THE MONKEY ON OUR BACKS: HOW THE U.S. SYSTEM OF STUDENT LOANS NEGATIVELY IMPACTS THE LEGAL PROFESSION, AND HOW THESE MASSIVELY-INDEBTED STUDENTS MAY JUST BE OUR LAST HOPE

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I. INTRODUCTION

As the 2016 presidential election fades further in the rearview mirror, urgent conversations about student loan debt have reached a fever pitch in university hallways. The student debt crisis, fueled by ever-increasing tuition prices and changing priorities in federal and state investment, has impacted students all over higher education. Arguably, however, no one has been hit harder than the aspiring lawyer.

While medical school is currently the most expensive professional endeavor, law school isn't far behind.[1] To add insult to injury, employment numbers for law students are considerably bleaker than for their latex-gloved counterparts. Only about three percent of medical students are still looking for a full time position when they complete their degree;[2] for the 2013 graduating class of lawyers, the number unemployed at graduation was *forty-three percent*.[3] So, while law students may not borrow as much while in school, they are also not nearly as likely to be employed in their field when they walk across the stage.

These aren't your parents' student loans, either. Law student debt has risen fifty-nine percent since 2004;[4] that statistic alone suggests a problem of pandemic proportions. When combined with the realities that wages for first-year lawyers in the private sector have not yet surpassed their pre-recession

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1 Josh Mitchell, *Grad-School Loan Binge Fans Debt Worries*, WALL ST. J. (Aug. 18, 2015), http://www.wsj.com/articles/loan-binge-by-graduate-students-fans-debt-worries-1439951900.

2 Brian Palmer, *Unmatched*, SLATE (Apr. 2, 2015, 10:15 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2015/04/match_day_for_medical_residency_the_scramble_foreign_doctors_and_a_shortage.html.

3 The Editorial Board, *The Law School Debt Crisis*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=0.

4 *Id.*

levels,[5] state investment in public defenders is thinning by the hour,[6] law school tuition rates are still skyrocketing,[7] and student loan interest rates remain unjustifiably high,[8] it's difficult to imagine what the future holds for this noble profession.

High law school tuition rates threaten even wealthy students' ability to pay the astronomical amount required to finance a legal education. In a profession traditionally valued for its equalizing potential, skyrocketing costs of a legal education effectively shut the door on low- or even middle-income students' dreams of attending law school. There is no doubt that this additional barrier threatens access to zealous advocacy for those who need it most.

With Donald J. Trump poised triumphantly at the reigns of the presidency and a Republican Congress riding shotgun, the future of our student loan problem is unclear. Will they eliminate forgiveness programs? Will they eliminate student-friendly Obama-era repayment methods? Will they privatize the system? The future, if not bleak, is at the very least uncertain.

Before delving into the future, however, this Note will take a good hard look at the past. How were student loans traditionally used? What makes today's crisis different? Then, this Note will examine the role that student loans play in the higher education models of other nations around the world. What can the U.S. learn from them? Could any of their ideas work here? Finally, this Note will argue that the federal government should act in several meaningful ways to ease the burdens on young lawyers, institute policies that promote access to higher education, and ensure that we leave future generations with a system of education funding that centers on the needs of students.

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[5] Elizabeth Olson, *Welcome to Your First Year as a Lawyer. Your salary is $160,000.*, N.Y. TIMES (Apr. 16, 2015), http://www.nytimes.com/2015/04/17/business/dealbook/welcome-to-your-first-year-as-a-lawyer-your-salary-is-160000-a-year.html.

[6] Will Isenberg & Tom Emswiler, *Federally Fund Public Defenders*, BOSTON GLOBE (June 19, 2016), https://www.bostonglobe.com/ideas/2016/06/18/defenders/l8SmrqiickUVXo3PmYztcN/story.html#comments.

[7] *See* Karen Sloan, *Tuition Is Still Growing; Despite Lagging Law School Applications, It Vastly Exceeds Inflation*, NAT'L. L. J., Aug. 20, 2012.

[8] *See* Karen Wise, *Why Your Student Loan Interest Rate is So High*, BLOOMBERG BUSINESSWEEK (Apr. 4, 2013), http://www.bloomberg.com/news/articles/2013-04-04/why-your-student-loan-interest-rate-is-so-high.

II. STUDENT LOAN DEBT: THE WAY IT IS AND HOW WE GOT HERE

Today's student loan system was not born out of a desire to assist low- and middle-income students in the struggle to achieve their dreams of a college education.[9] Instead, our current system of crisis can be traced back to origins in the Cold War.

The National Defense Student Loan program—the first federal loan program in the United States—was authorized by the National Defense Education Act of 1958.[10] Driven by Soviet Russia's victory in the space race with the launch of Sputnik, Congress sought to increase student involvement in the areas of science, mathematics, engineering, and foreign languages.[11] Funds for this program were designed to go straight to higher education institutions for subsequent disbursement to students with financial need in the form of low-interest loans.[12] This came at a time when the annual tuition at Harvard, the most expensive college in the country, stood at just $1,250[13]—a laughably low number for any modern law student facing $20,000 or more per year in tuition alone.[14] Although it no longer has a stated focus on certain fields, this program still exists today and is known as the Federal Perkins Loan Program.[15]

In 1965, President Johnson lobbied Congress for a national need-based scholarship program to assist poor students in paying for college.[16] Part of his War on Poverty, the Higher Education Act of 1965 was meant to increase access to post-secondary education for low- and middle-income students.[17] Congress refused Johnson's requested need-based scholarship program unless they could also add a loan program for middle-income students.[18] Out of this legislative haggling, the Guaranteed Loan Program was born.[19] Today, it is called the Stafford Loan Program.[20] Up to this point, all federal loan programs were based on the same model: the government would guarantee

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[9] *See generally Student Loans: How Did We Get Here?*, LUMINA FOUND., https://www.luminafoundation.org/files/resources/loans-viewing-guide.pdf (last visited Sept. 10, 2016).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] George H. Watson, *College, Radcliff Tuition Raised to $1250; Increase Permits Higher Faculty Salaries*, HARV. CRIMSON (Jan. 8, 1958), http://www.thecrimson.com/article/1958/1/8/college-radcliffe-tuition-raised-to-1250/.

[14] Sloan, *supra* note 7.

[15] LUMINA FOUND., *supra* note 9, at 4.

[16] *Id.* at 4–5.

[17] *See id.*

[18] *Id.*

[19] *Id.* at 5.

[20] *Id.*

loans taken out through a private institution by a borrower who was using the money for higher education.[21] Yearly borrowed amounts were capped at $1,000 for undergraduate students with an aggregate amount of $5,000 total.[22] Graduate students were capped at $1,500 per year and $7,500 total.[23] $5,000 in 1960 is the equivalent of $41,000 today,[24] an amount many of today's borrowers would gladly pay.

Lawyers in the 1960s also had loan repayments that represented a smaller portion of their yearly salary (on average and adjusted for inflation) than their modern counterparts. The *Chicago Tribune* reported in 1960 that the average non-salaried lawyer in the Chicago area pulled in around $13,000 a year (about $107,000 a year in today's money).[25] An attorney paying a student loan of $5,000 on a salary of $13,000 a year would have a total loan repayment of less than half of his or her annual salary. The average amount owed by law students for public law schools in 2015 was $84,000,[26] which is approximately two-thirds the median annual salary of 2015 lawyers: $115,820.[27] Just looking at these numbers alone, it's not difficult to see why today's lawyers are having a substantially more difficult time paying off their student debt obligations. But other factors have contributed as well.

In 1972, intending to create a basic "floor" for education financing, the federal government created the Basic Educational Opportunity Grant.[28] This pool of money was appropriated by Congress and dispersed directly to low-income students without any expectation that it would ever be paid back.[29] These grants, later renamed after Senator Claiborne Pell (D-RI), provided the vast majority of all student aid until the 1980s.[30] For instance, more than fifty percent of all federal student aid was disbursed through the Pell Grant Program in 1973, with only about thirty percent coming from federal loans. By 1994, all federal grants represented less than twenty percent of federal aid

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[21] *Id.*

[22] *Id.* at 18.

[23] *Id.* at 5.

[24] *See* *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited June 24, 2017).

[25] *See id.*

[26] Robert Farrington, *Law School and Student Loan Debt: Be Careful*, FORBES (Dec. 18, 2014, 8:46 AM), http://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/#3016bc204f06.

[27] *Lawyer: Salary Details*, U.S. NEWS & WORLD REP., http://money.usnews.com/careers/best-jobs/lawyer/salary (last visited Sept. 10, 2016).

[28] *Pell Grants*, PELL INST., http://www.pellinstitute.org/pell_grants.shtml (last visited Sept. 10, 2016).

[29] *Id.*

[30] *See* Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, U.S. DEP'T OF EDUC. (Oct. 1995), https://www2.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html.

funding, with federal student loans clocking in at around sixty percent.[31] This trend continued well into the 2000s, with student loans surpassing *all* grant programs in 2003.[32] While this has gotten better in recent years—grants outpaced loans again for undergraduate students in 2009 and have since—the loans taken in the period between 1994 and 2008 have contributed to sharp increases in student loan debt per borrower: from $20,000 in 2000 to nearly $26,000 in 2014.[33] In short, the government has cut back on giving and has started to loan more instead.

The financial burden of paying for college has shifted more and more from governments to students, and the *amount* of this burden has also increased dramatically. In 1972, in-state tuition at a four-year public institution *with* room and board cost approximately $8,307 in 2016 dollars.[34] In 2016, the cost of that same four-year public institution with room and board had increased to $20,092,[35] an increase of over 250 percent.

The numbers are even bleaker for graduate students. As much as forty percent of the $1.1 trillion in outstanding student loan debt financed graduate or professional degrees, even though graduate students make up only sixteen percent of the total student population.[36] While the average student loan borrower has around $30,000 in outstanding debt,[37] the average graduate student holds a debt of more than $57,600.[38] One quarter of graduate students borrow nearly $100,000, and one in ten borrows more than $150,000.[39]

For law students specifically, the average amount borrowed didn't change dramatically between 2004 ($88,634) and 2008 ($90,052). But by 2012, the average borrowed by law students to finance their education spiked to an unbelievable $140,616.[40] Many people blame a 2006 policy change, allowing graduate students to borrow any amount needed, limited only by the

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31 *See id.*

32 *Trends in Student Aid 2015*, C. BOARD 14, http://trends.collegeboard.org/sites/default/files/trends-student-aid-web-final-508-2.pdf (last visited Jan. 7, 2017).

33 *Id.*

34 *Trends in Higher Education*, C. BOARD, https://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-and-board-over-time (last visited Jan. 7, 2017).

35 *Id.*

36 Allie Bidwell, *How Much Loan Debt is From Grad Students? More Than You Think*, U.S. NEWS & WORLD REP. (Mar. 25, 2014, 11:38 AM), http://www.usnews.com/news/articles/2014/03/25/how-much-outstanding-loan-debt-is-from-grad-students-more-than-you-think.

37 *Project on Student Debt – State by State Data*, INST. FOR C. ACCESS AND SUCCESS, http://ticas.org/posd/map-state-data (last visited Jan. 8, 2017).

38 Bidwell, *supra* note 36.

39 *Id.*

40 *Id.*

"cost of attendance."[41] Many argue that this, coupled with generous forgiveness programs for those working in public service, has created a system where individual students can borrow as much as they want without ever worrying about how to pay it back.[42] This theory seems to operate under the assumptions that public service jobs are widely available and that working at one for ten years (while also making monthly payments) is a walk in the park. The general consensus seems to be that neither of these assumptions is true.[43] The more likely explanation takes into account problems that are unique to law schools themselves. According to a 2014 Council Resolution to the American Bar Association:

> There are a variety of explanations for the persistent ability of law schools to raise tuition at rates far exceeding inflation for the past several decades. Declining support for public schools from state legislatures, the rise of practice-oriented legal education, declining faculty-student ratios, and significant increases in faculty compensation to compete with private sector opportunities are all no doubt part of the explanation. Nonetheless, there is little doubt that an overriding factor is the nearly unfettered access that law schools enjoy to federal funds. So long as the federal government provides a blank check, law schools can raise their tuition with near impunity, confident that their students will be able to pay the price by taking out more federal loans.[44]

Law schools know that their students can borrow as much as the "cost of attendance" requires. So, why not increase the cost of attendance just a little bit more? Law school tuition rates have increased by more than a factor of four in just the last two decades.[45] As a recent report by the Illinois State Bar Association explains:

> The market pressure on law schools to keep tuition affordable is significantly blunted . . . by the generous lending policies of the federal government. To date, the federal government has allowed nearly any student enrolled in a recognized educational program to borrow amounts limited only

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[41] Daniel Thies, *2014 March YLD Report to Council*, ALASKA B. ASS'N 3, https://www.alaskabar.org/servlet/download?id=3326 (last visited July 31, 2017).

[42] *See* Bidwell, *supra* note 36.

[43] *See Fact vs. Fiction: Public Interest Careers*, YALE L. SCH., https://www.law.yale.edu/student-life/career-development/students/career-guides-advice/fact-vs-fiction-public-interest-careers (last visited Jan. 8, 2017) ("Getting a permanent public interest job is more challenging than getting a large firm job."); *see also* Josh Jarman, *Lawyers Take Risk in Public Defense*, COLUMBUS DISPATCH (May 28, 2012, 5:40 AM), http://www.dispatch.com/content/stories/local/2012/05/28/lawyers-take-risk-in-public-defense.html ("Law-school debt, low public-defender pay and a giant workload . . . means high turnover . . . .").

[44] Thies, *supra* note 41, at 3.

[45] *Id.* at 2.

by the cost of attendance. To remain eligible to enroll students receiving federal student loans, moreover, an institution need meet few requirements other than remaining accredited by a recognized accrediting agency. As a result, the federal government will fully fund the education of any person who gets into law school, independent of the employment outcomes that the law school's graduates achieve and of their ability to repay the taxpayers' money.[46]

With this in mind, blaming individual students for the increase in student loan borrowing seems pretty silly. Law students typically aren't driving Porsches or living in million-dollar homes on the government's dime.[47] Law schools, on the other hand, face little financial pressure to rein in the cost of tuition or to ensure that their students graduate with manageable debt loads.

This, expectedly, has resulted in a far greater burden on students. But it isn't just sharp increases in tuition and sharp declines in grant funding that are hurting the American student loan borrower; even the *method* the government employs to dole out and collect student loans is designed to minimize cost to the government and maximize cost to the student-borrower.

Starting in 1992, the federal government determined that it was cheaper and easier to directly disperse loan money to individual students rather than simply guarantee private loans made through a third-party financial institution.[48] This did have the cost-cutting effect that the federal government desired, but coupled with the 1997 privatization of Sallie Mae—a formerly government-affiliated organization whose board had traditionally been partially made up of government officials—federal dollars were now being freely and easily dispersed, but then collected by a private, profit-driven organization.[49] For years, this combination had the effect of making loans extremely easy to get and extremely stressful to try to pay back.[50] Very suddenly, hedge funds, investors, and banks had a much more direct role in the lending, collection, fees, and services of federally-backed student loans.[51]

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[46] ILL. ST. B. ASS'N, FINAL REPORT, FINDINGS & RECOMMENDATIONS ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES 39–40 (June 22, 2013), https://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf.

[47] *See, e.g.*, Staci Zaretski, *Law Student Living in Poverty Relies on Food Stamps to Survive*, ABOVE THE L. (May 22, 2015, 11:31 AM), http://abovethelaw.com/2015/05/law-student-living-in-poverty-relies-on-food-stamps-to-survive.

[48] LUMINA FOUND., *supra* note 9, at 8.

[49] *Id.*

[50] Eric Westervelt, *'I'm a Student Debt Slave.' How'd We Get Here?*, NAT'L PUB. RADIO (July 11, 2016, 7:07 AM), http://www.npr.org/sections/ed/2016/07/11/484364476/im-a-student-debt-slave-howd-we-get-here.

[51] *Id.*

Over time, the original intent of student loans (low and middle-income tuition assistance) became secondary to private profits.[52] Today, nearly ninety percent of law students graduate with student loan debt, which suggests that loans are now being used by borrowers at all levels of the income spectrum.[53]

The Obama administration brought several positive changes to the life of a student loan borrower—lowering the amount of income-based repayment from fifteen percent of discretionary income to ten percent and establishing the Pay As You Earn plan, to name only two examples.[54] But these positive steps have yet to put a dent in the amount of debt owed by law students. Perhaps a look at methods employed in other countries will give us—and the new administration—some valuable insight into a good strategy.

III. WHAT WE CAN LEARN FROM OUR NEIGHBORS

Borrowing money to go to college is definitely not a purely American experience. In fact, borrowing money for higher education is pretty common around the world.[55] What sets the U.S. apart from other nations is the sheer backbreaking *amount* of debt and the ever-increasing number of borrowers in default. American students currently hold about $1.3 trillion in student loan debt.[56] More than seven million borrowers are currently in default, and millions more are facing eminent default if action is not taken soon.[57] Since 2004, nearly a quarter of all student loan borrowers have slipped into default.[58]

These problems set us apart, but there is mounting evidence that they may only be symptoms of our actual problem. The real culprit, it seems, is a multi-headed dragon of issues that, conspiring together, have created a system that punishes our nation's brightest minds and stagnates the world's largest market economy. These issues can sometimes seem contradictory. For instance, the United States expects students to pay back the entire principal

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[52] *Id.*

[53] Eliana Osborn, *Expected Law School Student Loan Debt Continues to Grow, According to New Survey*, GOODCALL (Mar. 30, 2016, 2:30 PM), https://www.goodcall.com/news/expected-law-school-student-loan-debt-continues-to-grow-according-to-new-survey-05475.

[54] LUMINA FOUND., *supra* note 9, at 12.

[55] Susan Dynarski, *America Can Fix Its Student Loan Crisis. Just Ask Australia.*, N.Y. TIMES (July 9, 2016), http://www.nytimes.com/2016/07/10/upshot/america-can-fix-its-student-loan-crisis-just-ask-australia.html.

[56] *Id.*

[57] *Id.*

[58] Betsy Mayotte, *Understand the Consequences of Student Loan Debt Default*, U.S. NEWS & WORLD REP. (Mar. 4, 2015, 10:00 AM), http://www.usnews.com/education/blogs/student-loan-ranger/2015/03/04/understand-the-consequences-of-student-loan-default.

of their loan, plus interest, in just ten years[59]—the least amount of time given under any system in the western world.[60] The short payback time forces the amount of individual payments to be very high, which increases the burden on new graduates and can often cause borrowers to forgo having children, buying homes, or making other economic choices that could otherwise benefit the market economy.[61]

Contrary to conventional expectations, policies requiring students to pay off loans more quickly actually cause the opposite result: they force American students to take longer to pay off their student debt than their counterparts in other countries.[62] The average American student takes twenty-one years to pay off an average loan of just under $30,000.[63] The average debt in Australia is around $22,000, yet it is paid off on average within eight to twelve years.[64] Our policies, rather than our dollar amounts, seem to be the cause of student borrower struggles in the United States.

Furthermore, the average individual student loan debt in the U.S. is greater than the average individual student loan debt of Australia, Canada, Finland, Hungary, and the Netherlands *combined*.[65] The average Finnish student graduated from college with less than $6,000 in debt in 2014, a figure that many American students would kill for.[66] When you also consider the averages owed in Australia ($22,000), Sweden ($20,000), and Norway ($25,000),[67] the U.S. emerges as one of the most expensive higher education loan systems in the world.[68] Surely, the U.S. can learn valuable lessons from other nations when deciding on a policy that will most benefit their students.

In the United States, the average debt held by a graduate of a four-year institution is about $30,000.[69] In Sweden, the typical student debt is a little more than $20,000, even though higher education is tuition free.[70] Yet, there is no student loan default problem in Sweden.[71] The Swedes have structured

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59 Dynarski, *supra* note 55.

60 *See* Elena Del Rey & Ioana Schiopu, *Student Debt in Selected Countries*, EUR. EXPERT NETWORK ON ECON. OF EDUC. 10–24 (Nov. 2015), www.eenee.de/de/dms/EENEE/Analytical_Reports/EENEE_AR25.pdf.

61 Westervelt, *supra* note 50.

62 Del Ray & Schiopu, *supra* note 60.

63 Bidwell, *supra* note 36.

64 Dynarski, *supra* note 55.

65 Del Ray & Schiopu, *supra* note 60, at 9.

66 *Id.* at 16.

67 *Id.* at 9.

68 KEVIN CAREY, THE END OF COLLEGE 7 (2015).

69 Dynarski, *supra* note 55.

70 *Id.*

71 *Id.*

their loan payback timeline to operate on a twenty-five-year fixed scale.[72] Compare this with the United States, where the default loan repayment plan gives students only ten years to pay back the entirety of their loans, with interest.[73] On this point, the Swedish plan makes a lot of sense. The entire point of financing something is that repayment should correlate in some way with the life-span of the thing invested in.[74] Thus, car loan repayments are generally around five years, and home loan repayments are generally around thirty.[75] This is because the house is probably going to last longer than the car, and it will be worth more for a longer amount of time. Education as an investment is no different.[76] Education pays off over the course of a lifetime, so it makes sense that the borrower should be given a longer time to make payments.[77] Sweden's plan reflects this logic. The U.S. plan does not. Additionally, Sweden has a very strong welfare state, which supports recent graduates who struggle to find gainful employment right after graduation.[78] Swedes are therefore able to meet their small monthly payments on even meager salaries, preventing their accounts from slipping into default.[79]

It's not only countries with strong social safety nets that make their student loan systems work better than America's.[80] Enter Australia. Like the United States, Australia has much higher income inequality than Sweden.[81] Australian students borrow comparably to U.S. students, as well: their students borrow about $22,000, compared with around $30,000 in the U.S.[82] But, like Sweden, Australia does not currently face a student loan default problem.[83] Australia has implemented a system where student loan debt is paid in the amount of a four-percent automatic deduction from borrowers' paychecks.[84] Automatic deduction isn't unheard of in the United States; we already do it with Social Security and income taxes.[85] The Australian system, by basing repayment amounts on the income of the student, puts the real emphasis on participation in the market economy and the basic needs of

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72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *See id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*

survival.[86] The American system, by simply dividing the amount owed by 120 and sending a bill for that amount every month, does not account for any immediate changes in income or other obligations.[87] This "pay what you owe, not what you're able" system has forced many borrowers who can't meet their monthly obligations into default,[88] which comes with a whole slew of other problems, including garnished wages and litigation.[89] This isn't a problem in Australia because a student loan payment doesn't require any work on the part of the borrower. It's simply automatically deducted from the borrower's paycheck, and borrowers pay nothing until their pay reaches about $40,000 per year.[90] This system also helps students pay off the principal debt more quickly, allowing them to avoid costly interest and move on with their lives with less total amount paid.[91] The typical Australian graduate discharges their total debt in eight to twelve years,[92] compared to twenty-one years in the United States.[93] Australian students who make more money often pay their loans off even quicker.[94] Lawyers in Australia often pay off their student debt in as little as five years.[95]

In addition to the convenience of never being forced to fill out a form or sign up for a special program, Australia's automatic withdrawal system also ensures that graduates are not overly burdened by their debt.[96] Students who make below about $40,000 a year aren't required to pay anything on their student loan debt until they make above that amount.[97] When they do, payments fluctuate between four percent and eight percent of each paycheck, depending on the amount earned.[98] If a student's salary suddenly decreases because of a loss of employment or continuing education or for any reason at all, the amount paid on the loan automatically drops accordingly and no interest or fees accrue during this time.[99] Compared to the U.S. system, this

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[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Mayotte, *supra* note 58.
[90] Dynarski, *supra* note 55.
[91] *Id.*
[92] *Id.*
[93] Bidwell, *supra* note 36.
[94] Dynarski, *supra* note 55.
[95] *Id.*
[96] *See id.*
[97] *Id.*
[98] Sarah Dillard, *How We Finance College Impacts the Real Cost of Higher Education – A Look at the American vs. Australian Student Loan System*, NERD WALLET, https://www.nerdwallet.com/blog/finance/prof/finance-college-impacts-real-cost-higher-education-american-australian-student-loan-system/ (last visited Nov. 13, 2016).
[99] *Id.*

seems like a dream for students. U.S. borrowers receive a bill for their first monthly payment just six months after graduation, whether they have gained employment or not.[100]

The United States has an option for so-called "pay-as-you-earn" plans that tie the amount of monthly payments to the amount made in salary, but it is a special program that requires the completion of a twelve-page application—a sometimes bumpy process that often leads to students being mistakenly put on the standard repayment plan, even though it isn't best for them.[101] Pay-as-you-earn plans make sense because it's generally more important macro-economically for the borrower to be participating in the short-term market economy than it is for them to pay off the entirety of their student loan with interest.[102] This is the driving principle behind the Australian student loan system.[103] Students don't have to sign up for a pay-as-you-earn plan or fill out any forms or make any special calls to any private lenders (an agonizing process in the U.S.).[104] Instead, it's all automatic and tied to actual employment checks rather than annual income.[105] If a student doesn't work one week, she doesn't make a student loan payment that week.[106] In the United States, income-based repayment plans are calculated based on *annual* income, instead of paychecks.[107] This means that a borrower who loses her job, chooses to go back to school, or gets her hours cut, will still be liable for the same monthly payment until the next fiscal year.[108] By that time, many borrowers will have already slipped into default.[109] The reason that this system continues to exist is its immense profitability for both the government and the corporations who assist in the collection of student loan debt.[110]

In fact, in the U.S system, borrowers who pay their loans for twenty years on the Income-Based Repayment Plan *always* end up paying more than they borrowed.[111] This isn't necessarily a bad thing. Besides the positive economic

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[100] Dynarski, *supra* note 55.

[101] *Id.*

[102] *See* Josh Freedman, *Student Loans Are a Drag on the Economy and Society*, FORBES (Feb. 11, 2014, 9:00 AM), http://www.forbes.com/sites/joshfreedman/2014/02/11/student-loans-are-a-big-drag-on-the-economy-and-society/#7e79be7b5504.

[103] Dynarski, *supra* note 55.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* Del Ray & Schiopu, *supra* note 60, at 26.

[111] *Income-Based Student Loan Repayments*, FED. STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven (last visited Jun. 4, 2017).

effects of a more educated workforce (higher salaries, better benefits, more taxes paid, etc.), the return on investment to the federal government for every dollar loaned is estimated to be around nine percent.[112] In short, the U.S. government is profiting handsomely from our current student loan system. It's also not altogether unreasonable for students to pay back more than they originally borrowed. Over time, due to inflation, the value of a dollar goes down.[113] So over time, in order to both make up for inflation and add a profit margin, interest is charged on the principle of the loan. In the U.S., these interest rates are different depending on the type of student loan that the student takes.[114] For undergraduate students, the rates are generally pretty low—around 3.76 percent. But law students will likely be taking the vast majority of their student loans while in law school, due to the heavier workload, work restrictions, and additional cost of tuition. Federal graduate student loan interest rates range from five percent to 6.31 percent.[115] Still not a terribly high rate (although higher than most home loans), but it does ensure that graduate students who take student loans are likely to be saddled with a debt that dwarfs their original borrowed amount. Australian student loans, on the other hand, are indexed to the Consumer Price Index, so they have a zero-percent real interest rate.[116] This means that students who take longer to pay off their student loans in Australia actually pay less for them overall because of the falling value of the dollar.[117] This may seem counter-intuitive because it means that the Australian government is ultimately losing money on the deal. But it's pretty clear that Australia sees student loans as a means of investing in its workforce—a way to attract businesses and give citizens more meaningful and productive lives.[118]

It seems that the major problem with the U.S. student loan system is not just the sheer *amount* of student loan debt, although this certainly does have personal ramifications, especially to law students who often borrow more than $100,000 to get their degree.[119] It seems that the bigger problem in our system is that we have taken debt amounts that ought to be perfectly manageable and made them catastrophic for millions of Americans.[120] Our administrative system is what has created these problems, but it can be

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[112] Del Ray, *supra* note 60, at 20.

[113] Dillard, *supra* note 98.

[114] Teddy Nykiel, *The Complete Guide to Student Loan Interest Rates*, NERD WALLET (Mar. 15, 2016), https://www.nerdwallet.com/blog/loans/student-loans/student-loan-interest-rates.

[115] *Id.*

[116] Dillard, *supra* note 98.

[117] *Id.*

[118] *Id.*

[119] Farrington, *supra* note 26.

[120] Dynarski, *supra* note 55.

changed to better reflect the goals of a student loan program. While it's not necessarily a bad thing, the fact that the U.S. government could potentially turn a profit on federal student loans does allow the government some wiggle room to further assist struggling borrowers.[121] The roadblock is political will.[122] It's not just the government that profits from massive student indebtedness.

In fact, while more than 40 million people have student debt totaling more than $1.2 trillion,[123] average monthly payments are nearly $700,[124] and roughly eleven percent of borrowers are in default, there exists a $200 billion market for student loan asset-backed securities (SLABS).[125] This is a circular business that involves some of the biggest names in the financial sector: Sallie Mae, Wells Fargo and Bank of America, to name a few.[126] Just like mortgages of yesteryear,[127] student loans are often pooled and repackaged into new financial products called "securities."[128] The lenders then sell these securities to investors, who receive the reward of monthly payments, plus interest.[129] They can hold on to the securities for themselves, trade them to someone else, or bet on them in the stock market.[130] The lenders who sold the loans get quick cash, including fees and commissions, and alleviate themselves of all risk related to the actual underlying stability of the loan.[131]

Maybe this is surprising, but it certainly shouldn't be. Basic principles of property law tell us that debt can be bought, sold, transferred and hedged.[132] This by itself, though likely infuriating for borrowers, isn't remarkably different from other countries.

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[121] *See* Katie Lobosco, *Is the Government Making Money off Your Student Loans?*, CNN MONEY (Aug. 4, 2016, 9:57 AM), http://money.cnn.com/2016/08/04/pf/college/federal-student-loan-profit/index.html.

[122] *Cf. Student Loan Companies: Lobbying, 2017*, OPENSECRETS CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/industries/lobbying.php?ind=F1410 (last visited July 31, 2017).

[123] Raúl Carrillo, *How Wall Street Profits from Student Debt*, ROLLING STONE (Apr. 14, 2016), http://www.rollingstone.com/politics/news/how-wall-street-profits-from-student-debt-20160414.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See* Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), http://www.forbes.com/sites/stevedenning/2011/11/22/5086/#62e6f8a55b56 (asserting that this sort of bundling of securities, called "derivatives," is part of a massive regulatory hole that allowed for the 2008 financial collapse to occur); *see also* THE BIG SHORT (Paramount Pictures 2015).

[128] Carrillo, *supra* note 123.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *See Consumers Should Understand Debt Buying*, OHIO ST. B. ASS'N (May 26, 2016), https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-681.aspx.

What is different is the unusual amount of security that the investments bring along with them—more than virtually any other type of investment.[133] With normal securities, investors take out insurance policies on loans to ensure that, should the borrower default, they won't actually lose any money.[134] But this added protection is really not necessary with SLABS because the government has already secured their investment for them.[135] In fact, the federal government has backed the value of roughly eighty percent of outstanding student loans.[136] Even if the original borrowers default on their obligations to pay, the lender and the investor will still make money.[137] This actually creates a horribly perverse incentive for both the lender and the investor. If the borrower continues to make timely monthly payments, the amount of the payoff will come slowly over time. But if the borrower defaults and the investment is government-backed, the lender and the investor get paid the full amount of the loan and full interest *immediately*.[138] This is the same perverse incentive that causes investors to oppose government relief programs for borrowers.[139] Wall Street gains profits more quickly when borrowers default on their loans.[140] Rather than extending time and lowering payments, investors want borrowers to fail quickly in order to maximize immediate profit.[141]

Additionally, bankruptcy laws in the United States are much stricter than those in other countries.[142] It's basically impossible to discharge federal student loans through bankruptcy in the United States.[143] Knowing that the borrower is locked in no matter what, for the entire life of the loan, investors enjoy more security with SLABS than virtually any other investment product on the market.[144] This system leads to private gains for investors, *no matter what*, and public losses, *no matter what*. We have created an unstable system,

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[133] Carrillo, *supra* note 123.

[134] PWC LOANS AND INVESTMENTS GUIDE (2017) https://www.pwc.com/us/en/cfodirect/assets/pdf/accounting-guides/pwc-guide-loans-investments-cecl-impairment-model.pdf.

[135] Carrillo, *supra* note 123.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *See* Gretchen Morgenson, *A Student Loan System Stacked Against the Borrower,* N.Y. TIMES (Oct. 9, 2015), https://www.nytimes.com/2015/10/11/business/a-student-loan-system-stacked-against-the-borrower.html.

[140] Julie VerHage, *Wall Street Sees Big Money in Student-Loan Defaults,* FOX BUSINESS (June 19, 2014), http://www.foxbusiness.com/politics/2014/06/19/wall-street-sees-big-money-in-student-loan-defaults.html.

[141] Carrillo, *supra* note 123.

[142] *Id.*

[143] *Id.*

[144] *Id.*

built on an unknown amount of volatile loans. The scariest part is how much this unstable system resembles the mortgage derivative scheme that collapsed the American economy in 2008, hurling the nation toward an inferno of loss and despair.[145]

All accountability in this system has been removed. Lenders don't care if students can ever pay back their loans because the government has guaranteed the investment. There is no incentive for lenders to ensure that the borrower is going to be able to repay because lenders won't suffer any consequences even if they can't. The investor doesn't care if a loan is bad because the investor just bought 300 loans bundled together; if one fails, it's not a big deal. Plus, the government will pay investors for their assets, even when they go into default. This is the same lack of accountability that bit us in 2008. Except in this case, rather than banks failing and insurance companies hemorrhaging assets, it's the government that is subsidizing both sides of the coin.[146] This means the government is eating all of the risk, but the effects will be much more widespread.[147] Now is the time to remove the volatility from the system—before it's too late.

IV. A BOLD NEW APPROACH

Changing our system to remove the potential of a catastrophic financial event, ensure that students aren't saddled with ridiculous amounts of debt, and rein in the cost of higher education wouldn't actually be that difficult.[148] Essentially, we should immediately replace federal lending with stable federal spending. This would involve the creation of a federal public option for higher education, forcing the private sector to compete, decreasing student debt, and lowering tuition along the way.[149] The federal government doesn't need to profit from students because the ultimate goal of an economy is not to produce profit for the government, but to produce a higher standard of living for the majority of citizens.[150] If that's indeed the ultimate goal, then the move to a debt-free system that encourages students to attend college and eliminates the risk of doing so (especially for lower income students) should be the immediate action. This wouldn't even require a tax hike; it would simply tap the pool of public money that we already use to fund student loans (and subsidize the Wall Street investors who trade them) in order to fund

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145 *See* Denning, *supra* note 127.
146 Carrillo, *supra* note 123.
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*

public investment in free college.[151] Rather than charging students an engorged amount for tuition, the federal government could simply fully fund universities and mandate that with the guaranteed federal dollars comes the commitment to keep enrollment free. Doing so will also ensure educational quality because it gives educators a paycheck not dependent on enrollment, but guaranteed by the federal government. Rather than guaranteeing the assets of the Wall Street bankers who bet on students to fail, let's guarantee the real assets in the system: the educators and the students. Doing so could increase competition for careers in higher education and allow the federal government a say-so over the type of professors being hired—no more hiring part time professors only so the University can save money on benefits and office space.[152] This creates a whole economy built around education rather than fake investing in students' failure.

For law schools specifically, the American Bar Association has recommended that, in order to rein in tuition hikes, the federal government should impose reasonable outcome-based requirements on schools in order for them to maintain eligibility to enroll students receiving federal funding.[153] This solution has a few gaping holes that prevent it from being largely endorsed here.

First, imagine a scenario in which a student is accepted to her hometown law school and is planning to live with her parents for the express purpose of saving money (except that her hometown law school has recently lost the privilege of enrolling students who require federal funding). This student would face two terrible options: either move out of town to attend a different law school (assuming she was accepted to one) and pay rent, causing her to take even more in federal loans than she would have otherwise, *or* take her cost for tuition in private loans, which are more dubious financially than federal loans.

Second, imagine a student who enrolls at a law school and is accepting federal student assistance. In his second year, the law school fails to meet the requirements necessary to continue accepting federal dollars. The student is now faced with the impossible choice of transferring law schools or staying and taking private loans.

Essentially, the ABA's solution, while well intentioned, is not really a solution at all. It continues to unfairly push the burden for institutional failure

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[151] *Id.*

[152] *Cf.* Dan Edmonds, *More Than Half of College Faculty Are Adjuncts: Should You Care?*, FORBES (May 28, 2015, 2:25 PM), https://www.forbes.com/sites/noodleeducation/2015/05/28/more-than-half-of-college-faculty-are-adjuncts-should-you-care/#6b14a7916005.

[153] Thies, *supra* note 41, at 4.

onto the students, rather than the institution. There is a better way, and the solution is radically simple: eliminate tuition altogether.

Schools that are funded by the government should have their operational budgets set by the government, and funding for the school should be provided entirely by the government. Students who are accepted should not be required to pay a fee to attend; instead, government loan and grant programs could be used to fund student living expenses only. In our current scheme, state governmental entities (universities) are indiscriminately raising tuition because they know students can take whatever amount is required in federal student loans.[154] Thus, the federal government is essentially paying whatever the state government wants and wagering the financial futures of the students as collateral. It's one of those strange one-government-paying-another-government-at-the-detriment-of-citizens situations that make the rest of the Western world look at our antiquated federalist system with amused bewilderment.[155]

Think about it this way: the federal government tells you that it will pay the entire salaries of your employees, no matter what the job, no matter what the salaries. The best part is, you need not provide any sort of justification for your employees' salaries. Suddenly, your fry-cook is worth a million dollars a year. This is essentially what the federal government has allowed law schools to do. The federal government has promised to pay the cost of any student, no matter what the cost is, without any justification needed for the amount charged.[156]

Federalizing all public universities would also allow the democratic process to determine the cost of college, instead of unelected boards and appointed college presidents. It will prevent state entities from taking their students hostage in order to get a ransom from Uncle Sam. This action, coupled with a saner approach to student loan forgiveness, will lead to an affordable higher education system that prevents students from shouldering the brunt of the burden for their own success.

Donald Trump, our newly-elected president, has hinted that he is not in favor of the federal government profiting from student loans.[157] He even

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[154] *Id.* at 3.

[155] *Cf.* Ellen Wexler, *Student Loan Lessons From Abroad: Could Student Loan Repayment Models from Other Countries Work in the United States?*, INSIDE HIGHER ED (June 14, 2016), https://www.insidehighered.com/news/2016/06/14/what-other-countries-can-teach-us-about-student-loans.

[156] Thies, *supra* note 41, at 3–4.

[157] *See* Andrew Josuweit, *Where the Candidates Stand on Student-Loan Debt*, CNBC (Apr. 4, 2016, 2:08 PM), http://www.cnbc.com/2016/04/04/where-the-candidates-stand-on-student-loan-debt-commentary.html.

unveiled a plan in October of 2016 to curb the default issue, suggesting that payments be capped at 12.5 percent of discretionary income and that all loans be forgiven after fifteen years of timely payments.[158] In a move that was called a "clear effort to court the millions of Americans struggling with the high cost of college,"[159] Trump laid out a plan that's not wildly different from what we have now, but if history is any indication of the future, he could easily change his mind at any moment.[160] With our newly-elected Republican Congress, it is also unlikely that a student-friendly change in this system will be coming any time soon.[161] In these times, it's even more important that we pressure our leaders to ensure that the fundamental, fixable problems of our student loan system are adequately addressed.

V. CONCLUSION

The 2016 election brought a white-hot spotlight to the student loan crisis.[162] In fact, fixing the broken student loan system and creating free public college was a center-point of Bernie Sanders's campaign for president.[163] Republicans predictably spun Sanders's stance on the issue as a ploy to woo millennials with "free stuff."[164] Other than to trash relief efforts, Republican leadership and President Donald J. Trump have rarely spoken on

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[158] Danielle Douglas-Gabriel, *Trump Just Laid Out a Pretty Radical Student Debt Plan*, WASH. POST (Oct. 13, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/10/13/trump-just-laid-out-a-pretty-radical-student-debt-plan/?utm_term=.2fea53cb2b36.

[159] *Id.*

[160] *See* Jane C. Timm, *The 141 Stances Donald Trump Took During His White House Bid*, NBC NEWS (Nov. 28, 2016, 11:59 AM), http://www.nbcnews.com/politics/2016-election/full-list-donald-trump-s-rapidly-changing-policy-positions-n547801.

[161] *See* Farran Powell, *3 Student Loan Reforms to Expect Under Trump*, U.S. NEWS & WORLD REP. (Jan. 31, 2017, 10:00 AM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-01-31/3-student-loan-reforms-to-expect-under-trump.

[162] *See, e.g.* Linda Bell, *Millennials Drowning in Student Loans Play Key Election Role*, FOX BUSINESS (Aug. 3, 2016), http://www.foxbusiness.com/politics/2016/08/03/millennials-drowning-in-student-loans-play-key-election-role.html; Danielle Douglas-Gabriel, *How Student Debt Became a Presidential Campaign Issue*, WASH. POST (May 24, 2015), https://www.washingtonpost.com/business/economy/how-student-debt-became-a-presidential-campaign-issue/2015/05/24/1463948e-f41c-11e4-b2f3-af5479e6bbdd_story.html; Andrew Josuweit, *Student Debt Is Already a Hallmark Issue for 2016*, HUFFINGTON POST: THE BLOG (Nov. 3, 2015, 4:10 PM), https://www.huffingtonpost.com/andrew-josuweit/student-debt-is-already-a_b_8392530.html.

[163] *See It's Time to Make College Tuition Free and Debt Free*, BERNIE, https://berniesanders.com/issues/its-time-to-make-college-tuition-free-and-debt-free (last visited Jan. 8, 2017).

[164] Joan Venochi, *When Did Democrats Become the Party of Free Stuff?*, BOS. GLOBE (Oct. 15, 2015), https://www.bostonglobe.com/opinion/2015/10/15/when-did-democrats-become-party-free-stuff/1YmL3ZhiS3mXldHsyiPTfP/story.html.

the student loan crisis.[165] Any solution is almost certainly going to require major changes in our higher education system and the relationship between the higher education consumer and the federal government. It's not at all clear what President Trump and the Republican Congress will do for students who are struggling.[166] One thing *is* clear, however: we cannot go on like this.

It is absolutely necessary that the federal government act now to ensure ongoing access to higher education. To not do so would jeopardize quality of life for over 40 million people while allowing an unstable investment scheme to profit from the misery.[167] To not take this immediate federal action would impact the ongoing ability of the United States to train and retain qualified workers in fields that require higher education, while also perpetuating a zero-sum system that discourages borrowers from participating in the short-term goods and services market, dragging down economic performance. To prevent these potentially catastrophic results, the federal government should make all public colleges and universities, including professional schools, tuition-free.

Law students are currently being saddled with a large portion of the student loan burden. To ensure that access to this profession is not hindered by the incredible financial gamble law school requires, law students, professors, administrators, and practitioners should advocate without pause for a better system—one that puts students over profits and ensures that education dollars are being used to their fullest towards this end. Equal and less-burdensome education will be the advocacy of millennial lawyers in the coming years. This is our issue to take up. Our profession suffers when the gates to participation require a toll that many cannot pay. Law schools, and ultimately the legal profession itself, benefit extraordinarily from students who come from all socio-economic backgrounds.[168] The time for free higher education is now. The time for a better system—one that promotes payment to the public, instead of to the piper—is now. If there ever was a profession built to convince the masses that there must be massive changes in a system built on failure, the law would have to be that profession. Ironically, the profession most drastically impacted by this antiquated dysfunctional system

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[165] *See* Allesandra Lanza, *5 Possible Student Loan, Higher Ed Impacts of a Trump Presidency*, U.S. NEWS & WORLD REP. (Nov. 16, 2016, 10:00 AM), http://www.usnews.com/education/blogs/student-loan-ranger/articles/2016-11-16/5-possible-student-loan-higher-ed-impacts-of-a-trump-presidency.

[166] Bill Nelson, *Will Student Struggling with Debt Benefit Under Trump*, CNBC (Jan. 12, 2017), https://www.cnbc.com/2017/01/12/will-students-struggling-with-debt-benefit-under-trump.html.

[167] Blake Ellis, *40 Million Americans Now Have Student Loan Debt*, CNN MONEY (Sept. 10, 2014), http://money.cnn.com/2014/09/10/pf/college/student-loans/index.html.

[168] *See* Edward T. Kang, *Diversity and Its Impact on the Legal Profession*, LAW PRAC. TODAY (Sept. 14, 2016), http://www.lawpracticetoday.org/article/diversity-impact-legal-profession.

may be the one most specifically and uniquely equipped to advocate for its eradication. The time is now. Let's get to work.