

CHALLENGES TO LEGAL EDUCATION, CLINICAL LEGAL EDUCATION, AND CLINICAL SCHOLARSHIP

PETER A. JOY*

INTRODUCTION

The *Clinical Law Review* published the symposium issue, “The Many Voices of Clinical Legal Education,” in Volume 1, Issue 1, in the spring of 1994.¹ Several of the articles and essays in the symposium presented different views about what the goals of clinical legal education should be, and, consequently, what clinical scholarship should be about.² Since that first issue, clinical legal education has developed and advanced in the past 25 years, and clinical scholarship has burgeoned in large part due to the *Clinical Law Review*. In considering how far clinical legal education and clinical scholarship has come, it is also important to recognize the challenges that lie ahead – especially

* Henry Hitchcock Professor of Law and Director of the Criminal Justice Clinic, Washington University in St. Louis School of Law. I thank Minna Kotkin for her very helpful suggestions and edits to a draft of this essay. I also thank Brian Tamanaha for helpful comments to an earlier draft of this essay.

¹ Symposium, *The Many Voices of Clinical Legal Education*, 1 CLIN. L. REV. 1 (1994).

² Anthony Amsterdam, Nancy Cook, and Phyllis Goldfarb all focused on the importance of stories and the use of narratives for drawing out lessons useful for both clinical teaching and the practice of law. Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994); Nancy Cook, *Legal Fictions: Clinical Experience, Lace Collars and Boundless Stories*, 1 CLIN. L. REV. 41 (1994); Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLIN. L. REV. 65 (1994).

Gary Palm and Lucie White wrote about the importance of collaboration and expressed views on the types of clinical scholarship that could arise out of collaborations. Palm emphasized the importance of clinical legal education as the only place where a law student and faculty member could work collaboratively with shared responsibility for clients. Gary Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruction*, 1 CLIN. L. REV. 127, 128-29 (1994). Palm argued that “the new Clinical Law Review should provide a forum for accounts of students and teachers collaborating on actually improving the law and societal institutions through their case work in law school clinics.” *Id.* at 127. White emphasized the importance of collaboration, especially with client communities, and how such collaborations “might support wider efforts toward social, cultural, and political reform.” Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157, 170 (1994). White also described the different types of clinical scholarship that might come out such clinical work. *Id.* at 170-71.

Peter Hoffman focused on what he thought clinical scholarship should emphasize. Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLIN. L. REV. 93 (1994). Hoffman stated that he did not want to create a litmus test for or boundaries of clinical scholarship, but rather what he thought should be the attributes of clinical scholarship. *Id.* at 93-94.

how the challenges to legal education are challenges to clinical legal education and clinical scholarship as well.

Much of the story of the advances in clinical legal education may be traced to 1992, a year that marked two major events. First, the American Bar Association (ABA) published the Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, known as the MacCrate Report.³ Second, the Clinical Legal Education Association (CLEA) called for the creation of a clinical law journal.⁴

The MacCrate Report proved to be instrumental in advancing clinical legal education over the past 25 years. Among its recommendations, the MacCrate Report stated that “[l]aw schools should be encouraged to develop or expand” their lawyering skills offerings,⁵ and “should stress in their teaching that examination of the ‘fundamental values of the profession’ is as important in preparing for professional practice as acquisition of substantive knowledge.”⁶

The MacCrate Report sparked a reexamination of legal education, which ultimately led to two significant changes in the ABA Accreditation Standards. First, there was a 1996 amendment to Standard 302 that provided: “A law school shall offer to all students . . . adequate opportunities for instruction in professional skills.”⁷ Second, there was another 1996 amendment to Standard 302 that stated: “A law school shall offer live-client or other real-life practices experiences. This might be accomplished through clinics or externships. A law school need not offer this experience to all students.”⁸ Today, the ABA Standards require that every law graduate have at least six credits in an experiential course or courses.⁹ As of October 2018, 75 law schools required or guaranteed their J.D. students a law clinic or ex-

³ A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter the MACCRATE REPORT].

⁴ Stephen Ellmann, Isabelle R. Gunning & Randy Hertz, Foreword, *Why Not a Clinical Lawyer-Journal*, 1 CLIN. L. REV. 1, 3 (1994).

⁵ MACCRATE REPORT, *supra* note 3, at 332.

⁶ *Id.*

⁷ A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 302(a)(4)(1996).

⁸ *Id.* at Standard 302(d).

⁹ Standard 303 states: “(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: . . . (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304.” A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018-2019, Standard 303(a)(3) [hereinafter 2018–2019 ABA STANDARDS]. The ABA Council approved the six credit requirement in an experiential course or courses at its meeting in March 2014. A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *Explanation of Changes*, A.B.A., <https://tinyurl.com/y2ks4sng>.

ternship course of at least two credits – 43 required each student to complete a clinic or externship and 32 guaranteed enrollment.¹⁰ This is a far cry from the state of clinical legal education in in the late 1980s and early 1990s, when the future of the in-house clinic was uncertain.¹¹

In addition to the development of clinical legal education, CLEA was successful in helping to start and continuing to support the *Clinical Law Review*, which has promoted and served as an important outlet for clinical scholarship. During its existence, the *Clinical Law Review* has published hundreds of articles and essays exploring issues of clinical pedagogy, the theoretical underpinnings of teaching different lawyering skills and values, cross-cultural lawyering, poverty law practice, client-centered lawyering in a multitude of different contexts and with different client groups, a variety of approaches to clinic and externship designs, and many other topics too numerous to mention. While much of the clinical scholarship has been aimed at clinical faculty, a significant portion has also dealt with practice of law issues equally valuable to clinical students and practitioners.

The development of clinical legal education and clinical scholarship is significant, but there are considerable challenges to legal education, and consequently clinical legal education and clinical scholarship. Since the Great Recession, several law schools have closed, some have merged, and still other ABA-approved law schools have been found out of compliance with ABA Standards and either have been directed to take specific remedial action, have been placed on probation, or have lost ABA accreditation.¹² While enrollment has rebounded at some law schools, other law schools have continued to experience much smaller entering classes than in Fall 2010, with 25 ABA-approved law schools enrolling fewer than 100 first year stu-

¹⁰ R. Kuehn, Required or Guaranteed Clinical Experience (Oct. 2018) (unpublished list) (on file with author).

¹¹ In the late 1980s, the Association of American Law Schools (AALS) Section on Clinical Legal Education created a special committee, the Committee on the Future of the In-House Clinic. The Committee on the Future of the In-House Clinic, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 508 (1992). Among the issues the Committee explored were the pedagogical justifications for live-client, in-house clinics and whether “live client clinical education ha[d] remained stagnant.” *Id.* (quoting Gary H. Palm, *Message from the Chair*, AALS SEC. ON CLINICAL LEGAL EDUC. NEWSL., Apr. 1986, at 1-2.). In 1987, Arthur LaFrance predicted that less expensive “simulation, placements and externships” would replace in-house clinical programs. Arthur B. LaFrance, *Clinical Legal Education in the Year 2010*, 37 J. LEGAL EDUC. 352, 355 (1987). In 1996, Jim Moliterno wrote an essay imagining clinical legal education in the year 2010, by which time he imagined that in-house, live-client clinics would diminish in importance and law schools would replace them with “more efficient externship programs.” James E. Moliterno, *On the Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010*, 46 J. LEGAL EDUC. 67, 70 (1996).

¹² See *infra* notes 78-93 and accompanying text.

dents,¹³ and many of these schools enrolling first year classes with 50 percent or fewer students than in 2010.¹⁴

Surely, these developments should be part of the conversation about clinical legal education and the future of clinical scholarship. If law schools are challenged financially, those challenges may affect their clinical programs and their support for clinical scholarship. Shouldn't we understand and examine these challenges? By understanding the scope of the challenges facing legal education, we will also be able to understand what these challenges may mean both to clinical legal education and to clinical scholarship. With that in mind, this essay proceeds in four parts. Part I begins with a brief discussion of the Great Recession and some of its effects on the legal profession. Part II analyzes the Great Recession and its effects on law schools' budgets, staffing, law school admissions, and overall enrollment. Part III compares expectations about the need for more law schools in the United States prior to the Great Recession and what has occurred since then. Part IV explores what the challenges to legal education mean for clinical legal education and clinical scholarship. The essay concludes with some observations about the future of clinical legal education and clinical scholarship.

I. THE GREAT RECESSION EFFECTS ON THE LEGAL PROFESSION

The Great Recession in the United States began in December 2007, a few months after the housing market crashed.¹⁵ From 2008 to 2010, the largest law firms in the U.S. reported layoffs of nearly 9500 lawyers.¹⁶ In 2009, law firm entry-level associate hiring fell by 40 percent.¹⁷ In 2008 and 2009, many law firms deferred or rescinded associate level offers.¹⁸ Several other law firms closed, causing many lawyers to become unemployed.¹⁹ The law firms most effected by the Great Recession were "money-center" and transactional firms in New York, Boston, and San Francisco and in money-centers elsewhere such as London.²⁰ Law firms with litigation and real estate practices suffered

¹³ See *infra* note 72 and accompanying text.

¹⁴ See *infra* note 73 and accompanying text.

¹⁵ *The Great Recession*, INVESTOPEDIA, <https://tinyurl.com/y8akujfd>.

¹⁶ *Law Firms: A Less Gilded Future*, THE ECONOMIST, May 5, 2011, <https://tinyurl.com/y6wg5nwy>.

¹⁷ Karen Sloan, *Class Dismissed*, AM. LAW., July 2019, at 30.

¹⁸ *Id.*

¹⁹ See, e.g., JAMES H. MOLITERNO: THE AMERICAN LEGAL PROFESSION IN CRISES: RESISTANCE AND RESPONSE TO CHANGE 192-93 (2013) (identifying some of the law firms that closed).

²⁰ Peter A. Giuliani, *The Long and Winding Road Ahead*, 84 N.Y. ST. B.J. 19, 19 (Feb. 2012).

as well.²¹ The Great Recession also led to some law firm partnerships dissolving and even law firm bankruptcies.²²

The layoffs in law firms also meant that demand for new lawyers declined. One report in the summer of 2011 indicated a decline of 35 percent in law firms hiring new lawyers.²³ In addition, the Great Recession caused significant losses to lawyer retirement accounts, and older lawyers continued to practice law because they could not afford to retire.²⁴

The lack of demand for new lawyers is reflected in the employment data for the graduating class in 2011. Only 54.9 percent of graduates had long-term full-time bar passage required employment.²⁵ Another 12 percent of graduates had long-term full-time employment where having a J.D. is considered an advantage by their employers (known as “J.D. advantage” employment).²⁶ Most of the other graduates had part-time employment or employment where a J.D. is neither required nor an advantage, and 9.2 percent of graduates of the class of 2011 were unemployed and seeking employment nine months following graduation.²⁷ In 2012, the employment statistics for the graduating class were almost the same.²⁸

There has been some improvement in the employment of new graduates, but it is still much less than full employment for jobs where bar passage is required. The most recent data for the J.D. graduating class of 2018 show that 70.1 percent of graduates from ABA-approved law schools had full-time long-term bar passage required employment, up from 68.7 percent in 2017.²⁹ It should be noted that this improvement is attributable to the significant decline in the number of law graduates, not an improvement in the job market for lawyers. The total number of newly hired lawyers actually declined from the year

²¹ *Id.*

²² Atinuke O. Adediran et al., *Making the Best of a Bad Beginning: Young New York Lawyers Confronting the Great Recession*, 9 NE. U. L. REV. 259, 264 n.10 (2017).

²³ Jack Crittenden, *The Good News About the Dismal Salary Reports*, NAT'L JURIST, July 31, 2011, <https://tinyurl.com/y8kwucqj>.

²⁴ Carolyn Lamm, *Leadership When It's Needed Most*, 95 A.B.A. J. 9, Nov. 2009, <https://tinyurl.com/y9hp6yur>.

²⁵ A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *2012 Law Graduate Employment Data*, A.B.A., <https://tinyurl.com/y9plxkua> (reporting employment data for both the Class of 2011 and the Class of 2012).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *Employment Outcomes as of April 2019 (Class of 2018 Graduates)*, A.B.A., <https://tinyurl.com/y3sk3g2h> (reporting data for both the Class of 2018 and the Class of 2017) [hereinafter *Employment Outcomes for Class of 2018*].

before.³⁰ An additional 9.4 percent of graduates in 2018 had long-term full-time J.D. advantage employment, down from 11.8 percent in 2017.³¹ Most of the other graduates had part-time employment or employment where a J.D. is neither required nor an advantage, and 7.3 percent of graduates of the class of 2018 were unemployed and seeking employment as of April, 2019, marginally better than the 7.9 percent of 2017 graduates who were unemployed ten months after graduation.³²

In the aggregate, the employment of law students graduating in 2017 and 2018 is better than the graduating classes in 2011 and 2012, but it is not better for graduates at all law schools. Twenty-eight law schools had 50 percent or less of their graduates employed in long-term full-time bar passage required positions.³³ The ten law schools with the worst employment rates had 38 percent or fewer of their graduates with long-term full-time bar passage required employment, and eight schools had unemployment rates of 20 percent or higher ten months after graduation.³⁴

The employment outlook for new law graduates is still challenging because entry-level hiring has not recovered since the Great Recession. From 2007 to 2018, the number of entry-level legal jobs fell more than 23 percent.³⁵ The competition for entry level jobs is expected to remain strong, because law schools continue to graduate more students than there are jobs available.³⁶

The decline in the demand for new lawyers has affected law schools in many ways. The next part of this essay explores some of these effects, especially the way the Great Recession has affected budgets, staffing, and enrollment at law schools.

II. THE GREAT RECESSION'S EFFECTS ON LAW SCHOOLS

There is no denying that the Great Recession has affected law schools. Some of the effects have been economic, resulting in smaller

³⁰ In 2018, there were actually fewer jobs than in 2017, but the size of the 2018 graduating class was smaller than the Class of 2017. A report from the National Association of Law Placement (NALP) explains: "In very simple terms, the rise in the employment rate can be explained by the fact that the size of the graduating class has fallen faster than the number of jobs secured." NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs – EMPLOYMENT FOR THE CLASS OF 2018—SELECTED FINDINGS (2019).

³¹ *Employment Outcomes for Class of 2018*, *supra* note 29.

³² *Id.*

³³ *Law Grads Hiring Report: Job Stats for the Class of 2018*, LAW.COM, May 8, 2019, <https://tinyurl.com/y2ujr3xw>.

³⁴ *Id.*

³⁵ Sloan, *supra* note 17, at 30.

³⁶ Bureau of Lab. Stat., *Occupational Outlook Handbook, Lawyers*, U.S. DEPT. OF LAB., <https://www.bls.gov/ooh/legal/lawyers.htm>.

budgets and the need to reduce faculty and staff. Other effects have been on law school admissions and overall enrollment.

A. *Effects on Budgets and Staffing*

The Great Recession directly and indirectly hurt the financial health of universities and law schools. There were significant losses in the stock market, and university endowments, income from which helps to pay expenses, fell by 25 percent from late 2007 to January 2009.³⁷ The value of most endowments continued to fall throughout 2009.³⁸ Publicly funded universities found that, due to the recession, state legislatures reduced their state funding by as much as 24 percent.³⁹ While endowments have largely recovered,⁴⁰ funding to publicly-funded universities has only recovered by half.⁴¹

Starting in 2009, many universities and law schools implemented furloughs (forced leaves without pay) for faculty and staff or lay-offs to balance their budgets. These staffing reductions even occurred at prestigious universities, such as Harvard University, which cut 275 jobs in 2009, beginning with the business and law schools, through lay-offs.⁴² In addition to layoffs, salaries either stayed the same or were reduced at many universities and law schools.⁴³ For example, the University of California system saw a 20 percent budget cut.⁴⁴ This resulted in salary cuts for faculty from four percent for low earners to ten percent for high earners.⁴⁵

At several law schools, full-time faculty were offered buy-outs to give up their positions. By November of 2015, at least 15 law schools had used buy-outs to reduce the size of their full-time faculties.⁴⁶ At other law schools, layoffs eliminated faculty positions. One researcher

³⁷ Kim Clark, *The Recession Hits College Campuses*, U.S. NEWS EDUC., Jan. 27, 2009, <https://tinyurl.com/yda2aocc>.

³⁸ See, e.g., *Endowment Value Declines 29.5% as Investment Return Is Negative 27.3%*, HARVARD MAG., Sept. 10, 2009, <https://tinyurl.com/yax9tlwe>.

³⁹ Roger L. Geiger, *Impact of the Financial Crisis on Higher Education in the United States*, INT'L HIGHER EDUC., <https://tinyurl.com/ybaoqxxc>.

⁴⁰ Molly F. Sherlock et al., *College and University Endowments: Overview and Tax Policy Options*, CONG. RES. SERV. (May 4, 2018), <https://tinyurl.com/y2gu4p75>.

⁴¹ Jillian Berman, *State Support for Public Colleges Has Not Recovered Since the Great Recession*, MARKETWATCH, Apr. 19, 2019, <https://tinyurl.com/yypkisyfv>.

⁴² Tracy Jan, *Harvard Workers Stunned by Layoffs, Endowment Loss Cited, 275 Jobs Cut*, BOSTON.COM, June 24, 2009, <https://tinyurl.com/y9ucokkw>.

⁴³ All of the salaries at my university and law school were frozen for the 2009-2010 and 2014-2015 academic years.

⁴⁴ Barry Bergman, *Furloughs, Pay Cuts Proposed for UC Staff and Faculty*, UC BERKELEY NEWS, July 10, 2009, <https://tinyurl.com/y8wjfymz>.

⁴⁵ *Id.*

⁴⁶ Paul Caron, *List of Law School Faculty Buyouts*, TAXPROFBLOG, Nov. 30, 2015, <https://tinyurl.com/zu3e53s>. I know of at least three more law schools not on Paul Caron's list that offered buy-outs, although they were not made public.

looked at the data and determined that 142 of the 203 ABA-accredited law schools eliminated some full-time faculty from 2010 through 2015.⁴⁷ According to his analysis of the data, this represented the elimination of 1206 full-time faculty members, from 9093 full-time faculty in 2010 to 7887 full-time faculty in 2015.⁴⁸

The reduction of faculty has continued. In 2018, Vermont Law School revoked the tenure of 75 percent of its faculty (14 of 19 members), although the law school permitted some faculty to continue with temporary contracts and reduced salaries.⁴⁹ This comes after Vermont Law School implemented its first round of faculty layoffs in 2013.⁵⁰ In late 2018, Northwestern University Pritzker School of Law announced that it was cutting staff and lecturer positions, including cuts to the school's clinical program.⁵¹ At this point, Northwestern is not cutting tenured faculty positions, but most clinical faculty at Northwestern are not tenured.

I anticipate that more law schools will eliminate or freeze the number of long-term faculty positions, and faculty and staff salaries at many (perhaps most) law schools will not keep pace with inflation into the foreseeable future. Inevitably, clinical programs and clinical faculty are affected by such cuts and fiscal constraints.

B. *Effects on Law School Enrollment*

In the first few years of the Great Recession, enrollment in law schools increased as persons who lost their jobs or who had recently graduated from undergraduate schools pursued additional education, including law degrees.⁵² In fact, the entering class in 2010 was the peak of first year law school enrollment since enrollment figures have been compiled, with a total of 52,448 first year law students.⁵³ This was up from first year enrollment of 51,646 in the 2009-2010 academic

⁴⁷ Staci Zaretsky, *The Law Schools That Have Gotten Rid Of the Most Full-time Faculty Since 2010*, ABOVE THE LAW, Jan. 15, 2016, <https://tinyurl.com/y7tfbvbb>.

⁴⁸ Matt Leichter, *Which Law Schools Are Shedding Full-Time Faculty? (2015 edition)*, THE LAST GEN X AMERICAN, <https://tinyurl.com/yghyvv6>.

⁴⁹ Katy Savage, *Vermont Law School Revokes Tenure for 75 Percent of Faculty*, VTDIGGER, July 15, 2018, <https://tinyurl.com/y5rmp48u>.

⁵⁰ Matt Hongolz-Hetling, *VLS Cuts Salaries for Faculty in Bid to Close Budget Deficit*, VALLEY NEWS, July 17, 2018, <https://tinyurl.com/yb8fb24x>.

⁵¹ Debra Cassens Weiss, *Northwestern University Law School Cuts Positions Despite Nearly Reaching \$250M Fundraising Goal*, ABA JOURNAL, Nov. 6, 2018, <https://tinyurl.com/y2zvnnbd>.

⁵² Rebecca R. Ruiz, *Recession Spurs Interest in Graduate, Law Schools*, N.Y. TIMES, Jan. 9, 2009, <https://tinyurl.com/ycjhu6gf>.

⁵³ A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *Enrollment and Degrees Awarded 1963 -2012*, A.B.A., <https://tinyurl.com/ybk8hakt> [hereinafter *Enrollment and Degrees Awarded 1963 -2012*].

year, and 49,414 in the 2008-2009 academic year.⁵⁴

The softening of demand for lawyers hit law schools as well, as fewer prospective students began applying to law schools. Because law schools are tuition dependent, the lower enrollments at most law schools has led to another source of economic pressure. The 2012 entering class at approximately half of the ABA-approved law schools was at least ten percent smaller than the 2011 entering class,⁵⁵ and the total first year enrollment for the 2012-2013 academic year was only 44,481 compared to 52,488 for the 2010-2011 academic year.⁵⁶ The decline continued in each succeeding year until the 2016-2017 academic year, when there began to be small increases in enrollment. For the 2018-2019 academic year, total first year enrollment was 26.9 percent lower than the first year enrollment in the 2010-2011 academic year. Table 1 provides the data.⁵⁷

⁵⁴ *Id.*

⁵⁵ Bernard A. Berk, *Still More on What Matters Most (Or, a Guided Tour of Pandaemonium)*, FAC. LOUNGE, Jan. 13, 2013, <https://tinyurl.com/y276pm3o>.

⁵⁶ *Enrollment and Degrees Awarded 1963 -2012*, *supra* note 53.

⁵⁷ These data come from various ABA publications. Data for academic years 2005 – 2006 to 2012 – 2013 are from a summary of data from 1963 – 2012. *Enrollment and Degrees Awarded 1963 -2012*, *supra* note 53. Data for the 2013 – 2014 and 2014 – 2015 academic years are found in an ABA news release. *ABA Section of Legal Education Reports 2014 Law School Enrollment Data*, A.B.A., <https://tinyurl.com/y7ekxf4n>. Data for the 2015-2016 academic years are in a data overview sheet posted on the ABA website. A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *2015 Standard 509 Information Report Data Now Available*, A.B.A., <https://tinyurl.com/ybwswj8h>. Data for Fall 2016 enrollment are in a data overview sheet posted to the ABA website. A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *2017 Standard 509 Information Report Data Overview (posted 04/02/2018)*, A.B.A., <https://tinyurl.com/ybf8s7zs>. Data for the Fall 2017 and Fall 2018 enrollments are in a data overview sheet posted to the ABA website. A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *2018 Standard 509 Information Report Data Overview (posted 12/014/2018)*, A.B.A., <https://tinyurl.com/y6pztkg7> [hereinafter *2018 Standard 509 Information Report Data Overview*].

TABLE 1: LAW SCHOOL ENROLLMENT TRENDS IN ABA-APPROVED LAW SCHOOLS

Academic Year	Number of Law Schools	First Year Enrollment	Total J.D. Enrollment
2007 - 2008	198	49,082	141,719
2008 - 2009	200	49,414	142,922
2009 - 2010	200	51,646	145,239
2010 - 2011	200	52,488	147,525
2011 - 2012	201	48,697	146,288
2012 - 2013	201	44,481	139,055
2013 - 2014	204	39,674	128,710
2014 - 2015	204	37,924	119,775
2015 - 2016	204	37,058	113,900
2016 - 2017	204	37,105	110,951
2017 - 2018	203	37,320	110,176
2018 - 2019	203	38,390	111,561

As Table 1 illustrates, first year enrollment dropped by 14,098 students from the 2010-2011 academic year to the 2018-2019 academic year. This is a decline of 26.9 percent. Total J.D. enrollment also fell precipitously from a high of 147,525 in the 2010-2011 academic year, to 111,561 in the 2018-2019 academic year. This loss of 35,964 students is a decline of 24.4 percent in the overall J.D. enrollment in ABA-approved law schools.

The only growth in enrollment has been in the number of non-J.D. degree students. Before the Great Recession started, there were 9111 non-J.D. students pursuing degrees such as the LL.M. (Masters in Law), J.S.D. (Doctor of Juridical Studies), M.L.S. (Masters of Legal Studies), or similar non-J.D. degree programs in the 2008-2009 academic year.⁵⁸ In the 2018-2019 academic year, there were 18,523 students enrolled in non-J.D. programs.⁵⁹ The increase of 9412 non-J.D. students offsets approximately 25 percent of the 35,964 loss of total J.D. student enrollment.

The distribution of non-J.D. enrollment has not been uniform, and consequently not all law schools have a proportional share of the increase in non-J.D. students. At the 17 law schools enrolling the most non-J.D. students, non-J.D. enrollment makes up between 31 to 78 percent of each law school's total enrollment.⁶⁰ In the 2018-2019

⁵⁸ *Law School Enrollment, Summary*, LAW SCHOOL TRANSPARENCY, <https://tinyurl.com/ybfbfzfc>.

⁵⁹ *2018 Standard 509 Information Report Data Overview*, *supra* note 57.

⁶⁰ Derek T. Muller, *Law School JD Enrollment Inches Upward as Non-JD Enrollment Continues to Soar*, EXCESS OF DEMOCRACY (Dec. 14, 2018), <https://tinyurl.com/y22mus8t>.

academic year, the non-J.D. enrollment in these 17 law schools accounted for 6898 of the 18,523 students enrolled in non-J.D. programs of study, or 37 percent of the total non-J.D. enrollment in all ABA-approved law schools.⁶¹ Sixty-five law schools enrolled ten or fewer students in non-J.D. programs, and 44 of these schools did not enroll any non-J.D. students.⁶²

To put the trends in law school enrollment in perspective, it is helpful to consider J.D. enrollment at the start of each decade and the number of law schools.⁶³ It is also helpful to consider the number of ABA-approved law schools and both first year and total J.D. enrollments that most closely correspond to first year and total J.D. enrollments for the last academic year, 2018-2019.⁶⁴ The following two tables provide those comparisons.

TABLE 2: ENROLLMENT TRENDS AND NUMBER OF LAW SCHOOLS BY DECADE

Academic Year	ABA-Approved Law Schools	First Year Enrollment	Total J.D. Enrollment
1960 - 1961	132	15,607	38,894
1970 - 1971	146	34,289	78,081
1980 - 1981	171	42,296	119,501
1990 - 1991	175	44,104	127,261
2000 - 2001	183	43,516	125,173
2010 - 2011	200	52,488	147,525
2018 - 2019	203	38,390	111,561

Table 2 shows that there was an increase of 12 law schools from 1980, when there were 171 ABA-approved law schools, to 2000, when there were 183 ABA-approved law schools. During these 20 years, both the first year enrollment and total J.D. enrollment were relatively stable. From 2000 to 2018, there were 20 additional law schools and enrollment has declined significantly. Table 2 also shows the growth in the number of U.S. law schools from 132 ABA-approved law schools in 1960 to 203 ABA-approved law schools in 2018.

⁶¹ These calculations were based on the ABA’s 2018 JD/Non-JD Enrollment Data report available on the ABA’s website. A.B.A. Legal Educ. & Admissions to the Bar, *Statistics*, A.B.A., <https://tinyurl.com/y3xr2ez9>.

⁶² *Id.*

⁶³ These data are from two sources the ABA posted on its website. *First Year and Total J.D. Enrollment by Gender*, A.B.A., <https://tinyurl.com/y8elwuqg>; *2018 Standard 509 Information Report Data Overview*, *supra* note 57.

⁶⁴ *Id.*

TABLE 3: 2017-2018 ENROLLMENT AND ENROLLMENT IN A COMPARABLE ACADEMIC YEAR

Academic Year	ABA-Approved Law Schools	First Year Enrollment	Total J.D. Enrollment
2018 - 2019	203	38,390	111,561
1975 - 1976	163	39,038	111,047

Table 3 shows that the last time there were first year and total J.D. enrollments comparable to the 2018-2019 academic year was in the 1975-1976 academic year. What is different, though, is that in the 1975-1976 academic year there were 40 fewer ABA-approved law schools than in the 2018-2019 academic year. This means that there are 40 more law schools than necessary to meet current student demand for J.D. degrees, unless law schools are reducing their class sizes for reasons other than lack of demand by prospective students the schools would otherwise admit.

III. LAW SCHOOL EXPECTATIONS VERSUS REALITY

A number of universities and other entities were contemplating opening new law schools as late as 2008, but only five universities started new law schools.⁶⁵ In the first year that these law schools had ABA provisional accreditation from the Council of the Section of Legal Education and Admissions to the Bar (ABA Council),⁶⁶ three of the new law schools had entering classes of 53 or fewer students, and the other two law schools each had entering classes of 194 or fewer students.⁶⁷ By 2018, one of those law schools, Indiana Tech Law

⁶⁵ The universities that started new law schools after 2008, and the year of ABA accreditation are: Belmont University College of Law (2013); Lincoln Memorial University Duncan School of Law (2014); Concordia University College of Law (2015); Indiana Tech Law School (provisional ABA accreditation 2016); and University of North Texas Dallas College of Law (provisional ABA accreditation 2017). *ABA-Approved Law Schools by Year*, A.B.A., <https://tinyurl.com/y2936q74>; Memorandum from Barry A. Currier, Managing Director of Accreditation and Legal Education, to Deans of ABA-Approved Law Schools et al. (Mar. 16, 2016), <https://tinyurl.com/y92qtgej>.

⁶⁶ The United States Department of Education recognizes the ABA Council of the Section of Legal Education and Admissions to the Bar (ABA Council) as the accreditor of J.D. programs. 2018–2019 ABA STANDARDS, *supra* note 9, at Preface. While the ABA Council is the entity that accredits law schools, accredited law schools are usually referred to as “ABA-approved,” even though the Council is separate and independent of the ABA. *See id.* “[T]he ABA is not involved in any way in the approval of a lawyer school or the enforcement of the ABA Standards for Approval of Law Schools against law schools, including findings of non-compliance, imposition of sanctions, or withdrawal of approval.” *Id.*

⁶⁷ Those schools and their first year enrollment were: Concordia University School of Law, 19 students; Indiana Tech Law School, 40 students; Lincoln Memorial University Duncan School of Law, 53 students; Belmont University School of Law, 132 students; and University of North Texas Dallas College of Law, 194 students. Law Schools’ ABA Stan-

School, had closed.⁶⁸ First year enrollments at the four remaining law schools went from admitting 194 to 136 students (North Texas Dallas), 132 to 109 students (Belmont), 53 to 72 students (Lincoln Memorial), and 19 to 59 students (Concordia).⁶⁹ These enrollment trends indicate that the new law schools that initially had larger enrollments reduced the size of their entering classes, while those with initially smaller enrollments have been able to enlarge their entering classes.

Established law schools have experienced lower first year enrollments than in the past. In 2018, 25 ABA-approved law schools, which had been accredited since at least 2010 and had not stopped admitting students, reported first year enrollments of under 100 students.⁷⁰ At ten of these law schools, first year enrollments were less than half their 2010 first year enrollments,⁷¹ and at another eight law schools the first year enrollments were between 70 and 50 percent of their 2010 first year enrollments.⁷²

dard 509 Information Reports (on file with author).

⁶⁸ Marilyn Odendahl, *Valparaiso Law School to Write Its Final Chapter*, IND. LAW., Nov. 28, 2018, <https://tinyurl.com/y6bhl3t2>.

⁶⁹ University of North Texas Dallas College of Law went from admitting 194 students to 136 students, Belmont University School of Law went from admitting 132 students to 109 students, Lincoln Memorial University Duncan School of Law went from admitting 53 students to 72, and Concordia University School of Law went from admitting 19 students to 59 students. Law Schools' ABA Standard 509 Information Reports (on file with author).

⁷⁰ I identified these schools from the ABA's 2018 1L JD Applicant/First Year Class Data report available on the ABA's website. A.B.A. Legal Educ. & Admissions to the Bar, *Statistics*, A.B.A., <https://tinyurl.com/y3xr2ez9> [hereinafter 2018 1L JD Applicant/First Year Class Data Report].

⁷¹ The law schools and the drops in enrollment are: Appalachian School of Law enrolled 94 first year students in 2018, 40.9 percent of the 2010 enrollment of 122 first year students; Ave Maria School of Law enrolled 94 first year students in 2018, 46.8 percent of the 2010 enrollment of 201 first year students; University of Dayton School of Law enrolled 98 first year students in 2018, 48.3 percent of the 2010 enrollment of 203 first year students; University of the District of Columbia David A. Clarke School of Law enrolled 61 first year students in 2018, 48.4 percent of the 2010 enrollment of 126 first year students; Faulkner University School of Law enrolled 59 first year students in 2018, 40.4 percent of the 2010 enrollment of 146 first year students; Florida Coastal School of Law enrolled 60 first year students in 2018, 7 percent of the 2010 enrollment of 784 first year students; North Carolina Central University School of Law enrolled 94 first year students in 2018, 48.3 percent of the 2010 enrollment of 205 first year students; Ohio Northern University School of Law enrolled 48 first year students in 2018, 40 percent of the 2010 enrollment of 120 first year students; Pontifical Catholic University School of Law enrolled 96 first year students in 2018, 35.4 percent of the 2010 enrollment of 271 first year students; and Thomas Jefferson School of Law enrolled 51 first year students in 2018, 14.4 percent of the 2010 enrollment of 354 first year students. I arrived at this information using two data reports prepared by the ABA. 2018 1L JD Applicant/First Year Class Data Report, *supra* note 70; 2010 jd 1234 ftpt enrollment (on file with author).

⁷² Liberty University School of Law enrolled 70 first year students in 2018, 51.8 percent of the 2010 enrollment of 135 first year students; University of Missouri-Columbia School of Law enrolled 94 first year students in 2018, 58.9 percent of the 2010 enrollment of 151

In addition to lower enrollments, law schools have been netting even less tuition due to the pressure to award ever increasing grants to attract students. Two reporters analyzed tuition and scholarship data and identified ten law schools that awarded grants to at least 78 percent of their students that covered more than half of the students' tuition.⁷³ Data collected by the ABA show that law schools are, on average, awarding grants to 72.4 percent of students, and awarding between half to full tuition to 27 percent of full-time law students.⁷⁴

A study by law professors Bernard Burk and Jerome Organ and economist Emma Raisel estimated that the aggregate annual tuition revenue for all ABA-accredited law schools "fell by *over \$1.5 billion* in current dollars between its inflation adjusted peak in 2011-12 and 2016-17."⁷⁵ They also concluded that efforts of law schools with higher reputational ranking to preserve the credentials of entering students caused them to reduce their entering class sizes during this period, and that in turn meant that prospective students went to law schools with weaker reputational rankings, which "effectively prevented the closing of as many as twenty weaker law schools."⁷⁶

In 2015, a legal analyst estimated that approximately 50 ABA-approved law schools had multi-year deficits and a very low probability of increasing enrollment sufficient to overcome those deficits in the foreseeable future.⁷⁷ In light of the economic pressure due to lack of student demand and the low net tuition they are receiving, some law schools have done more than simply cut costs. Law schools have begun to merge or close.

first year students; University of New Hampshire School of Law enrolled 88 first year students in 2018, 67.2 percent of the 2010 enrollment of 131 first year students; Northern Illinois School of Law enrolled 89 first year students in 2018, 64 percent of the 2010 enrollment of 139 first year students; Regent University School of Law enrolled 61 first year students in 2018, 48.4 percent of the 2010 enrollment of 126 first year students; Southern Illinois University School of Law enrolled 75 first year students in 2018, 52.1 percent of the 2010 enrollment of 144 first year students; University of Toledo School of Law enrolled 96 first year students in 2018, 50.8 percent of the 2010 enrollment of 189 first year students; and Western New England School of enrolled 87 first year students in 2018, 51.2 percent of the 2010 enrollment of 170 first year students. I arrived at this information using two data reports prepared by the ABA. 2018 1L JD Applicant/First Year Class Data Report, *supra* note 70; 2010 jd 1234 ftpt enrollment (on file with author).

⁷³ Farran Powell & Ilana Kowarski, *10 Law Schools that Offer the Most Tuition Help*, U.S. NEWS, Mar. 21, 2019, <https://tinyurl.com/y5qdt5bw>.

⁷⁴ This is based on the 2018 Grants and Scholarships report, available through the ABA website. A.B.A. Legal Educ. & Admissions to the Bar, *509 Required Disclosures: Compilation – All Schools' Data*, A.B.A., <http://abarequreddisclosures.org/Disclosure509.aspx>.

⁷⁵ Bernard A. Burk, Jerome M. Organ & Emma B. Raisel, *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 18 NEV. L.J. 583, 586-87 (2018).

⁷⁶ *Id.* at 590.

⁷⁷ See Paul Lippe, *Merging Law Schools, Merging Firms: What Does It Mean?*, A.B.A. J., Feb. 19, 2015, <https://tinyurl.com/y87nz7qq>.

The first law school merger was in 2015, when William Mitchell College of Law and Hamline University School of Law merged.⁷⁸ As a result of the merger, Hamline University closed the law school on its campus, and the new merged law school is the Mitchell-Hamline College of Law.⁷⁹ Rutgers University, which had separate law schools in Camden and Rutgers, New Jersey, merged those two law schools but have, at least for now, maintained the separate campuses.⁸⁰

The first of law school closures began in June 2017, with Indiana Tech Law School, which first admitted students in 2013.⁸¹ The law school gained provisional ABA accreditation in 2016, and that same year the law school announced that it was closing and would not admit any more new students.⁸² This came after Indiana Tech managed to admit only 13 students for the 2016-2017 academic year. Indiana Tech was the first ABA-accredited law school to fully close in the past 20 years.⁸³

In 2017, several other law schools either closed or announced that they would not admit new students. Charlotte School of Law, which had been placed on probation by the ABA due, in large part, to its admissions policies, closed.⁸⁴ Valparaiso University School of Law, which had been ABA-accredited since 1929,⁸⁵ and Whittier Law School, which had been an ABA-accredited law school since 1978,⁸⁶ announced that they would no longer accept new students.⁸⁷ Whittier announced that it was closing,⁸⁸ and although Valparaiso University attempted to transfer its law school to Middle Tennessee State University,⁸⁹ it announced it was closing when the Tennessee Higher Edu-

⁷⁸ Adam Wahlberg, *Why William Mitchell and Hamline Law Had to Merge*, MNNPOST, Feb. 18, 2015, <https://tinyurl.com/y3cuwrrm>.

⁷⁹ Karen Sloan, *RIP, Law Schools. A Look at Closed Campuses*, LAW.COM, Mar. 26, 2018, <https://tinyurl.com/ya9mqvju>.

⁸⁰ *American Bar Association Approves Merger Creating Rutgers Law School*, RUTGERS TODAY, July 31, 2015, <https://tinyurl.com/yasaxq9w>.

⁸¹ Marilyn Odendahl, *supra* note 68.

⁸² Fatima Hussein, *Indiana Tech Will Shut Down Law School*, INDYSTAR, Oct. 31, 2016, <https://tinyurl.com/y2xsput7>.

⁸³ Sloan, *supra* note 79. Prior to Indiana Tech closing, the last ABA-approved law school to close was Antioch School of Law, which closed in 1986. *School of Law History*, U.D.C. DAVID A. CLARKE SCH. OF L., <https://www.law.udc.edu/page/History>.

⁸⁴ *Id.*

⁸⁵ *ABA-Approved Law Schools by Year*, *supra* note 65.

⁸⁶ *Id.*

⁸⁷ Sloan, *supra* note 79; Stephanie Francis Ward, *Valparaiso Law School Told by Board To Not Admit First-Year Students in 2018*, A.B.A. J., Nov. 16, 2017, <https://tinyurl.com/ybcg2433>

⁸⁸ Elizabeth Olson, *Whittier Law School Says It Will Shut Down*, N.Y. TIMES, Apr. 19, 2017, <https://tinyurl.com/yec9acvd>.

⁸⁹ Valparaiso University officials had entered into a non-binding letter of intent to transfer to Middle Tennessee State University's campus in Murfreesboro, Tennessee. Amy

cation Commission rejected the proposal in 2018.⁹⁰

More law schools continue to close or face very uncertain futures. In 2018, Arizona Summit Law School announced it was closing.⁹¹ In 2019, Western State College of Law at Argosy University submitted a teach-out plan that the ABA approved and is in receivership.⁹² As I was writing this essay in June 2019, the ABA announced that it was withdrawing ABA accreditation from Thomas Jefferson School of Law,⁹³ although the school continues to be ABA-accredited while it appeals the ABA Council's decision.⁹⁴

In addition to the mergers, closures, and schools that have stopped admitting new students, two law schools that had multiple campuses closed some of their branch campuses. In 2014, Thomas M. Cooley Law School (now known as Western Michigan University Cooley Law School) closed its Ann Arbor campus, which it opened in 2009, due to poor enrollment.⁹⁵ In 2018, Atlanta's John Marshall Law School announced that it would close its Savannah Law School campus, which had been open for six years, also due to poor enrollment.⁹⁶

From August 2016 to May 2019, the ABA Council issued notices for 14 different law schools concerning accreditation issues, including failure to demonstrate compliance with the admissions standard. The ABA Council issued either a public notice of noncompliance, directed the schools to take specific remedial action, placed the schools on probation, withdrew ABA-approval, or took some combination of these actions in separate notices if a law school failed to come back into compliance.⁹⁷ The law schools all faced problems because of ABA

Lavalley, *Universities Study Plan to Transfer VU Law School to Tennessee Campus*, CHICAGO POST-TRIBUNE, June 22, 2018, <https://tinyurl.com/y7tcvqgq>.

⁹⁰ Emma Whitford, *Another Law School Will Close*, INSIDE HIGHER ED, Oct 31, 2018, <https://tinyurl.com/y6bs3u92>.

⁹¹ Mitchell Hartman, *Downsizing Hits Legal Education*, MARKETPLACE, Feb. 21, 2019, <https://tinyurl.com/yxwroagc>.

⁹² Stephanie Francis Ward, *Urge to Merge: Difficult Times for Law Schools Have Prompted Several to Attempt to Be Acquired by Other Schools*, A.B.A. J., July 1, 2019, <https://tinyurl.com/y2w5lr3v>.

⁹³ Rick Seltzer, *ABA Yanks Thomas Jefferson Approval*, INSIDE HIGHER ED, June 12, 2019, <https://tinyurl.com/yywsk233>.

⁹⁴ Thomas Jefferson School of Law has stated that it will be appealing, which will enable the school to retain ABA-accreditation during the appeal process. Matt Hoffman, *Thomas Jefferson School of Law Fighting to Keep Its National Accreditation*, June 12, 2019, KPBS.ORG, <https://tinyurl.com/yjrjwu75>.

⁹⁵ Sloan, *supra* note 79.

⁹⁶ *Id.*

⁹⁷ The ABA issues notices of non-compliance or probation for the following schools: Appalachian School of Law, found out of compliance in May 2017, and directed to take specific remedial action in December 2017; Arizona Summit Law School, placed on probation in March 2017, and withdrawal of ABA-approval in May 2018; Atlanta John Marshall Law School, found out of compliance in October 2017, placed on probation in May 2019;

Standard 501, which requires law schools to have sound admission policies and “only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”⁹⁸ Five of those law schools (Arizona Summit, Charlotte, Indiana Tech, Thomas Jefferson, and Valparaiso) have closed, are in the process of closing, or, in the case of Thomas Jefferson, the school is appealing the threatened loss of a ABA accreditation.⁹⁹ As of May 2019, the ABA Council found that five law schools previously out of compliance were back in compliance with the ABA admissions standard.¹⁰⁰

As ABA Council’s actions indicate, a law school has to be careful to admit students whom the law school is committed to assisting in successfully completing the school’s program of legal education. A law school cannot to seek to address tuition shortfalls or otherwise bolster enrollment by admitting law students who are not capable of successfully completing law school and being admitted to the bar.

Take, for example, one of the law schools that has closed, Charlotte School of Law. The ABA Council awarded ABA accreditation to Charlotte School of Law in 2008, and eight years later, in June 2016, the ABA Accreditation Committee concluded that Charlotte School of Law was not in compliance with various standards, including the

Ave Maria School of Law, found out of compliance in August 2016 and directed to take specific remedial action; Charlotte School of Law, placed on probation in October 2016, and withdrawal of ABA-approval in February 2018; Florida Coastal School of Law, found out of compliance in October 2017, directed to take specific remedial action in March 2018, and directed to take remedial action in August 2018; Golden Gate University School of Law, found out of compliance in April 2018; Indiana Tech Law School, withdrawal of ABA-approval in August 2017; Lincoln Memorial University Duncan School of Law, found out of compliance in April 2018; North Carolina Central University School of Law, found out of compliance in December 2017; SUNY Buffalo School of Law, found out of compliance in May 2017; Texas Southern University Thurgood Marshal School of Law, found out of compliance and directed to take remedial action in June 2017; Thomas Jefferson School of Law, found out of compliance in May 2017, placed on probation in November 2017, and withdrawal of ABA-approval in May 2019; Valparaiso University School of Law, found out of compliance and sanction of public censure imposed in October 2017; and Western Michigan Thomas M. Cooley School of Law, found out of compliance in November 2017. The notices are currently linked on either the ABA website, the Law School Transparency website, or both. A.B.A. Sec. of Legal Educ. & Admissions to the Bar, *Accreditation Notices*, A.B.A., <https://tinyurl.com/y55f3m25> [hereinafter *Accreditation Notices*]; *Transparency at U.S. Law Schools*, LAW SCHOOL TRANSPARENCY, <https://tinyurl.com/yebp9hds>.

⁹⁸ 2018–2019 ABA STANDARDS, *supra* note 9, at Standard 501.

⁹⁹ See *supra* notes 81-94 and accompanying text.

¹⁰⁰ The ABA found that Ave Maria School of Law demonstrated compliance with the admissions standard in February 2018, Western Michigan Thomas M. Cooley School of Law in March 2018, North Carolina Central University School of Law in June 2018, Lincoln Memorial Duncan School of Law in November 2018, and Florida Coastal School of Law in May 2019. *Accreditation Notices*, *supra* note 97.

admissions standard.¹⁰¹ In October 2016, the ABA Council placed Charlotte on probation,¹⁰² after, among other reasons, the law school had been admitting hundreds of students who did not successfully complete their first year of law school. Charlotte School of Law reported that it had admitted 343 first year students in the 2016 calendar year, and attrited for academic and other non-transfer reasons 157 first year students during the 2016-2017 academic year, which is 45.8 percent of the students admitted.¹⁰³ This was not an isolated instance. Charlotte School of Law reported that it admitted 309 first year law students in the 2015 calendar year, and attrited 170 first year students, or 55 percent, for academic and other non-transfer reasons during 2015-2016 academic year.¹⁰⁴ In other words, Charlotte School of Law admitted students who only had a 50-50 chance of completing their first year of law school.

IV. WHAT THE CHALLENGES TO LEGAL EDUCATION MEAN FOR CLINICAL LEGAL EDUCATION AND CLINICAL SCHOLARSHIP

Clinical legal education and clinical scholarship are not immune to the challenges facing legal education. The combination of low enrollments and high tuition discounts is challenging a great number of law schools, not all of which are able to compensate by admitting more non-J.D. students.¹⁰⁵ The ABA Council is also more closely monitoring law schools' admissions policies.

In recent years, the ABA Council enacted new requirements that should ensure that law schools will not admit large numbers of students unable to complete law school and join the legal profession. In 2017, the ABA adopted a new interpretation to Standard 501 that addresses attrition, which states: "A law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with the

¹⁰¹ ABA Council Decision, Notice of Probation and Specific Remedial Action, Charlotte School of Law, October 2016 (on file with author).

¹⁰² *Id.*

¹⁰³ Charlotte School of Law 2016 Standard 509 Information Report (on file with author). In addition to academic attrition, other reasons for non-transfer attrition includes a student withdrawing from law school due to financial, health, or other personal reasons before dismissal. If only academic attrition was considered, a law school could counsel a failing student to withdraw from law school prior to being dismissed to reduce its academic attrition rate. Mark Hanson, *Law Schools Would Have to Break Down Attrition Info If Proposed Changes Get Green Light*, A.B.A. J., May 1, 2015.

¹⁰⁴ Charlotte School of Law 2015 Standard 509 Information Report (on file with author).

¹⁰⁵ See *supra* note 62 and accompanying text.

Standard.”¹⁰⁶ Then, in May 2019, the ABA Council adopted a new bar pass standard that requires at least 75 percent of a law school’s graduates who sat for a bar exam to pass the exam within two years of graduation.¹⁰⁷

The ABA Council adopted its new bar passage standard amid controversy that the standard would adversely affect diversity in the legal profession.¹⁰⁸ ABA data concerning the effects of the new bar passage standard indicated that 88.6 percent of 2016 graduates and 88.5 percent of 2015 graduates sitting for the bar within two years of graduation passed.¹⁰⁹ Law graduates sitting for the bar within two years of graduation from law schools at Historically Black Colleges and Universities (HCBUs) in 2016 had a 77.3 pass rate, and in those graduating in 2015 had a 75.2 pass rate, with two of six HBCU law schools not making the 75 percent pass rate for those two graduating classes.¹¹⁰ If the new bar pass standard had been in effect for the class of 2016, the ABA data also projected that 14 schools would be out of compliance.¹¹¹ Three of those law schools have closed or are closing,¹¹² and the ABA Council has removed accreditation from another,

¹⁰⁶ 2018–2019 ABA STANDARDS, *supra* note 9, at Interpretation 501-3. The ABA Council adopted the new attrition interpretation after the ABA Mid-Year Meeting in February 2017. Marilyn Odendahl, *ABA Watches Law Schools’ Attrition, Bar Pass Rates*, IND. LAW., Feb. 22, 2017, <https://tinyurl.com/y3vuls44>. In addition to academic attrition, other reasons for non-transfer attrition include a student withdrawing from law school due to financial, health, or other personal reasons before dismissal. *Id.* If only academic attrition was considered, a law school could counsel a failing student to withdraw from law school prior to being dismissed to reduce its academic attrition rate. Mark Hanson, *Law Schools Would Have to Break Down Attrition Info If Proposed Changes Get Green Light*, A.B.A. J., May 1, 2015, <https://tinyurl.com/yjyrbt3v>. The new interpretation combines academic attrition with other non-transfer attrition because “[b]oth types of attrition raise questions of whether the law school’s admission standards are adequate.” Odendahl, *supra* note 106.

¹⁰⁷ Stephanie Francis Ward, *ABA Legal Ed Section’s Council Adopts Tighter Bar Pass Standard; Clock for Compliance Starts Now*, A.B.A. J., May 17, 2019, <https://tinyurl.com/y532v65l>.

¹⁰⁸ See Stephanie Francis Ward, *ABA Legal Ed Section’s Council to Reconsider Stricter Bar Passage Standard*, A.B.A. J., May 10, 2019, <https://tinyurl.com/y3sqo54v>. CLEA, the Society of American Law Teachers (SALT), and the Legal Writing Institute (LWI) all opposed the new bar pass standard. *LWI Joins SALT and CLEA in Opposing Proposed Revisions to ABA Standard*, LEGAL WRITING INSTITUTE, <https://tinyurl.com/y5dx8f97>. The LWI statement and links to the statements filed by CLEA, SALT, and others in opposition to the new bar pass standard are on the LWI website. *See id.*

¹⁰⁹ A.B.A. Legal Educ. & Admissions to the Bar, *Revisions to Standard 316: Bar Passage (revised 5/6/2019)*, A.B.A., <https://tinyurl.com/y2sytcls>.

¹¹⁰ *Id.*

¹¹¹ *Id.* The law schools that the ABA projects would have been out of compliance with the new Standard 316 are: “Appalachian, Arizona Summit, Atlanta’s John Marshall, Barry, Dayton, University of the District of Columbia, Golden Gate, New England/Boston, San Francisco, Thomas Jefferson, La Verne, Valparaiso, WMU Cooley, and Whittier.” *Id.*

¹¹² The law schools that have closed or are closing are Arizona Summit School of Law, Valparaiso School of Law, and Whittier University School of Law. *See supra* notes 85-101

although that school is still accredited while it appeals the ABA Council's action.¹¹³

The new ABA standards concerning attrition and bar passage, combined with tighter law school budgets, will inevitably put pressure on many law schools. In turn, the law schools may put pressure on clinical programs and faculty in at least three ways – program cuts, diverting students away from clinics, and reducing support for scholarship.

A. *Law Schools Budgets and Clinical Legal Education*

When it comes to budget cuts, clinical programs have often been the first to suffer.¹¹⁴ As I have argued in the past, the only sensible way to address a law school's budgetary challenges is to look at all "law school expenses and the overall objectives of legal education."¹¹⁵ The aim should be to reduce costs in ways that do not sacrifice the quality of a law student's legal education.¹¹⁶

If one looks at what the overall objectives of legal education should be, as the Carnegie Foundation study, *Educating Lawyers*,¹¹⁷ did in 2007, "the value of clinical education [is] as a site for developing not only intellectual understanding and complex skills of practice but also the dispositions crucial for legal professionalism."¹¹⁸ That same year, Roy Stuckey and others published *Best Practices for Legal Education*,¹¹⁹ which noted that "it is only in the in-house clinics and some externships where students' decisions and actions can have real consequences and where students' values and practical wisdom can be tested and shaped before they begin law practice."¹²⁰ For these reasons, and many more, law schools should resist the temptation to meet the ABA experiential standard by, as Michele Gilman cautions, rely-

and accompanying text.

¹¹³ The ABA Council withdrew ABA accreditation from Thomas Jefferson School of Law in May 2019, but the school continues to be accredited while it appeals the Council's decision. *See supra* notes 94-95 and accompanying text.

¹¹⁴ "When faculties feel pressure to reduce budgets or to restrain rates of increase, they look first to, and often not beyond, the clinical curriculum. Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272, 271 (1984).

¹¹⁵ Peter A. Joy, *The Cost of Clinical Legal Education*, B.C. J.L. & SOC. JUST. 309, 329 (2012).

¹¹⁶ *Id.*

¹¹⁷ WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

¹¹⁸ *Id.* at 120.

¹¹⁹ ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

¹²⁰ *Id.* at 114.

ing on seemingly lower-cost options such as simulation and externship courses.¹²¹

In spite of the value of clinical legal education, lower enrollments and the resulting economic pressure on legal education have prompted some law schools to cut back or eliminate some law clinics. For example, Lewis & Clark announced the closing of its law clinic in downtown Portland, Oregon, in 2014.¹²² The law school cited lower enrollment and declining revenue as the reasons for closing the clinic, which provided a wide array of civil legal services to low income persons.¹²³ The dean explained that other clinics based in the law school would not close, but that the downtown clinic “has largely been a tuition-driven enterprise that we can’t afford. It’s purely financial.”¹²⁴ In 2017, the dean of University of North Dakota School of Law announced that “the school would be putting its student law clinic on hiatus for at least two years in response to budget reductions.”¹²⁵ In July 2019, the University of North Dakota School of Law experiential learning website promoting its “practice ready” approach lists externships and simulation courses, but no law clinics.¹²⁶

It is regrettable that some law school are closing some or all of their clinics for financial reasons. Bob Kuehn looked closely at tuition across law schools, and he found that “there is *no* statistically significant difference between tuition charged by schools . . . that mandate or guarantee a clinical experience to their students with the schools that do not.”¹²⁷ Kuehn also found that requiring or guaranteeing a clinical experience did not cause a law school to raise its tuition at a rate higher than the average increase for a comparable school that did not have costs associated with a clinical requirement or guarantee.¹²⁸ In addition, he found that “171 schools with existing clinical course capacity for all graduating students charge *less* in tuition, on average,

¹²¹ Michele Gilman, *The Future of Clinical Legal Scholarship*, 26 CLIN. L. REV. 189 (2019). As Gilman explains, law schools are at a crossroads with respect to experiential education in two respects. First, will law schools continue to embrace live-client, in-house clinical education or rely primarily on simulation courses? *Id.* at 202. Second, will law schools provide clinical faculty, both those teaching law clinics and those teaching externships, with faculty status that encourages and supports their scholarship? *Id.*

¹²² Jeff Manning, *Lewis & Clark Law School Closes Downtown Legal Clinic, Cites Enrollment, Revenue Decline*, OREGONIAN, Sept. 18, 2014, <https://tinyurl.com/y3vdd68f>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Andrew Haffner, *UND Releases Budget Cut Proposals*, GRAND FORKS HERALD, Mar. 10, 2017, <https://tinyurl.com/y68o7gry>.

¹²⁶ *Gaining ‘Practice Ready’ Experience While in Law School*, UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW (July 27, 2019, 1:59 PM), <https://tinyurl.com/yxnl9ut9>.

¹²⁷ Robert R. Kuehn, *Universal Clinical Legal Education: Necessary and Feasible*, 53 WASH. U. J.L. & POL’Y 89, 98 (2017).

¹²⁸ *Id.*

than schools that do not have sufficient available slots, though the difference is not statistically significant.”¹²⁹ Considering the value of a clinical course to a student’s legal education, Kuehn concluded, and I agree, that there is no reason why every law school should not provide a clinic or well-structured externship experience to every student.¹³⁰ If a law school values the importance of experiential education, then law clinics should continue to be an essential aspect of an effective program of legal education that will better prepare law graduates for the practice of law.

B. Diverting Students Away from Experiential Courses, Especially Clinical Courses

Bar passage rates have fallen in recent years, and with this decline some have speculated that more bar courses and fewer experiential courses would be the answer to boosting bar passage.¹³¹ These beliefs are based on conjecture and not facts, as a forthcoming empirical study by Bob Kuehn and David Moss demonstrates.¹³² Kuehn and Moss also identify other studies that have reached the same conclusion that there is “scant empirical evidence to support the belief that additional bar-subject courses would improve exam performance, or improve it meaningfully.”¹³³

Still, many law schools advise or require students to enroll in bar-subject courses,¹³⁴ and a survey of law schools indicates that this practice is common.¹³⁵ As a result, some law schools may steer students away from experiential courses, especially clinics and externships, and into more bar-subject courses in the mistaken belief that this will improve bar passage.

Recently, the belief that more clinic courses might negatively affect bar passage was put to the test by a California State Bar commissioned study of over 7500 bar applicants from 11 ABA-approved California law schools to the 2013, 2016, and 2017 July bar exams.¹³⁶ The study found that the number of credits a student took in clinical

¹²⁹ *Id.* at 100.

¹³⁰ *Id.* at 103.

¹³¹ See, e.g., Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. ____ (forthcoming 2019) (citing other studies).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ AALS Comm. on Bar Admissions and Lawyer Performance & Richard A. White, *AALS Survey of Law Schools on Programs and Courses Designed to Enhance Bar Examination Performance*, 52 J. LEGAL EDUC. 453, 461 (2002).

¹³⁶ ROGER BOLUS, PERFORMANCE CHANGES TO THE CALIFORNIA BAR EXAMINATION: Part 2 iii (2018)

courses had no relationship to bar exam performance across all schools, and when evaluated at each school separately.¹³⁷ The study also found that “the number of externship units had no independent relationship with CBX [California Bar Exam] performance,” across all schools and when evaluated at each school separately.¹³⁸

Kuehn’s and Moss’s empirical study is consistent with the study the California State Bar commissioned. Kuehn and Moss found that “the claim that enrollment in experiential courses is related, either positively or negatively, to bar exam passage lacks empirical support in our sample.”¹³⁹ They also examined enrollment increases in law clinic courses and externships, and, comparing them with first-time bar passage rates tracked by the National Conference of Bar Examiners (NCBE), Kuehn and Moss found that during a time period when experiential course enrollments increased by 50 percent, bar pass rates held steady.¹⁴⁰ In terms of the decline in bar pass rates in recent years, Kuehn and Moss stated: “A more likely contributing cause for the bar passage rate decline since 2014 is the weaker credentials of entering J.D. students, an association seen . . . in which the downward direction of the reported median LSAT scores of entering law students mirrors the decline in the national bar exam results three years later.”¹⁴¹ Kuehn and Moss found, as have other studies,¹⁴² including the California State Bar study,¹⁴³ “that final law school GPA is the strongest predictor of bar exam scores or passage.”¹⁴⁴

As these studies indicate, there is no good reason to divert students away from experiential courses, especially clinical courses. Instead, law clinic and well-structured externship courses should be part of the overall legal education a law school provides to each student.¹⁴⁵

¹³⁷ *Id.* at 53.

¹³⁸ *Id.*

¹³⁹ Kuehn & Moss, *supra* note 131.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* (citing several other studies reaching the conclusion that ultimate law school GPA is the strongest predictor of bar exam performance).

¹⁴³ “Of the antecedent performance measures, *LSGPA* [law school grade point average] was the single most important predictor of CBX [California Bar Exam] performance” BOLUS, *supra* note 136, at 58.

¹⁴⁴ Kuehn & Moss, *supra* note 131.

¹⁴⁵ Ideally, every law student should have the opportunity for a first-chair experience, in which the student is primarily responsible for client representation. Law clinics typically provide such experiences, and a small percentage of externships also provide first-chair experiences for students. Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLIN. L. REV. 493, 494 n.5 (2002). Even if an externship does not provide a law student with a first-chair experience, a student will learn a great deal if the externship is well-structured to emphasize student learning, including articulated goals, clearly defined responsibilities for students related to learning goals, opportunities for student self-reflection and feedback by field supervisors, and appropriate

Instead of cutting back on clinical legal education, a law school should strive to maintain, improve, and, if the school is not meeting student demand, expand their clinical offerings so that every student may have a real-life practice experience in which each student is able to assume the role of a lawyer, which is so important for the development of lawyering skills and professional values.¹⁴⁶

C. *Reduced Support for Scholarship*

Legal scholarship is costly, and the cost has risen over the past several decades due to reductions in teaching loads and increases in salaries, the two most significant long-term drivers of rising legal education costs.¹⁴⁷ A review of teaching load expectations from 1941 to 2006 indicates that law faculty are teaching approximately half as much as they did in the past,¹⁴⁸ with the annual teaching loads for some faculty averaging as little as 6.7 hours a year, approximately one course per semester.¹⁴⁹

In 2011, Richard Neumann estimated that a law review article written by a full professor over one year could cost a law school over \$100,000, assuming that as much as 50 percent of a faculty member's job is producing scholarship.¹⁵⁰ Neumann points out that the cost would be less for faculty receiving lower pay, but the cost is still substantial when a law school reduces a faculty member's teaching load and provides research support, such as summer research stipends, for scholarship.¹⁵¹

Given the precarious nature of the budgets at many law schools, there is a question about how much support for legal scholarship there will be in the future. Inevitably, that question also looms large for the

oversight of student experiences by both field supervisors and faculty. J.P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZAGA L. REV. 155, 160-61 (2002/03).

¹⁴⁶ Only by being in the role of a lawyer in a clinic or a well-structured externship is a law student able to develop professional judgment by "applying legal doctrine, skills, and values in the real world of practice." Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 250 (1992).

¹⁴⁷ Benjamin Franklin Boyer, *The Smaller Law Schools: Factors Affecting Their Methods and Objectives*, 20 OR. L. REV. 281, 284-85 (1941); Jack Crittenden, *Why Is Tuition Up? Look at All the Profs*, NAT'L L. JURIST, Mar. 2010, at 40, 40.

¹⁴⁸ Compare Boyer, *supra* note 147, at 284-85, with Theodore P. Seto, *Understanding the U.S. News Law School Ranking*, 60 SMU L. REV. 493, 546 (2007).

¹⁴⁹ Seto, *supra* note 148, at 546-48.

¹⁵⁰ See Joy, *supra* note 115, at 319 n.74 and accompanying text (citing a presentation at the Boston College Journal of Law & Social Justice Symposium by Richard Neumann, *The Way to Carnegie: Practice, Practice, Practice, Practice—Pedagogy, Social Justice and the Cost in Experiential Legal Education* (Oct. 28, 2011)).

¹⁵¹ *Id.*

future of clinical scholarship.¹⁵² At a minimum, clinical faculty will likely experience the same or greater pressure to teach more as will their colleagues who do not teach clinical courses, and will likely experience the same or greater cuts to support for research and scholarship.

CONCLUSION

Experiential education in U.S. law schools has had an uneasy history,¹⁵³ and the economic challenges for law schools will continue to affect clinical faculty, as the terminations of faculty at Northwestern and Vermont demonstrate.¹⁵⁴ Budget shortfalls will also affect the availability of clinical legal education, as the elimination of law clinics at University of North Dakota and Lewis & Clark's closing of one of its clinics illustrate.¹⁵⁵ For law schools that have been running deficits and have no more ways to cut expenses, the schools will likely merge or close. In this regard, I agree with those commentators who have predicted that more law schools will close within the next decade, and that reducing enrollments and decreasing the size of law school faculty and staff will continue.¹⁵⁶

As academic institutions that are also professional schools, law schools have been pulled in different directions – emphasizing legal scholarship or stressing the training of students for careers as lawyers. In recent decades, most of the emphasis by legal academics has been on increasing the production of scholarship, while improvements in clinical legal education at many law schools have occurred more begrudgingly, mainly in response to external pressures on law schools, such as the ABA standards, special reports, and advocacy by committed clinical faculty.¹⁵⁷

Law schools were able to support and expand legal scholarship

¹⁵² Gilman, *supra* note 121, at 189-90.

¹⁵³ I documented the uneasy history of experiential legal education in an earlier article. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICKINSON L. REV. 551 (2018).

¹⁵⁴ See *supra* notes 49-51 and accompanying text.

¹⁵⁵ See *supra* notes 122-26 and accompanying text.

¹⁵⁶ See, e.g., BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 181 (2012) (“Schools will be downsized whether they want to or not.”); Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More “Same Old, Same Old”*, 45 CONN. L. REV. 1409, 1414 (2013) (stating that some law schools will close within the next decade); Rick Seltzer, *What Comes after Whittier Shutdown?*, INSIDE HIGHER ED, Apr. 25, 2017, <https://tinyurl.com/y8q4h7ba> (stating that some experts estimate that 10 to 25 law schools will close).

¹⁵⁷ See, e.g., Peter A. Joy, *Law Schools and the Legal Profession: A Way Forward*, 47 AKRON L. REV. 177, 182-84 (2014) (discussing several studies or task forces, including the MacCrate Report, that have focused on the need for law schools to prepare students better for the practice of law). The ABA Standards have also pushed law schools to provide more experiential education. See *supra* notes 7-11 and accompanying text.

through reduced teaching loads and generous summer research grants because they had ample tuition revenue due to growing enrollments. When resources were plentiful, law schools funded legal scholarship at high levels, while clinical legal education at many law schools expanded only to adequate levels.¹⁵⁸ Now that resources are scarce, there is a real danger that the bulk of the cost cutting may fall on clinics, which would return law schools to previous unsatisfactory levels of clinical legal education. The obligation to prepare students for the practice of law should come first, even if this means less support for legal scholarship. How law schools manage the challenges to legal education due to limited resources in the coming years will not only define the future of legal education, but the future of clinical legal education and clinical scholarship as well.

¹⁵⁸ Approximately only a third of ABA-approved law schools, 75 of 203 schools, require or guarantee a law clinic or externship course for every law student. *See supra* note 10 and accompanying text.