

# J.D.s and Jobs: The Case for an ABA Accreditation Standard on Employment Outcomes

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## I. Introduction

Students graduating from law schools accredited by the American Bar Association (ABA) over the past twelve years have faced a declining entry-level legal employment<sup>1</sup> market, stagnant or decreased starting salaries, and increased tuition debt burdens. While most law schools report strong legal employment rates, some schools consistently report very weak employment outcomes. At least partly in response to the declining legal employment market, law school applications and enrollments have decreased sharply in the past seven years. However, some law schools with persistently very weak graduate employment outcomes have lowered admission standards to minimize reduction in class sizes. In doing so, they almost inevitably exacerbate existing problems because their bar passage rates suffer and their graduates' employment prospects are further diminished.

The perfect storm of increased student debt and diminished employment outcomes has drawn a wide range of responses, including two reports from

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1. Throughout this article, "legal employment" and "law jobs" are used interchangeably to refer to full-time, long-term, bar-passage-required and J.D. Advantage jobs as defined in the Definitions and Instructions that accompany the ABA Employment Questionnaire. 2018 Employment Questionnaire (for 2017 Graduates) Definitions and Instructions, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/Questionnaires/2018\\_eq\\_definitions\\_and\\_instructions.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Questionnaires/2018_eq_definitions_and_instructions.authcheckdam.pdf). As discussed in Part V.A-B below, most but not all of these jobs are the types of jobs that a typical law school applicant envisions obtaining upon graduating from law school.

American Bar Association presidential task forces,<sup>2</sup> and extensive analysis and commentary by a range of legal education observers.<sup>3</sup> In 2016, the committee to advise the secretary of education on higher education accreditation, reacting to media reports about law graduate debt, bar passage, employment outcomes, and admission standards, recommended suspending the ABA's authority to accredit new law schools.<sup>4</sup> While the secretary ultimately rejected the committee's recommendation and continued the ABA's accreditation authority,<sup>5</sup> the committee's underlying concerns are nevertheless well-founded,

2. See *Report of the American Bar Association Task Force on the Financing of Legal Education*, American Bar Association (June 17, 2015), [http://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](http://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) [hereinafter *Task Force on the Financing of Legal Education*]; *Report and Recommendations of the American Bar Association Task Force on the Future of Legal Education*, AMERICANBAR.ORG (Jan. 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).
3. See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); Frank McIntyre & Michael Simkovic, *Timing Law School*, 14 J. EMPIRICAL LEGAL STUD. 258 (2017); Jerome M. Organ, *Net Tuition Trends by LSAT Category from 2010 to 2014 with Thoughts on Variable Return on Investment*, 67 J.L.E. 1 (2017); *Life After Law School, A Pilot Study Examining Long-Term Outcomes Associated with Graduating Law School and the Value of Legal Education*, GALLUP/ACCESS GROUP (2016), <https://www.accesslex.org/life-after-law-school/>; Deborah J. Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043 (2015); Sandy Baum, *A Framework for Thinking About Law Schools Affordability*, ACCESSLEX INSTITUTE 17 (Dec. 2015), <https://www.accesslex.org/a-framework-for-thinking-about-law-school-affordability/>; Steven J. Harper, *Bankruptcy and Bad Behavior, The Real Moral Hazard: Law Schools Exploiting Market Dysfunction*, 23 AM. BANKR. L. INST. L. REV. 347 (2015); 2015 *State of Legal Education, An in-depth look into law school admissions choices*, LAW SCHOOL TRANSPARENCY, <http://lawschooltransparency.com/reform/projects/investigations/2015/> (last visited Feb. 20, 2017); Bernard A. Burk, *What's New About the New Normal: The Evolving Market for New Lawyers in the 21<sup>st</sup> Century*, 41 FLA. ST. U. L. REV. 541 (2014); Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEG. STUD. 249 (2014); Deborah J. Merritt, *The Job Gap, The Money Gap, and The Responsibility of Legal Educators*, 41 WASH. U. J. L. & POL'Y 1 (2013); Jerome M. Organ, *Reflections on the Decreasing Affordability of Legal Education*, 41 WASH. U. J. L. & POL'Y 33 (2013); Ronit Dinovitzer, Bryant G. Garth, Joyce S. Sterling, *Buyers' Remorse? An Empirical Assessment of the Desirability of a Lawyer Career*, 63 J. LEG. ED. 211 (2013); Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 WM. MITCHELL. L. REV. 1185 (2013); Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177 (2012). In addition, there are several blogs that are devoted almost exclusively to reporting on, analyzing, and critiquing legal education. See, e.g., THE LAW SCHOOL CAFÉ, [www.lawschoolcafe.org](http://www.lawschoolcafe.org/); *State-Level Employment Projections: High Lawyer Replacement*, THE LAST GEN X AMERICAN, <https://lawchooltuitionbubble.wordpress.com/>; Jerry Organ, *Thoughts on Fall 2013 Enrollment and Profile Data Among Law Schools*, THE LEGAL WHITEBOARD (Mar. 2, 2014), <http://lawprofessors.typepad.com/legalwhiteboard/2014/03/thoughts-on-fall-2013-enrollment-and-profile-data-among-law-schools.html>.
4. Transcript of the June 22, 2016, appearance of ABA representatives before the National Advisory Committee on Institutional Quality and Integrity (NACIQI) 164-256 (June 22, 2016), <https://sites.ed.gov/naciqi/files/2016/08/naciqi-transcripts-062216-508.pdf>.
5. See *Letter dated Sept. 22, 2016 from Emma Vadehra, Chief of Staff, U.S. Department of Education, to Barry Currier, Managing Director, Accreditation and Legal Education*, ABA Section of Legal Education and Admissions to the Bar (Sept. 22, 2016), <http://www.americanbar.org/content/dam/aba/>

and its recommendation might well have been accepted had the committee grounded it on the appropriate accrediting agency recognition criteria.<sup>6</sup> This paper builds on the preexisting analyses by assembling the data and reviewing the literature, and then advocating the adoption of a new ABA accreditation standard on law graduate employment outcomes.

The ABA Council of the Section of Legal Education and Admissions to the Bar is recognized by the U.S. Department of Education (ED) as the accrediting agency for all programs leading to the J.D. degree.<sup>7</sup> Higher education accreditors like the ABA play a gatekeeping function; accreditation is a prerequisite to participation in Title IV student aid programs, including federal student loan programs.<sup>8</sup> One of the ED's key criteria for recognition requires accreditors to impose student outcome standards on the programs or institutions that they accredit. According to the ED regulation, which is taken verbatim from the Higher Education Opportunity Act (HEOA),<sup>9</sup> accreditors must have "standards [that] effectively address the quality of the institution or program [in regard to] [s]uccess with respect to student achievement in relation to the institution's mission."<sup>10</sup> The HEOA provision and ED regulation on outcome standards do not require accreditors to impose any particular outcome standards, but specifically mention "course completion, State licensing examination, and job placement rates" as potentially appropriate standards.<sup>11</sup>

The requirement that ED-recognized accreditors have student outcome standards serves two essential purposes. The first and primary purpose is to help ensure that students realize the promise of the degree program.<sup>12</sup> The large majority of law students attend law school with the objective of practicing law.<sup>13</sup> Indeed, the ABA standards state that the objective of a law

administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/2016\_september\_doe\_letter\_re\_recognition.authcheckdam.pdf.

6. See 34 C.F.R. § 602.16(a)(1) (2010), and discussion, *infra* notes 63-81 and accompanying text.
7. See *Accreditation in the United States*, U.S. DEPARTMENT OF EDUCATION, [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg5.html#NationallyRecognized](http://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html#NationallyRecognized) (last visited May 27, 2018).
8. 20 U.S.C. § 1001(a) (2017).
9. 20 U.S.C. § 495(2)(A) (2017).
10. 34 C.F.R. § 602.16(a)(1).
11. *Id.*; 20 U.S.C. § 495(2)(A).
12. See 34 C.F.R. 602.16(a)(1) (2010) (requiring that accreditors have standards that "effectively address the quality of the institution or program" regarding "success with respect to *student achievement in relation to the institution's mission*") (emphasis added).
13. The number of graduates of ABA-accredited law schools who took a bar examination for the first time in 2015 equals approximately ninety-three percent of the number of graduates in the 2014-2015 academic year. See <http://www.abarequireddisclosures.org/> (Compilation—All Schools Data 2016/dropdown for Bar Passage Rates; and Compilation—All Schools Data 2015/dropdown for JD Enrollment and Ethnicity (academic year)). While this calculation does not yield the precise percentage of Class of 2015 graduates who took a bar exam,

school academic program is to prepare students for admission to the bar and the practice of law.<sup>14</sup> Students who complete law school and seek but do not obtain legal employment do not realize the promise of the J.D. program. The adoption of a new accreditation standard on employment outcomes would directly advance the central objective of the J.D. program by requiring ABA-accredited law schools to demonstrate that their student outcomes align with the objective. The argument for an employment outcome standard is especially compelling where the cost of legal education has become so high.

A subsidiary purpose of the HEOA provision and implementing ED regulation is to conserve federal tax dollars.<sup>15</sup> Higher education institutions receive their students' borrowed Title IV tuition dollars upfront and regardless of individual student outcomes, but if large numbers of those students are unlikely to repay their student loans because they do not obtain suitable employment upon graduation, the institution effectively receives an unintended federal taxpayer subsidy. The Title IV loan programs are not grant programs.<sup>16</sup>

While the ED recognition criteria do not mandate any particular student outcome standards, the outcome standards adopted by an accreditor must be effective.<sup>17</sup> Currently, the ABA has a licensing exam (bar examination) passage

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because some graduates from previous years took the bar for the first time in 2015, and some graduates in the Class of 2015 deferred taking the bar to a later year, it clearly confirms that the large majority of law students go to law school to become attorneys. *See also* Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, LSAC RESEARCH REPORT SERIES 6 (1998), <http://www.unc.edu/edp/pdf/NLBPS.pdf> (reporting that over ninety-three percent of students participating in study who enrolled in law school in 1991 and graduated had taken a bar examination).

14. ABA Standard 301(a) is the overarching standard on academic program. It provides: Standard 301. Objectives of Program of Legal Education. A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession. *ABA Standards and Rules of Procedure for Approval of Law Schools 2017-2018*, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR 15 (2017), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABASstandardsforApprovalofLawSchools/2017\\_2018\\_aba\\_standards\\_rules\\_approval\\_law\\_schools\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASstandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf) [hereinafter *ABA Standards*].
15. *See, e.g., Ass'n of Private Sector Colleges and Universities v. Duncan*, 640 Fed. App'x 5, 8 (D.C. Cir. 2016), *aff'g* 110 F. Supp. 3d 176 (D.D.C. 2015) (upholding ED's gainful employment rule, which conditions access to Title IV student aid programs by proprietary and post-secondary vocational schools on graduates of the institution achieving a specified minimum ratio of student loan debt to income).
16. *Id.* at 8.
17. 34 CFR § 602.16 ("The agency's accreditation standards [must] *effectively* address the quality of the institution or program . . .") (emphasis added).

standard<sup>18</sup> and the equivalent of a minimum course completion rate standard.<sup>19</sup> While the ABA requires schools to collect and report detailed graduate employment outcome information,<sup>20</sup> the accreditation standards currently do not address employment outcomes.

Under current standards, however, there is a small but not insignificant group of schools that consistently report very weak graduate employment outcomes at nine to ten months after graduation. For these schools, it appears likely that a large proportion of graduates may not realize the promise of the degree program and, further, that the schools are receiving a significant federal taxpayer subsidy. Moreover, most of the schools in this group have responded to the decline in law school applications over the past seven years by enrolling more students with markedly lower scores on the Law School Admission Test (LSAT), leading to lower bar examination passage rates and worsening employment prospects for their graduates.<sup>21</sup> In addition, most of the same schools with weak employment outcomes and large declines in entering class credentials also report comparatively high average student debt amounts.

As a starting point for discussion, this article proposes a draft ABA employment outcome standard. Under this draft, a school would be required to demonstrate that, for two or more of the past five graduating classes, at least sixty percent of its graduates had full-time (FT), long-term (LT), bar passage-required (BPR) or J.D. Advantage (JDA) jobs at ten months after graduation. It further provides that in lieu of complying with the sixty percent requirement at ten months after graduation for a given graduating class, a school may

18. Standard 316, *ABA Standards*, *supra* note 14, at 24. The Council of the ABA Section of Legal Education has preliminarily approved a revised Standard 316. The revisions to the standard and the status of its final approval are discussed *infra* notes 108-111, and accompanying text.
19. Standard 501(b) (providing that “[a] law school shall admit only applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar) and Interpretation 501-3 (providing that “[a] school having a cumulative non-transfer attrition rate above 20 percent” is presumptively not in compliance with Standard 501(b)). *ABA Standards*, *supra* note 14.
20. Standard 509(b)(7), *ABA Standards*, *supra* note 14, at 35 (requiring law schools to disclose their graduate employment outcomes in the form and manner prescribed by the ABA).
21. See *infra* notes 31-37 and accompanying text (examining admissions policies, and bar passage and employment outcomes at schools with persistently weak employment outcomes). LSAT score helps to predict first-year law school grade point average, and first-year law school grade point average generally predicts bar passage. Thus, lower LSAT scores are likely to result in lower bar passage rates and by extension lower legal employment rates. See Linda F. Wightman, *supra* note 13, at 77; Debra Cassens Weiss, *Multistate bar exam scores drop to lowest point ever; is there a link to low-end LSAT scores?*, ABA JOURNAL (April 12, 2017), [http://www.abajournal.com/news/article/multistate\\_bar\\_exam\\_scores\\_drop\\_to\\_lowest\\_point\\_ever\\_are\\_low\\_end\\_lsats\\_score](http://www.abajournal.com/news/article/multistate_bar_exam_scores_drop_to_lowest_point_ever_are_low_end_lsats_score) (reporting that the average score on the MBE in February 2017 was the lowest since the exam was first administered in 1972; and quoting Erica Moeser, president of the NCBE, regarding the cause: “decisions on who to admit”).

comply with the standard by demonstrating that at least seventy-five percent of the class was employed in FT, LT, BPR or JDA jobs at twenty-two months after graduation.<sup>22</sup> An employment outcome standard could be adopted in addition to or in lieu of the existing bar passage standard.

Part II of the article frames the problem for which an employment rate standard is a proposed solution. It describes: the gap between the numbers of law graduates and the numbers of law jobs available to those graduates within nine to ten months of graduation for the graduating classes of 2001 through 2017; the extreme range of legal employment rates across ABA-accredited schools; the high cost of legal education and amounts borrowed by students to obtain the law degree; the range in average amounts borrowed by students across schools; and the admission policies at the schools with persistently very weak legal employment rates.<sup>23</sup> Part III makes the case for adopting an ABA employment outcome standard, and considers arguments against such a standard. Part IV briefly reports on the other ED-recognized accrediting agencies that have adopted employment rate standards. Part V considers what jobs should be considered “law jobs” for purposes of an employment rate accreditation standard and lays out several guiding principles for a proposed standard. Part VI presents the draft proposed employment rate standard as a starting point for discussion. Part VII is a brief conclusion.

## **II. Defining the Problem: Persistently Weak Graduate Employment Outcomes at Some Law Schools, and High Levels of Law School Debt**

### *A. The Data on Law Graduate Employment Outcomes*

#### 1. The Numbers of Law School Graduates Versus the Numbers of Entry-Level Law Jobs<sup>24</sup>

As reported in Table 1<sup>25</sup> below, the number of ABA-accredited law school graduates has exceeded the number of entry-level FT, LT, BPR jobs by more

22. See *infra* Part VI (laying out tentative draft employment outcomes standard, with additional details).

23. “Schools with persistently very weak employment outcomes” is used throughout the article to refer to the schools, numbering twenty, that have reported less than forty-five percent of graduates in FT, LT, BPR jobs for the Class of 2013 and the Class of 2017. See *infra* notes 31-32, and accompanying text (defining “schools with persistently very weak employment outcomes”).

24. NALP changed its data collection methods in 2001, so that it is not possible to reliably compare the pre-2001 data with the post-2000 data. The seventeen-year period from the Class of 2001 to date is sufficiently long to encompass several economic cycles and to assess trends in the market on law graduate employment and rates and compensation. See Deborah Jones Merritt, *The Job Gap, the Money Gap, and the Responsibility of Legal Educators*, 41 WASH. U. J. L. & POL’Y 1, 6-16 (2013) (discussing the gap between the number of graduates and the number of BPR jobs for the ABA-approved law school graduating classes of 2007 to 2011).

25. The data reported in Table 1 and Figure 1 come from both NALP and the ABA. The NALP data are for the classes of 2001 through 2010. NALP Class of 2001 Summary

than 30% in every year since 2001, ranging from a low of 30.7% (Class of 2001)

Findings, [http://www.nalp.org/uploads/43\\_erssoisum.pdf](http://www.nalp.org/uploads/43_erssoisum.pdf); NALP Class of 2002 Summary Findings, [http://www.nalp.org/uploads/44\\_summaryfindings2002.pdf](http://www.nalp.org/uploads/44_summaryfindings2002.pdf); NALP Class of 2003 Summary Findings, [http://www.nalp.org/uploads/45\\_ersinio3.pdf](http://www.nalp.org/uploads/45_ersinio3.pdf); NALP Class of 2004 Selected Findings, [http://www.nalp.org/uploads/160\\_selectedfindings04.pdf](http://www.nalp.org/uploads/160_selectedfindings04.pdf); NALP Class of 2005 Selected Findings, [http://www.nalp.org/uploads/316\\_erssselectedfindings05.pdf](http://www.nalp.org/uploads/316_erssselectedfindings05.pdf); NALP Class of 2006 Selected Findings, [http://www.nalp.org/uploads/768\\_classofo6selectedfindings.pdf](http://www.nalp.org/uploads/768_classofo6selectedfindings.pdf); NALP Class of 2007 National Summary Report, [http://www.nalp.org/uploads/1229\\_natlsummary07revised.pdf](http://www.nalp.org/uploads/1229_natlsummary07revised.pdf); NALP Class of 2008 National Summary Report, <http://www.nalp.org/uploads/natlsummary2008.pdf>; NALP Class of 2009 National Summary Report, <http://www.nalp.org/uploads/NatlSummaryChartClassofo9.pdf>; NALP National Summary Chart for Class of 2010, <http://www.nalp.org/uploads/NationalSummaryChartforSchools2010.pdf>. The NALP data for the classes of 2001 through 2006 do not break out full-time and part-time jobs, so the figures in the table somewhat overstate the numbers and percentages of FT, LT, BPR and JDA jobs for those classes. For the Class of 2007, the first class for which NALP broke out full-time and part-time jobs, 2.6% of BPR jobs were part time, and 13.5% of JDA jobs were part-time. See NALP Class of 2007 National Summary Report, [http://www.nalp.org/uploads/1229\\_natlsummary07revised.pdf](http://www.nalp.org/uploads/1229_natlsummary07revised.pdf).

The ABA data are for the classes of 2011 through 2017, ABA 2012 Law Graduate Employment Data, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/law\\_grad\\_employment\\_data.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/law_grad_employment_data.authcheckdam.pdf) (includes Class of 2011 data); ABA 2013 Law Graduate Employment Data, [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); ABA 2014 Law Graduate Employment Data, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2014\\_law\\_graduate\\_employment\\_data\\_042915.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2014_law_graduate_employment_data_042915.authcheckdam.pdf); ABA 2015 Law Graduate Employment Data, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2015\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_law_graduate_employment_data.authcheckdam.pdf); ABA 2016 Law Graduate Employment Data, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2016\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_law_graduate_employment_data.authcheckdam.pdf); ABA 2017 Law Graduate Employment Data, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2017\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2017_law_graduate_employment_data.authcheckdam.pdf). The ABA began requiring schools to report graduate employment data directly to the ABA in 2010 but did not start collecting data on whether jobs were BPR, JDA, professional, or nonprofessional until the Class of 2011. The ABA changed the NALP category of J.D. Preferred to J.D. Advantage. All schools' reported employment data are published each year on the ABA website at <http://employmentsummary.abaquestionnaire.org>. Before 2010, schools reported their data to NALP and provided the ABA with summaries of those data.

The percentages of graduates reported as employed in the Table 1 were calculated using total number of graduates in a class, not graduates whose employment status was known, as the denominator. (The source of the numbers of graduates for the classes of 2001 to 2010 in Table 1 is: J.D and LL.B Degrees Awarded, 1981-2011, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_llb\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_llb_degrees_awarded.authcheckdam.pdf). The source of the numbers of graduates for the classes of 2011 to 2017 is in the ABA Law Graduate Employment Data cited immediately above). In effect, the calculations assume that graduates whose employment status was unknown did not have FT, LT, BPR or JDA jobs. The percentage of graduates whose employment status was known increased from 91.8% to 98.5% between 2001 and 2017. See the NALP reports and the ABA 2017 Law Graduate Employment Data cited above in this footnote. Graduates who do not report their employment status to their school

to a high of 45.1% (Class of 2011). The average excess is almost 37%. Figure 1 below graphically illustrates the gap between the numbers of graduates and FT, LT, BPR jobs for those graduates over the seventeen-year period.

Table 1 also shows that both the percentage and the absolute number of law school graduates employed in FT, LT, BPR jobs within nine to ten months after graduation has declined since at least 2001. There has been a drop of approximately 3 points in the percentage of graduates employed in FT, LT, BPR jobs, and a decrease of nearly 8% in the number of graduates employed in such jobs, over the past seventeen years. The percentage of graduates in FT, LT, BPR jobs has gradually increased for the classes of 2012 to 2017 as graduating class sizes have decreased. After increasing somewhat in 2012 and 2013 after the end of the Great Recession, the number of FT, LT, BPR jobs inched lower in 2014, 2015, and 2016, and remained essentially flat for the Class of 2017.

The decline in the number and percentage of law graduates employed in FT, LT, BPR positions over the past seventeen years has been substantially offset by an increase in the number and percentage of law school graduates employed in FT, LT, JDA jobs. Counting JDA positions as law jobs somewhat reduces the oversupply of law graduates compared with law jobs, but the difference is still quite large. The number of graduates has exceeded the number of entry-level FT, LT, BPR and JDA jobs combined by more than 25% for every class except two since 2001, ranging from a low of 23.7% (Class of 2007) to a high of 37.0% (Class of 2011). The average excess is almost 30%. Figure 1 also graphically illustrates the gap between the numbers of graduates and BPR + JDA jobs for those graduates over the seventeen-year period.

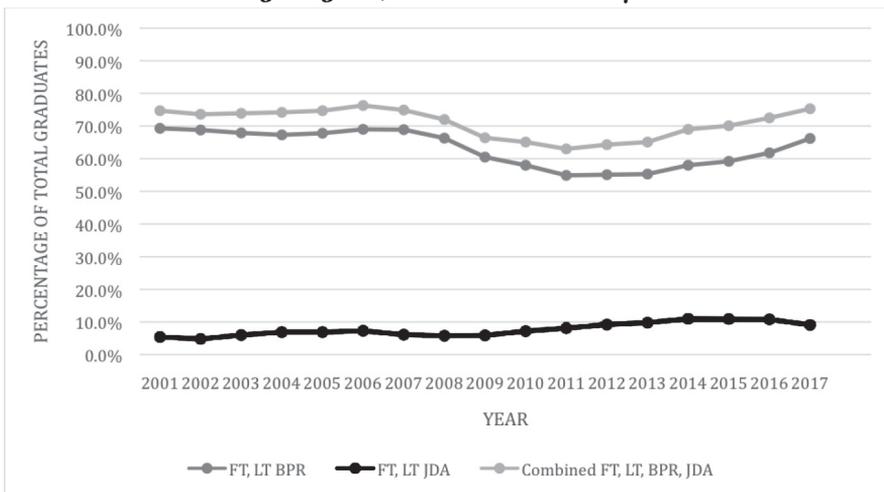
presumably but not necessarily had bad employment outcomes, thus using total graduates as the denominator slightly understates the percentages of graduates in FT, LT, BPR and JDA jobs. Given the higher percentages of graduates not reporting their status in the earlier years between 2001 and 2016, the understatement of FT, LT, BPR and JDA jobs may be somewhat higher in those years.

Beginning with the Class of 2015 Employment Questionnaire, the ABA established law school-funded positions as a separate employment category along with BPR, JDA, other professional, and nonprofessional. Before the Class of 2015, law school-funded positions were reported within the then-existing four categories. For example, if a graduate before the Class of 2015 was employed in a FT, LT, BPR job that was law school-funded, the position was reported as a FT, LT, BPR job. To facilitate an apples-to-apples comparison of BPR and JDA jobs between the classes of 2015 through 2017 and the classes of 2012 through 2014, I have backed out the numbers of law school-funded positions. This is possible because schools separately reported the numbers of law school-funded positions for each of the then four employment categories. For the Class of 2011, the ABA collected information on whether law school-funded positions were full time or part time and long term or short term, but did not collect information on whether the positions were BPR, JDA, etc. There were relatively few—476—FT, LT law school-funded positions reported for the Class of 2011. However, because it is not known how many were FT, LT, BPR and JDA, it is not possible to back them out, and the Class of 2011 figures therefore slightly overstate these employment rates. Because there were exceedingly few law school-funded positions before 2011, the comparisons should be valid across all of the years reported except as just noted for the Class of 2011.

**Table 1. Graduate Employment in FT, LT, BPR and JDA Jobs, Classes of 2001-2017**

Class Year	Graduating Class	FT, LT BPR		FT, LT JDA		Combined FT, LT, BPR, JDA	
	Total	Total	Percent	Total	Percent	Number	Percent
2001	37,910	26,279	69.3%	2,058	5.4%	28,337	74.7%
2002	38,606	26,564	68.8%	1,836	4.8%	28,400	73.6%
2003	38,875	26,387	67.9%	2,340	6.0%	28,727	73.9%
2004	40,024	26,939	67.3%	2,756	6.9%	29,695	74.2%
2005	42,672	28,932	67.8%	2,924	6.9%	31,856	74.7%
2006	43,883	30,273	69.0%	3,194	7.3%	33,467	76.3%
2007	43,518	29,978	68.9%	2,635	6.1%	32,613	74.9%
2008	43,588	28,890	66.3%	2,513	5.8%	31,403	72.0%
2009	44,004	26,625	60.5%	2,594	5.9%	29,219	66.4%
2010	44,258	25,654	58.0%	3,170	7.2%	28,824	65.1%
2011	43,979	24,149	54.9%	3,556	8.1%	27,705	63.0%
2012	46,364	25,545	55.1%	4,246	9.2%	29,791	64.3%
2013	46,776	25,878	55.3%	4,581	9.8%	30,459	65.1%
2014	43,832	25,417	58.0%	4,815	11.0%	30,232	69.0%
2015	39,984	23,687	59.2%	4,342	10.9%	28,029	70.1%
2016	37,124	22,930	61.8%	3,993	10.8%	26,923	72.5%
2017	34,922	23,114	66.2%	3,179	9.1%	26,293	75.3%
2001-2016	(-2,988)	(-3,165)	(-3.1 pts.)	+1,121	+3.7 pts.	(-3,044)	+0.6 pts.

**Figure 1. Percentages of Law Graduates Employed in FT, LT BPR and JDA Jobs, Classes of 2001-2017**



## 2. Law Graduate Salaries

The oversupply of law graduates compared with law jobs over the past seventeen years has been accompanied by deflation and stagnation in entry-level law graduate salaries. NALP collects salary information on full-time jobs as part of its annual employment survey. For the Class of 2016 (the most recent for which salary information is available), a little more than half of graduates reported their salaries.<sup>26</sup> Graduates with higher salaries are more likely than graduates with lower salaries to report their salaries, so NALP statistically adjusts its reported means downward to take account of the reporting bias.<sup>27</sup> Even if there is some question about just how accurate the salary figures are, it appears that the reporting methodology has been consistent over the years so that the changes over time are reasonably accurately captured.

Table 2 below reports the NALP data on graduate salaries, adjusted for inflation based on 2016 dollars using the Bureau of Labor Statistics' Consumer Price Index (CPI).<sup>28</sup> The blank cells reflect the omission of those numbers in the data published by NALP on its website. As reported in the table, starting salaries have declined in real terms between 2001 and 2016 and have been essentially flat since 2011, with modest increases across the board for the classes of 2015 and 2016. The median salary has decreased by 13% between 2001 and 2016, and by 19% between 2009 and 2016, in inflation-adjusted dollars. The picture is similar for private practice and government salaries. The median private practice salary has decreased by 14% since 2001, and by 29% between 2009 and 2016. Government salaries appear to have fallen from their prerecession high of just over \$66,000 for the Class of 2007 to less than \$59,000 for the Class of 2016.<sup>29</sup>

There has been a modest uptick in entry-level law graduate pay since 2014. The median law firm starting salary increased by 8.6% and the median government starting salary increased by 11.1% from the Class of 2014 to the Class of 2016. However, the overall median starting salary increased by only 2.4%. Big Law (firms of more than 100 lawyers) increased entry-level salaries

26. See *Class of 2016 National Summary Report*, NALP (Aug. 2017), [https://www.nalp.org/uploads/Classof2016\\_NationalSummaryReport.pdf](https://www.nalp.org/uploads/Classof2016_NationalSummaryReport.pdf) (reporting that approximately 19,900 of 37,124, or about fifty-four percent, of graduates in the Class of 2016 reported salaries).
27. See, e.g., *Class of 2014 Bimodal Salary Curve*, NALP (Aug. 2015), [http://www.nalp.org/class\\_of\\_2014\\_salary\\_curve](http://www.nalp.org/class_of_2014_salary_curve) (reporting mean salary of \$82,292 and adjusted mean of \$77,382).
28. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited May 27, 2018).
29. The median and mean salaries reported in Table 2 above obscure the bimodal distribution in entry-level salaries, with salaries grouped on either side of the average and relatively few salaries actually at the average. For the graduating Class of 2014, the most recent for which NALP has published a report on the distribution of entry-level law graduate salaries, one peak in the distribution of salaries occurs in the \$45,000-\$60,000 range, with about 50.5% of graduates earning salaries in that range. The second peak comprises salaries of \$160,000, garnered by 17% of graduates. See *Class of 2014 Bimodal Salary Curve*, *supra* note 27.

from \$160,000 to \$180,000 for the Class of 2016, an increase of 12.5% and the first increase in Big Law salaries since 2009 (seven years).<sup>30</sup>

**Table 2. Law Graduate Salaries, Classes of 2001-2016, in Inflation-Adjusted 2016 Dollars**

Class of	All Salaries		Private Practice Salaries		Gov't Salaries
	Median	Mean/Adjusted Mean	Median	Mean	Median
2016	\$65,000	\$90,305/	\$104,000	\$113,571	\$59,000
2015	\$65,352	\$84,452/	\$100,853	\$104,987	\$55,469
2014	\$63,490	\$82,941/\$78,002	\$95,739	\$102,794	\$53,110
2013	\$63,905	\$84,297/\$80,000	\$97,187	\$102,302	\$53,197
2012	\$63,578	\$83,879/\$78,480	\$93,429	\$104,641	\$53,981
2011	\$63,937	\$83,758/\$78,856	\$90,578	\$104,431	\$55,412
2010	\$68,935	\$92,022/\$84,582	\$113,797	\$116,471	\$56,898
2009	\$80,605	\$103,675/95,383	\$145,538	\$129,029	\$58,215
2008	\$80,296	\$102,601/	\$139,403	\$127,246	\$60,072
2007			\$125,820	\$124,428	\$66,041
2001	\$74,332		\$121,634		\$55,411

3. The Range of Legal Employment Rates Across ABA-Accredited Law Schools

Law schools report a wide range of legal employment rates. Table 3 below reports the 5th, 10th, 25th, 50th, 75th, and 90th percentile percentages of Class of 2017 graduates at the 203 ABA-accredited law schools employed in FT, LT, BPR positions, and FT, LT, BPR and JDA positions combined. Nearly eight years after the end of the Great Recession of 2007-2009, at a quarter of all ABA-accredited law schools (fifty-one schools), fewer than 56% of graduates were employed in LT, FT, BPR jobs, and fewer than 67% were employed in LT, FT, BPR and JDA positions combined at ten months after graduation. At eleven schools (the fifth percentile), barely more than a third of graduates were employed in LT, FT, BPR jobs, and less than half were employed in LT, FT, BPR and JDA jobs combined. Even at the 75th percentile (153 schools), nearly 25% or more of Class of 2017 graduates did not obtain FT, LT, BPR jobs within ten months after graduation.

30. See *Jobs and JDs, Employment for the Class of 2016 - Selected Findings*, NALP (2017), <https://www.nalp.org/uploads/SelectedFindingsClassof2016.pdf> (last visited June 7, 2018).

**Table 3. Range of Employment Rates Across Schools, Graduating Class of 2017**

Percentiles	LT, FT, BPR	LT, FT, BPR + JDA
5th	34.4%	47.3%
10th	44.5%	52.7%
25th	55.2%	66.7%
50th	65.6%	76.5%
75th	75.1%	82.4%
90th	80.8%	88.3%
Range	0.7%-93.8%	2.2%-96.9%

*B. The Response of Schools with Very Weak Graduate Employment Outcomes*

More than just a few ABA-accredited law schools have reported persistently very weak graduate legal employment rates over the past five years.<sup>31</sup> Twenty law schools – nearly 10% of all ABA-accredited law schools – reported FT, LT, BPR employment rates below 45% for the Class of 2013 and again for the Class of 2017, including 10 schools – nearly 5% of ABA-accredited schools – that reported FT, LT, BPR employment rates of less than 35% for both classes.<sup>32</sup> (These twenty schools are referred to as “the schools with persistently very weak employment outcomes” throughout this article.)

Most of the twenty schools with persistently very weak graduate employment outcomes over the past five years appear to have pursued admission policies designed to minimize the reduction in enrollment as law school applications have declined rather than to improve graduate employment outcomes. Instead of increasing admission requirements to boost bar passage and legal employment rates, most have increased acceptance rates and markedly reduced admission criteria.<sup>33</sup> As reported in Table 4 below, at all but four of the twenty schools, the 25th percentile LSAT score has decreased from 2011 to 2017, by between 1 and 6 points, with an average decrease of 2.6 points. At twelve of the schools, the decrease is 3 or more points, and two schools posted 6-point declines. (At three schools, there was no change, and one school posted a 1-point increase.<sup>34</sup>)

31. The data reported in this Part (except for the data reported *infra* note 35 and accompanying text) are from the 2010-2017 spreadsheets posted by the ABA under “Compilation-All Schools Data,” at <http://employmentsummary.abaquestionnaire.org/>.

32. Fourteen of the twenty schools improved their FT, LT, BPR employment rates between 2013 and 2017, but only one school’s rate improved by more than the overall national increase of 10.9 percentage points over the same period. *See* Tables 4 and 1. Six schools’ FT, LT, BPR employment rates actually worsened. *See* Table 4.

33. Moreover, a decline in quality of the graduates “could be reflected in earnings over the long run.” Baum, *supra* note 3, at 17.

34. *See also* 2015 *State of Legal Education: An in-depth look into law school admissions choices*, LAW SCHOOL

**Table 4. 25th Percentile LSAT Scores, Bar Passage Rates, and Average Debt at Schools with Persistently Weak Employment Outcomes**

School	2013 % FT, LT, BPR	2017 % FT, LT, BPR	2013 1 <sup>st</sup> Time Bar Pass Rate	2017 1 <sup>st</sup> Time Bar Pass Rate	Change in First Time Bar Pass Rate (pct. pts.)	2011 25 <sup>th</sup> LSAT	2017 25 <sup>th</sup> LSAT	Change in 25 <sup>th</sup> % LSAT (pct. pts.)	Avg. Debt <sup>35</sup>
1	39.7	40.7	67.1	49.3	-17.8	148	144	-4	\$142,515
2	34.6	39.5	62.6	52.8	-9.8	146	145	-1	\$152,476
3	34.6	43.7	61.1	73.0	+11.9	147	148	+1	\$131,421
4	32.8	34.1	65.5	51.2	-14.3	150	145	-5	\$135,740
5	30.8	40.8	68.4	39.5	-28.9	145	145	--	\$160,942
6	22.8	37.9	55.7	48.9	-6.8	150	146	-4	\$158,857
7	26.5	8.8	55.6	37.3	-18.3	135	135	--	\$139,624
8	40.6	38.2	89.2	58.6	-30.6	149	146	-3	\$100,603
9	22.5	30.1	65.6	57.1	-8.5	145	142	-3	\$63,300
10	7.5	0.7	32.1	34.7	+2.6	132	131	-1	NR
11	19.8	20.5	53.6	49.4	-4.2	143	139	-4	NR
12	40.0	43.5	73.5	52.8	-20.7	152	150	-2	\$147,976
13	23.6	29.0	55.2	29.2	-26.0	148	142	-6	\$198,962
14	31.6	34.9	56.4	42.1	-14.3	150	147	-3	\$122,628
15	38.4	39.6	76.0	46.6	-29.4	147	147	--	\$128,221
16	30.7	26.9	51.5	46.0	-5.5	143	139	-4	\$122,395
17	42.6	36.8	64.1	60.2	-3.9	151	146	-5	\$125,143
18	43.8	37.4	77.6	58.7	-18.9	149	145	-4	\$90,302
19	29.5	26.7	65.7	35.3	-30.4	149	N/A	N/A	\$179,056
20	26.8	26.3	54.7	38.5	-16.2	151	145	-6	\$105,330
Avg.					-14.5			-2.6	

TRANSPARENCY, <http://lawschooltransparency.com/reform/projects/investigations/2015/> (last visited Feb. 20, 2017) (documenting declining entering class admission profiles at some law schools and the impact on bar admissions).

35. These figures for average amount borrowed by graduates who borrowed any amount to attend law school are from *Law School Costs: Debt*, LAW SCHOOL TRANSPARENCY, <https://data.lawschooltransparency.com/costs/debt/?scope=schools> (last visited May 27, 2018). While 181 of 203 ABA-accredited law schools reported the average amount borrowed for their 2017 graduates, only eight of the 20 schools with persistently weak employment outcomes did so. Another ten of the schools have reported average graduate debt at least once since 2012. Table 4 reports the most recently available figures. For schools 3, 4, 6, 9, 13, 15, 17, and 18, the figures are for 2017 graduates. For schools 2, 7, 8, 19, and 20, the figures are for 2016

As reflected in Table 5 below, at all but one of the ten schools that reported less than 35% of graduates in FT, LT, BPR jobs in 2013 and again in 2017, the 25th percentile LSAT scores have decreased by between 1 and 6 points. In the most extreme case, the school's 25th percentile LSAT score dropped by 6 points (from 148 to 142), even as its FT, LT, BPR rates for 2013 and 2017 were 23.6 and 29.0, respectively.

**Table 5. 25th Percentile LSAT Scores, Bar Passage Rates, and Average Debt at Schools with FT, LT, BPR Rates Below 35%, 2013 and 2017**

School	2013 % FT, LT, BPR	2017 % FT, LT, BPR	2013 1 <sup>st</sup> Time Bar Pass Rate	2017 1 <sup>st</sup> Time Bar Pass Rate	Change in First Time Bar Pass Rate (pct. pts.)	2011 25 <sup>th</sup> LSAT	2017 25 <sup>th</sup> LSAT	Change in 25 <sup>th</sup> % LSAT (pct. pts.)	Avg. Debt
4	32.8	34.1	65.5	51.2	-14.3	150	145	-5	\$135,740
7	26.5	8.8	55.6	37.3	-18.3	135	135	--	\$139,624
9	22.5	30.1	65.6	57.1	-8.5	145	142	-3	\$63,300
10	7.5	0.7	32.1	34.7	+2.6	132	131	-1	NR
11	19.8	20.5	53.6	49.4	-4.2	143	139	-4	NR
13	23.6	29.0	55.2	29.2	-26.0	148	142	-6	\$198,962
14	31.6	34.9	56.4	42.1	-14.3	150	147	-3	\$112,628
16	30.7	26.9	51.5	46.0	-5.5	143	139	-4	\$122,395
19	29.5	26.7	65.7	35.3	-30.4	149	N/A	N/A	\$179,056
20	26.8	26.3	54.7	38.5	-16.2	151	145	-6	\$105,330
Avg.					-13.5			-3.6	

Predictably, as admission selectivity has declined, the first-time bar passage rates at nearly all of the twenty schools with persistently very weak employment outcomes have also declined.<sup>36</sup> As further reported in Table 4 above, at eighteen of the twenty schools, the first-time bar passage rate fell by between 3.9 and 30.6 percentage points from 2013 to 2017. The average decrease in first-time bar passage rates across the twenty schools was 14.5 percentage points, more than twice the 6 percentage-point decline in overall bar passage rates since 2013.<sup>37</sup>

The declining admissions profiles and first-time bar passage rates at most of the twenty schools with persistently very weak employment outcomes over the

graduates. For school 5, the figure is for 2015 graduates. For schools 1, 12, 14, and 16, the figures are for 2012 graduates. The figures from earlier years are not adjusted for inflation.

36. See *supra* note 21 (discussing the link between LSAT scores and bar passage rates).

37. Bar pass rates nationally declined from 81% in 2013 to 75% in 2017. See *infra* note 157 (reporting national bar pass rates for 2007-2017).

past five years are reflected in their continuing weak employment outcomes. At six of the twenty schools, the FT, LT, BPR employment rate actually decreased from 2013 to 2017, compared to an increase of 10.9 percentage points across all ABA law schools. Only two of the schools posted gains greater than 10.9 percentage points.

### C. *The Cost of Legal Education and Law Graduate Debt*

#### 1. Law School Tuition and Law Graduate Debt—The National Picture

Even as the legal employment market has declined over the past two decades,<sup>38</sup> the cost of legal education has increased markedly. The average tuition at private law schools in 2017-2018 was \$46,329. At public schools, it was \$26,425 for in-state tuition.<sup>39</sup> Although tuition discount rates are at least 28% on average at private schools and 22% at public law schools, approximately 38% of students at private law schools and 40% of students at public law schools pay full tuition.<sup>40</sup>

As reported by the ABA Task Force on the Financing of Legal Education in 2015, “[u]sing the higher education price index (referred to as HEPI), which makes an inflation adjustment based on the cost of doing business, private law school tuition increased 29% from 1999-2000 to 2014-2015, and public law school in-state tuition increased 104%. Using the consumer price index (referred to as CPI), which makes an inflation adjustment based on the price to the consumer, the increases were 46% and 132%, respectively.”<sup>41</sup>

With the increases in law school tuition have come increases in law graduate debt.<sup>42</sup> As reported in Table 6 below, across all law schools, the average amount borrowed by Class of 2017 graduates who borrowed money to attend law school was nearly \$116,000. At private schools, the average was over \$130,000,

38. See *supra* notes 24-30, and accompanying text.

39. *Law School Costs: Tuition*, Law School Transparency, <https://data.lawschooltransparency.com/costs/tuition/> (last visited May 27, 2018).

40. See *Task Force on the Financing of Legal Education*, *supra* note 2, at 7-8. The Task Force Report figures are for 2013-2014. The trend has been toward increased tuition discounting. *Id.* at 7.

41. *Id.* at 7.

42. Before 2012, the ABA required schools to report the average amount borrowed for law school by graduates who borrowed any money for law school. In other words, the calculation of the average excluded graduates who did not take out any student loans for law school. The ABA stopped collecting that information in 2012, but U.S. News & World Report has continued to ask schools to report the figure to it. Instead, the ABA currently requires schools to report the average amount borrowed by all students who borrow any money during the previous year. The chart relies on the ABA data for the years 2001-2002 to 2011-2012, and on the U.S. News data for the years 2011-2012 to 2016-2017.

and at public law schools, nearly \$93,000.<sup>43</sup> As high as these numbers are, they somewhat understate actual debt at graduation, as they include only the amount borrowed and do not include accrued interest.<sup>44</sup> (Also, they are for law school debt only, and do not include any amounts borrowed to obtain the undergraduate degree.) Law schools do not report 25th, 50th, or 75th percentile amounts borrowed. A New America Foundation report published in 2014 found that the 75th percentile amount borrowed by students at all types of law schools was more than \$190,000, with \$150,000 of that borrowed for law school and \$40,000 for undergraduate school.<sup>45</sup>

**Table 6. Average Amount Borrowed, Class of 2017 Graduates<sup>46</sup>**

Type of School	Average Debt Per Student
Private	\$130,142
Public	\$92,997
All	\$115,852 (with 75.5% of graduates borrowing)

## 2. Average Amount Borrowed—The Range Across Schools

Of course, the average amount borrowed by students at different law schools varies considerably because of variations in tuition, cost of living, and perhaps other factors. Table 7 below reports the 10th, 25th, 50th, 75th, and 90th percentile amounts for the Class of 2017.<sup>47</sup>

43. *Law School Costs: Debt*, *supra* note 35 (based on data reported by schools to U.S. News & World Report and additional data collected by LST directly from schools). The Task Force on the Financing of Legal Education reported that “[p]eriodic surveys of individual students by the U.S. Department of Education show that individual law student debt—adjusting for inflation—increased by 56% from 2004 to 2012.” *Task Force on the Financing of Legal Education*, *supra* note 2, at 32.
44. Professor Campos has estimated that, because the reported numbers for average amount borrowed do not include interest, they understate law student debt at graduation by close to fifteen percent. *See* Campos, *supra* note 3, at 205.
45. *See* Steven J. Harper, *Bankruptcy and Bad Behavior: The Real Moral Hazard: Law Schools Exploiting Market Dysfunction*, 23 AM. BANKR. L. REV. 347, 347 (2015) (citing 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>).
46. *Law School Costs: Debt*, *supra* note 35.
47. Calculations are based on data published by Law School Transparency at <https://data.lawschooltransparency.com/costs/debt/?y1=2017&scope=schools>.

**Table 7. Average Amount Borrowed Across Law Schools, Class of 2017**

Percentile	Average Amount Borrowed
10 <sup>th</sup>	\$73,230
25 <sup>th</sup>	\$85,703
50 <sup>th</sup>	\$116,514
75 <sup>th</sup>	\$131,421
90 <sup>th</sup>	\$148,879

The law schools with persistently very weak employment outcomes also tend to have higher average student debt amounts for those graduates who borrowed. Of the twenty schools that had FT, LT, BPR employment rates less than 45% in 2013 and again in 2017,<sup>48</sup> eighteen have reported average debt figures in at least one year since 2012. (Only eight of the schools reported average debt for 2017 graduates.) Of these eighteen, over half (ten) are in the top quartile, with seven in the top decile (in the year for which the most recent data is available). Only one, a public school, is in the bottom decile. One of the ten schools with a FT, LT, BPR employment rate below 35% for the classes of 2013 and 2017 had the highest average graduate debt of any reporting school in 2017, at \$198,962.<sup>49</sup>

#### *D. The Value of a J.D. Degree*

It appears clear that the value of a law degree has substantially exceeded the cost of obtaining it for the large majority of people who graduated from law school before 2009;<sup>50</sup> however, it is not known whether any particular schools had been graduating large numbers of students for whom this was not the case. Furthermore, the available data cast considerable doubt on whether the law degree continues to yield the large earnings premium attributed to the law degree versus a terminal undergraduate degree for a large majority of law school graduates.<sup>51</sup> However, any definitive conclusions are not possible

48. See *supra* notes 31-34, and accompanying text (discussing twenty law schools with persistently very weak employment outcomes).

49. Calculations are based on data published by Law School Transparency at <https://data.lawschooltransparency.com/costs/debt/?y1=2017&scope=schools>, <https://data.lawschooltransparency.com/costs/debt/?y1=2016&scope=schools>, <https://data.lawschooltransparency.com/costs/debt/?y1=2015&scope=schools>, and <https://data.lawschooltransparency.com/costs/debt/?y1=2012&scope=schools>.

50. See generally Simkovic & McIntyre, *The Economic Value of a Law Degree*, *supra* note 3.

51. See, e.g., *Life After Law School*, *supra* note 3, at 19 (finding lower levels of “financial well-being” and higher levels of financial difficulty by more recent law school graduates, that “[t]he percentage of . . . study participants who report that they had a good job awaiting them when they graduated from law school has decreased consistently over time, from a high of 70 percent among 1960-1969 graduates to a low of 38 percent among 2010-2015 graduates,” and

without more data on earnings and loan repayment by law graduates on a school-by-school basis.

At the same time, there is no basis to conclude that law school today is an investment that enables most students at every law school to repay their law student loans.<sup>52</sup> Indeed, a number of schools have both exceptionally high average graduate debt and exceptionally low graduate legal employment rates ten months after graduation. Over one-third of the schools with persistently very weak employment outcomes from 2013 to 2017 are also in the top 10th percentile for average amount borrowed (in the recent year for which the most recent data is available). The law school with the highest average amount borrowed per graduate in the Class of 2017 reported only 29% of 2017 graduates in FT, LT, BPR jobs at ten months after graduation. It appears likely that such schools are receiving a substantial taxpayer subsidy.

*E. The Relationship Between LSAT Scores, the Cost of Legal Education,  
and Bar Pass and Employment Outcomes*

Overall, law school applicants with the lowest LSAT scores pay more for law school tuition but have markedly worse bar passage and employment outcomes. Jerry Organ has recently completed a study funded by the Access Group<sup>53</sup> finding that applicants with LSAT scores in the lowest range (below

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that 32% of 2000-2015 graduates stated that law school was not worth the cost); Burk, *supra* note 3; Merritt, *What Happened to the Class of 2010?*, *supra* note 3; *After the JD III: Third Results from a National Study of Legal Careers*, THE AMERICAN BAR FOUNDATION AND THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION 2014 45, [http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report\\_final\\_for\\_distribution.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf) (last visited May 27, 2018) (suggesting that the Great Recession had a significant negative impact on earnings that extended beyond the end of the Recession for most lawyers in small firms, while lawyers in larger law firms saw significant increases in income between 2007 and 2012); William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, ABA JOURNAL (July 2011), [http://www.abajournal.com/magazine/article/paradigm\\_shift](http://www.abajournal.com/magazine/article/paradigm_shift).

52. See Baum, *supra* note 3, at 1 (finding that “[c]urrent prices not only lead to debt levels not sustainable at typical earnings levels, but likely generate earnings premiums for many students that do not support the investment”); Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates’ Economic Viability*, 38 WM. MITCHELL L. REV. 1185 (2013) (concluding that education debt should not exceed one and one-half times starting salary or require more than twelve percent of monthly income repayment); Jerome M. Organ, *Reflections on the Decreasing Affordability of Legal Education*, 41 WASH. U. J. L. & POL’Y 33 (2013) (using Chen’s debt guidelines, estimating that only one-third of Class of 2011 graduates had “marginal financial viability,” with monthly payments on debt amortized over twenty-five years not exceeding twelve percent of gross income or debt of not more than 1.5 times starting salary); *After the JD III*, *supra* note 51, at 45 (reporting that lawyer salaries in the 25th percentile had decreased between 2007 and 2012); Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEG. ED. 4, 30-35 (2010) (earnings of graduates who never pass a bar examination are well below those of lawyers (and also are lower than average college graduates) for the first five to ten years after law school, but in the latter half of their careers they achieve earnings comparable to lawyers in the bottom 25th percentile of earnings).

53. Organ, *Net Tuition Trends*, *supra* note 3.

145) paid the highest average net tuition, \$32,912, in 2014. (While this finding may be surprising at first blush, it likely reflects that schools with the lowest LSAT profiles have pricing power because many of their students cannot gain admission at more selective schools and have few options.)<sup>54</sup> At the same time, law schools with median LSAT scores from 145-149 had the lowest weighted-average first-time bar pass rates—less than sixty percent in 2015—compared with law schools with higher LSAT score ranges. The average percentage of “bad news” employment outcomes (unemployed seeking, unemployed not seeking, and employment status unknown) for graduates of these schools was the highest among all categories of law schools, at over 25% for the graduating Class of 2012, as was imputed average income (starting salary), at less than \$45,000.<sup>55</sup> In sum, the study concludes that even though students with lower LSAT scores generally are paying more for their legal education, the short-term return on their investment is generally much less than the return of those with higher LSAT scores who are paying the same or less for their legal education.<sup>56</sup>

**Table 8. Organ/Access Group Study on J.D. Costs and Outcomes by LSAT Score Ranges**

LSAT Ranges	Average Cost (2014)	Bar Passage (Class of 2015)	“Bad News” Empl. Outcomes (Class of 2015)	Starting Salaries (Class of 2015)
165+	\$32,703	89%	3.8%	\$99,100
160-164	\$23,994	81%	9.9%	\$65,200
155-159	\$23,948	77.8%	11.8%	\$55,900
150-154	\$26,066	67.9%	16.5%	\$50,700
145-149	\$29,741	56.2%	25.9%	\$43,800
<145	\$33,435	Not reported	Not reported	Not reported

*F. The Differential Costs and Outcomes of Law School for Black and Hispanic Law Students*

As law school enrollments have declined by nearly 30% since 2010, the number of minority matriculants has remained steady. Thus, the percentage of law students who are black and Hispanic has increased during the downturn in law school enrollments. However, more minority students are enrolling at schools with lower LSAT scores, while minority enrollments at schools with higher LSAT scores have declined since 2011.<sup>57</sup> Aaron Taylor has expressed the concern that some schools have increased minority enrollment as a “survival strategy.” “Put simply,” he writes, “black and Hispanic students have increased

54. *See id.* at 6.

55. *Id.* at 14, 16. Moreover, the trends with respect to cost and bar passage at these schools have been decidedly negative over the past several years. Average net tuition at schools with an LSAT median below 145 increased by nearly twelve percent from 2010 to 2014, while bar pass rates declined by more than four percentage points at schools with median LSAT scores from 145-149 from 2013 to 2015. *Id.* at 5, 13.

56. *Id.* at 17.

57. *Task Force on the Financing of Legal Education*, *supra* note 2, at 17-19.

their proportions among law schools considered least prestigious while essentially being shut out of schools considered most prestigious. White and Asian students, on the other hand, have reaped the benefits of the increasingly competitive admissions climate.”<sup>58</sup>

The available data indicate that women and minorities are disproportionately hurt by law school pricing practices. Organ’s study found that, because “students of color and women make up much larger percentages of students in law schools with lower median LSATs,” “[t]he average net tuition trends . . . suggest that [they] are being disproportionately impacted by the net tuition pricing differentials reflected in these data.”<sup>59</sup>

The 2016 Law School Survey of Student Engagement supports this finding. Black and Latino respondents to the survey were significantly less likely (49% and 53%, respectively) to receive merit scholarships than white and Asian students (67% and 61%, respectively). Likewise, black and Latino respondents (53% and 57%, respectively) were more likely to expect to incur over \$100,000 in law school debt compared with white and Asian respondents (38% and 40%, respectively).<sup>60</sup>

As reported in Table 9 below, the *After the JD III* study found that at about twelve years after being admitted to the bar, minority lawyers tended to have higher debt levels than white lawyers.<sup>61</sup> The comparative median income and debt amounts from *After the JD III* are summarized in the following table.<sup>62</sup>

58. Aaron N. Taylor, *Diversity as a Law School Survival Strategy*, 59 ST. LOUIS U. L.J. 321, 355 (2014).

59. Organ, *Net Tuition Trends*, *supra* note 3, at 18.

60. Paul Caron, *Law School Survey of Student Engagement, Law School Scholarship Policies: Engines of Inequity*, TAXPROF BLOG (Feb. 9, 2017), [http://taxprof.typepad.com/taxprof\\_blog/2017/02/lssselaw-school-merit-scholarship-policies-engines-of-inequity.html#more](http://taxprof.typepad.com/taxprof_blog/2017/02/lssselaw-school-merit-scholarship-policies-engines-of-inequity.html#more); *see also* Aaron N. Taylor, *Robin Hood, In Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & EDUC. 41 (2018) (analyzing data from the 2016 Law School Survey of Student Engagement; concluding that “law school scholarships flow most lucratively to students who tend to come from privileged backgrounds, contributing, most notably, to increased student loan debt among students from disadvantaged backgrounds. The result is a cascade of negative outcomes, including a ‘reverse Robin Hood’ cost-shifting strategy through which disadvantaged students subsidize the tuition of their peers from privileged backgrounds.”).

61. *After the JD III*, *supra* note 51, at 76-77, 80-81 (study based on a survey of a sample of 2862 lawyers admitted to the bar in 2000); *accord* Yakowitz, *supra* note 52, at 14, 15.

62. *After the JD III*, *supra* note 51, at 76-77, 80-81.

**Table 9. AJD III/Debt Levels by Race/Ethnicity**

Race/Ethnicity	Median Income	Median Debt	% with debt > \$100,000	% paid off loans in full
White	\$124,000	\$50,000	5.2	48.4%
Asian	\$120,600	\$37,000	2.0	60.1%
Black	\$112,000	\$57,000	7.3	23.3%
Hispanic	\$130,000	\$75,000	15.5	30.4%

**III. The Case for an Employment Outcome Standard**

As the ED-recognized accrediting agency for all J.D. programs in the United States,<sup>63</sup> the ABA Council of the Section of Legal Education and Admissions to the Bar plays a gatekeeping function; accreditation is a prerequisite to participation in Title IV student aid programs, most importantly in the federal student loan programs.<sup>64</sup> The ED criteria for recognition of an accrediting agency primarily focus, of course, on assuring the quality of the programs and institutions that participate in the federal student aid programs. One of the ED’s key criteria for recognition, taken verbatim from the HEOA,<sup>65</sup> requires accreditors to impose student outcome standards on the programs or institutions that they accredit. It states:

The agency must demonstrate that it has standards for accreditation . . . that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the . . . programs it accredits. The agency meets this requirement if—

- (I) The accreditation agency’s standards effectively address the quality of the institution or program in the following areas:
  - (i) Success with respect to student achievement in relation to the institution’s mission, . . . including, as appropriate, consideration of course completion, State licensing examination, and job placement rates.<sup>66</sup>

63. See *Accreditation in the United States*, U.S. DEPARTMENT OF EDUCATION, [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg5.html#NationallyRecognized](http://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html#NationallyRecognized) (last visited May 27, 2018).

64. 20 U.S.C. § 1001(a). It is not widely appreciated that, of the 205 J.D. programs that have ABA accreditation, only about fifteen are independent law schools for which ABA accreditation provides access to the Title IV student aid programs. About 190 ABA-approved law schools are part of institutions that are accredited by one of the ED-recognized regional accreditors, and therefore participate in the Title IV student aid programs by virtue of their parent institution’s accreditation. Further, in recent years, several of the approximately fifteen independent law schools have obtained regional accreditation so that students in their non-J.D. programs will be eligible for federal student aid programs under Title IV.

65. 20 U.S.C. § 495(2)(A) (2016).

66. *Id.*; 34 C.F.R. § 602.16(a)(1) (2010). The remaining sections of the regulation require standards concerning curriculum, faculty, finances, and the like. See *id.* § 602.16(a).

As noted, the expressed purpose of the HEOA/ED mandate is to ensure that student outcomes align with the objectives of the accredited program or institution—that is, that students realize the promise of the degree. In addition, the mandate serves to protect taxpayer dollars by helping to ensure that graduates can repay the loans that they take.<sup>67</sup>

The current ABA standards are not “sufficiently rigorous” and do not “effectively address the quality” of some law school programs. Specifically, some schools with persistently very weak graduate employment outcomes are able to pursue admission and other policies that further diminish their graduates’ employment prospects. An employment outcome standard will better serve the purposes underlying the HEOA/ED mandate.

*A. Law Graduate Legal Employment Rates as a Measure of Whether  
Student Outcomes Align with J.D. Program Objectives*

If one accepts the premise that the large majority of law students attend law school to practice law,<sup>68</sup> the case for an employment rate standard that requires law schools to demonstrate that outcomes align with objectives is straightforward. The ABA accreditation standards themselves state that the objectives of a law school academic program are to “prepare . . . students, upon graduation, for admission to the bar and for effective . . . participation as members of the legal profession.”<sup>69</sup> A law school that persistently places very low percentages of its graduates in law jobs patently is not fulfilling the promise of the J.D. degree program. The high cost of legal education heightens the need for an employment outcome standard.<sup>70</sup> The negative repercussions of a low graduate legal employment rate are magnified where graduates have borrowed substantial sums to obtain the law degree, regardless of whether they are able to repay their student loans according to the terms.

Persistently weak employment outcomes indicate a shortcoming in the quality of a school’s program, perhaps inadequate admission standards in particular. Passing a bar exam is only part of what is required to participate in the legal profession, and even where a school has a very high bar passage rate, it may be failing to produce graduates sufficiently qualified or prepared for the

67. See *supra* notes 12 and 15, and accompanying text.

68. See *supra* notes 13-14 and accompanying text.

69. *ABA Standards*, *supra* note 14, at 15 (Standard 301(a)). Standard 301 is titled “Objectives of Program of Legal Education.” Standard 301(b) provides further that “[a] law school shall establish and publish learning outcomes designed to achieve these objectives.” *Id.* Perhaps it could be argued that the objective of a J.D. program is limited to preparing students for the practice of law, without regard to whether graduates are able to use the degree in a law job. So long as law school prepares students to pass a bar examination and practice law, the objective of the program is met, apart from whether the graduate obtains a law job. This argument ignores, however, the reality that students attend law school to both prepare for the practice of law and to practice law. Preparation for practice is a hollow objective apart from becoming part of the profession.

70. See *supra* notes 38-46 (discussing law graduate debt levels).

practice of law. Thus, the ABA standards require law schools both to prepare students to pass a bar examination and for the practice of law.<sup>71</sup> Bar passage is necessary, but not sufficient. In a market where there are persistently more law school graduates than available law jobs, the qualifications for employment may be higher, and the level of preparation required thus will be greater. Schools with persistently low legal employment rates have not met the demands of the entry-level legal employment market. The reasons may be varied and cumulative, including the ability of students (admission requirements), the quality of the faculty, the rigor and relevance of the academic program, and the level of career services provided by the school.

While the ED recognition criteria do not mandate any particular student outcome standards, the outcome standards adopted by the accreditor must be effective.<sup>72</sup> Currently, the ABA has the equivalent of a minimum course completion rate standard. ABA Standard 501(b) prohibits schools from admitting applicants who do not appear capable of completing law school and passing a bar examination,<sup>73</sup> and the ABA closely monitors law schools' admission requirements and academic attrition rates.<sup>74</sup> The ABA also has a licensing exam passage rate standard—ABA Standard 316, the bar examination passage standard.<sup>75</sup> While the ABA requires schools to collect and report detailed graduate employment outcome information,<sup>76</sup> the accreditation standards presently do not address employment outcomes.

An ABA employment outcome standard would redress a gap in the ABA's current outcome standards. The current standards on attrition and bar passage have not effectively constrained some schools with persistently very weak graduate employment outcomes to improve those outcomes. To the contrary, as discussed above, some schools with dismal graduate employment outcomes have responded to the decline in law school applications by enrolling more students with markedly lower LSAT scores, almost inevitably leading to lower bar passage rates and further diminished employment prospects for their graduates.<sup>77</sup> Moreover, some of the same schools with weak employment outcomes and significant declines in entering class credentials also report high average student debt amounts (or no longer report the amount).<sup>78</sup> Minority

71. *ABA Standards*, *supra* note 14, at 15 (Standard 301(a)).

72. 34 CFR § 602.16 (2010) (“accrediting agency standards [must] effectively address the quality of the institution or program . . .”).

73. *ABA Standards*, *supra* note 14, at 31 (Standard 501(b)).

74. *ABA Standards*, *supra* note 14, at 52-53 (Rule 6(b)(4)).

75. *ABA Standards*, *supra* note 14, at 24 (Standard 316). The Council is currently considering revising the standard to both simplify it and make it more rigorous. *See infra* notes 110-114 and accompanying text regarding revisions to the standard and the status of its final approval.

76. Standard 509(b)(7), *ABA Standards*, *supra* note 14, at 35.

77. *See supra* notes 31-37, and accompanying text.

78. *See supra* notes 48-49, and accompanying text.

students in particular are more likely to pay higher tuition, incur more debt, pass the bar at lower rates, and realize worse employment outcomes.<sup>79</sup> The transparency of schools' employment outcomes<sup>80</sup> and quasi transparency of the average indebtedness of schools' graduates<sup>81</sup> have not led applicants to avoid schools with extremely weak employment outcomes, at least where those applicants present credentials that will not gain them admission to schools with better employment outcomes.

*B. An Employment Outcome Standard as a Check on Unintended  
Taxpayer Subsidies for Law Schools*

A subsidiary purpose of the ED requirement of student outcome standards is to conserve federal tax dollars.<sup>82</sup> As explained by the U.S. Court of Appeals for the District of Columbia in an opinion upholding the ED's gainful employment rule,<sup>83</sup>

[t]he conditions attached to Title IV funds “are intended to ensure that participating schools actually prepare their students for employment, such that those students can repay their loans.” . . . The financial aid at issue is, after all, a “loan,” not a scholarship, grant, or award. It would be strange for Congress to loan out money to train students for jobs that were insufficiently remunerative to permit the students to repay their loans. And it would be a perverse system that, by design, wasted taxpayer money in order to impose crippling, credit-destroying debt on lower-income students and graduates.<sup>84</sup>

79. See *supra* notes 57-62, and accompanying text.

80. ABA Standard 509(b)(7) requires that “[a] law school shall publicly disclose on its website, in the form and manner and for the time frame designated by the Council, . . . employment outcomes.” *ABA Standards*, *supra* note 14, at 35. In addition, all schools' Employment Summary Reports are available on the ABA website, <http://employmentsummary.abaquestionnaire.org/>.

81. Data on average indebtedness are not collected by the ABA, nor do most schools publish them on their websites, but they are collected and reported by U.S. News. The U.S. News information can also be found on the Law School Transparency website, at <http://www.lawschooltransparency.com/reform/projects/Law-School-Financing/?show=2015>.

82. See, e.g., *Duncan*, 640 Fed. App'x at 8 (upholding the ED's gainful employment rule, which conditions access to Title IV student aid programs by proprietary and post-secondary vocational schools on graduates of the institution achieving a specified minimum ratio of student loan debt to income).

83. The gainful employment rule requires that graduates of proprietary and post-secondary vocational schools meet specified debt-to-earnings ratios. See 34 C.F.R. § 668.401 et seq.

84. *Duncan*, 640 Fed. App'x at 8 (quoting *Ass'n of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 433-34 (D.C. Cir. 2012)). The “gainful employment rule,” a federal regulation promulgated by the Department of Education pursuant to 20 U.S.C. §§ 1002(b), (c) (2010), conditions participation in Title IV student aid programs by proprietary and postsecondary vocational institutions on meeting minimum student debt-to-income metrics. See 79 Fed. Reg. 64,889 (Oct. 31, 2014).

Taxpayers subsidize higher education, including legal education, in part by assuming the risk that students who borrow money under one of the Title IV federal student loan programs will not repay their loans.<sup>85</sup> (The purpose underlying the subsidy is to promote access to higher education for students who cannot otherwise afford it.<sup>86</sup>) The ED remits the monies borrowed by students for tuition directly to the eligible education institution,<sup>87</sup> which assumes no risk that individual students will not complete the program, pass a licensing exam, obtain suitable employment, and repay the debt. The greater the risk that a student will not obtain suitable employment, and thus have the means to repay her student loan debt, the larger the federal subsidy for the school at which the student is enrolled. Stated differently, at institutions with strong graduate employment outcomes, the taxpayer subsidy is minimal, while at institutions with weak graduate employment outcomes, the subsidy may be quite large. Moreover, where a law school reports a low legal employment rate, the starting salaries of the graduates who obtain law jobs likely fall, for the most part, on the lower end of the salary range.<sup>88</sup>

A large majority, more than seventy-five percent, of law students borrow to finance their legal educations,<sup>89</sup> and most law schools are tuition-dependent.<sup>90</sup> The federal government loaned more than \$3 billion to the students who graduated from ABA-accredited law schools in 2017.<sup>91</sup> The schools that are the most tuition-dependent also tend to be the schools with the weakest employment outcomes.<sup>92</sup> Moreover, most of the same schools with persistently

85. This risk is at least partially accounted for by the interest rates charged for the loans, but that is not the issue. The rates are higher for all borrowers to the extent that institutions receive unwarranted subsidies because their graduates' employment outcomes do not support repayment of their loans. The availability of student loan refinancing also drives up the cost of borrowing under the federal direct student loan program. Private lenders refinance low-risk borrowers' loans at below the government interest rate, thereby decreasing the subsidy that lower-risk borrowers provide to higher-risk borrowers under the federal loan program, which issues loans without underwriting. See Kyle P. McEntee, *How Student Loan Refinancing Could Undo Federal Loan Policy*, ABOVE THE LAW (Jan. 26, 2016), <http://abovethelaw.com/2016/01/how-student-loan-refinancing-could-undo-federal-loan-policy/?rf=1>.
86. See generally Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1, 5-10 (2008).
87. See 20 U.S.C. § 1001 et seq. (2017).
88. TAMANAHA, *supra* note 3, at 157.
89. "[T]he percentage of law graduates who borrow . . . has been over 85% at least since 2003-04." Baum, *supra* note 3, at 4. This compares with fifty-six percent of students in all programs. *Investing in Higher Education: Benefits, Challenges, and the State of Student Debt*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES 22 (July 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160718\\_cca\\_student\\_debt.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160718_cca_student_debt.pdf).
90. *Law School Costs: Debt*, *supra* note 35.
91. *Id.* (calculating that the federal government loaned approximately \$3.07 billion).
92. *Task Force on the Financing of Legal Education*, *supra* note 2, at 22 ("Private GI [lowest-tier] schools are by far the most tuition-dependent (the same schools noted above for their low employment rates). In AY 2012-13 the average was ninety-five percent of revenue."); see also 2015 *State of Legal*

very weak employment outcomes also report high average student debt amounts.<sup>93</sup>

The extent of the federal taxpayer subsidy to law schools is difficult to estimate. The default rate on law student loans is quite low,<sup>94</sup> but default rate does not begin to capture the true rate of loan repayment because of the widely available income-driven repayment (IDR) plans.<sup>95</sup> IDR is “designed for those for whom standard repayment would be a great hardship” resulting from a combination of high student loan debt and insufficient income to service the debt.<sup>96</sup> These IDR plans offer loan forgiveness at the end of a longer repayment period, with payments calculated as a percentage of the borrower’s discretionary income. Thus, where a borrower’s income is not sufficient to pay modest living expenses and service the loan debt, payments are reduced while unpaid interest is added to the principal obligation. In this way, the amount borrowed may continue to increase during “repayment.” IDR payment amounts can be little or nothing depending on the amount of the borrower’s discretionary income. A law school receives a subsidy to the extent that a graduate does not repay student loan debt through an IDR plan.

It appears likely that the extent of the subsidy is quite large for some schools. A recent report from the General Accounting Office estimates that the IDR plans will cost upward of \$74 billion, more than twice the amount originally estimated for loans made in 2009-2016. The huge increase in the cost of the programs is due largely to the increasing numbers of borrowers opting into the IDR plans.<sup>97</sup> At some law schools, the bulk of graduates likely qualify

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*Education, Visual Data Navigator*, LAW SCHOOL TRANSPARENCY, <http://lawschooltransparency.com/reform/projects/investigations/2015/data/visualize/?g=tfi&show=jobs> (last visited Feb. 20, 2017) (reporting on federal investment in law schools categorized by employment outcomes).

93. See *infra* notes 48-49, and accompanying text.
94. See *Official Cohort Default Rates for Schools*, U.S. DEPARTMENT OF EDUCATION: FEDERAL STUDENT AID (Sept. 27, 2017), <https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html> (providing official cohort default rates for institutions, including independent law schools, participating in title IV student aid programs).
95. There are currently five different IDR plans, each one available to a different set of borrowers. The plans provide for payment of a percentage, ranging from ten percent to twenty percent, of a borrower’s discretionary income, and for forgiveness of the unpaid balance of the loan after twenty to twenty-five years. The amount of debt forgiven is taxable as income. See *Report to the Chairman, Committee on the Budget, U.S. Senate, Federal Student Loans, Education Needs to Improve Its Income-Driven Repayment Plan Budget Estimates*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE 5 (Nov. 2016), <http://www.gao.gov/assets/690/681064.pdf> [hereinafter *GAO Report*]. In addition, there is the Public Service Loan Forgiveness Program, available to graduates in certain government and public interest positions, which provides for payments over ten years, after which the unpaid balance is forgiven (and the amount forgiven is not taxable as income).
96. Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 41 (2007).
97. See *GAO Report*, *supra* note 95, at 12-13.

for IDR in light of the high average law school debt and the relatively low entry-level salaries reported by graduates.<sup>98</sup>

### *C. Arguments Against an Employment Outcome Standard*

Several arguments against an employment outcome standard can be anticipated. One is that such a standard is paternalistic, that qualified applicants should be free to choose to attend the law school of their choice without regard to any particular school's graduate employment outcomes, as long as full and accurate bar passage and employment outcome information is available. It may also be argued that the ABA's revised admission and proposed revised bar passage standards will more effectively address the law graduate employment problem than an employment outcome standard. Further, it will be contended that an employment outcome standard will lead to the closure of law schools that provide access to the legal profession for underrepresented minorities. Finally, arguably the more effective way to limit unintended subsidies to law schools (and any other higher education institution that participates in the federal Title IV student aid programs) would be to cap the amount that can be borrowed under the federal student aid programs, and thereby require schools to directly assume some of the risk of student loan nonrepayment. These arguments are considered in turn.

#### 1. An Employment Outcome Standard is Paternalistic

Since the 1960s, the ABA has followed a course that has significantly increased the number of accredited law schools. Over the past fifty years, the number of ABA-accredited law schools has increased by over one-half, from 135 in 1963-1964 to 205 schools today, and first-year enrollments grew by over 150 percent from 20,776 in 1963-1964 to 52,488 in 2010-2011.<sup>99</sup> For most of this period, the expansion of legal education coincided with an increase in the number of law jobs for law school graduates.<sup>100</sup> To date, of course, accreditation has not depended upon meeting any minimum legal employment outcome requirement. The ABA adopted its bar passage standard in 2009.

It may be argued that the market of law school applicants, not an accrediting agency, is the most efficient regulator of law school enrollments. Indeed, the law school applicant market has responded to the decline in the legal employment market, as evidenced by the sharp decrease in applications over the past seven years.<sup>101</sup> The argument continues, if a law school provides a legal education of sufficient quality to prepare students for admission to the

98. See TAMANAHA, *supra* note 3, at 123.

99. *Enrollment and Degrees Awarded 1963-2012*, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, [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 May 27, 2018).

100. Burk, *supra* note 3, at 564-65.

101. See *infra* note 108.

bar and the practice of law, it should be no concern to the accreditor whether graduates of the school can actually use the degree. As long as applicants have access to complete and accurate data on a law school's graduate employment outcomes, they can make informed decisions on whether law school is a good investment. It would be paternalistic to make that decision for them no matter how remote the odds of obtaining legal employment with a degree from a given school.<sup>102</sup>

To assert that the applicant market rather than the accreditor is the more efficient regulator of law school enrollments fails to recognize that the higher education applicant market is anything but normally functioning. The market is not efficient in the case of higher education because the transactions involved create large external costs. As noted above, the large majority of law school students borrow to attend.<sup>103</sup> Schools receive payment of their students' borrowed tuition dollars upfront and without assuming any of the risk that any individual student will be unable to repay her debt. The federal government makes and students obtain Title IV loans to cover the full cost of tuition at an accredited school without regard to the risk of nonrepayment. The availability of loans without underwriting feeds an optimism bias on the part of student borrowers<sup>104</sup> and artificially fuels enrollments that would not occur in a private student loan market.<sup>105</sup> (In addition, the federal student aid programs likely have fueled the increases in the cost of education, especially legal education.<sup>106</sup>) The dysfunction of the legal education marketplace seemingly is confirmed by the fact that students continue to enroll in and pay very high tuitions at schools with persistently very weak legal employment rates notwithstanding substantial transparency in law graduate employment outcomes. (And the same can be said for enrollment at schools with very low bar pass rates.)

102. Cf. Noah Feldman, *Don't Baby Law School Applicants*, BLOOMBERG (Oct. 27, 2015), <https://www.bloomberg.com/view/articles/2015-10-27/don-t-baby-law-school-applicants> (“Those who think law schools shouldn’t admit students with low test scores are reflecting, whether they know it or not, a culture of paternalism that verges on infantilization.”); see also Austen Parrish, *Dean’s Desk: A troubling focus by the ABA on the bar exam*, THE INDIANA LAWYER (Nov. 16, 2016), <http://www.theindianalawyer.com/deans-desk-a-troubling-focus-by-the-aba-on-the-bar-exam/PARAMS/article/42025> (addressing the ABA’s proposed revised bar admission standard, Parrish argues that if the standard takes effect, “it’s because the ABA believes students with lower LSAT test scores should be denied opportunities for their own good . . . . There’s little evidence that students choosing to attend law school don’t understand the risks and the potential rewards . . . . [R]arely have we been so openly paternalistic as to suggest the ABA should make this decision for them.”).

103. See *supra* note 89, and accompanying text.

104. See TAMANAHA, *supra* note 3, at 143-44 (citing TALI SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN (2011)).

105. See discussion *infra* notes 122-123 and accompanying text, regarding proposals to cap amounts that can be borrowed under the federal student loan programs to attend law school, forcing students into the private lending market.

106. See Goldie Blumenstyk, *The ‘Bennett Hypothesis,’ on Why College Prices Rise, Is Alive and Well*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 20, 2012), <http://www.chronicle.com/article/The-Bennett-Hypothesis-on/130880>.

Further, the paternalism argument fails to acknowledge the interest of taxpayers and other student loan borrowers in graduate employment outcomes, as they foot the costs of the unpaid student loans. As discussed above, this is one of the policies underlying the HEOA/ED provision mandating student outcome measures, which is directed at ensuring the quality of the program and permits an (effective) employment rate standard as a measure of quality.<sup>107</sup> Taken to its logical conclusion, the paternalism argument would do away with accreditation standards entirely.

Related to the paternalism argument, some may contend that an employment outcome standard is essentially an anticompetitive trade association attempt to restrain competition among lawyers by limiting the number of entrants into the profession. This contention misconstrues the purpose of the standard, however. Again, the objective is to fill a gap in the current standards that allows or encourages law schools to pursue admission policies that are directly at odds with improving profoundly weak graduate employment outcomes. As discussed above, a school's persistently weak legal employment rates indicate that the market lacks confidence in the quality of the law school's program, whether it be the quality of the faculty, students, academic program, career services, or some combination of these or other factors.

## 2. Revised ABA Admission and Bar Passage Standards Will Effectively Address the Law Graduate Employment Problem

It may also be argued that the law graduate employment problem facing legal education, if there is one, is that the number of law school matriculants has not declined commensurate with the number of applicants.<sup>108</sup> As a result, the conventional qualifications of the matriculant pool have declined substantially.<sup>109</sup> The solution to this problem is stricter admission and bar passage standards, not regulating law schools based on employment outcomes. In fact, the ABA has done exactly this by moving to tighten the admission and bar passage standards. Perhaps the revised standards would significantly reduce enrollments and the number of law school graduates

107. See 34 C.F.R. § 602.16(a)(1); 20 U.S.C. § 495(2)(A) (2017).

108. While enrollments have declined by nearly thirty percent since 2010 (from 52,488 in 2010 to 37,400 in 2017), see [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2017\\_509\\_enrollment\\_summary\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2017_509_enrollment_summary_report.authcheckdam.pdf) (2017 figure) and [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (2009-2010 data), applications have declined by nearly thirty-six percent (from 87,900 in 2010 to 56,400 in 2017), see <https://www.lsac.org/lisacresources/data/aba-coy> (2017 data) and <http://www.lsac.org/lisacresources/data/lisac-volume-summary/archive> (2010 data).

109. See, e.g., Jerry Organ, *Updated Analysis of Attrition through the 2014-2015 Academic Year*, THE LEGAL WHITEBOARD (Feb. 27, 2016), <http://lawprofessors.typepad.com/legalwhiteboard/2016/02/updated-analysis-of-attrition-through-the-2014-15-academic-year.html> (reporting on the declines in LSAT scores as law school applications have fallen).

would more closely align with available law jobs, making an employment outcome standard superfluous.

The pending changes to Standard 316 would make it slightly stricter. The revised standard would eliminate the first-time bar pass rate alternative under the current standard, and make ultimate bar pass rate the sole criterion. The minimum ultimate bar pass rate would remain at 75%, but the measurement period would be reduced from five to two years.<sup>110</sup> Final approval of the proposed revised bar passage standard was in doubt as of press time for this article.<sup>111</sup> Even if it is implemented and causes some schools to reduce enrollments, it will not remedy the gap in the current standards that allows or encourages schools to admit students without regard to employment outcomes. As under the current standards, as long as a school is in compliance with the bar passage standard, it has wide latitude to admit applicants without regard to their employment prospects.

Indeed, an effective employment outcome standard may obviate the need for a bar passage standard, and the ABA should consider eliminating the bar passage standard with the adoption of an employment outcome standard. Bar passage is a necessary but not sufficient prerequisite to most legal employment. While a school can meet a bar passage standard without regard to placing graduates in law jobs, graduates cannot obtain most law jobs without passing a bar exam. Further, schools have no control over bar exams, but they and their alumni can do much to promote employment of their graduates.

Replacing the bar passage standard with an employment outcome standard may reduce the regulatory burden on law schools. Under the current bar passage standard, schools must report bar examination outcomes for only seventy percent of graduates.<sup>112</sup> Under the revised standard, schools would be

110. See *Summary of Council Actions Related to Standards at its October 2016 Meeting*, AMERICANBAR.ORG, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/October2016CouncilMaterials/2016\\_october\\_council\\_summary\\_of\\_actions\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/October2016CouncilMaterials/2016_october_council_summary_of_actions_authcheckdam.pdf) (last visited May 27, 2018). The proposed revised Standard 316 provides: “At least 75% of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination within two years of their date of graduation.” See *id.*

111. The governing Council of the ABA Section of Legal Education and Admissions to the Bar approved a revised Standard 316 in October 2016. See *id.* Under the ABA’s bylaws, changes to the accreditation standards are effective upon approval by the Council and concurrence by the ABA House of Delegates (HOD). When the HOD does not concur, the proposed changes are returned to the Council for reconsideration. However, after a second determination by the HOD not to concur in a proposed change, the Council may approve the standard for a third time, and it will take effect without HOD concurrence. The HOD declined to concur in the changes to Standard 316 at its midyear meeting in February 2017. See Stephanie Francis Ward, *ABA House rejects proposal to tighten bar-pass standards for law schools*, ABA JOURNAL (Feb. 6, 2017), [http://www.abajournal.com/news/article/aba\\_house\\_rejects\\_proposal\\_to\\_tighten\\_bar\\_pass\\_standards\\_for\\_law\\_schools](http://www.abajournal.com/news/article/aba_house_rejects_proposal_to_tighten_bar_pass_standards_for_law_schools). As of press time, the Council had not reconsidered or reapproved the proposed revised standard.

112. Standard 316(a)(1) and (2) (hanging paragraphs), *ABA Standards*, *supra* note 14, at 24.

expected to report on bar passage for all graduates.<sup>113</sup> This increased burden is significant for many schools because the bar examiners in some jurisdictions will not release bar pass information to law schools. By contrast, under the existing employment data reporting system, schools are able to report on the employment outcomes of ninety-eight percent of graduates at ten months after graduation.<sup>114</sup>

The change to the admission standard, which became effective in February 2017, is not a change to the standard itself, but the addition of a new interpretation of the standard. The new interpretation provides: “A law school having a non-transfer attrition rate above 20 percent bears the burden of proving that it is in compliance with the Standard.”<sup>115</sup> The import of the new interpretation is that it sets twenty percent in nontransfer attrition as the threshold at which a school is presumptively out of compliance with the standard’s requirement that a school “only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”<sup>116</sup>

Again, this change appears unlikely to effectively constrain schools from pursuing admission policies that minimize reduction in class size without regard to employment outcomes. There are fourteen schools that reported nontransfer attrition rates greater than twenty percent for the 2016 entering class.<sup>117</sup> About one-third – seven – of the twenty schools that have reported persistently very weak employment outcomes<sup>118</sup> reported nontransfer attrition rates greater than twenty percent in 2017 (for the entering Class of 2016). Thus, while the new interpretation may catch some of the schools with persistently very weak employment outcomes, it will miss most of them. Further, some

113. See *supra* note 110 (quoting the proposed revised standard).

114. Over ninety-eight percent of Class of 2017 graduates reported their employment status to their schools. See *Employment Outcomes As Of April 2018 (Class of 2017 Graduates)*, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (Apr. 20, 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2017\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2017_law_graduate_employment_data.authcheckdam.pdf).

115. See Barry A. Currier, *Memorandum to Interested Persons and Entities: Adoption and Implementation of Revised ABA Standards and Rules of Procedure for Approval of Law Schools*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR 5 (Feb. 23, 2017), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/March2017CouncilOpenSessionMaterials/2017\\_february%20notice\\_revisions\\_to\\_standards\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/March2017CouncilOpenSessionMaterials/2017_february%20notice_revisions_to_standards_rules.authcheckdam.pdf).

116. Standard 501(b), *ABA Standards*, *supra* note 14, at 31.

117. Spreadsheet of ABA accredited law school’s Standard 509 Information Reports found at *Compilation—All Schools Data*, <http://www.abarequireddisclosures.org> (selecting 2017 and J.D. Attrition from the dropdown menus, Column DV).

118. See *supra* note 31-32, and accompanying text.

schools might adjust their academic policies to stay within the twenty percent line.<sup>119</sup>

### 3. An Employment Outcome Standard Will Reduce Access to the Profession

Another argument that can be anticipated is that a graduate employment outcome standard will reduce access to the profession, and at the margin disproportionately harm lower-income and minority students. This is a leading argument against the proposed revised bar passage standard. As stated by Austen Parrish, “[l]egal education remains one of the few avenues for upward mobility (not a guarantee, but still a path). Broad access to a legal education serves [the profession] and society well. The rule of law is one of the foundations of our society, our political system, and our economic system, and we benefit when our society understands the importance of law and legal institutions.”<sup>120</sup>

The profession gains no diversity when minority law graduates do not obtain law jobs. Moreover, the available data indicate that an employment outcome standard is especially needed to help ensure that minority students realize the promise of the J.D. degree. As discussed above, minority law students on the whole pay more for law school than nonminority students. At the same time, bar passage rates, employment rates, income levels, and debt levels tend to be worse for minority law school graduates.<sup>121</sup> An employment standard would be another encouragement for alumni to hire minority graduates. Employment (in contrast to bar passage) is something that alumni can directly influence. On the other hand, however, some employers discriminate in the hiring of lawyers and therefore an employment outcome standard could disproportionately

119. See Jerry Organ, *Comments on Proposed Revisions to Standard 501*, THE LEGAL WHITEBOARD (Mar. 8, 2016), <http://lawprofessors.typepad.com/legalwhiteboard/2016/03/-comments-on-proposed-revisions-to-standard-501.html>.

120. See Austen L. Parrish, *Parrish: More Thoughts on The ABA's Proposed 75% Bar Passage Standard*, TAXPROF BLOG (Dec. 21, 2016), [http://taxprof.typepad.com/taxprof\\_blog/2016/12/parrishmore-thoughts-on-the-abas-proposed-75-bar-passage-standard.html](http://taxprof.typepad.com/taxprof_blog/2016/12/parrishmore-thoughts-on-the-abas-proposed-75-bar-passage-standard.html). Dean Parrish's argument continues: “[T]he legal profession does best when it's inclusive and reflects the diversity of the communities it serves. The new rule will hurt diversity in the profession. That's undoubtedly true if diverse states like California have pass rates significantly below the national average and schools and students in those states are placed under greater scrutiny regardless of educational program quality.” See also Sheldon Bernard Lyke, *Adding Clarity to Law School Transparency*, THE FACULTY LOUNGE (Dec. 4, 2015), <http://www.thefacultylounge.org/2015/12/adding-clarity-to-law-school-transparency.html> (“[w]hen admission standards become easier, those at the margins of society—specifically the poor and black & brown racial and ethnic minorities—have the potential benefit. But just at the moment when it becomes easier for those at the margins to gain admission into the legal profession, the media and organizations like LST [Law School Transparency] engage in a crusade to vilify law schools and pressure them into accepting fewer students. This is done in the name of ‘transparency’ and a paternalist drive to help the ‘unqualified’ applicant who is at high risk of failing the bar. Instead, LST’s strategy is at high risk of keeping black and brown people, and the poor from having the opportunity to ever sit for a bar”).

121. See *supra* notes 57-62, and accompanying text.

adversely impact schools with larger enrollments of minority and women students or have an ex ante negative effect on admissions of minority and women students. Finally, there is substantial capacity in the system to increase enrollment even if some schools close; there is no reason to fear that closing schools in a down cycle might result in too few seats going forward. At least for the foreseeable future, more students could be accommodated in fewer schools.

#### 4. Reforming the Federal Student Loan Program Will Most Effectively Address the Law Graduate Employment Problem

Another approach to the problem of persistently weak employment outcomes at some law schools (and the less than stellar employment outcomes at many other schools) is for the federal government to require schools to bear some of the risk that their graduates do not repay their student loans. Several commentators have urged that the federal government set a limit on the amount of money that can be borrowed to attend law school.<sup>122</sup> Such a limit would force students to look to the private lending market (or to the law schools that they attend) to finance tuition and living expenses in excess of the cap. In turn, the private lending market would look to the schools to assure payment of at least a portion of their graduates' loans in the event of default. Because private as well as federal student loans are nondischargeable in bankruptcy (except where repayment constitutes an "undue hardship" on the graduate),<sup>123</sup> graduates likely would never escape liability for the loans. However, nondischargeability is not the same as repayment, and the private lenders would certainly underwrite their loans as they do now.

This approach is market-based and therefore arguably a better response to the problem of persistently weak employment outcomes at some law schools. But it would be a radical change in the current federal student aid system that could decimate a large segment of legal education, and significantly reduce access to the profession. Better to address the problem in a more controlled way through accreditation before much more draconian measures are imposed from outside. Legal education has an obligation to fix its graduate employment problems before more draconian remedies are imposed by Congress or the Department of Education.

### IV. The Use of Employment Outcome Standards by Other Ed-Recognized Accreditors

Currently, about a quarter of all ED-recognized programmatic accreditors<sup>124</sup> such as the ABA, which generally accredit a particular type of program

122. See TAMANAHA, *supra* note 3, at 178-81.

123. 11 U.S.C. § 523(a)(8) (2016).

124. ED classifies accrediting agencies as regional, national, or programmatic. There are eight regional accreditors (such as the Southern Association of Colleges and Schools and the Northwest Association of Colleges and Schools). Regional accreditation covers two- and four-year public and private nonprofit degree-granting institutions. See *The Different*

or school (and not institutions per se), currently have employment rate standards in place.<sup>125</sup> Eleven of approximately forty programmatic accreditors use placement rate standards, ranging from seventy percent to ninety-eight percent, as a measure of student achievement. Most of these accreditors cover professional or quasi-professional programs that prepare students for employment in a particular health-related profession.<sup>126</sup> Seven of the eleven also use licensing exam passage rates, while four use employment outcome standards but have no licensing exam passage standard. Nine programmatic accreditors, including the ABA, use license exam passage rates but currently have no employment outcome standard.<sup>127</sup>

The ABA might be distinguished from the other professional program accreditors in that their degree programs qualify the graduates for employment only in the specific field of the program. By contrast, the law degree is more versatile; it can be and is held by professionals across a wide range of careers, from law to business, government, politics, education, and so forth. Therefore, it is arguably not appropriate to assess eligibility for Title IV funds based on graduate employment rates in a single profession, just as institutional accreditors do not have employment rate standards because their institutions offer a wide array of degree programs. However, as noted above, the typical

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*Types of Accreditation*, ONLINECOLLEGEDEGREES.NET, <http://www.onlinecollegedegrees.net/accreditation-types.html> (last visited May 27, 2018). A placement rate standard makes sense only where an educational program prepares graduates for employment in a particular career. Thus, none of the ED-recognized regional accreditors, which accredit institutions that offer a wide range of degree programs, have placement rate standards.

125. In addition, six of eight national accreditors that accredit “specialized and nontraditional institutions like vocational colleges, technical colleges, religious colleges, and online universities,” also have employment rate standards. See *Accreditation: Universities and Higher Education*, U.S. DEPARTMENT OF EDUCATION, <http://www.ed.gov/accreditation?src=rn> (last visited May 27, 2018). Three of these accreditors require seventy percent employment rates, two require sixty percent, and one requires employment rates of not less than one standard deviation from comparable schools. At least one of the national accreditors, the Accrediting Council for Independent Colleges and Schools, accredits institutions that offer programs in professional fields, including such programs as master’s in accounting, master’s in business administration, master’s in computer information, B.A. in nursing, and B.A. in pharmaceutical sciences. Regarding for-profit and postsecondary vocational schools, the ED’s gainful employment rule presumably will supplant any applicable employment rate standard.
126. The eleven programmatic accreditors with employment rate standards are the: Liaison Committee on Medical Education, American Osteopathic Association, Accreditation Council for Pharmacy Education, Commission on Collegiate Nursing Education, Council on Education for Public Health, Joint Review Committee on Education in Radiologic Technology, Accreditation Council for Education in Nutrition Dietetics, American Speech Language Hearing Association, Commission on Accreditation in Physical Therapy Education, Commission on Massage Therapy Accreditation, and Montessori Accreditation Council for Teacher Education. See *id.*
127. See *id.*

law student goes to law school to practice law,<sup>128</sup> although many will leave law practice for other careers after initial employment as a lawyer. The fact that some law degree holders pursue careers outside of law practice may be a reason to lower the minimum legal employment rate required of law schools, but it is not a reason for equating the ABA with regional as opposed to other programmatic accreditors.

## V. Some Substantive Considerations for a Draft Standard

This part first addresses which graduate employment outcomes should qualify for purposes of an employment outcome standard. It then sets out a draft proposed standard.

### *A. Ascertaining the Employment Outcomes that Qualify for Purposes of the Standard*

In his article addressing whether trends in the entry-level legal employment market reflect structural or merely cyclical changes, Professor Bernard Burk proposed the following definition of “law jobs”:

those placements that someone would, *ex ante*, rationally plan to attend law school to obtain. This should include only placements for which a law degree is typically a necessary or extremely valuable substantive preparation (as opposed to being merely useful or relevant); or put slightly differently, the law degree must provide dramatic and substantial advantages in obtaining or performing the job not more easily obtainable or substitutable (whether in nature or extent) another way.<sup>129</sup>

Because this definition centers on the reasonable expectations of rational law school applicants, it is also the appropriate definition for the purpose of determining which employment outcomes qualify for purposes of an employment outcome standard. A school fulfills the promise of the J.D. program when its graduate employment outcomes align with the objectives of the program—to prepare students for employment in available jobs for which the degree is “necessary or extremely valuable.”<sup>130</sup>

Next is a question of whether the current ABA employment data reporting regime, which is designed for disclosure of employment outcomes for use

<sup>128</sup>. See *infra* note 13, and accompanying text.

<sup>129</sup>. Burk, *supra* note 3, at 547. Professor Burk further explains that this definition of “law jobs” is objective, focusing on the ordinary rational person and not taking into account any idiosyncratic reasons for going to law school; omits any “hedonic component” as to whether a job is desirable or fulfilling; and omits any “economic component,” *i.e.*, any threshold amount of compensation; see also Kyle P. McEntee & Derek M. Tokaz, *Take This Job and Count It*, 2 J. LEG. METRICS 309, 315-16 (2012) (describing Law School Transparency’s Law School Score Reports on law school employment outcomes; “start[ing] with the conventional assumption that the bulk of people attend law school aiming to pursue a career practicing law.”).

<sup>130</sup>. As discussed above, the primary purpose of the ED regulation requiring accrediting agencies to have student outcomes standards is to ensure that students realize the promise of the degree program. See *supra* notes 65-67, and accompanying text.

by the reasonable law school applicant, is appropriate for purposes of an employment rate standard.<sup>131</sup> Does the ABA Employment Questionnaire produce the data necessary to accurately ascertain the extent to which law schools are placing students in qualifying jobs? Further, is ten months after graduation an appropriate measuring point? On the first question, as will be seen below, applying Professor Burk's qualitative definition of "law jobs" to the quantitative data collected through the employment questionnaire proves to be a somewhat awkward exercise, but it nevertheless produces a substantively accurate measure of employment rates in qualifying jobs at ten months after graduation. Indeed, given that qualifying employment should be defined by reference to the reasonable expectations of a rational law school applicant, the ABA's current employment data reporting regime produces a good measure of entry-level qualifying employment rates precisely because it is designed to produce employment outcome information that is "complete, accurate and not misleading to a reasonable law school student or applicant."<sup>132</sup>

On the second question, the ten-month measuring point obviously does not capture longer-term employment outcomes. It is premised on the fact that July bar examination results are released between October and December depending on the state, and many employers do not make hiring decisions until bar passage is assured. It is only a snapshot, and one that is taken at the point of entry into the profession. It may say little about the value of the degree over the course of a graduate's career.<sup>133</sup> However, a number of considerations support using the ten-month measuring point that has traditionally been used for the disclosure of employment outcomes for an employment outcome standard. The definition of qualifying employment, based on the reasonable expectations of a typical law school applicant, strongly implies a job obtained shortly after graduating and taking a bar examination, if not before the first student loan payments will come due. Moreover, it would be much more difficult and expensive to track outcomes at two or more years after graduation, and these data likely would be less complete than what schools can collect relatively soon after graduation. Finally, there is no reason to think that schools' longer-term employment outcomes are not closely correlated with the outcomes at ten months after graduation. As discussed more fully below,<sup>134</sup>

131. Professor Burk undertook this same analysis for the purpose of evaluating trends in the entry-level legal employment market. See Burk, *supra* note 3, at 564-71. My analysis tracks his in most but not all respects, but with the different purpose of implementing a minimum employment rate accreditation standard for the future.

132. See Standard 509(a), *ABA Standards*, *supra* note 14, at 35.

133. See Burk, *supra* note 3, at 546 ("Focusing on entry-level employment truncates the inquiry more or less at the first job a graduate obtains out of law school. Such a focus may tell us little about the course lawyers' career paths may follow as they advance from there, and thus will not be as informative as we might like about the state or evolution of the legal employment market overall."); see also Simkovic & McIntyre, *The Economic Value of a Law Degree*, *supra* note 3 (finding that starting salary is not a good predictor of earnings later in a law graduate's career).

134. See *infra* notes 154-160, and accompanying text.

the key is to set an employment rate that accounts for an appropriate level of graduate legal employment ten months after graduation.

The ABA Employment Questionnaire has eleven categories of employment status: Employed—Bar Passage Required (BPR); Employed—J.D. Advantage (JDA); Employed—Professional Position; Employed—Nonprofessional Position; Employed—Law School/University Funded; Employed—Undeterminable; Pursuing Graduate Degree Full Time; Unemployed—Start Date Deferred; Unemployed—Not Seeking; Unemployed—Seeking; and Employment Status Unknown. All employment must be reported as either long term (LT) or short term (ST), and as either full time (FT) or part time (PT). In addition, employment type must be reported. The employment types are: Law Firms (Solo, 2-10, 11-25, 26-50, 51-100, 101-250, 251-500, 501+, Unknown Size); Business & Industry; Government; Public Interest; Clerkships—Federal; Clerkships—State & Local; Clerkships—Other; Education; Employer Type Unknown.<sup>135</sup>

Initially, the categories “Employed—Professional Position,” “Employed—Nonprofessional Position,” “Employed—Law School/University Funded,” and “Employed—Undeterminable,” as well as short-term positions, can be quickly excluded from the definition of qualifying employment for purposes of an employment rate standard. Very few law students enter law school for the purpose of obtaining nonlegal, temporary, or part-time employment.<sup>136</sup>

Part-time employment also should probably be excluded from the definition of qualifying employment, although there is room for argument that graduates who take long-term, part-time, BPR or JDA positions have achieved for the time being what they expected in coming to law school. Some number of graduates no doubt prefer part-time employment due to a variety of reasons, including family commitments or health concerns. For the graduating Class of 2017, 642 or 1.8% of graduates had part-time, long-term, BPR or JDA positions at ten months after graduation (282 BPR and 360 JDA).<sup>137</sup> The disparity in the numbers and percentages of such jobs reported by individual schools implies a degree of uncertainty about how the long-term classification is being used. The median number of graduates reported in LT, PT, BPR jobs was 1, but the number ranged from 0 to 7 and the percentage ranged from 0 to 10.2% of the graduating class. Similarly, the median number of graduates reported in LT, PT JDA positions was 1, while the number ranged from 0 to 11 and the percentage from 0 to 7.2%.

135. The ABA Employment Questionnaire and accompanying Definitions and Instructions are available at: [http://www.americanbar.org/groups/legal\\_education/resources/questionnaire.html](http://www.americanbar.org/groups/legal_education/resources/questionnaire.html).

136. *Accord* Burk, *supra* note 3, at 560; McEntee & Tokaz, *supra* note 129, at 316-317; Campos, *supra* note 3, at 198 (2012) (“[A] real legal job consists of full-time, non-temporary employment that requires a law degree . . . [I]t is safe to assume that very few people spend \$150,000 to \$250,000 in order to qualify for part-time or temporary work.”).

137. ABA Section of Legal Education, Employment Summary Report, Compilation—All Schools Data (2017), <http://employmentsummary.abaquestionnaire.org> (columns D, I, and AK).

Likewise, solo practice jobs probably should not be considered qualifying employment for purposes of an employment outcome standard. Again, very few law students enter law school with the objective of setting up a solo practice right out of law school. As Professor Burk writes,

very few law students are realistically prepared to practice without more experienced supervision on the day they pass the bar exam (let alone have clients to practice on). Moreover, solo practice straight out of school is strongly negatively correlated with school prestige, suggesting that this placement is chosen disproportionately by those with few alternatives. The category is also subject to reporting abuse, because a school may be tempted to report its unemployed more favorably as self-employed.<sup>138</sup>

For the Class of 2017, 393 of 34,923 graduates, or 1.1%, were reported as being employed full time and long term as solo practitioners.<sup>139</sup> The percentage has varied across years, with higher numbers of graduates reported as employed in solo practice when the unemployment rate is higher,<sup>140</sup> reinforcing the conclusion that few students attend law school with the purpose of starting their careers in solo practice.

138. Burk, *supra* note 3, at 560-61; *see also* McEntee & Tokaz, *supra* note 129, at 317. Professor Campos has argued that, beyond graduates who are employed as solo practitioners, many are employed at very small firms whose employment is functionally “unsustainable self-employment.” He posits that while some jobs in firms with two to ten attorneys are “genuine, if generally low-paying, associate positions with stable law firms,” “others consist[ ] of nominally paid ‘clerkships’ or so-called eat-what-you-kill arrangements, in which a firm offers office space to a graduate in return for a percentage of whatever business the graduate manages to drum up. Yet others consist[ ] of a couple of new grads opening a law office and trying to make a go of it . . . .” Campos, *supra* note 3, at 201-02. For the Class of 2017, 14.8% of graduates were reported as being employed FT, LT in law firms of two to ten attorneys. Based on data published by the American Bar Association Section of Legal Education and Admissions to the Bar for the graduating Class of 2017. *See* Employment Summary ABA Questionnaire, *supra* note 25.
139. ABA Section of Legal Education, Employment Summary Report, Compilation—All Schools Data (2017), <http://employmentsummary.abaquestionnaire.org> (column BK). The number of FT, LT solo practitioners reported by schools for the Class of 2017 ranged from 0 to 15. The 25th percentile was zero, the median was one, and the 75th percentile was three. The schools with the highest numbers of solo practitioners were all lower-tier schools.
140. *See* James G. Leipold & Judith N. Collins, *The Stories Behind the Numbers: Jobs for New Grads Over More Than Two Decades*, NALP (Dec. 2016), <http://www.nalp.org/1216research> (observing that the graduating classes of 2012 and 2013 “with the overall lowest employment rates (and the two largest classes to ever move through the American legal education pipeline) secured the largest number of jobs in Small Law of any classes ever;” and explaining that: [i]t was not necessarily because Small Law was thriving in the aftermath of the recession, but faced with a dearth of opportunities at larger law firms, many graduates created opportunities for themselves in small law firms out of necessity. For the Class of 2015, about 1,400 fewer Small Law jobs were secured compared with 2012 and 2013, and the numbers of jobs in the smallest law firms now look very similar to what they were before the recession. As Big Law opportunities increased by about 1,300 over that period, Small Law jobs secured decreased by about 1,400, even as the graduating class size fell somewhat precipitously.

Graduates who are “Unemployed–Seeking” obviously must be excluded from qualifying employment outcomes and included in the number of graduates in calculating a law school’s employment rate. Similarly, graduates who are “Unemployed–Start Date Deferred” should not be counted. There are very few of these graduates (293, or 0.08% of the Class of 2017<sup>141</sup>), and it is inevitable that a few graduates will obtain employment shortly after the status determination date no matter what it is.<sup>142</sup>

Graduates reported “Unemployed–Not Seeking” and “Employment Status Unknown” raise interesting questions. Where graduates are not seeking employment, or their employment status is unknown, these outcomes are not necessarily negative. Nationally, these categories comprise a fairly small fraction of all employment outcomes, 948 graduates, or 2.7% of the Class of 2017.<sup>143</sup> However, appreciable numbers of graduates at a few schools are reported in these categories.<sup>144</sup> It is fair to assume that a large proportion of graduates who are not seeking employment or whose status is unknown do not have positive employment prospects or outcomes.<sup>145</sup> The schools that report the highest percentages of graduates as Employment Status Unknown are all lowest-tier schools.<sup>146</sup> Moreover, these categories may be subject to manipulation, so that including them in the calculation of a school’s legal employment rate is necessary to help assure the integrity of the reported data.<sup>147</sup>

141. ABA Section of Legal Education, Employment Summary Report, Compilation–All Schools Data (2017), <http://employmentsummary.abaquestionnaire.org> (column AG).
142. Also, there is no guarantee that the promised employment will actually materialize, although the ABA Employment Questionnaire instructions do require a written offer with a specified start date to report a graduate in this category. See EQ Definitions and Instructions, [http://www.americanbar.org/groups/legal\\_education/resources/questionnaire.html](http://www.americanbar.org/groups/legal_education/resources/questionnaire.html).
143. ABA Section of Legal Education, Employment Summary Report, Compilation–All Schools Data (2017), <http://employmentsummary.abaquestionnaire.org> (columns AH and AJ).
144. Eleven schools report ten or more graduates as Employment Status Unknown, comprising one third of all graduates reported as such. The median number is one, and the average is 2.35. The school reporting the largest percentage of graduates as Employment Status Unknown reported twenty-three percent of its graduates as such.
145. As to Unemployed–Not Seeking, Professor Burk has also noted that “unemployed is unemployed, which is not a state of affairs that an ordinary person would rationally plan to attend law school to achieve. It seems odd not to count it as such just because the graduate has purportedly decided not to try to work at a particular point in time.” Burk, *supra* note 3, at 561. Regarding graduates whose employment status is reported as unknown, Professor Burk likewise opines that “it stands to reason that [the employment outcomes for these graduates] are disproportionately bad; as a practical matter, people with jobs they are proud of seem more likely to respond to their schools’ inquiries, and schools seem more likely to seek out and report good results.” *Id.* at 563.
146. *Id.* at 563 (“Unknown outcomes in a particular school’s graduating class are strongly inversely correlated with the school’s prestige, suggesting that more outcomes are likely to be reported as unknown by schools having worse employment results overall.”).
147. *Accord id.* (“[T]reating unknowns as anything other than not holding a Law Job is an incentive for reporting schools to avoid learning (or disclosing) bad news”).

Falling between unemployed and employed is “Pursuing Graduate Degree Full Time.” This category contains a small proportion of graduates nationally and at any individual law school. For the Class of 2017, 550 graduates, or 1.6%, were reported as Pursuing Graduate Degree Full Time, and the schools with the largest numbers comprise an even mix of top fifty and unranked schools.<sup>148</sup> On the one hand, it might be assumed that graduates who had legal employment options would not pursue a graduate degree full time. On the other hand, the graduate will normally have started the degree program before bar passage results are reported—graduate degree programs typically start in the fall semester, so that the graduate who is pursuing a graduate degree full time would have started in the fall after May graduation to be reported in this category as of March 15 of the year following graduation. These graduates therefore should be excluded from the denominator in computing a school’s legal employment rate.<sup>149</sup>

### *B. The J.D. Advantage Question*

The most difficult call is whether to include JDA positions within the definition of qualifying legal employment. Law school is often viewed as a “graduate degree in critical thinking” that prepares graduates for a wide range of careers beyond the practice of law, even if the typical applicant envisions practicing law for at least some stretch of time following graduation. Further, it appears that a majority of graduates in JDA positions are not seeking other jobs at ten months after graduation,<sup>150</sup> suggesting that most are satisfied with the utility of their legal education in the position. While this does not establish that law students *ex ante* would rationally decide to attend law school to obtain these positions, it does tend to support that proposition. Further, the likelihood that some students who matriculated with the intention of obtaining a BPR job will develop an interest in JDA employment during the course of their legal education should not be ignored. The available data suggest that while law school “graduates who practice law earn more than those who do not on average,” “law graduates who switch to other occupations when [graduating class] cohorts are bigger are not hurt financially.”<sup>151</sup>

At the same time, there are good reasons to be skeptical of whether most jobs classified as JDA jobs are jobs that “someone would, *ex ante*, rationally plan to attend law school to obtain.” As reported in Table 1 above, the number and percentage of graduates taking JDA jobs have increased significantly in the wake of the Great Recession of 2007-2009, from 2,156 and 4.9% for the Class of 2009 to 3,179 and 9.1% for the Class of 2017 (excluding law school-

148. ABA Section of Legal Education, Employment Summary Report, Compilation—All Schools Data (2017), <http://employmentsummary.abaquestionnaire.org> (column AF).

149. *But see* Burk, *supra* note 3, at 562 (stating that “it appears that many graduates pursuing further education are . . . discouraged job-seekers pursuing LL.M.s in the probably misguided hope that it will improve their lot in the job market”).

150. *See id.* at 557-58.

151. *See* McIntyre & Simkovic, *Timing Law School*, *supra* note 3, at 290.

funded positions).<sup>152</sup> The size and timing of the increase strongly suggest that some graduates are taking JDA jobs because BPR jobs are not available. This is generally confirmed by the fact that lower-tier law schools generally report higher percentages of graduates in JDA positions, and further by the NALP data that forty-three percent of graduates in JDA jobs were looking for other employment, compared with fifteen percent of graduates in BPR jobs.<sup>153</sup> Indeed, the definition of JDA positions in large part describes employment for which one-year postbaccalaureate master of laws degrees are designed to prepare students.<sup>154</sup> Moreover, the definition of JDA is less than precise—the line between JDA and Other Professional is open to interpretation—and therefore reporting is subject to manipulation.<sup>155</sup>

On balance, it would be appropriate to count JDA jobs as qualifying employment outcomes, provided that the current definition is narrowed to eliminate placements for which students would qualify with a master of laws degree. It is hard to justify three years of time and expense for a J.D. degree where one year for the master's is sufficient to prepare a student for the job.

In sum, the existing ABA graduate employment outcome reporting system requires schools to collect and report the employment information that is relevant to a typical and reasonable law school applicant's decision to attend a law school and allows for the calculation of each law school's graduate legal employment rates in an accurate and workable manner. Consistent with the discussion above, the numerator in the calculation would be all FT, LT, BPR and JDA jobs, excluding graduates in solo practice positions. The denominator

152. Interestingly, after nearly doubling from 2,513 in 2008 to 4,814 in 2014, the number of FT, LT, JDA jobs has decreased noticeably in each of the past three years, to 3,179 for the Class of 2017.

153. See Burk, *supra* note 3, at 557-58.

154. Professor Burk has observed that:

Recent events illustrate the difficulty of isolating which placements are truly dependent enough on the placement value of a law degree to count as Law Jobs. Nearly thirty accredited law schools now offer pre-JD one-year master's degrees in law, many having begun lately. One dean explained his program succinctly: Many lawyers work in human resources, but you don't have to have a J.D. . . . It's the same thing with compliance officers in banks and hospitals. There are all these jobs in law—criminal justice jobs, law firm management jobs, consultants—where a J.D. makes no sense but some legal training is useful." However, "the very positions offered to justify a one-year master's [degree] 'where a J.D. makes no sense'—'human resources,' 'compliance officers,' 'criminal justice jobs,' 'consultants'—are specifically enumerated examples of JD Advantage' positions in the ABA definition."

*Id.* at 557 (alterations in original).

155. *Accord id.* at 556 (stating that the JDA category is "subject to opportunism in self-reporting"), and 558 (concluding that "while no quantitative precision is possible, . . . it [is] likely that at least some of the jobs being reported as JD Advantage or JD Preferred would comprise a goal for which someone might rationally seek a law degree, and thus should be counted as Law Jobs. But it appears equally likely that quite a few of those placements, and probably more of those reported in recent years, should not."); see also Campos, *supra* note 3, at 198 (contending that "a real legal job consists of . . . employment that requires a law degree").

would be all graduates, excluding those pursuing a graduate degree full time. In general, this formula will yield an employment rate that is very close to the same as all FT, LT, BPR and JDA positions (without adjustment) divided by all graduates (again, without adjustment).

### C. Guiding Principles for an Employment Outcome Standard

A law graduate employment outcome standard must serve the purposes underlying the ED criterion requiring accreditors to have student outcome standards,<sup>156</sup> while taking into account that the current ten-month measuring point used by the ABA and NALP may obscure longer-term positive outcomes. An employment outcome standard must also recognize that economic downturns may span several years, and so provide that substandard outcomes in a few years would not lead to a loss of accreditation.

In establishing an employment outcome standard, it is useful to first consider what the generally attainable maximum legal employment rate is. About twenty percent of graduates do not pass the bar on the first try,<sup>157</sup> and a large proportion of these graduates may pass the bar on a subsequent attempt and therefore not obtain legal employment until after the ten-month measurement date. (By the same token, some who do not pass the bar on the first attempt nevertheless secure legal employment within ten months of graduation.) In addition, some graduates decide to pursue a graduate degree full time even though they have the option of legal employment. (As noted above, 1.6% of Class of 2017 graduates were pursuing a graduate degree full time at ten months after graduation.) Further, a small percentage of graduates likely decide not to take legal employment for reasons other than the absence of opportunity or are unemployable due to mental health or character and fitness issues, or because they interview poorly. Taking account of these factors, it is reasonable to estimate that the generally attainable maximum LT, FT, BPR employment rate for law graduates ten months after graduation is about seventy-five to eighty percent. This estimate is borne out by the employment reports from schools with the very highest legal employment rates. At the schools with law

156. As discussed above, *supra* notes 12-14 and 62-67, and accompanying text, the primary purpose of the ED regulation is to assure that program outcomes align with program objectives, so that students realize the promise of the degree program. In addition, the regulation aims to prevent unintended subsidies to schools that would arise where graduates are not able to obtain jobs that allow them to repay their student loans.

157. The average first-time bar passage rate for graduates of ABA-approved law schools for the years 2007 through 2017 is 80.3. (The National Conference of Bar Examiners web site has information on state and overall bar passage rates going back to 2006, however, unlike the years 2007 through 2015, the 2006 data does not include a breakdown for graduates of ABA-approved law schools.) From 2013 to 2016, the first-time bar pass rate fell from 81% to 73%, and then rebounded slightly to 75% for 2017. See *Statistics*, National Conference of Bar Examiners, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F218> (last visited May 27, 2018).

2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Avg.
82%	85%	83%	81%	82%	79%	81%	77%	74%	73%	75%	80%

job placement rates in the top decile, slightly more than eighty percent of graduates obtained FT, LT, BPR jobs within ten months after graduation.<sup>158</sup>

Beyond FT, LT, BPR jobs, some graduates take FT, LT, JDA jobs, either by choice or because they do not find acceptable BPR employment (perhaps because they did not pass the bar). At the schools with law job placement rates in the top decile, about eighty-eight percent obtain FT, LT, BPR and JDA jobs combined.<sup>159</sup> So, approximately eighty-five percent would be the combined maximum attainable FT, LT, BPR and JDA combined employment rate.

The maximum should be discounted to some degree to take account of the ten-month measuring point under the ABA's current employment data reporting system. The ten-month measuring point likely obscures a number of positive employment outcomes.<sup>160</sup> On the one hand, the large majority of law students attend law school with an expectation of having a law job within ten months of graduation (at least assuming they pass the bar on the first attempt), and so no allowance for positive outcomes beyond ten months is appropriate given the purpose of the employment rate standard to assure that program outcomes align with program objectives. (The fact that about twenty percent of graduates do not pass the bar on the first attempt and therefore do not land a law job until ten months after graduation is already baked into the generally attainable maximum law job placement rate discussed above.) Further, employment prospects likely diminish over time after passing the bar, and especially when the graduate must compete with the next year's graduates for legal employment. On the other hand, positive outcomes may be delayed for a variety of reasons and, regardless of the reason, should be credited to the school.

Recognizing that legal employment rates for some schools could be meaningfully higher at two or more years after graduation, an employment outcome standard should also give schools the option to demonstrate compliance by collecting data at the two- or three-year mark after graduation. The burden of collecting data at that point is likely significantly more onerous than at ten months after graduation. While it is not necessary to impose such a burden on all schools, giving schools that do not meet the standard based on the ten-month measuring date an opportunity to show better outcomes at

158. See *supra* Table 3.

159. *Id.* Compare Burk, *supra* note 3, at 573 (suggesting that “80% may approach the highest level of Law-Job employment nine to ten months after graduation that is likely to be achievable in the entry-level legal markets of the last thirty years”), with Merritt, *What Happened to the Class of 2010*, *supra* note 3, at 1118 (predicting that law school applicants “will want to see about 85% of a school’s graduates practicing law several years after graduation,” taking into account the fact that some graduates do not pass the bar on the first attempt and enter the law practice later than most).

160. *Cf.* *Life After Law School*, *supra* note 3, at 19 (reporting that “[i]t took 17% of the most recent graduates, who graduated between 2010 and 2015, more than a year to find a good job—the highest percentage among all generations of graduates.”). Some of the seventeen percent presumably had law jobs at ten months after graduation, just not good jobs that they wanted to keep.

two or three years after graduation is appropriate. The minimum rate at two or three years after graduation would of course be higher than that set for ten months after graduation. (The data submitted by any such schools will help the ABA evaluate how well the ten-month rate predicts a higher rate at later points in time.) The pending change to the bar passage standard would require that seventy-five percent of graduates who took a bar pass it within two years of graduation. This standard implies a FT, LT, BPR rate of something less than seventy-five percent at two years after graduation.

Given the evidence that JDA jobs are taken by many students because BPR jobs are not available, an employment outcome standard might also limit the percentage of JDA positions that can be counted toward meeting the standard. In any event, the ABA's definition of JDA jobs should be revised to exclude jobs for which a one-year postbaccalaureate master's degree would qualify a graduate. As noted, currently law schools on average report about nine percent of their graduates in FT, LT, JDA positions.<sup>161</sup>

Economic downturns may span several years, and employment rates at most schools can be expected to decrease in these times. To ensure that a school does not lose accreditation when legal employment rates slip temporarily, the standard should provide that only persistent failure to meet the minimum will affect accreditation. The ED's gainful employment rule for proprietary and trade schools is instructive. It protects schools from "unanticipated fluctuations in local labor market conditions" by allowing programs "to remain eligible [for financial aid] for up to four years,' which is long enough to survive '[m]ost economic downturns' that tend to last around eleven months."<sup>162</sup>

An employment rate standard might also require schools that fall below the minimum rate for the first or second time (in consecutive years) to submit a realistic plan to reverse the trend before accreditation could be removed after four years of failing to meet the standard. In this way, schools that do not have a viable plan for maintaining compliance with the standard can be dealt with before the day of noncompliance inevitably arrives.

The features of an employment rate standard mentioned so far relate to the primary purpose of the ED regulation requiring program outcome standards, that program outcomes align with program objectives. As to the subsidiary purpose of the regulation, to help ensure that graduates are in a position to repay their loans in full, the standard might include a provision that makes it more difficult for a school with a higher average law school graduate loan debt to comply with the standard, and easier for a school with a lower average graduate debt amount to comply.

161. See *supra* Table 1, and note 152 and accompanying text.

162. *Ass'n of Private Section Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 191-92 (D.D.C. 2015) (quoting 79 Fed. Reg. 64,926, 64,918), *aff'd*, 640 Fed. App'x 5, 8 (D.C. Cir. 2016).

## **VI. A Draft Employment Outcome Standard**

Consistent with the above general contours of an employment outcome standard, here is a tentative draft standard.

### **Standard XXX. Graduate Employment Outcomes**

- (a) A law school must demonstrate that for at least two of the past five graduating classes:
  - (1) at least sixty percent of the graduates were employed in full-time, long-term, bar passage-required or J.D. Advantage jobs as of March 15 of the year following graduation; or
  - (2) at least seventy-five percent of the graduates were employed in full-time, long-term, bar passage-required or J.D. Advantage jobs as of March 15 of the second year following graduation.No more than fifteen percent of graduates employed in full-time, long-term J.D. Advantage jobs may be counted toward the percentage rates specified in subparagraphs (1) and (2) of this paragraph.
- (b) A law school that fails to comply with subsection (a)(1) of this standard with respect to any graduating class must promptly submit a detailed plan for how it will remain in compliance with the standard.
- (c) As used in this standard,
  - (1) “graduating class” is defined as a cohort of graduates who graduated between September 1 and August 30 of the following year, and includes graduates whose employment status is unknown, but excludes graduates who are pursuing a graduate degree full time; and
  - (2) the terms “full-time,” “part-time,” “long-term,” “short-term,” “bar passage-required,” and “J.D. Advantage” are as defined in the Definitions and Instructions accompanying the ABA Employment Questionnaire, except, however, that graduates employed as solo practitioners shall not be counted as employed.

## **VII. Conclusion**

Over the past seventeen years, the numbers and percentages of law graduates obtaining legal employment within nine to ten months after graduation have declined, and median entry-level salaries have decreased. During the same period, the cost of the J.D. degree at most law schools has increased substantially. The graduate employment outcomes at most ABA-accredited law schools are robust. However, some schools have been consistently placing less than forty percent or fifty percent of their graduates in FT, LT BPR jobs within nine to ten months after graduation. At these schools, the graduate outcomes do not align with the objectives of the J.D. program—to prepare students to pass a bar examination and to participate in the legal profession. Moreover, the current admission and bar passage standards do not constrain law schools from pursuing admission policies that minimize reduction in enrollments without regard to the impact on employment outcomes. Most of

the schools with persistently very weak employment outcomes have reduced admission criteria as law school applications have declined steeply over the past seven years. The predictable result is that bar passage rates have fallen, and the schools' graduates' employment prospects are further diminished. Finally, it appears likely that many graduates at schools with very weak legal employment rates are not able to repay their loans, especially when the amount borrowed is very high, resulting in an unintended federal taxpayer subsidy for the schools. An ABA employment outcome standard will better ensure that: law graduates realize the promise of the J.D. program, law schools do not pursue admission policies that fail to give due regard to employment outcomes, and law schools are not receiving unwarranted taxpayer subsidies.