that prompted them to consider law school in the first place? In that respect, the current system of unlimited federal loan guarantees, non-dischargeable educational debt, and dubious employment prospects for graduates of weak schools in the Problematic Submarket victimizes the very individuals for whom defenders of unlimited guarantees profess concern.<sup>73</sup>

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<sup>67</sup> See *Which Law School Graduates Have The Most Debt?*, *supra* note 51; see also *Directory: Law*, U.S. NEWS & WORLD REPORT: BEST GRAD SCHOOLS, 2015 ed., at D-85 to D-86 (providing average law school indebtedness for each law school in California).

<sup>68</sup> See *Which Law School Graduates Have The Most Debt?*, *supra* note 51; see also *Directory: Law*, *supra* note 67, at D-91 (stating average student indebtedness at graduation for law schools in Massachusetts).

<sup>69</sup> See *Which Law School Graduates Have The Most Debt?*, *supra* note 51; see also *Directory: Law*, *supra* note 67, at D-94 to D-95.

<sup>70</sup> See Theodore Seto, Comment to *Student Loans, Moral Hazard, and a Law School Mess*, BELLY OF THE BEAST (Sept. 11, 2014, 11:45 AM), <http://thelawyerbubble.com/2014/09/10/student-loans-moral-hazard-and-a-law-school-mess/#comments>.

<sup>71</sup> See *id.*

<sup>72</sup> See Delisle, *supra* note 3, at 1, 9 (analyzing amount of student debt incurred by graduate students and concluding "debt for students who earned a range of master's and professional degrees has surged in recent years").

<sup>73</sup> The proposal offered here might be applicable to higher education generally. However, the relevant "outcome" for loan guarantee funding purposes would be different from the JD-required employment model. For example, post-graduate employment placement is not the appropriate metric for determining the value of a liberal arts degree. However, the five-year graduation rate from a college or vocational school might be.

Perhaps deans, administrators, and faculty in the weakest submarkets believe their own press releases, namely, that a law degree from *their* school is worth what they are charging students. If so, tying federal loan guarantees to outcomes should not bother them. If optimistic predictions of a general surge in the demand for lawyers are correct—and *apply to all prospective law students at every school*—even the weakest schools in the Problematic Submarket should have nothing to fear. Such a rising tide would lift even the most leaky boats. Consumers will flock to their product because it offers value, not because a federal subsidy creates moral hazard that encourages marginal law schools to engage in bad behavior that fills classrooms and maximizes revenues.

On the other hand, talk is cheap. Decisional errors about a young person's career can be expensive and enduring.