

Law School-Administered Financial Aid: The Good News and the Bad News

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In 2015, the ABA Task Force on Financing Legal Education reported a vast increase in law school-administered financial aid over the previous ten years. Financial aid administered by law schools was even the most rapidly rising cost factor for law schools collectively.¹ At first glance this increase might seem like some good news for persons sharing my values and worldview. Historically financial aid has been associated with helping the financially needy, encouraging them and members of underrepresented identities to attend law school, and helping make it possible for students who want to devote their careers to low-paying, public-interest-oriented work to achieve their dreams. In fact, however, as the task force makes clear, almost all the increased financial aid is being awarded to applicants with high LSAT scores and high undergraduate GPAs—what is called “merit” these days.² Any correlation between the beneficiaries of increased financial aid and the kinds of students who traditionally benefited from law school-administered financial aid is purely coincidental.

The recent increases in law school-administered financial aid have taken place as law schools cope with their most turbulent decade in my lifetime. They face decreasing applications and enrollments, rapidly rising tuition, rapidly rising aggregate student debt levels at graduation, and intense competition between comparable law schools for rankings by *U.S. News & World*

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1. TASK FORCE ON FINANCING LEGAL EDUCATION, AM. BAR ASS’N, FINAL REPORT (2015), at 37 (figure 11), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf [https://perma.cc/6JPZ-QJ9X] [hereinafter ABA TASK FORCE 2 REPORT]. The report divides the expenses of running a law school into three primary categories: instructional salaries, administrative salaries, and grants/scholarships. Only the latter category has grown per full-time equivalent student throughout the period for which the task force had data (AY 2004-05 to AY 2012-13). *Id.* at 36 (figures 10a and 10b). *See infra* note 14 and accompanying text.
2. *Id.* at 28-30. *See infra* notes 19-20 and accompanying text.

Report.³ These developments account for the dramatic increase in law school-administered financial aid, as well as the decisions law schools make about how to distribute that increased aid, as I will explain. I will conclude this essay with some discussion of the possibilities of redirecting a substantial part of this increased financial aid, so that it might better fulfill the objectives traditionally associated with law school-administered financial aid.

In this essay I rely upon empirical evidence gathered by others—especially the task force report⁴—and upon generally accepted assumptions about developments in legal education, and their causes. I have paid particular attention to Brian Tamanaha’s provocative 2012 book, *Failing Law Schools*,⁵ and the considerable literature it has spawned.⁶ A good deal of this literature addresses Tamanaha’s concern that law schools toward the bottom of *U.S. News* rankings charge students more aggregate tuition than those students can expect as a return on their investment in the form of enhanced income after graduation.⁷ This concern, though a real one, is not the subject of this essay.⁸ I focus instead on developments within roughly the top 100 law schools as ranked by *U.S. News*.

What Has Happened in the Twenty-First Century

The ABA’s Task Force on Financing Legal Education (hereinafter ABA Task Force 2) was formed at the recommendation of the ABA’s earlier Task Force on the Future of Legal Education (hereinafter ABA Task Force 1).⁹ ABA Task Force 1 documented increasing law school tuitions, the resultant increases in graduating students’ debt loads, and the increasing practice of distributing available financial aid on the basis of “merit” rather than “need.”¹⁰ Concerned

3. U.S. NEWS & WORLD REPORT, BEST GRADUATE SCHOOLS (annual) contains a section devoted to ranking American law schools. Partial information from this section of the latest year is available online. *Top Law Schools*, U.S. NEWS & WORLD REP. EDUC., <https://www.usnews.com/best-graduate-schools/top-law-schools> (last visited Aug. 11, 2017).
4. ABA TASK FORCE 2 REPORT, *supra* note 1.
5. BRIAN TAMANAHA, *FAILING LAW SCHOOLS* (2012).
6. The critique of Tamanaha of greatest relevance to this essay is Philip Schrag, *Failing Law Schools—Brian Tamanaha’s Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387 (2013). See also Randall Shephard, *The Problem of Law School Discounting—How Do We Sustain Equal Opportunity in the Profession?*, 50 IND. L. REV. 1 (2016).
7. E.g., Elizabeth Chambliss, *It’s Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, 26 GEO. J. LEGAL ETHICS 423 (2013).
8. Much good and current information on this topic is reported in a wonderful website maintained by Law School Transparency, a nonprofit organization. See LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited Feb. 3, 2017).
9. TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS’N, REPORT AND RECOMMENDATIONS 30 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf [<https://perma.cc/HQ9J-DUFW>] [hereinafter ABA TASK FORCE 1 REPORT].
10. *Id.* at 22–23.

that these developments were unfair and inhibiting access to law schools, Task Force 1 recommended formation of ABA Task Force 2 to consider possible remedies, and the ABA quickly acted upon this recommendation.

ABA Task Force 2 proceeded to gather the most complete data on law school finances, including law school-administered financial aid, that has been made public to date.¹¹ Each law school has long been required to provide detailed financial data about its costs and expenses, including financial aid, to the ABA Section on Legal Education and Admissions to the Bar (hereinafter “the section”), the accrediting agency for legal education institutions. The section treats reports to it by individual law schools as proprietary and confidential.¹² Because law schools compete for students and rankings, the schools do not want their detailed data shared with rivals. ABA Task Force 2 was able to get the section to make much of the reported data available to it, on the understanding that the data would be used only to create tables and graphs showing collective trends. ABA Task Force 2 did not break down its collective data by tiers—that is, in which quartile or quintile a law school stood in the *U.S. News* rankings.¹³ It is possible, perhaps likely, that law school financial aid policies vary by which tier in the rankings the school occupies, but it is not possible to learn or validate that from the report.¹⁴ Nonetheless the ABA Task Force 2 has provided the best data available on what is happening with tuition levels, aggregate student indebtedness, and financial aid in our law schools.

The ABA Task Force 2 data confirm the widely held impressions that since Academic Year (AY) 2009-2010, law school enrollments have been declining,

11. Published elsewhere in this issue is an article reporting even more detailed information about law school tuitions, but this information is based on modeling, as described in the appendix to the article. Though the models seem reasonable, the information published is not data as such, just good guesses based on reasonable models. Jerome M. Organ, *Net Tuition Trends by LSAT Category from 2010 to 2014 with Thoughts on Variable Return on Investment*, 67 *J. LEGAL EDUC.* 51 (Autumn 2017).
12. The section requires that some of the information submitted be made publicly available, annually, on law school websites, in what is called a Standard 509 Information Report. *E.g.*, *University of Wisconsin—2015 Standard 509 Information Report*, U. WIS. L. SCH., https://law.wisc.edu/prospective/admissions/documents/std509infoport-162-2730-12-11-2015_11-26-01.pdf (last visited Sept. 6, 2017) [<https://perma.cc/L6ZK-NBX6>] (for Wisconsin Law School). The same information for all schools can be found at SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N ABA REQUIRED DISCLOSURES, www.abarequireddisclosures.org (last visited September 6, 2017) section. The 509 information report includes a good deal of information about law school-administered financial aid, including the percentage of students receiving at least some aid, the percentage receiving full tuition or more, and the percentage receiving at least fifty percent to ninety-nine percent of tuition. But the required 509 disclosures do not report whether the aid is awarded on the basis of “merit” or “need,” nor do they report the average student indebtedness at graduation. ABA TASK FORCE 2 REPORT, *supra* note 1 includes information about these latter matters, though not broken down by individual school.
13. Its tables and graphs do, however, distinguish between public and private schools.
14. Organ’s article in this issue estimates, based on his modeling, considerable differences. See Organ, *supra* note 11.

while tuition levels and aggregate student indebtedness (of graduates) have risen dramatically and steadily since AY 1999, and continue to do so. Annual tuition has increased over a hundred percent between AY 1999-2000 and AY 2014-2015 for public law schools on an inflation-adjusted basis.¹⁵ Average student indebtedness at graduation, on an inflation-adjusted basis, increased about thirty-three percent for public law school students between AY 2004-2005 and AY 2012-2013.¹⁶

The finding with respect to law school-administered financial aid, which has stimulated this essay, is as follows: “[T]he greatest percentage increase (in law school expenditures per student) came in grants/scholarships to use in discounting tuition. Between AY 2004-05 and AY 2012-13, the average increase for public law school grants/scholarships expenditures was 99%, while for private law schools the average increase was 44%.”¹⁷

Increases in law school-administered financial aid have not kept up with increases in tuition when the entire period beginning in AY 1999 is considered, but since AY 2009 they have come close. During this period what both task forces call net tuition (tuition less grants/scholarships) has remained stable for private schools, while for public schools in the post-AY 2009 period net tuition has increased at less than half the rate of net tuition increases in the preceding ten years.¹⁸

ABA Task Force 2 looked into how much of the increased financial aid was being awarded on the basis of “merit” as opposed to “need,” or what Task Force 2 called “need plus.”¹⁹ The available data come from the information that the section required law schools to report for a period of years that ended in AY 2009-2010. The data are not very reliable because the section has never

15. ABA TASK FORCE 2 REPORT, *supra* note 1, at 7. The rate of increase in inflation-adjusted private law tuition for the same period was considerably less but nonetheless substantial. *Id.*
16. *Id.* at 8. The equivalent figure for private law schools is about twenty-five percent. *Id.* The period measured for student indebtedness levels, as reported by the ABA Task Force 2, is different from the period used for tuition levels, presumably because of the data made available to it.
17. *Id.* at 9. *See also id.* at 34-37.
18. *Id.* at 27-28. Organ estimates that net tuition has decreased between 2010 and 2014 for middle tier schools (in *U.S. News* rankings), based on his modeling. Organ, *supra* note 11, at 56 (Figure 1).
19. Throughout this essay I put the words “merit,” “need,” and “need plus” in quotation marks. With respect to the latter two categories, that is because there is no consensus understanding of what the measures of “need” should be in a financial aid scheme that targets needy students. With respect to “merit,” I am convinced that substantial consensus does exist as concerns decisions about financial aid—LSAT score and undergraduate GPA—but I use quotation marks nonetheless to show that I dissent from the exclusive reliance on these measures to define “merit.” Such a definition does not include reference to any graduate school record or other post-undergrad work experience, for example, presumably because the *U.S. News* rankings do not consider these factors in measuring “selectivity.” Stated otherwise, for purposes for financial aid an applicant with “merit” is one who will help the school’s ranking by matriculating, and nothing else.

provided clear guidelines to reporting schools for what should be considered a “merit” or “need” award, so schools did not apply the same criteria. Nonetheless the data suggested that nearly all the increase in financial aid went to “merit” or “needs plus” awards. Pure “need” awards remained largely stable during this period, essentially at historic levels.²⁰ Testimony received by the ABA Task Force 2 from law school deans reinforced these conclusions. One dean spoke of a “merit scholarship arms race.”²¹ The ABA Task Force 2 did not attempt to assess what is meant by “merit” in its report, but anecdotal evidence convinces me it refers almost exclusively to the LSAT and undergraduate GPA scores that are relied on strongly by the *U.S. News* rankings to determine a school’s “selectivity.”

Should Merit Aid Be Shifted to Need?

Quite a few people, including both task forces, have expressed distress that the distribution of the vast increase in law school-administered financial aid has been almost exclusively to students selected for “merit.” The biggest concern is for increased financial aid funded by tuition increases. These tuition increases are not paid by the “merit” awardees of financial aid, who receive their “merit”-based financial aid as tuition discounts.²² And because these students do not receive sizable tuition discounts, the tuition increases contribute, often substantially, to their aggregate student indebtedness upon graduation. It is presumed—reasonably, I think, but I have not seen an empirical study on this point—that students with higher LSATs and undergraduate GPAs have better prospects than their classmates for higher-paying employment opportunities upon graduation. The net effect is that lower-LSAT students are subsidizing the legal education of higher-LSAT students, when the latter are more likely to have the postgraduate income that will allow them to repay substantial student indebtedness without undue hardship. In the words of Brian Tamanaha:²³ “Law schools have in effect constructed a reverse Robin Hood arrangement,

20. ABA TASK FORCE 2 REPORT, *supra* note 1, at 28–30. For a recently published study that validates this finding, based on a student survey in which the students self-report whether they received a “merit” scholarship, see LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2016 ANNUAL SURVEY RESULTS: LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY (2017), <http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE-2016-Annual-Report.pdf> (last visited Sept. 8, 2017) [<https://perma.cc/HZ8R-93P4>] [hereinafter LAW SCHOOL SCHOLARSHIP POLICIES].

21. ABA TASK FORCE 2 REPORT, *supra* note 1, at 30.

22. The clear trend is for schools to grant some kind of tuition discount to an ever-increasing percentage of students. ABA TASK FORCE 2 REPORT, *supra* note 1 found that in AY 2013–2014 about sixty percent of law students received some kind of tuition discount. *Id.* at 9. In this essay I assume that these discounts are distributed in a skewed fashion, with the highest-LSAT students receiving the highest discounts and students at the LSAT median or below receiving much more modest discounts. Organ makes a similar assumption in constructing his models. Jerome M Organ, *supra* note 11.

23. TAMANAHA, *supra* note 4, at 99. If one assumes that there is a correlation between LSAT score and the wealth of the applicant’s family of origin, as I think is likely, then Tamanaha’s “reverse Robin Hood” characterization is even more appropriate.

redistributing resources between students, making the (likely) poorer future graduates help pick up the tab for the (likely) wealthier future graduates.”

When the resources for additional financial aid are derived from tuition increases, the normative argument for shifting increased aid to “need” rather than “merit” is based on distributional fairness, dramatized by Tamanaha’s “reverse Robin Hood” characterization. However, not all the increased financial aid comes from tuition increases, and in some schools none of the increased aid funds are derived in that way.²⁴ Even when the resources for increased aid come from sources other than tuition increases, strong arguments exist for shifting increased financial aid away from “merit” awards to entering law students. I would redirect the awards to entering students with need and to law graduates with low incomes through loan repayment assistance programs (hereinafter LRAPs). My rationales are detailed in the following paragraphs.

Historically, when law school-administered financial aid was commonly distributed on a “need” basis, aid was thought to help students from families who could not help them financially to enroll in a law school. Today access to legal education is facilitated by student loan programs, which will provide students sufficient resources to cover tuition and reasonable living expenses without working while in law school. Given the rapid tuition increases, however, as well as the less-than-robust employment markets for recent law graduates, there must be potential law students coming from families with limited financial resources who are deciding simply not to incur the heavy indebtedness that a law school education would demand.²⁵ Legal education is the gateway to the legal profession. For persons who value class diversity in the legal profession,²⁶ as I do, there is still a strong case for distributing financial aid on a “need” basis in order to encourage matriculation. Few other ways exist to enhance diversity in background within the legal profession.

I also argue for shifting financial aid from “merit” awards to entering students to LRAPs for law graduates needing assistance in repaying student

24. At my former law school, Wisconsin, for example, all tuition goes into the campus’s general fund. The law school receives an annual budget from the university administration, but that budget is not directly dependent on tuition raised in any given year. Any relationship between tuition raised and resources available to the law school, including those that could be spent on financial aid, is only long term, if there is one at all. So when Wisconsin directs increased spending to financial aid for “merit” students, in the immediate term it must find those funds from enhanced donor giving, from an enhanced stipend from the university administration, or from cuts to other programs.

25. I am not aware of good data showing reasons for the decline in law school applications over the past five-plus years, but I assume that rising tuitions is one important factor, despite the ready availability of federally guaranteed student loans to cover those tuition increases. For a similar lament about the impact of rising tuitions coupled with tuition discounting for “merit” students, see Shephard, *supra* note 6. Mr. Shephard, formerly Chief Justice of the Indiana Supreme Court, was chair of ABA Task Force 1.

26. I would also justify shifting aid from “merit” to “diversity,” whether or not the diversity applicants have “need,” on similar grounds—that is, a commitment to improved demographics in the legal profession of the future—but I haven’t developed that argument in this essay.

loan indebtedness. Student loan indebtedness for law graduates has been rising along with tuition levels, and the amounts have become staggering, exceeding \$100,000 for the median graduate.²⁷ Professor Philip Schrag, in several publications, has rightly emphasized that the potential hardships facing these students has been significantly reduced by federal government subsidy programs developed for persons carrying more student loan indebtedness than they can comfortably handle.²⁸ Under the current income-based repayment plans (called PAYE and REPAYE), most persons owing the federal government can elect to set their student loan indebtedness payment at ten percent of disposable income, even if that amount is less than the interest accruing on the loan. If payments are maintained, any balance remaining unpaid at the end of twenty-five years is forgiven.²⁹ However, as Professor Schrag has recognized, these generous repayment and forgiveness terms may not be stable. Both the President, by executive order, and Congress can alter or repeal these terms. President Trump proposed significant changes in the 2018 budget which, if enacted, would negatively affect law graduate student

27. ABA TASK FORCE 2 REPORT, *supra* note 1, at 32 (figure 9), reported an average aggregate indebtedness in AY 2012-2013 of \$127,000 for private schools and of \$88,000 for public law schools. The well-known Tax Prof blog reports average aggregate indebtedness for 2015 graduates of each of the top twenty-five law schools. The totals ranged from \$144,000 to \$175,000, suggesting the amounts continue to rise. Paul Caron, *2017 U.S. News Law School Rankings: Average Student Debt*, TAXPROF BLOG (Mar. 18, 2016), http://taxprof.typepad.com/taxprof_blog/2016/03/2017-us-news-law-school-rankingsaverage-student-debt.html [<https://perma.cc/ML6V-EFZX>]. It must be remembered that these numbers are averages. Many graduates have much higher debt loads. And these figures do not report all student debt, excluding accrued interest at graduation as well as undergraduate indebtedness.
28. *E.g.*, Schrag, *supra* note 5. And Michael Simkovic and Frank McIntyre have rightly pointed out that for most law graduates, the investment in legal education is likely to yield a positive return over a lifetime, when compared with earnings likely obtained by persons not pursuing education beyond a bachelor's degree. Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 284 (2014) ("For most law school graduates, the benefits of a law degree exceed its cost by a large margin."). "[O]ur results suggest that attending law school is generally a better financial decision than terminating education with a bachelor's degree." *Id.* at 285. See also Michael Simkovic & Frank McIntyre, *Populist Outrage, Reckless Empirics: A Review of Failing Law Schools*, 108 NW. U. L. REV. ONLINE 176 (2014).
29. Schrag, *supra* note 5, at 396-97. Discretionary income is defined as adjusted gross income (from tax returns) less 150% of the poverty level for a family of the graduate's family size. Any forgiven amounts are subject to tax at the time of forgiveness, which will be a sizable tax jolt. Persons who hold public-interest jobs receive even more generous forgiveness terms. For more information on repayment plans, see the Department of Education's guidance, *Work with Your Loan Servicer to Choose a Federal Student Loan Repayment Plan That's Best for You*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans> (last visited Sept. 6, 2017) [<https://perma.cc/4TB3-R8GW>], as well as guidance for law graduates specifically provided by the AccessLex Institute: THE ROAD TO ZERO: A STRATEGIC APPROACH TO STUDENT LOAN REPAYMENT (Mar. 017), https://www.accesslex.org/sites/default/files/2017-03/29398_road_to_zero_legal_final3.17.pdf [<https://perma.cc/4DVM-TR7P>].

loan indebtedness incurred in 2018 or later.³⁰ While these budget proposals still must make their way through Congress, where they may not be accepted, in my judgment similar proposals will become increasingly probable as the cost to the federal budget of promised loan forgiveness becomes more immediate.³¹ It is well-established that aggregate student loan indebtedness now exceeds aggregate credit card indebtedness, and most of it is owed to the federal government and eligible for forgiveness.³²

Little beyond anecdote has been published about the hardships imposed on persons carrying large student indebtedness—for example, in securing a mortgage loan to purchase a home—even assuming they have elected to repay that indebtedness under the currently generous income-based repayment plans. But it is hard to believe such hardships are not substantial for the large number of law school graduates with aggregate indebtedness exceeding \$100,000, many with indebtedness well in excess of that amount.³³ I believe law schools should be concerned about the quality of life of their graduates.

Financial aid programs for matriculating students based on “need” can help address the problem of law graduate overindebtedness, but I am suggesting that LRAP programs, or what I like to call back-ended needs-based financial aid, are a more efficient method to distribute financial aid where it is most needed. A student may graduate with very large accumulated indebtedness, but if the student secures employment with a six-figure income, that indebtedness is not likely to be a substantial hardship. It is students who decline and/or are unable to obtain such employment who face the potential problems of overindebtedness, and they are best identified by a back-ended financial aid program. LRAP programs can also facilitate greater law graduate choice

30. The most significant changes for law graduates would extend the minimum payment period before eligibility for forgiveness for student loan “graduate” debt to thirty years, and increase the minimum annual payments for low-income earners to 12.5% of disposable income. The proposed budget would also eliminate the special ten-year forgiveness period for graduates with public-interest employment. Danielle Douglas-Gabriel, *Trump and DeVos Plan to Reshape Higher Education Finance. Here’s What It Might Mean for You*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/17/trump-and-devos-plan-to-reshape-higher-education-finance-heres-what-it-might-mean-for-you/?utm_term=.1c0997295335 [https://perma.cc/DBC3-ECZK].
31. ABA TASK FORCE 2 REPORT, *supra* note 2, at 57-62 (Separate Statement of Professor Philip Schrag, a member of Task Force 2). The forgiveness features apply only to persons who have graduated after 2007, so with few exceptions the forgiveness “promises” have not yet affected federal revenues. There has been concern expressed in the media about the rising burden on the federal budget from the forgiveness programs. See Jason Delisle, *The Spiraling Costs of a Student Loan Relief Program*, POLITICO, July 21, 2017, <https://www.politico.com/agenda/story/2017/07/21/public-service-loan-forgiveness-cost-double-000478> (last visited Sept. 8, 2017) [https://perma.cc/Q6FQ-HDM3].
32. See Sreekar Jasthi, *Credit Card, Student Loans and Mortgage Debt in the U.S.*, NERDWALLET, <https://www.nerdwallet.com/blog/credit-card-data/credit-card-student-loans-mortgage-debt-comparison> (last visited Sept. 6, 2017) [https://perma.cc/QMN6-D6FY].
33. For recent accounts of the hardships imposed by student loans, see Editorial, *Student Debt’s Grip on the Economy*, N.Y. TIMES, May 21, 2017, at SR 10.

in selecting jobs. Many graduates may prefer to pursue low-paying public-interest jobs (e.g., civil legal aid), or to work in smaller communities where legal needs are substantial but lawyer salaries lower, even when better-paying opportunities are available.³⁴ Count me among those who not only value law graduate choice in selection of a job but also welcome choices that provide legal services to sectors of the population whose legal needs are underserved. The latter would seem a particularly appropriate emphasis for a public law school, partially supported by tax revenues.

Not only do I personally favor a shift from “merit”- to “need”-based financial aid, including LRAP, but I think many law schools would implement this shift if they were free of the pressures created by the *U.S. News* rankings. As evidence of that conclusion, I offer the financial aid plans offered by three law schools that are largely free of those pressures—Harvard, Stanford, and Yale. These schools do not have to compete for high-ranking students because they are assured, by their reputations and previous rankings, of a student body with high “selectivity” scores. They are also very well-endowed, receive large donations from graduates as annual giving, and have lots of resources to devote to financial aid. I will briefly describe Yale’s program as an example of the kind of financial aid program that I believe many law schools would, and should, adopt if they were free of the pressures to increase the amount of “merit”-based aid. Obviously most schools cannot afford to be as generous as Yale, but they could assign whatever resources are available for financial aid in the same categories as Yale.

Yale Law School distributes its financial aid on a needs-only basis. Some of the aid is given to current students as grants during their studies. The balance is given to graduates through what Yale calls a Career Options Assistance Program (COAP), basically an LRAP program. The student grants are awarded after a complicated calculation that takes account of the student’s savings, what parents can be expected to contribute if the student is twenty-eight or younger, any spouse’s income, and what the student should be expected to incur as loans. Parents and a spouse must submit financial information forms.³⁵ The COAP program is very generous, much more generous than the federal PAYE plan. Annual debt payments for graduates of moderate income are lower under COAP, and COAP enables graduates to

34. Both task forces addressed the unmet need for legal services, especially civil legal services, by the economically less advantaged. Both explored the possibility of meeting some of those needs by persons with less than a full legal education. *See also* Shephard, *supra* note 25, at 12–13.

35. *See How Need-Based Aid Works*, YALE L. SCH., <https://www.law.yale.edu/admissions/cost-financial-aid/how-need-based-aid-works> (last visited Sept. 8, 2017)[<https://perma.cc/65KK-LVEW>].

pay off their law school loans over a ten-year period, rather than over twenty years under PAYE.³⁶

Can Law Schools Shift from Merit- to Need-Based Financial Aid?

It has been frequently observed that competition for *U.S. News* rankings has caused both the increase in law school-administered financial aid and its almost exclusive assignment to “merit”-based aid. Law schools are obviously concerned that if they do not offer financial aid, usually in the form of tuition discounts, to applicants with high LSATs and GPAs, their median scores on those measures, so important to *U.S. News*’s selectivity score, will go down. In regretting the almost exclusive assignment of additional financial aid to “merit” students, I am hardly the first to assign deleterious consequences to the competition for rankings.³⁷ But it is important to stress this point. Student selectivity is weighted substantially in *U.S. News* rankings.³⁸ As importantly, selectivity is a variable that schools believe they can control or manipulate more easily than other variables weighted in the rankings. A school (other than the very elite, like Yale) that significantly shifted financial aid from “merit” to “need” could reasonably fear that fewer high-LSAT and/or high-GPA students would matriculate, with a consequent lowering of the median scores on those factors and a drop in the ratings. The extent of the drop is far from clear—I know of no schools that have experimented—but this uncertainty simply increases the risk adversity of schools to actions that can cause a drop in the rankings. A drop in the ratings can have deleterious consequences to a dean’s career, to the job prospects at top firms for the school’s graduates, to the willingness of alumni to donate, and to the ability of faculty to place publications in top law reviews.

An obvious solution to these difficulties is to get law schools to act in concert. To gain control of financial aid policy, law schools, or a significant group of them, might agree to implement a common financial aid policy that gave much greater emphasis to need, and then no single law school would lose ground in the rankings competition for choosing such a course. Something similar was proposed by Professor Deborah Merritt in a letter she sent to ABA Task Force 1, suggesting an accreditation standard that required law schools to award at least fifty percent of available financial aid funds on the basis of

36. Students earning less than \$50,000 annually are not expected to pay anything toward loan repayment. Then the subsidies are scaled down as income rises. See *Post Graduate Loan Repayment: The Career Options Assistance Program (COAP)*, YALE L. SCH., <https://www.law.yale.edu/admissions/cost-financial-aid/post-graduate-loan-repayment> (last visited Sept. 8, 2017) [<https://perma.cc/2AP5-33LC>].

37. *E.g.*, TAMANAHA, *supra* note 4, at 71-103.

38. Robert Morse & Kenneth Hines, *Methodology: 2018 Best Law Schools Rankings*, U.S. NEWS: EDUC. (Mar. 31, 2017, 9:30 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> (last visited Sept. 6, 2017) [<https://perma.cc/5MWV-XB2C>]. Selectivity is weighted as twenty-five percent of a law school’s “score,” with median LSAT and undergraduate GPA constituting most of the selectivity measure.

need.³⁹ But Task Force 1 agreed that such use of accreditation standards would probably violate antitrust standards,⁴⁰ as may any agreement or compact to so act entered into by a sizable group of law schools. However, Deborah Merritt and her husband have argued to the contrary in an article published in this issue.⁴¹ Some of the Merritts' ideas require Justice Department or Congressional action. The reader can decide how likely such action will be during the Trump administration.

An alternative approach would be to persuade *U.S. News* to change its metrics for the rankings. One obvious approach would be to give schools credit for having a financial aid program that emphasizes "need," but this would require some kind of reliable measure of what constitutes an award based on "need." That might be easier if only LRAP programs were considered for this credit. *U.S. News* might also reduce the weight assigned to selectivity in its algorithm, so that law schools that chose to reassign financial aid from "merit" to "need" would take less rankings risk. Another approach, which would still allow *U.S. News* to include in its algorithm the current weight for "selectivity," would be to limit the LSAT and GPA scores used to calculate a median to those scores for entering students who receive a tuition discount no greater than twenty-five percent per year. The rationale for such a limitation would be that a student who enrolls only because of a generous aid award, perhaps even a full tuition discount, signals little about her/his evaluation of the school's quality, and hence his/her matriculation decision indicates little about the quality of the school relative to competitors.⁴² If this last change were adopted, a school would have an incentive to award its highest-LSAT and -GPA applicants only a modest financial incentive, perhaps reserving the funds saved for some kind LRAP program. I think any of these kinds of change in the metrics used by *U.S.*

39. Letter from Professor Deborah Merritt, The Ohio State Univ. Coll. of Law, to ABA Task Force 1, May 11, 2013 [<https://perma.cc/44UU-TF3L>] [hereinafter Deborah Merritt Letter]. The letter is discussed in Shephard, *supra* note 25, at 10–11. See also Deborah Jones Merritt & Andrew Lloyd Merritt, *Agreements to Improve Student Aid: An Antitrust Perspective*, 67 J. LEGAL EDUC. 17 (2017).

40. The ABA is already under a consent decree that forbids it from adopting accreditation standards that regulate the salaries paid to law school employees, including faculty. See *U.S. v. American Bar Association*, U.S. DEP'T OF JUST. ANTITRUST DIVISION (last updated July 9, 2015), <https://www.justice.gov/atr/case/us-v-american-bar-association> (final judgment June 27, 1995). It would be consistent with this decree to forbid the use of accreditation standards to limit competition among schools in attracting students through financial aid policy.

41. Deborah Merritt & Andrew Merritt, *supra* note 39, *passim*.

42. I appreciate that many people believe that enrolling many high-LSAT students improves the quality of a school, even if they do not pay any tuition. If *U.S. News* wanted to reflect that value, it could base its selectivity score partly on median LSAT (and GPA) of all students and partly the medians for students who, by paying at least seventy-five percent tuition, are expressing an opinion about the quality of the school.

News could be effective in getting schools to alter their financial aid policies.⁴³ I am not experienced, in any way, in trying to persuade *U.S. News* to change its metrics, and so have no basis for assessing the likelihood of persuading it.⁴⁴

Finally, an individual law school could decide to do what I regard as the right thing, accepting whatever consequences for its rankings that ensue.⁴⁵ Were I still able to vote on a faculty, I would urge precisely that. And I am pleased to be able to say that former Dean Frank Wu just shared similar views in print:

Instead of identifying talented individuals who lack resources—the “strivers” we claim to admire—we [law schools] are reinforcing economic hierarchy [through our scholarship distribution policies]. We are sending the message that those who already have so much, deserve so much more. We must do better. The soul of legal education is at stake.⁴⁶

I conclude this essay by highlighting two recommendations of ABA Task Force 2 that are of relevance to this essay and can be achieved relatively easily. First, ABA Task Force 2 recommends that the section resume collecting information about the amount and percentage of law school-administered financial aid distributed on a “merit” and a “need” basis, and that the section then make public the information for each school.⁴⁷ Second, it recommends that the section mandate that each law school provide more debt counseling to its students and graduates than is now required by the U.S. Department of Education.⁴⁸ Both recommendations, if implemented, would be good

43. One effect would probably be to cause some schools to reduce their financial aid budgets and divert the funds to other purposes. Perhaps one effect would be a reduction in that part of tuition now used to fund financial aid awards, which would not be all bad. It would effectively be a pro rata distribution of aid. Hopefully schools would divert more of their financial aid funds to LRAP programs, using the existence of a well-funded program as a recruiting tool.
44. A concerted effort by law schools to get *U.S. News* to change its rankings metrics runs the risk of constituting an antitrust violation. See note 40 *supra* and accompanying text. Cf. *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999). Individual law schools not acting in concert could, however, contact Robert Morse, the chief data strategist for *U.S. News & World Report*, who is in charge of developing the methodologies used by *U.S. News* in compiling its various rankings of educational institutions.
45. It might even be possible for a school to promote its needs-based financial aid policy, including an expansive LRAP system, as a way of attracting a niche group of students who, despite lacking the highest LSAT scores, nonetheless will enrich the student body as well as the profession later. In that way it could help build a student body with more “merit,” though not as that term is defined by *U.S. News*.
46. LAW SCHOOL SCHOLARSHIP POLICIES, *supra* note 20, at 6.
47. ABA TASK FORCE 2 REPORT, *supra* note 1, at 42. It would be helpful if the section would also set standards for what qualifies as “need”-based financial aid. These standards should be precise enough that observers can meaningfully compare one school’s policies and performance with another’s.
48. *Id.* at 41. The Department of Education’s current mandate is a prerequisite for the eligibility for student loans for the students of each law school.

developments, in my opinion. If law schools are going to continue to devote nearly all aid to “merit,” because of rankings competition, they should at least have to endure whatever public shame or guilty conscience results from devoting little aid to students with “need.” And given the levels of debt held by many law school graduates, surely as many debt-counseling opportunities as possible should be made available to them. Within the very complicated system for managing and paying student debt, a graduate can make many choices, and the best option is often not obvious. I also note that both changes are ones that schools could adopt without a requirement by the section, so law faculty who share my opinion can urge such actions at their schools.