

# Where Do We Go From Here?\*

## International Students, Post-Pandemic Law Schools, and the Possibilities of Universal Design

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*Following on our earlier research on the experiences of international students, this article uses the recent global pandemic as a revealing lens to revisit structural inequalities in American law schools. Over the years, law schools have simultaneously encouraged international student enrollment and functioned in ways that have marginalized these students. We suggest that this dissonance between postured inclusion and the actual experience of exclusion these students endure highlights important ways in which law schools' commitments to equity and inclusion more generally can appear more performative than substantial. We argue that the pandemic has made stark inequalities that have always existed, and that despite its devastating consequences, this period offers new insights that could help reshape the future of legal education. Focusing on specific teaching and learning innovations (e.g. virtual learning), we begin to deliberate on the ways that law schools can better address inequality as they resume in-person activities. Ultimately, we caution that as law schools emerge from the pandemic, they ought to resist the urge to return to their old normal ways of doing equity. Instead, by concentrating on the differential needs of diverse students, there might be an opportunity for a collective shift to avoid recentering past embedded inequalities.*

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\* The question in the title is taken from Andrew Lloyd Webber & Tim Rice, "You Must Love Me", soundtrack (Warner Brothers, 1996) (for the film adaptation of the musical *Evita*).

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[See acknowledgements at the end of this article.]

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## I. Introduction

Although market instability is not traditionally associated with the incapacitation of educational institutions,<sup>1</sup> the current COVID-19 crisis may have put in motion a range of ‘long haul’ effects for students and schools alike to contend with. While the impacts during this time have been innumerable across educational contexts,<sup>2</sup> we use this article to trace the ways in

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<sup>1</sup> Crisis studies usually show that education is the most resilient institution during times of instability. While reductions in income and increases in tuition prices could have negative effects on enrollment, growing unemployment usually has the opposite effect by reducing the foregone costs of attending school. Research on the great recession, for example, suggests that college attendance levels increased during the recession, especially in the states most affected in terms of rising unemployment and declining home values, but it was part-time enrollment that grew while full-time enrollment declined, see Jeffrey R Brown & Caroline M Hoxby, eds, *How the Financial Crisis and Great Recession Affected Higher Education*, 1st ed (Chicago: University of Chicago Press, 2014).

<sup>2</sup> COVID-19 is no doubt, as scholars from the Abdul Latif Jameel Poverty Lab (J-PAL) show, “exacerbating the learning crisis”, but it also allows for a new framework to transform these systems especially as they affect parents, teachers, and students. On the possibilities this offers schools, see Radhika Bhula & John

which law schools have had to deal with a set of interconnected unpredictabilities, especially around recruitment and retention of their international students. International students are a useful demographic to observe and learn from for several reasons. Over the last 20 plus years, these students have grown to be a substantial proportion of all law students,<sup>3</sup> and their enrollment has more than doubled in terms of numbers and rate of proportionate representation within the larger student population in law schools.<sup>4</sup> This growth is significant not only because it has changed the composition of students, but because it has altered the financial dependencies of schools on these students and, more centrally, their rhetoric about being globally committed organizations.<sup>5</sup> International students often pay full tuition

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Floretta, “A Better Education for All During – and After – the COVID-19 Pandemic” (16 October 2020) *Stanford Social Innovation Review*.

- 3 We use this general statement about proportionality because more specific figures on the proportion and rate of growth of international students in US law schools are unavailable. See *infra* at notes 21 and 61. For more on the dearth of reported data about LLM programs, see also Carole Silver, “What We Know and Need to Know about Global Lawyer Regulation” (2016) 67 *South Carolina Law Review* 461.
- 4 Carole Silver & Swethaa S Ballakrishnen, “Sticky Floors, Springboards, Stairways & Slow Escalators” (2018) 3 *UC Irvine Journal International, Transnational, and Comparative Law* 39 at 49–50 [Silver & Ballakrishnen, “Sticky Floors”].
- 5 Curricular reform around internationalization was identified in a study by the ABA Section of Legal Education and Admissions to the Bar in 2012, see Catherine L Carpenter, ed, *A Survey of Law School Curricula: 2002-2010* (Chicago: American Bar Association, Section of Legal Education and Admissions to the Bar, 2012) at 74. These reforms include mandatory courses on issues related to international, transnational or global legal matters at a handful of law schools, see *e.g.* Harvard Law School’s requirement of an upper level international and comparative law course, “J.D. Degree Requirements Quick Reference” (2022), online: Harvard Law School <[www.hls.harvard.edu/dept/registrat/registration-information/jdreferenceguide/](http://www.hls.harvard.edu/dept/registrat/registration-information/jdreferenceguide/)>; and the University of Michigan Law School also requires an international or comparative law course prior to graduation, “Degree Requirements & the Degree Audit Report (DAR)” (2020), online (pdf): University of Michigan Law School

for legal education, particularly in LLM degree programs, often without aid or loans from their United States law schools.<sup>6</sup> At the same time, beyond financial

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<[www.law.umich.edu/currentstudents/registration/Documents/JD%20Regulations%20-%20Current.pdf](http://www.law.umich.edu/currentstudents/registration/Documents/JD%20Regulations%20-%20Current.pdf)>. Law schools also focus on globalization through journals and moot court opportunities, N William Hines, “Ten Major Changes in Legal Education Over the Past 25 Years” (November 2005) *AALS News*. See generally Carole Silver, “Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?” (2014) 82:6 *Fordham Law Review* 2869 (describing the ABA’s regulatory stance with regard to central issues relating to globalization in US legal education) [Silver, “Globalization and Monopoly”]; and Carole Silver, “Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.” (2013) 24 *Stanford Law and Policy Review* 457 (describing the substantial influence of globalization on curricular reform in law schools at 469) [Silver, “Getting Real”].

- <sup>6</sup> In an earlier study of international LLM graduates who earned their degrees in the late 1990s and 2000, Silver found that a full 40% of her sample “relied exclusively on personal and family resources to pay for the LLM . . .”. Carole Silver, “Agents of Globalization in Law” (2009) *Law School Admission Council Grants Report No 09-01* at n 45; this was consistent with findings about sources of support for international students in higher education generally at that time, according to the Institute for International Education [Silver, “Agents of Globalization in Law”]. Moreover, this reliance on only personal or family savings did not differ based on the student’s home country, Silver, “Agents of Globalization in Law”, *ibid* at 7. Only 2% of respondents in Silver’s study relied exclusively on their US law school’s funding for tuition, Silver, “Agents of Globalization in Law”, *ibid*. More recently, law schools have had to invest in attracting international students to their LLM programs, although the amounts provided in funding are substantially lower than what is invested for JD students on a per-student basis. See generally Carole Silver, “Coping with the Consequences of ‘Too Many Lawyers’ Securing the Place of International Graduate Law Students”, (2012) 19:2 *International Journal of the Legal Profession* 227 at 230 (describing these findings) [Silver, “Coping with the Consequences”]. For a more current analysis of the importance of international students to the funding of higher education generally, see Karin Fischer & Sasha Aslanian, “Fading Beacon” (2 August 2021) *The Chronicle of Higher Education*:

[t]he chief motivation for American colleges to attract students from abroad has shifted over time: It began as an act of benevolence, became a tool of diplomacy, then evolved into an important part of their business model . . . [According to Professor Liping Bu of Alma College, “When I came here, in

dependency, international students afford us an important lens into understanding the experiences of precarious students more generally<sup>7</sup> and, with this, the hostility of institutions that house them. In particular, this period of

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the '80s, foreign students were sponsored by these universities. And now it's foreign students' money in the universities that provide scholarships for American students'] . . . International students not only helped hold tuition down and make up for lost state support. They also provided a financial windfall for college towns and for the American economy as a whole. The US Department of Commerce estimates international students' financial impact is \$44 billion a year. Higher education has become one of the United States' largest service exports, equal to annual exports of soybeans, corn, and textile supplies combined. From 2006, when enrollments from abroad began to climb, to their all-time high, of nearly 1.1 million in 2018, the number of international students in America more than doubled;

Julia Wang, "The Burden of Being Asian American on Campus" (15 August 2016) *The Atlantic*:

[s]tudying in the U.S. has a big price tag. This has led to a disproportionate representation of the wealthy and elite from China on American campuses. Public universities, suffering from a loss of funding after the 2008 financial crisis, have looked to international, and particularly Chinese, students for a full-tuition boost to their budgets. . . . While some financial aid is available to international students, there are vastly fewer funds, and most universities are not need-blind in their admissions processes for applicants from abroad;

and Bianca Quinlantan & Lauraine Genota, "Colleges Beg Biden to Save International Student Enrollment" (29 May 2021) *Politico* ("[s]tudents from abroad often pay the full sticker price on tuition and fees, making them desirable to admit").

- 7 Swetha S Ballakrishnen & Carole Silver, "Language, Culture, and the Culture of Language: International Students in U.S. Law Schools" in Meera Deo, Mindie Lazarus-Black & Elizabeth Mertz, eds, *Power, Legal Education, and Law School Cultures* (England: Routledge, 2020) at n 25 (a third year international JD student, Emily Ye, for example, explained the importance of including an international LLM from the Caribbean on a panel about marginalized voices on campus, who spoke:

about the foreign student and LLM experience. I think having her on the panel that I was a part of really brought in another layer of marginalized voices, because she was bringing forth to all the professors the fact that there are students from different places who have a different perspective to bring to the classroom, that sometimes aren't invited to bring it, so they feel awkward, or they feel like it's unnecessary, and so they just don't say anything.)

[Ballakrishnen & Silver, "Culture of Language"].

instability helps highlight anew the ways in which schools' commitments to equity and inclusion might be more performative integration than substantial commitment and performed reality. In unpacking the possibilities and precarities that legal education has inherited from this pandemic, we ask whether there is 'hope' of returning to normal and if normal was ever hopeful to start with. Instead, we offer that this time has new insights into existing and persistent structural inequities that could offer a new turning point for legal education. At the same time, we feel compelled to caution that any institutional amnesia that schools return to once normal feels accessible could have great costs.

This inquiry follows a strain of our research that has focused on this inequality inherent in the international law student experience.<sup>8</sup> In earlier work, we describe, from the student perspective, the unique difficulties of being a non-model student in the law school context, where the model or ideal student is one who holds American citizenship and for whom the cultural references replete in US law classrooms are innate.<sup>9</sup> On the one hand, we suggest that there is a sense among international students that they are similar to their domestic peers in that all opportunities are at least theoretically available to them and that the temporary nature of their presence does not shape curricular or career search decisions.<sup>10</sup> On the other hand, beyond functional factors like grades and visas, the everyday experiences of international students in these elite spaces are rife with affective distancing and hurdles that compromise their sense of

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<sup>8</sup> Silver & Ballakrishnen, "Sticky Floors", *supra* note 4; Ballakrishnen & Silver, "Culture of Language", *supra* note 7; Swethaa S Ballakrishnen & Carole Silver, "A New Minority? International JD Students in U.S. Law Schools" (2019) 44:3 *Law & Social Inquiry* 647 at 669–70 [Ballakrishnen & Silver, "New Minority"]; and Silver, "Getting Real", *supra* note 5.

<sup>9</sup> Ballakrishnen & Silver, "New Minority", *ibid* at 669–70; and Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 203–10.

<sup>10</sup> But see Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 216–7 (describing certain curricular choices as reflecting what a 2L Korean international JD student described as the goal of avoiding "play[ing] a catch-up game with other students who were . . . born and raised in an environment where they . . . would just have a more . . . fundamentally solid knowledge of the system to begin with . . .").

belonging.<sup>11</sup> Compounding the marginalization experienced by these students are differences in organizational factors, such as variations in degree programs and institutional resources for support.<sup>12</sup>

The period since the beginning of the pandemic has both brought to keen light and exacerbated many of these existing concerns. With increasingly unreliable cues from national and international institutions managing risk, schools were anxious about losing their international students during the pandemic when international travel was prevented by travel restrictions, embassy closures and general fear. This is understandable, especially given the nature of these student enrollments. Our research shows,<sup>13</sup> for example, that international students account for a larger proportion of the student body than particular other underrepresented minorities in many highly ranked schools, and that even outside of this elite group, this pattern remains noticeable, particularly in schools with a strong international reputation or located in a major metropolitan area.<sup>14</sup> For certain law schools, even during the 2020-2021 academic year when the pandemic was in full swing, international students were a significant segment of the student population, and in fact were a larger group proportionate to the aggregate student body than Black, Asian or Latinx students.<sup>15</sup> These demographics are important because they highlight the ways in which practical institutional responses to a major demographic within its population helps articulate its larger vocalized cultural commitments.

We continue our focus here on inequality and international law students by using preliminary lessons from COVID-19 and the related experience with online legal education as a framework for helping law schools reconsider their

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<sup>11</sup> Ballakrishnen & Silver, “Culture of Language”, *supra* note 7.

<sup>12</sup> Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4; and Silver, “Getting Real”, *supra* note 5.

<sup>13</sup> Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4; Ballakrishnen & Silver, “New Minority”, *supra* note 8; and Ballakrishnen & Silver, “Culture of Language”, *supra* note 7.

<sup>14</sup> See *infra*, Table 1.

<sup>15</sup> *Ibid.*

approach to equity and inclusion in the particular context of the international student population. We frame our inquiry using comparative insights from before the pandemic and by focusing on questions of change in experience. For instance, we ask: did the different and unequal experiences of international students when law school was conducted in-person, prior to the pandemic, transfer over once life and legal education shifted to being virtual because of the pandemic? Did that shift to online classes and learning entirely undermine the value of law school for international students? Some have read our earlier research as suggesting that international students *should* (and perhaps would) wait out this period of online learning rather than lose the opportunity of in-person interaction and the chance to soak up US law school culture. But perhaps there are ways that a virtual learning environment might enable marginalized students to experience law school differently, and in turn, with more similarity to the experience of others in an online class, including the ideal law student. Finally, this article starts to deliberate on the lessons that law schools could take from the experiences of teaching and learning online in order to better address inequality once law schools resume in-person activities. What would it look like, we ask, to develop alternate coordinates of law school capital and credentials given these new hierarchies and structures? Particularly, could law schools rethink the inequities inherent in their activities and structures, and help re-establish corollary meanings attributed to legal education by students and potential employers, among others, to develop alternative models of value and assessment?

In engaging in this inquiry, we hope to be able to shed light on the ways in which these institutional spaces routinely exclude students that they initially were not conceived to include, often while alluding to the very commitments to globality and diversity that they act in dissonance from. Part II begins by framing our findings of international students before the onslaught of the pandemic. We highlight the demographic shifts in this category of students over the last several decades and show how many of the structural inequalities that were made more drastic by the pandemic existed well before its attack. We end by suggesting that these students deserve our attention not just because they are a growing subset



with institutional implications, but because their interchangeability implicates both their own experience as well as the experience of others who are seen to fit their category. In Part III, we consider how the pandemic both revealed and reinforced existing inequalities while also offering a new environment — online learning — for students to navigate. We suggest that this new space of exchange allowed for, what was on the face of it, a more inclusive system of participation while simultaneously reinforcing feelings of exclusion for those students least capable of handling its precarity. Students, for example, expressed the opportunities that online learning offered in aberration to the traditional classroom dynamic as an effective entry point for participation (recordings were made available, and, as one student offered, the ‘blue hand’ was simply easier to raise than a real hand), but these new ways of counting participation did not make up for the ways in which these students continued to be structurally isolated by the administration. From time differences for class schedules to visa paperwork, lack of proximity made these students feel even more isolated than they might have in other circumstances, resulting in a reckoning about the value and meaning of a virtual credential. In Part IV, we consider how the experiences of the pandemic could lay the groundwork for reconceiving legal education to offer more opportunity for different kinds of students who otherwise have not, and likely cannot, gain from the pre-pandemic version. We suggest that these inequalities that the pandemic has made stark have always existed and that the pandemic could offer us a new way of thinking about the future of legal education that could build more universally equitable choices. We conclude with a warning about reverting to the pre-pandemic norm in lieu of navigating the way forward by embracing the incorporation of universal design principles into legal pedagogy and planning more agentially.

## **II. Pre-Pandemic Lessons: Looking Back without Rose-Colored Glasses**

To focus on international law students may convey a sense of homogeneity, but international students vary in important ways that shape how they experience

law school in the US and how they can use it to gain an advantage.<sup>16</sup> These differences include the obvious, such as home country and the degree program they pursue in the US, for example. Moreover, their experiences prior to beginning their US legal studies can prime them for different experiences and consequences arising from their US credentials. In fact, our research shows that these variations are not just structural or categorizable. While schools are likely to categorize students as technically international based on their documents, the experiences of students are predicated on factors well beyond how they are coded. Factors that contribute to these differences include, for example, a range of experiential attributes like whether they studied in the US or outside of their home country; non-education-based experiences with the US and third countries; their confidence and experience working and studying in English; familiarity with US popular culture and civic history; and their career aspirations, among other things. The many permutations of these characteristics and experiences give us a variance and texture to understanding the cohorts of international students present in these institutions. It also reveals the stickiness of the stereotypes that are traditionally attributed to them, and the problematic assumptions made by institutions to categorize them for efficiency.

In earlier work, we have used the difference between the JD and LLM degrees to analyze, as well as complicate, this question of institutional categorization and its dissonance with lived experience.<sup>17</sup> The one-year LLM degree continues to house the lion's share of international students enrolling in US law schools. After completing a first degree in law at home or in another country, students pursue the LLM for a variety of reasons, including that it is perceived as a valuable experience and credential in their home countries.<sup>18</sup> This value stems from a host of potential gains and experiences, from improving their ability and confidence about working in English, learning about a particular area of law, and being eligible to sit for a US bar exam, all of which are seen as

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<sup>16</sup> Ballakrishnen & Silver, "New Minority", *supra* note 8.

<sup>17</sup> Silver & Ballakrishnen, "Sticky Floors", *supra* note 4; Ballakrishnen & Silver, "New Minority", *supra* note 8.

<sup>18</sup> Silver & Ballakrishnen, "Sticky Floors", *ibid* at Figure 1.

important by home country employers, global law firms and the international and US-based clients of both. As one LLM graduate recently wrote, looking back on her year in the US for the LLM many years later, she learned: “US Law, but perhaps even more meaningful: the importance of and sensibility for cultural differences in anything I do, as well as . . . how important it is to find the right words and gestures in every situation”.<sup>19</sup>

But for a variety of reasons, including regulation and rankings, the LLM program is inherently marginal in US law schools. The regulatory framework governing law schools relegates the LLM to a second class status vis-à-vis the JD.<sup>20</sup> US News & World Report’s rankings — arguably the most influential force structuring the internal hierarchy of law schools<sup>21</sup> — reinforce this by excluding LLMs from its ranking of law schools.<sup>22</sup> These same forces have allowed a lack of disclosure about the LLM — enrollment patterns, job

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<sup>19</sup> Marion Welp, “When a circle closes” (July 2021), online: *LinkedIn* <[www.linkedin.com/feed/update/urn:li:activity:6824320234040635393/](https://www.linkedin.com/feed/update/urn:li:activity:6824320234040635393/)> (an LLM graduate looking back on her experience in the US for the LLM).

<sup>20</sup> By “regulatory framework” we refer to the rules adopted by the Council of the American Bar Association’s Section of Legal Education and Admissions to the Bar, which is authorized by the Department of Education to create and oversee the regulatory and monitoring framework for US law schools.

<sup>21</sup> Wendy Espeland & Michael Sauder, *Engines of Anxiety* (New York: Russel Sage Foundation, 2016).

<sup>22</sup> Some of the quandary surrounding the LLM stems from the policy implications that derive from its regulatory position, while others reflect the LLM’s exclusion from the ranking regime of US News. The ABA Council does not regulate LLM programs; rather, it ‘acquiesces’ in their existence as long as they do not undermine the integrity of the JD degree. Moreover, LLM students are not considered part of the US News & World Report ranking system in assessing law schools, which enables schools to create an off-the-books system for LLMs that funds the law school but does not ‘count’ against it in terms of rankings. Combined, these two factors provide a basis for law schools to justify different treatment for LLM and JD students, including resources devoted to each on a variety of matters, from scholarships to clinical seats to career advisors. Indeed, one might argue that to do anything else would be foolhardy, given the importance of US News. Silver, “Globalization and Monopoly”, *supra* note 5.

outcomes and more — to become acceptable, too.<sup>23</sup> As Samvar Gupta, an LLM graduate, commented: “[s]o long as the academic institutions focus on the JD course for purposes of school ranking and for purposes of accreditation, [the] LLM is just money making project for most schools . . . ”.<sup>24</sup>

These structural factors also impinge on the experiences of students in an LLM program. That same sense of marginality that characterizes the degree program seeps into the interpersonal experiences of students. LLM graduate Mateo Serrano, for example, described the interaction with JD students as:

always kind of distant. And again, . . . they were intimidating at the beginning. They ignored us completely, like if we didn't [exist]. . . [W]e were taking the same classes . . . and I was looking at them, and they just are looking at you like [you] are made of glass. They just don't see you. Again, that was obviously

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<sup>23</sup> See *e.g.* “Statistics” (2022), online: American Bar Association <[www.americanbar.org/groups/legal\\_education/resources/statistics/](http://www.americanbar.org/groups/legal_education/resources/statistics/)> (disclosing overall enrollment for non- and post-JD programs only sporadically, undifferentiated by degree, and without student demographic information that would parallel JD disclosure); and “509 Required Disclosures” (2022), online: American Bar Association <[www.abarequireddisclosures.org/](http://www.abarequireddisclosures.org/)> (standard 509 disclosure does not reflect LLM or other non-/post-JD degree students).

<sup>24</sup> I0611. Interviews with international law students and graduates, and with their employers and law firm hiring partners practicing with elite national and international law firms, were conducted as part of our ongoing research (separately and together) exploring globalization, legal education and the legal profession. Interviewees are referred to by a pseudonym derived from lists of common given and surnames in the interviewee’s home country. American names were assigned to interviewees who used American names. Interviews are cited by reference to a numerical code in the format of “I0611,” where “I” refers to interviews conducted with a single interviewee, “G” to those conducted in a small group. The next two digits refer to the year when the interview was conducted (2006) and the last two digits reflect the numerical code for the particular respondent (*e.g.* “11”); where a single respondent was interviewed multiple times, a letter following the interview number indicates which of the interviews is being referenced (*i.e.* I1933A would indicate this is the first of the interviews for respondent 33, and that it was conducted in 2019); page references to interview transcripts are indicated following a comma, where relevant [Interviews].

intimidating ... And then one of these JD students told me, like, you know, what he said, ‘It’s not because they are not friendly, they don’t know how to communicate with you guys; they don’t know what you are doing, and what’s it all about.’ So ... they are busy focusing on their studies, and I understand, ... but still, it doesn’t prevent anybody from keeping the relationship of their classmates. But again, I found actually a big gap between JD students and LLM students.<sup>25</sup>

Even the ability of students to get jobs in the US and interact in this way with others in the legal profession is constrained. The job search experiences of international LLMs often results in frustration and a sense of further marginalization. From the perspective of law schools, this is a rational consequence of both regulatory oversight by the Section of Legal Education and the rankings’ focus on job outcomes.<sup>26</sup> But international students — whether in the LLM or JD program — see opportunities to practice in the US as a way to deepen the value of their education, at a minimum. One LLM graduate described that: “[i]f you . . . do . . . a global analysis of two years here [in the United States], one working in a law firm and one studying here, I would say

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<sup>25</sup> Carole Silver, “States Side Story: ‘I like to be in America.’ Career Paths of International LLM Students” (2012) 80:6 *Fordham Law Review* 2383 at n 68 (quoting Mateo Serrano, I0861) [Silver, “States Side Story”]. The cluelessness of JD students was confirmed in a study conducted through the Law School Survey of Student Engagement that asked JDs about their perceptions of and experiences with international LLMs. Thirty percent of the respondents indicated that they “were not sure whether their school offered a graduate program in which foreign law school graduates could enroll. By the time [of the survey] even first-year students had completed nearly an entire academic year in law school”. Silver, “Getting Real”, *supra* note 5 at 479. LLMs shared this frustration; Samvar Gupta described his sense of exasperation with the in-class experience: “[i]n some respects the LLMs were like UFOs. They did not intensively participate in any course because they either lacked the depth or the confidence”, Interviews, *ibid*, I0611 at 9.

<sup>26</sup> See note 22, *supra*; Silver, “States Side Story”, *ibid* at 2414, n 100.

that 70% of importance is working here”.<sup>27</sup> Central to the value of international legal education is the *potential* for geographic mobility, and that potential is one of the attractions that US law schools promise.<sup>28</sup> In part, this is made possible by liberal bar rules of particular US jurisdictions that accept the LLM as sufficient for bar eligibility, which distinguishes the US from many other countries.<sup>29</sup>

But while the potential for working in the US is established through state regulation, operationalizing it is challenging. For JDs, there are elaborate structures and entire offices in place to help them find post-graduation employment. They include on-campus interviewing by law firms and even firm-hosted receptions, often held at law schools. For the most part, these structures are unavailable to LLMs.<sup>30</sup> While these activities and resources are not generally intended to include LLMs, occasionally LLMs attend. Mingxia Lai, a recent international LLM graduate, described her experience:

I went to a lot of receptions, especially law firm receptions, even though they were not for LLMs. But I really want to stay [in the US], so I will try everything. . . . I was invited to [law firm name]’s reception in NY, and was the only [law school name] Chinese student invited. That was the first official reception for LLMs that I attended. I was so nervous. Everyone was trying to attract the

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<sup>27</sup> Carole Silver, “The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession” (2002) 25:5 Fordham Journal of International Law 1039 at 1059 [Silver, “Case of the Foreign Lawyer”].

<sup>28</sup> Silver, “Agents of Globalization in Law”, *supra* note 6 at 18. Indeed, the frustration of this potential was one reason that the Trump rhetoric was devastating to the market for international students in fields well beyond law.

<sup>29</sup> For general information on the eligibility of lawyers educated in one country to qualify in another, see “International Trade in Legal Services, IBA Global Cross Border Legal Services Report” (2022), online: International Bar Association <[www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/BIC\\_ITILS\\_Ma](http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Ma) p>.

<sup>30</sup> Comments from LLM students and graduates about their frustration with the lack of equivalence in law school career search opportunities have been a consistent theme over the course of our research on international legal education, see *e.g.* Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4 at n 41.

partner's attention in a short time. I learned a lot about how to do it, by watching and practicing from very little things. You don't need to wait for a partner to talk to you, you can start the conversation.<sup>31</sup>

Another LLM student, Qiang Bai, commented on the paths he saw as leading to the possibility of a US-based job:

US law firms, they don't post internships or entry-level positions on their website. They just do OCI's, which is not available for LLM students. So, the only way I have left is only two ways. First, to seek a referral, which some of my previous professors or people I have encountered, they referred me to some firms, but then there is just no word. Second, I just send emails to HR's and people I've talked with during network events at school.<sup>32</sup>

LLMs have described hiring recruiting agencies to help them with jobs, among other things,<sup>33</sup> tactics that are quite unusual for JDs, and tactics that do not always help these students because of the relative ways in which they are perceived by their prospective employers.<sup>34</sup>

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<sup>31</sup> Interviews, *supra* note 24, I1550.

<sup>32</sup> *Ibid*, I1552.

<sup>33</sup> Silver & Ballakrishnen, "Sticky Floors", *supra* note 4 at 60.

<sup>34</sup> The LLM degree is viewed with skepticism by certain prospective employers, who see it as a potentially weak preparation for their work environments. This stems at least in part from the flexibility of the degree, which in turn harkens back to the lack of regulatory oversight mandating a particular curriculum. That flexibility is seen as an asset by many LLM students and law schools, but it can be seen as a liability in assessing the degree, particularly in comparison to the JD, which has such strong signaling with regard to curriculum. For example, the comments of a global law firm managing partner, explaining why his firm preferred JD graduates to LLMs, highlights the ambiguity that the LLM can convey: his firm, he said, sought to hire lawyers "[t]rained in the US. Really trained in the US, not as an LLM where they kind of went to class, didn't learn very much but got a degree, not to belittle the LLM programs but it's way different from somebody that's in a JD program at a top tier law school"; Carole Silver, "The Variable Value of US Legal Education in the Global Legal Services Market" (2010) 24:1 *Georgetown Journal of Legal Ethics* 1 at 48. See also Carole Silver, "Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers" (2005) 45:4 *Virginia*

These limitations, along with the consequence of growth of the LLM being a reduction in its ability to serve as a mark of distinction for graduates, contextualize the shift of a growing number of international students interested in law to opt for the JD degree over the LLM. As mentioned earlier, our research suggests that the division between these two degree paths is less distinct than it appears. Certain international students described intentionally pursuing the one-year LLM as a testing ground for their plans to earn a JD, for example,<sup>35</sup> while others transferred from an LLM to a JD once they were in the US. At the same time, though, there also exist a cohort of students for whom the LLM was not an option because they had earned their undergraduate degree in the US, for example, and saw themselves as more or less committed to the JD path, because they would have to repeat undergraduate studies to earn a qualifying law degree at home in order to satisfy the LLM admission criteria. These trajectories and international enrollment patterns are further explored below.

## **A. International Student Enrollment Trajectories**

While it is not possible to know how LLM programs were affected by the pandemic because of the lack of disclosure of LLM enrollment by the Section of Legal Education, disclosure requirements governing JD programs allow us to track the rise of international JD students. Generally, until about the time of Donald Trump's election, international student enrollment had been on the rise in US law schools, mirroring the larger trend that ran throughout higher education in the US.<sup>36</sup> At the same time, however, competition for international students, both in law school and generally, was heating up. In the law school context, much of this competition was aimed at the LLM graduate student population, coming particularly from other English-speaking common law

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Journal of International Law 897 at 912–3 (LLM does not do the same job of filtering and certification as the JD).

<sup>35</sup> Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4 at 61.

<sup>36</sup> *Ibid* at 40.



jurisdictions.<sup>37</sup> But the fluidity in the choice of degree program that we describe above, including applicants considering the LLM as a path to the JD, suggests that these forces also shape JD enrollment. And by 2016, when the pattern of increasing enrollment in the law school context had levelled off (Figure 1), the policies and rhetoric of the Trump administration made the work of US law schools and others in higher education harder to keep up, much less advance, in drawing additional international students to their programs.

Prior to this, the rise of international law student enrollment was particularly significant for law schools with elite reputations, as reflected in the US News rankings.<sup>38</sup> Despite the rhetoric and policies of the Trump administration dampening the enthusiasm of international students in US higher education generally, including in legal education, law schools continued to court international students, and they continued to comprise an important and relatively stable segment of new law students. Figure 1 shows the overall enrollment of international JD students, identified according to the need for a visa (reported as “non-resident” or “non-resident alien” in the ABA data). It shows a fall-off at the end of the Trump administration, particularly in the fall of 2020 when the COVID-19 pandemic made travel extremely challenging. But in the first years of the Trump administration, overall enrollment by

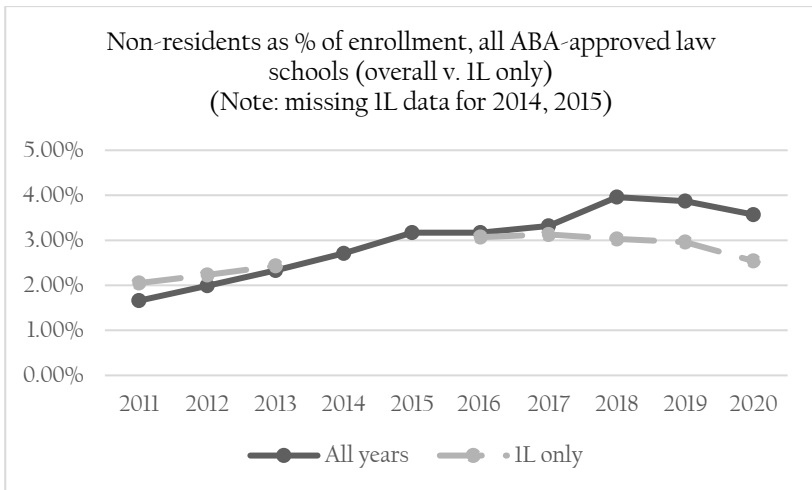
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<sup>37</sup> On competition for international law students, see Silver, “Coping with the Consequences”, *supra* note 6. On competition in higher education for international students, see Benjamin Mueller, “Western Universities Rely on China. After the Virus, That May Not Last” (16 April 2020) *New York Times*; and OECD, “Education at a Glance 2018: OECD Indicators” (2018), online (pdf): OECD Publication <[www.oecd-ilibrary.org/docserver/eag-2018-en.pdf?expires=1643316646&tid=id&accname=guest&checksum=68892D9D795932274688A4B43EEF30C6](http://www.oecd-ilibrary.org/docserver/eag-2018-en.pdf?expires=1643316646&tid=id&accname=guest&checksum=68892D9D795932274688A4B43EEF30C6)>. For statistics on the proportion of international students enrolled in specific countries, see Project Atlas, “A Quick Look at Global Mobility Trends” (2020), online: Institute of International Education <[www.iie.widen.net/s/rfw2c7rrbd/project-atlas-infographics-2020](http://iie.widen.net/s/rfw2c7rrbd/project-atlas-infographics-2020)>.

<sup>38</sup> Ballakrishnen & Silver, “New Minority”, *supra* note 8.

international JDs actually increased.<sup>39</sup> At the same time, first-year (1L) international JD enrollment was flat for much of the period from 2016 through 2019, falling off in approximately the same proportion as overall enrollment in the fall of 2020.<sup>40</sup>

**Figure 1: Non-resident enrollment in ABA-approved law school JD programs, comparing all years to only 1Ls (2011-2020)**



<sup>39</sup> According to the Institute for International Education (“IIE”), this follows the overall enrollment trend of international students at the undergraduate level in the US, too, which peaked in the 2017-2018 academic year. Graduate enrollment peaked in 2016/2017, “Academic Level” (2021), online: Open Doors <[www.opendoorsdata.org/data/international-students/academic-level/](http://www.opendoorsdata.org/data/international-students/academic-level/)>.

<sup>40</sup> This contrasts with overall trends in international enrollment in higher education during this period. According to the Institute for International Education IIE, new international student enrollment at the undergraduate level declined beginning in the 2016/2017 academic year and has continued declining since; graduate enrollment also dipped at the same time but has since stabilized, “New International Student Enrollment” (2020), online: Open Doors <[www.opendoorsdata.org/data/international-students/new-international-students-enrollment/](http://www.opendoorsdata.org/data/international-students/new-international-students-enrollment/)>.

The impact of Trump's rhetoric fell especially hard on Chinese students,<sup>41</sup> who also accounted for the largest group of LLM students and the second largest group of JDs.<sup>42</sup>

We have written elsewhere about the increasing importance of international students in the overall diversity of the law student population, which is particularly significant for highly-ranked law schools.<sup>43</sup> Indeed, as Figure 2 highlights, international students (identified as “non-resident” based on the source of data from the Section of Legal Education, which takes visa status as definitive) accounted for a larger proportion of the aggregate student body at a group of 20 highly-ranked law schools than did Black students beginning in the fall of 2014. This dynamic shifted, however, in the fall of 2020, when Black students accounted for a slightly larger proportion of the enrollment at these elite law schools compared to international students. We can only conjecture the reason for this change in enrollment pattern, but difficulty with travel and obtaining visas because of the pandemic, on top of the overall negative impact of the Trump administration on international higher education enrollment, may explain this shift.

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<sup>41</sup> Karin Fischer, “Is This the End of the Romance Between Chinese Students and American Colleges?” (11 March 2021) *The Chronical of Higher Education*. See also Swethaa S Ballakrishnen, Carole Silver, Anthony Park & Steven Boutcher, “Asian and Asian American Post-Pandemic Professional Identities” (working paper on file with authors).

<sup>42</sup> Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4 at 54, Figure 4. Information on home countries was obtained from visa data shared by Neil Ruiz, then of the Brookings Institution. See Ballakrishnen & Silver, “New Minority”, *supra* note 8 at 658.

<sup>43</sup> See Ballakrishnen and Silver, “New Minority”, *ibid.*

**Figure 2: Enrollment at 20 Highly-Ranked Law Schools, comparing proportion of Asian, Black, Latinx and Non-Resident (“NR”) students (aggregate years in school) (2011-2020)**

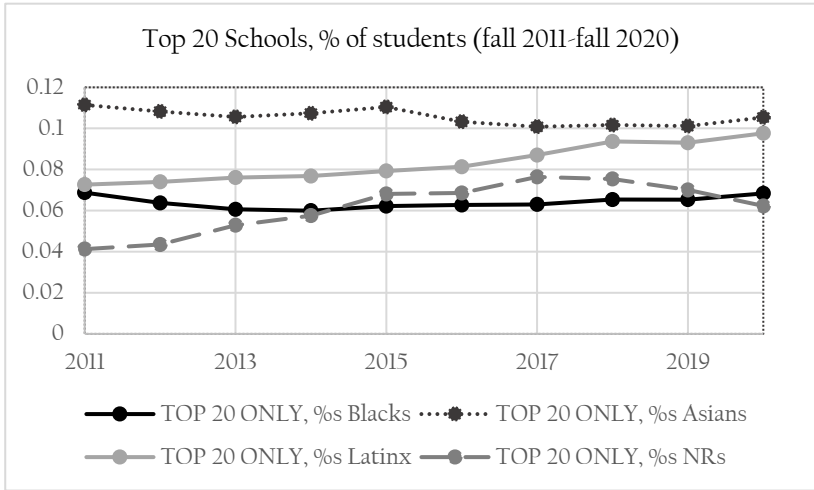
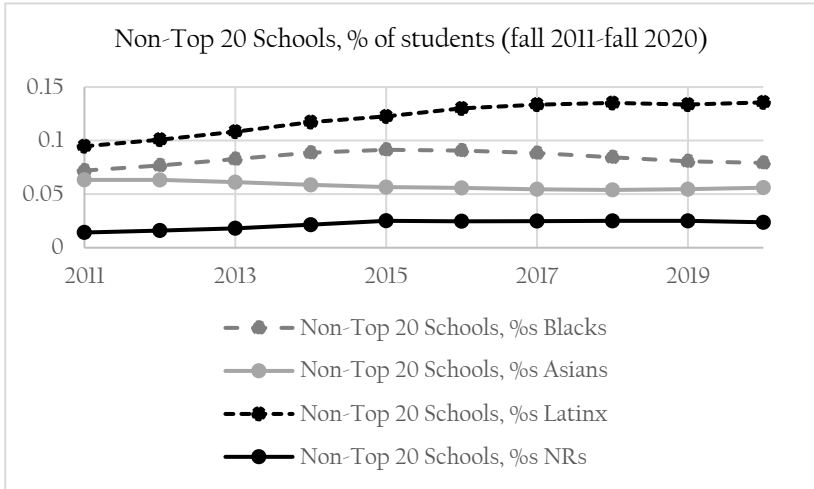


Figure 3, below, shows data comparable to Figure 2 but focuses on the law schools outside of the Top-20 ranking category. International students comprise a smaller proportion of this group’s enrollment, and they do not equal or exceed, in the aggregate, other minority groups. But their presence has been remarkably stable as a proportion of enrollment, comprising between 2.52% and 2.47% of the student body from the fall of 2015 through the fall of 2019, before dropping a bit to 2.37% in the fall of 2020.

**Figure 3: Enrollment at Schools Outside the Top-20, comparing proportion of Asian, Black, Latinx and Non-Resident (“NR”) students (aggregate years in school) (2011-2020)**



Aggregating the data masks important trends. In the fall of 2020, international students accounted for a larger proportion of the student population than Black, Latinx or Asian students at nearly 20% (19.29%) of all of the law schools, spanning various ranking tiers and characteristics. This is the case at eight of the 12 law schools that are part of public Big-Ten universities, seven schools in the Top-20 group and 24 additional law schools.<sup>44</sup> Table 1 offers some insight into the mix of schools where international students contributed in this way to the school’s diversity during the 2020-2021 academic year. There are various reasons that we highlight the schools below, including the relationship of the law school to its university and the reputation of the latter as being an important host of international students (Minnesota, Indiana and Wisconsin, among others), aggressive courting of the international student population, and the importance of location and proximity to the border or to an international city (for example, North Dakota and Brooklyn). That is, the

<sup>44</sup> Where the number of non-residents was exactly equal to — but did not exceed — the number of Black, Latinx or Asian students, we did not count the school for purposes of the analysis described in the text.

reasons why these schools are listed below reflect their own histories and strengths.

**Table 1: Enrollment details, comparing numbers of non-resident (“NR”), Black, Asian and Latinx students, for 15 sample law schools (2020)**

USN rank		# NR	Black	Asian	Latinx
4	Columbia	166	111	181	85
3	Harvard	175	139	190	180
13	Cornell	99	37	65	84
16	Washington University in St. Louis	72	60	49	29
27	George Washington	116	120	216	46
29	Emory	95	54	75	68
29	Wisconsin	28	28	21	70
29	Iowa	28	19	16	45
41	George Mason	12	8	27	35
43	Indiana (Maurer)	39	26	22	39
46	U. Arizona	44	9	10	48
72	Case Western	23	33	25	15
81	Brooklyn	71	45	103	121
126	Santa Clara	27	17	148	166
147 - 193	University of North Dakota	34	3	4	11

These enrollment figures highlight that even during the height of the lockdown during the pandemic, international students were a steadfast presence in US law schools. Some may have been residing in the US prior to the pandemic and opted to stay or simply decided not to leave (even assuming this

was an option).<sup>45</sup> Others could have enrolled while outside of the US given the reliance on online education during this period. Overall, they reflect the important role of international students, which is a trend going well beyond law schools. In fact, prior to the pandemic, one business school obtained insurance: “to protect against the loss of tuition revenue from any significant drop in Chinese student enrollment”.<sup>46</sup>

We highlight these data because they are central to the ways in which the changing demographics of these students might have reflected not just on particular students in specific kinds of programs, but rather, more generally on students that are perceived as international and in ancillary programs because of their reception within these environments. All of the factors we highlight in this Part II resulted in these students moving across categories not only for their own mobility but also in ways that were hard to distinguish from the perspective of those receiving them. As a result, despite some level of vagueness in the numbers of students across these programs, the general demographics of these students complicated the kinds of seamless similarities in how they were received. In other work<sup>47</sup> we suggest that because of the constant movement and immigration that predicated this mobility, there is a certain “interchangeability bias”<sup>48</sup> that

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45 Elizabeth Redden, “A Bleak Picture for International Enrollment” (26 May 2020) *Inside Higher Ed* (describing that international students who were in the US for high school might have remained here to begin college).

46 Marc Ethier, “Illinois Insures Itself Against Chinese Student Drop-Off, Poets and Quants” (29 November 2018) *Poets and Quants*.

47 Ballakrishnen et al, *supra* note 41.

48 Interchangeability — *i.e.* the experience of Asians being mistaken for another Asian in their organization or in a similar position — is not only an extraordinarily common experience in US culture, it is both dignity-stripping and capable of having longer term implications on professional plateaus for these actors. According to Jeff Yang, “an Asian American culture critic” . . . “[Mix-ups] stem[] from this different place where people tend to collectivize us in their imagination”, Brian X Chen, “The Cost of Being an ‘Interchangeable Asian’” (6 June 2021) *New York Times*, according to Yang:

[i]f one requirement to ascend in your career is to be distinguishable to people in power, it may come as no surprise, then, that Asian Americans — who make up 7 percent of the U.S. population and are the fastest-growing racial group

necessarily mires the fates of all students perceived as Asian, regardless of their histories. Moreover, international identity itself is socially constructed in addition to legal status, as we have explored elsewhere, and this can lead both to confusion in the reception of students by others, as well as affecting the self-perception of students who hold US citizenship while also having international backgrounds, whether reflecting where they attended primary or secondary school or where their parents resided, among other things.<sup>49</sup> No matter what their background was, then, and no matter how they hoped the program they were in would reshape their identity, for the most part, this visibility of being international was sticky. This encompasses both students perceiving that their international background somehow constrains them (whether in terms of curricular or career choices or their greater comfort with international friends) and that those they interact with see them as different (whether based on names, race or otherwise).<sup>50</sup> It is this stickiness that makes these trends important not just for those who are in fact international students, but also the implicated others who might be seen as being a part of this category.

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– are the least likely group to be promoted in the country, according to multiple studies. Even in Silicon Valley, where people of Asian descent make up roughly 50 percent of the tech workforce, a rare few rise to the executive level; most peak at middle management. The problem is especially acute for women.

<sup>49</sup> Ballakrishnen & Silver, “New Minority”, *supra* note 8. Our interviews of students who identify as international included US citizens and green card holders. Students who were citizens described a variety of reasons for their status and relationship to the US during childhood and adolescence, might have been born in the US but not spent substantial time here subsequently. See Ballakrishnen & Silver, “New Minority”, *supra* note 8 at 661–62 for examples from our interviews, and Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4 for a general discussion of the important factors to an international student’s experience in law school.

<sup>50</sup> Ballakrishnen & Silver, “Culture of Language”, *supra* note 7.



### III. Pandemic Reveals and Reinforcements: How Everything and Nothing Changed in March 2020

The onslaught of the pandemic had several direct and logistical implications for all students, and these were heightened for students whose lives were already riddled with precarity. International students complicated this balance because they were, for the most part, both less and more precarious than other minorities in this context.<sup>51</sup> While this is not a subset of students who have been defined by their economic disadvantage,<sup>52</sup> their position gets more complicated during a time like the pandemic when distance and presence, and prejudice of otherness<sup>53</sup> more generally, gets amplified. These students seemed to be last on

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<sup>51</sup> Among the factors that reflected resources available to students were access to a reliable internet connection, a quiet place for attending class online and for studying, privacy during exams and safety. See Heather Long & Danielle Douglas-Gabriel, “The latest Crisis: Low-Income Students are Dropping Out of College this Fall in Alarming Numbers” (16 September 2020) *Washington Post* (describing students without WiFi at home struggling to attend online classes and that “[s]tudents from families with incomes under \$75,000 are nearly twice as likely to say they ‘canceled all plans’ to take classes this fall as students from families with incomes over \$100,000, according to a U.S. Census Bureau survey in late August”); and Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, “COVID-19 and Learning Loss – Disparities Grow and Students Need Help” (8 December 2020), McKinsey & Company (blog), online: <[www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help](http://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help)> (describing particular impact of COVID-19 on students of color at pre-college levels due to the lack of resources needed to make online learning work).

<sup>52</sup> Indeed, international students often are courted because of their ability to pay full tuition. See Silver, “Agents of Globalization in Law”, *supra* note 6; and Branwen Jeffreys, “UK Universities See Boom in Chinese Students”, *BBC News* (“[t]he 120,000 Chinese students are an important source of income for universities because international students pay fees two to three times higher than UK students”). On the impact of international enrollment generally in higher education, see Mueller, *supra* note 37.

<sup>53</sup> The blame for the pandemic addressed to China by Trump and his administration was widely felt, including by students who were seen as Chinese, even if in fact they were not from China, Helier Cheung, Zhaoyin Feng &

the list of who was in mind as universities quickly adapted to the pandemic.<sup>54</sup> Moreover, with a full third of international students hailing from China,<sup>55</sup> their exclusion was seen as warranted by legitimate logics of immigrant threat, national security and fear, all of which were roiling the country. The shift to holding classes online occurred shortly before the Trump administration attempted to use visa regulations to put international students in the untenable situation of choosing between their health and maintaining their visa in good

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Boer Deng, “Coronavirus: What Attacks on Asians Reveal About American Identity” (27 May 2020) *BBC News*. Separately, one of our Korean students reported that he had been asked by his family to limit his time outside of his apartment as much as possible in order to avoid any acts of violence.

- 54 There was a rush to send students home when the pandemic struck, but for certain international students it was not possible to get home. Alex Schroeder, “Campus Chaos: International Students Navigate COVID-19 Closures” (18 March 2020) *Marketplace*.

[f]ive days. That’s all the time Woojin Lim, a sophomore at Harvard University, and his thousands of international classmates had to pack up, store their belongings and get on planes home after the school announced Tuesday, March 10 that it would be requiring students to leave campus over fears of the COVID-19 outbreak. Since then, hundreds of schools have followed suit [ . . . ].

See also Jonah Fox, “How Coronavirus Threw America’s International Students Into Chaos” (25 August 2020) *The College Post* (describing the financial costs of the pandemic for international students, including the price to fly home, travel disruptions, inability to work in the US to defray expenses, ineligibility for aid from the CARES Act to get home).

- 55 Institute for International Education, “2020 Fast Facts” (2020), online (pdf): OpenDoors <[opendoorsdata.org/wp-content/uploads/2020/05/Open-Doors-2020-Fast-Facts.pdf](https://opendoorsdata.org/wp-content/uploads/2020/05/Open-Doors-2020-Fast-Facts.pdf)>. The “Top Places of Origin of International Students” shows China as accounting for 34.6% of all international students.

standing,<sup>56</sup> and this assumed that in-person classes were even available.<sup>57</sup> As the immigration policy changes were announced, law schools — like other higher education institutions — attempted to calm and reassure international students that the schools had their backs. Messages like those from Harvard’s dean were common, telling students: “we will do all we can to help enable all of our students, from across the globe, to safely continue their law school education, earn their degrees and become great lawyers . . .”. Mary Lu Bilek, then dean of the City University of New York’s law school, explained that the school was: “committed to working with each [international student] to determine how to best accommodate their health and safety and educational needs consistent with the ICE rules”.<sup>58</sup> But how much of this signaling was actually on par with policy left more to be desired.<sup>59</sup>

On the one hand, law schools were simply responding to the larger regulatory regimes in which they were embedded. For example, in 2020, the ABA Council of the Section of Legal Education made a new exception for legal education to be virtual and still eligible for law school credit.<sup>60</sup> This was a

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<sup>56</sup> Max Cohen, “Trump Administration Bars International College Students If Their School’s Classes are All Online” (6 July 2020) *Politico* (“[i]nternational students who attend college in the United States on visas will be barred from staying in the country if their school’s classes are entirely online during the fall semester, the Trump administration said Monday”); Miriam Jordan & Anemona Hartocollis, “U.S. Rescinds Plan to Strip Visas From International Students in Online Classes” (16 July 2020) *New York Times*.

<sup>57</sup> Karen Sloan, “Law School’s Scramble to Retain Foreign Students Amid ICE Online Education Ban” (7 June 2020) *Law.com*.

<sup>58</sup> *Ibid.*, quoting both deans (among others).

<sup>59</sup> Based on a review of the websites of the top-50 ranked law schools in May and June of 2020, fewer than 10 schools specifically mentioned LLM students in early announcements relating to the fall of 2020. Even by the summer of 2020, many law schools omitted any mention of LLM students in their public communications about the 2020-2021 academic year.

<sup>60</sup> The Council of the ABA Section of Legal Education obtained authority to grant variances from the distance education credit limitation of one-third of all credits when the pandemic caused law schools to close their physical doors, “Council Moves to Expand Flexibility for Fall Academic Year” (2020), online:

required response to a raging public health crisis that would have otherwise derailed the course of these professional education trajectories, but it had mixed implications for international students. On the other hand, international students suddenly had more accessible options to US educational opportunities, but the shift to online classes also did not take their interests as central.<sup>61</sup> For example, it changed one of the main draws for many of these students, particularly those who had not spent significant time in the US prior to law school — the chance to be in the US and socialize within the law school environment before trying to make their way into an increasingly insular profession.<sup>62</sup> At the same time, bar regulators did not necessarily adapt in sync

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American Bar Association <[www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility/](http://www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility/)>; using this authority, they granted 199 variances during 2020, “Memorandum from the Office of the Managing Director of Accreditation and Legal Education” (2020), online (pdf): American Bar Association <[www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/20-21-distance-education-variances.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20-21-distance-education-variances.pdf)>. It is considering how to address distance education going forward, “Council of the ABA Section of Legal Education and Admissions to the Bar, Brief Overview of the Roundtable Questions and Discussions” (2021), online (pdf): American Bar Association <[www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/21-jan-roundtable-report.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/21-jan-roundtable-report.pdf)>.

<sup>61</sup> Because the change affected law schools, rather than particular degree programs, the issue of international students appears not to have been raised at the Council.

<sup>62</sup> The desire to live in the US as well as to experience a US college campus were among the most common reasons cited for enrolling in a US LLM program according to Silver’s study of international LLM graduates, Silver, “Coping with the Consequences”, *supra* note 6; and Silver, “Getting Real”, *supra* note 5. Apart from law, the same phenomenon is also widely understood as important, see *e.g.* Nadine Burquel & Anja Busch, “Lessons for International Higher Education Post COVID-19” (25 April 2020) *University World News*:

[o]nline education has many benefits. However, learners also search for networking on campus, exchanges, shaping of new ideas, project work (including with private sector companies and in the community) and working in groups. This can be done online but nothing will replace the

with these changes, so the eligibility of international LL.M.s to sit for a bar exam was at risk.<sup>63</sup>

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social and physical interactions that we all need as social beings. In business schools, MBA students pay significant tuition fees for the professional networks they develop and connections with professionals.

- <sup>63</sup> The District of Columbia’s Rule 46, which governs bar eligibility generally, was modified by an Order of the Court adopted on an emergency basis to provide that applicants who did not graduate from an ABA-approved law school (generally including international LL.M. students) could qualify for bar eligibility if they completed “at least 12 of the 26 credit hours . . . through in-person classroom courses in the ABA-approved law school”, meaning that students would have to attend classes in-person during the height of the pandemic:

[P]ersons who seek admission to the DC Bar under D.C. App. Rule 46(c)(4) [which applies to graduates of non-ABA-approved law schools, including non-U.S. law schools] . . . could complete up to 14 of the required 26 credit hours of study through distance learning classes that satisfy the ABA definition of ‘distance education courses’.

See Order of the District of Columbia Court of Appeals (2.10.2021), <[www.dccourts.gov/sites/default/files/2021-02/Order%20Adopting%20Emergency%20Amendments%20to%20D.C.%20App.%20R.%2046--FINAL\\_0.pdf](http://www.dccourts.gov/sites/default/files/2021-02/Order%20Adopting%20Emergency%20Amendments%20to%20D.C.%20App.%20R.%2046--FINAL_0.pdf)>. However, this meant that these students would be required to complete the rest of their credits in-person during a period when most law schools were not offering in-person classes and travel was restricted. The DC Court subsequently modified the Rule to remove this language, District of Columbia Court of Appeals (No. M-273-21)(5.13.2021), announcing changes to the rules, including:

[s]econd, Rule 46 will now explicitly address whether remote instruction is permissible for applicants who did not graduate from an ABA-approved law school and who seek admission to the D.C. Bar based in part on having taken 26 hours of qualifying classes from an ABA-approved law school. As amended, the Rule will permit such remote instruction as long as the instruction meets the definition of “distance education course” set out in the American Bar Association Standards and Rules of Procedure for Approval of Law Schools

Notice to adopt proposed amendments to D.C. App. R. 46, No. M-273-21 (D.C. Ct. App. February 10, 2021), <[www.dccourts.gov/sites/default/files/2021-05/M-273-21%20Promulgation%20Order%20for%20Rule%2046%205-2021%20Amendments%205.13.21\\_0.pdf](http://www.dccourts.gov/sites/default/files/2021-05/M-273-21%20Promulgation%20Order%20for%20Rule%2046%205-2021%20Amendments%205.13.21_0.pdf)>.

It is not possible to gauge with certainty the enrollment consequences for international law students during the height of the pandemic because, as we noted earlier, the largest group of international students pursue the LLM degree, and the regulatory demurrals to LLM programs creates a dearth of information.<sup>64</sup> But we can look to enrollment patterns in higher education generally for insight. According to the Institute for International Education, there was an overall 43% decline in new enrollment of international students nationwide, largely related to the disruption to travel caused by regulatory restrictions and embassy closures.<sup>65</sup> That figure rises to 72% if only in-person enrollment of new international students is the focus.<sup>66</sup> There is no comparable data for international law student enrollment, but enrollment of new international JD students suffered more than overall enrollment by more than 2-to-1: enrollment of new international JDs fell by approximately 14% while overall international JD enrollment fell by approximately 6%.<sup>67</sup> These figures may reflect the

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<sup>64</sup> We recently estimated that the number of schools hosting one or more post-JD programs for international law graduates doubled in the decade between 2006 and 2016, resulting in 80 law schools with such programs. Since then, law schools have invested in master's programs for non-law graduates, in which international graduates also often enroll. The lack of enrollment data in light of these trends is particularly frustrating because of the importance of tuition generated by these students for subsidizing other, JD-centric activities. But the vacuum of reported data does not mask growth, both in the number of schools offering LLM programs and in the size of the programs offered.

<sup>65</sup> Julie Baer & Mirka Martel, "IIE Fall 2020 International Student Enrollment Snapshot" (2020), online: IIE <[www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports#:~:text=November%202020%3A%20Fall%202020%20International%20Student%20Enrollment%20Snapshot%20\(Joint%20Survey\)](http://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports#:~:text=November%202020%3A%20Fall%202020%20International%20Student%20Enrollment%20Snapshot%20(Joint%20Survey)>)>. See also Karin Fischer, "Covid-19 Caused International Enrollments to Plummet This Fall. They Were Already Dropping" (16 November 2020) *Chronicle of Higher Education*.

<sup>66</sup> Baer & Martel, *ibid.*

<sup>67</sup> These figures are compiled from ABA Standard 509 disclosures reported by the law schools, "Standard 509 Information Reports" (2022), online: American Bar Association <[www.abarequireddisclosures.org/Disclosure509.aspx](http://www.abarequireddisclosures.org/Disclosure509.aspx)>.

variations in paths into legal education that international students pursue, where the decision to pursue a JD may follow years of being in the US for college, high school and even primary school.<sup>68</sup> While the JD numbers tell only a relatively small part of the story of international law student enrollment, aggregate losses may have been deflected by flexibility offered to LL.M.s, including with regard to the timing of beginning and completing their degrees.<sup>69</sup> Moreover, the structure of many LL.M. programs that capitalize on empty seats in classes that include JD students, too, enabled schools to avoid significant disruption in terms of curricular planning and use of faculty resources. But for students, this experience marked a new level of alienation, even if some were advantaged by the structures of online learning.

The pressures of this environment on students were clear from how ready they were to be done with the ‘new normal’. An account from five University of Connecticut students is revealing:

After a semester of online learning across a six-hour time difference, [one student]’s resolve to come to Hartford only intensified. The online format was difficult, and the time difference made it challenging to engage with lectures,

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<sup>68</sup> Silver & Ballakrishnen, “Sticky Floors”, *supra* note 4.

<sup>69</sup> A number of law schools, including Berkeley and Northwestern, offered international LL.M.s the option of starting their program in the spring rather than the fall, for example. See *e.g.* Dean’s Announcements Regarding 2020-2021 LL.M. Programs, UC Berkeley:

In response to the COVID-19 pandemic, Berkeley Law is providing our entering academic year students with 4 program options to better meet their educational needs. Students may choose to start this fall and finish their degree in spring 2021, as is the typical academic year schedule. Additionally, for this year, we are giving students the options to start their program in spring 2021 and finish in summer 2021 by enrolling in our LL.M. professional track courses; or start in spring 2021 and finish in fall 2021. Students may also choose to defer to fall 2021.

(announcement on file with authors). See also Karin Fischer, “After Deep Drops, International Applications Rebound, Survey Finds” (10 June 2021) *The Chronical of Higher Education* (describing colleges as “hedging their bets” by allowing international students to defer enrollment from fall 2021 to spring 2022 and also by offering online courses; “[o]nly 25 percent said they would offer only in-person instruction”).

she said. Once settled into their Hartford lifestyle, the students said they found a much easier school routine. Living within the time zone that aligned with the class hours allowed them to keep regular schedules and better engage with the material.<sup>70</sup>

The article characterized the students' decision to come to Hartford as "bold", but it still does not tell us about the attrition, or the very many who chose not to do this, or for whom this choice was an impossibility.

### **A. Nothing New Here: Pre-existing Scripts of Student Inclusion and Isolation**

Faculty responses to the presence of international students in classrooms have always isolated expectations and inclusions of international students, but COVID-19 offered new ways in which to do this exclusion. Some of this was explicit, such as the tweet by one law professor questioning whether he was exposed to COVID-19 from one of his Chinese students<sup>71</sup> and the blog post by

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<sup>70</sup> These students described their US-based experiences in much the same terms as LLMs have in the past:

[i]n addition to attending virtual and on-campus classes, the students made the most of their time in the United States by taking road trips and exploring the area. [Three of the five students in the U.S. for the spring semester of their LLM] traveled extensively together, including trips to Boston, New York City and Maine. They said these trips, and their friendship, have been the highlight of their time in Connecticut.

See Camille Chill, "Taking the Distance Out of Distance Learning" (26 May 2021) *UConn Today*.

<sup>71</sup> Saumya Gupta, "Professor's Tweets Regarding COVID-19 Elicit Student Concerns of Xenophobic Tone" (27 April 2020) *Daily Bruin*; see also Joe Patrice, "Law School Professor Muses That His Chinese Students Spread Coronavirus" (13 April 2020) *Above The Law*; and Cmaadmin (Edu), "UCLA Law Professor Wonders on Twitter if One of His Chinese Students Brought Back Coronavirus" (16 April 2020) *Diverse Issues in Higher Education*. See UCLA Chapter, Asian/Pacific Islander Law Students Association, "Letter From The Asian/Pacific Islander Law Students Association Regarding Stephen Bainbridge", online: (2020) 68:1 UCLA Law Review Discourse (response to Bainbridge tweets and responses, sent to administration of UCLA Law School;



a professor at a different law school asserting that it was ridiculous to think that COVID-19 was not leaked from a Wuhan lab.<sup>72</sup> While these examples are on the extreme, they reflect the longtime attitude that international students as a group are not seen as comprising of diversity in the same ways as other students in the context of higher education, including law schools.

While the pandemic certainly created new problematic strains for inclusion, it also shed light on a range of old microaggressions that were always rife in classroom interactions. Professors have always found distinguishing between international and domestic students to be justified — an othering that was necessary to maintain the institutional sanctity of their spaces. One example goes directly to the issue of how the COVID-19 experience might shift policies and practices because it addresses the question of recording a class. Prior to the pandemic, recording class was not the norm in the law schools we have studied, and this was a burden for at least one international JD we interviewed. When he asked his professor if he could record the class, he was refused; the professor answered: “if you’re a JD student, and if you’re here, I don’t think you will have any problem”.<sup>73</sup> But more individual teaching approaches also were implicated apart from policies that could be school-wide, like recording. For example, students in our earlier work relayed how another professor who was using American pop culture references stopped to identify a student as the only person in the room who would not understand the particular reference — in this instance to the TV show, *The Simpsons*.<sup>74</sup> Another example involved a professor

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note that earlier in the semester, the same faculty member tweeted about asking “China to ban eating bats . . . and other wild animals that serve as viral hosts”).

<sup>72</sup> University of San Diego Law school professor wrote on his personal blog “The Right Coast”: “[i]f you believe that the coronavirus did not escape from the lab in Wuhan, you have to at least consider that you are an idiot who is swallowing whole a lot of Chinese \*\*\*\* swaddle”. See Kristina Davis, “USD Law Professor Under Investigation Over Chinese Reference in Coronavirus Blog Post” (19 March 2021) *The San Diego Union Tribune*.

<sup>73</sup> Ballakrishnen & Silver, “Culture of Language”, *supra* note 7 at 207, quoting Minsoo Lee, Interviews, *supra* note 24, I1518.

<sup>74</sup> *Ibid* at 208.

who was reluctant to pronounce a student's name, so referred to her by her last name despite using first names for all of the other students in the class. Many students reported that their professors did not call on any international students at all, despite the norm in law school classrooms.<sup>75</sup> Faculty could be brutal in complaining about international students being passive in class; one faculty member removed their humanity entirely by referring to international students as “rocks and stones”. While these examples differ in the way that the faculty distinguish between international and American students, each instance worked as a separation of international students from the ideal or model of the American student. This distancing occurred even where the professor gave the same response to the international student about recording as would be given to an American — it is the difference in the starting point, however, that makes this seemingly equal treatment unequal. As one international JD put it: “there's some people, and dare I say some professors, . . . who are just uncomfortable with different cultures, bad English”.<sup>76</sup>

Students, in turn, have internalized many of these differences. Although some international students across programs expected to be treated differently because of their status, international students in the JD program felt the need to reinforce their identity as ‘mainstream’, *i.e.* JD students rather than international

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<sup>75</sup> For example, Susan Yang, an international JD, explained that one of her professors did not call on Asian students: “[b]ut the professor has a reputation of not calling on Asian students [*laugh*]. Which is what my academic advisor student mentor told me. She was like, “[o]h, yeah, him. He doesn't really cold-call on Asian students”, Interviews, *supra* note 24, I1947A. But even when students are called on, the experience does not always achieve parity, as Violet Min, another international JD student, explained: although one of her professors did call on international students, he spent less time with them, giving them short shrift in terms of an opportunity to “think about the questions or to find . . . the question”, compared to the time spent with native English speakers, I1511.

<sup>76</sup> Ballakrishnen & Silver, “New Minority”, *supra* note 8 at 663–64, quoting John Oh, Interviews, *supra* note 24, I1526.

students, to help buffer some of this treatment.<sup>77</sup> This sort of distancing, however, while strategic, did not always protect the international JD from being seen as non-ideal. In part, the challenge for certain international JDs reflects the particular emphasis on language that is part of the US law school experience and education, or what one international JD, Timothy Cho, described as:

the American JD students [being] really very, very bright students who are very well spoken even among, like, the Americans, right? They talk very fast, they're very eloquent, they're very quick and smart, so, it could be pretty difficult for someone who don't speak English very well to socialize with them, I think.<sup>78</sup>

This difficulty in socializing was reflected in friendship groups of international JDs tending to be focused on other international JD students from their home country or region; for certain students, social relationships also

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<sup>77</sup> International students in the JD program expect to have a different experience than their LLM classmates, and in fact, this motivates their choice of the JD program. They recognize the marginality of the LLM, and in choosing the JD they believe they are opting into a mainstream experience. See Ballakrishnen & Silver, “New Minority”, *supra* note 8. They see the JD as providing significant advantages for career purposes, particularly for those wanting to stay in the US, for providing a more thorough and grounded education and opportunity to soak up US culture and even language. For example, as we show in other work (Ballakrishnen & Silver, “Culture of Language”, *supra* note 7 at 201), certain international JDs took pains to distance themselves from LLMs, such as Adam Marquez, from Mexico:

for some reason I've seen a lot of negative comments, I hear them all the time from JDs about LLMs. And I think a lot of it has to do with the language barrier and sometimes LLMs don't know how to express themselves very good in class and so it slows down the class or . . . And some people criticize the LLM, like [they] think that many LLMs don't take studying as seriously, like they're more here or some of them are just here for a year and they go back to the law firm and they're more like having a good time and they're not going to be as prepared for class. And some people get upset about that, things like that

Interviews, *supra* note 24, 11525 at 17.

<sup>78</sup> Ballakrishnen & Silver, “Culture of Language”, *supra* note 7 at 204, quoting Timothy Cho, Interviews, *supra* note 24, 11521.

crossed the degree-divide to include LLMs from the same countries, too.<sup>79</sup> While online environments made these groups and networks harder to forge, they did make the uncertainties in everyday interaction less stark and the difference between students — especially when they were only boxes on a virtual screen — less palpable.<sup>80</sup> Students, for example, expressed the opportunities that online learning offered in aberration to the traditional classroom dynamic as an effective entry point for participation. This was not just because of structural accommodations like making recordings available. As one student offered, the ‘blue hand’ was simply easier to raise than the real hand.<sup>81</sup> Moreover, as faculty translated from in-person to online teaching, some conversations that might have occurred during class were moved to written forums, whether discussion boards or chats, which may have made contributing more comfortable for different students, including international students. Still, these new ways of

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<sup>79</sup> Anthony Paik, Swethaa Ballakrishnen, Carole Silver, Steven Boutcher & Tanya Rouleau Whitworth, “Diverse Disconnectedness: Homophily, Social Capital Inequality and Student Experiences in Law School” (under review 2021).

<sup>80</sup> Data from the Law School Survey on Student Engagement (“LSSSE”) on students’ self-reports of their participation in class shows marked differences between groups reflecting race and gender: overall, Asian students were least likely to participate frequently in class, and Black students were most likely to do so. Women consistently report less frequent participation than men across race, Jakki Petzold, “LSSSE Annual Results 2019: The Cost of Women’s Success (Part 3)” (4 March 2020), *LSSSE* (blog), online: <[www.lssse.indiana.edu/blog/lssse-annual-results-2019-the-cost-of-womens-success-part-3/](http://www.lssse.indiana.edu/blog/lssse-annual-results-2019-the-cost-of-womens-success-part-3/)>. Further, additional LSSSE data from 2016 highlighted the intersection of Asian and international identities: “[i]n LSSSE’s 2016 survey, 50% of students of Chinese descent were international students, while only 1% of Filipino students were, and proportions of other AAPI subgroups identifying as international students varied widely: 24% Korean; 14% Asian Indian; 8% Vietnamese; and 7% Japanese”, Vinay Harpalani, “Guest Post: Understanding the Nuances: Diversity Among Asian American Pacific Islanders” (21 May 2021), *LSSSE* (blog), online: <[www.lssse.indiana.edu/blog/guest-post-understanding-the-nuances/](http://www.lssse.indiana.edu/blog/guest-post-understanding-the-nuances/)>.

<sup>81</sup> Interviews, *supra* note 24, I21101.

counting participation did not make up for the ways in which these students continued to be structurally isolated by the administration.

The challenges that international students face in the classroom often go beyond technical reasons like language to more substantive structural issues like the cultural context, norms and expectations of law school. The “learned pattern of how to be present in an American [law school] classroom”<sup>82</sup> is foreign to many international JD students, whose experiences prior to law school — whether or not in the US — accept a variety of classroom behavior. In contrast, law school is less accepting and rewards a particular assertiveness that functions to exclude certain students, including many who identify as international. The hesitancy that international students experience in volunteering to participate in class can reflect their confidence in working in English, as well. As one student explained:

frankly speaking, I'm ... I'm always afraid to make mistakes in front of American students who are in class. Then I'll get really embarrassed. So I try not to speak when I know that it's ... when I'm not too confident with grammar. I only speak in class when I'm confident enough that I won't make any grammar mistakes. So even though my English ... even though I can communicate and I'm capable of conveying my thoughts in ... in English, I'm always self-conscious about the fact that my English ... isn't perfect.<sup>83</sup>

Getting a word in when one is already second-guessing one's position in class might seem hard enough, but it is unclear if these hesitations were aided by the virtual law school environment. Schools and classrooms make clear what is expected out of a model or ideal student in these spaces but being transparent about expectations might not be enough if the actual expectation is based on a biased version of participation. For instance, a professor at an elite law school recently commented that he assumed students who did not participate in his class had nothing to add to the conversation happening in it. This inference likely is inapposite for American students, but it is doubly so for international students. Good teachers often suggest that they ‘know’ when a student is paying

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<sup>82</sup> Ballakrishnen & Silver, “Culture of Language”, *supra* note 7 at 205.

<sup>83</sup> *Ibid* at 206 quoting Minsoo Lee, Interviews, *supra* note 24, I1518.

attention in class; but it is also possible that what is seen as ‘good participation’ is based on imaginations of effect rather than actual knowledge about what it ‘looks like’ to be paying attention in class. Further, in an online learning environment, where everyone is a pixelated window, assumptions about where one is directing attention or whether they are ‘good participants’ gets even more complicated. This new environment has allowed for reconsideration of our pedagogic assumptions of affect. As a result, however well-intentioned, professors’ perspectives on participation might hurt more than help inclusion.

But it is not simply the mindset, confidence and approach of the international students that frames their experiences and encounters. The responses of American students and faculty also play an important role. American classmates may respond with surprise to encountering a student whose first language is not English in a US law classroom, which can translate into reactions that feel very hard to international students. One international JD student, for example, described an interaction when a classmate gave her a “dirty look” for not being able to answer her question, when the student: “felt so awkward to ask questions, because I feel everybody else around me knows what is going on, except myself”.<sup>84</sup> Another student described an in-class interaction when she was paired with a classmate, but the classmate did not “have eye contact with me. I wonder why. And then I tend to not like those classes with class discussions”.<sup>85</sup> These and similar reports highlight that classroom interactions can be hostile for international JDs. In contrast, the pandemic might have offered new ways of being part of these conversations, such as the ease of entering a conversation online, mentioned earlier.<sup>86</sup> Alongside these insights into new possibilities are also age-old precarities that they highlight for our attention.

The pandemic, for example, made making social networks that were co-curricular or affinity-based much more difficult to navigate. But even when they

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<sup>84</sup> Ballakrishnen & Silver, “Culture of Language”, *supra* note 7 at 210.

<sup>85</sup> *Ibid.*

<sup>86</sup> See text, *supra* note 81.

were available logistically, pre-pandemic, these have been fraught spaces of interaction and inclusion. Outside of class, for example, interactions between international and American students continued to reflect expectations of the ideal American student. One example relates to student clubs, and particularly the Asian American student organization, one of several affinity groups common in US law schools. For international students from the Asia Pacific region, the Asian American student organization was perceived as especially *American*. One student described the students in his law school's Asian affinity group as: “a little too American, so I just don't click with them in a way”.<sup>87</sup> Qiang Bai, an international LLM, made a similar comment about the group at his law school:

[T]hey are Asian students, but they are Asian US students, and what we're looking for is Chinese international students. I think the US international thing makes the difference. There is not much identification, so to speak . . . with Asian Americans”.<sup>88</sup>

Interactions outside of these more structured opportunities were likely to follow the pattern of relationships revolving around students from the same home country or region rather than crossing national status lines, as we have described in other work.<sup>89</sup> Once seen through the framework of the ideal student and law schools as spaces valorizing a very neuro-nondiverse identity of that student, these patterns become easier to identify and their valence much more categorically obvious.

A third way in which the pandemic influenced students was its impact on their careers. International JDs have the benefit of access to all of the career advising structures that law schools offer to any JD, but here, too, equal treatment belies inequality. The advising needs of international JDs differ because their futures may be overlaid with uncertainty related to visa restrictions

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<sup>87</sup> Ballakrishnen & Silver, “New Minority”, *supra* note 8 at 664 quoting John Oh, Interviews, *supra* note 22, I1526.

<sup>88</sup> *Ibid*, I1552.

<sup>89</sup> Ballakrishnen & Silver, “New Minority”, *supra* note 8 at 663–64.

and family obligations. Nevertheless, students describe their career advisors as relatively indifferent to their backgrounds, despite these being crucial for helping students explain their reasons for wanting to develop careers in the US.<sup>90</sup> Moreover, because they cannot hold federal clerkships or most other federal governmental positions,<sup>91</sup> this can affect the development of mentoring relationships within the law school, too, particularly with faculty who pride themselves on being able to facilitate clerkship placements, in addition to the obvious limitation of career options. Being without US citizenship works as a limitation on the kinds of professional capital that international students can

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<sup>90</sup> These students pursue law school with one eye on career opportunities in a way that is distinctive. It affects their curricular decisions, the markets they target for job searches, and the kinds of organizations they pursue. One student described her disappointment with her career advisor: “[l]ike career service, I got an advisor. She – I don’t think she, like, she showed much interest in my background . . . when we talked about my Chinese background”, Ballakrishnen & Silver, “Culture of Language”, *supra* note 7 at 202 quoting Yu Wei, Interviews, *supra* note 24, I1517.

<sup>91</sup> Most federal agencies and clerkships are available only to US citizens. See “Citizenship Requirements for Employment in the Judiciary” (2022), online: Online System for Clerkship Application and Review <[www.oscar.uscourts.gov/citizenship\\_requirements](http://www.oscar.uscourts.gov/citizenship_requirements)>, describing conditions that include citizenship, refugee seeking permanent residency, permanent residency seeking citizenship and owing allegiance to the US, in certain circumstances, for federal clerkships; “Entry-Level (Honors Program) and Experienced Attorneys – Conditions of Employment”, online: Department of Justice <[www.justice.gov/legal-careers/entry-level-and-experienced-attorneys-conditions-employment](http://www.justice.gov/legal-careers/entry-level-and-experienced-attorneys-conditions-employment)>:

Congress generally prohibits agencies from employing non-citizens within the United States, except for a few narrow exceptions as set forth in the annual Appropriations Act . Pursuant to DOJ component policies, only U.S. citizens are eligible for employment with the Executive Office for Immigration Review, U.S. Trustee’s Offices, and the Federal Bureau of Investigation. Unless otherwise indicated in a particular job advertisement, qualifying non-U.S. citizens meeting immigration and appropriations law criteria may apply for excepted service employment with other DOJ organizations. However, please be advised that the appointment of non-U.S. citizens is extremely rare; such appointments would be possible only if necessary to accomplish the Department’s mission and would be subject to strict security requirements. Applicants who hold dual citizenship in the U.S. and another country will be considered on a case-by-case basis.



pursue. And in the midst of the pandemic, when international travel was more complicated by health regulations and concerns, consular offices were only intermittently operational, and disparities in vaccine availability and effectiveness raise the risk that the practicalities of hiring an international student might overwhelm even those organizations that typically are willing. Overall, then, the perception of international students was not one of equal treatment and the pandemic allowed for new legitimate reasons to exclude these students.

#### **IV. Where Can We Go from Here? Revisiting Inequalities with New Perspectives**

The experiences since the pandemic began have given us a new window into persistent and age-old institutional issues that plague legal education. It has also reinforced all the ways in which law schools work on a model that is set up to respond to a particular ‘ideal student’ and how changes at the institutional level only ever happen when that model student requires it. This model of predicating and responding institutionally to an ideal type is problematic for many reasons. For one, the category of an ideal type both alienates those that do not feel like they fit the category and creates an impossible pressure for those in that category to perform appropriately. Further, responding to this idea of an ideal student during times of crisis allows institutions to feel like they have ‘solved’ a problem when in fact, what they have accomplished is a performative posturing aimed at an assumed audience. We say an assumed audience because ideal types, by definition, are not actual actors but, rather, idealized versions of who actors ought to be. Thus, trying to solve a problem for a ‘typical’ student often will miss the mark because students are not typical and because the ways in which they deviate are relatively unpredictable.

For international students, the pandemic brought about many obstacles that were insurmountable, and the ‘fixes’ that were targeted at the typical American student did not give them the same relief. For instance, when schools started to shut down and close in March 2020, foreign nationals in the country had to make the impossible decision to either stay put and be separated from their families or to leave — if they could — and manage to continue doing

coursework from afar on schedules that were entirely incompatible. Naturally, this is not to say there are perfect solutions to these crisis scenarios, and when in flux, it is rational for organizations to make decisions based on what might serve the interests of the majority population.<sup>92</sup> Still, thinking about the tendency to prioritize certain kinds of students within these contexts when there are hard decisions to be made reveals something about the inherent inequality built into the architecture of these schools. Together, these inequalities — from time differences for class schedules to visa paperwork and lack of proximity — made students feel even more isolated than they might have been under other circumstances, resulting in a reckoning about the value and meaning of this virtual credential they were receiving.<sup>93</sup> Altogether, the pandemic may have brought about new spaces of exchange within law schools around curriculum, pedagogy and student services that allowed for a visibly more inclusive system of participation, but it also produced systems that simultaneously reinforced feelings of exclusion for those students least capable of handling its precarity.

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<sup>92</sup> See *supra* note 56. Apart from the complexity, expense and safety considerations of international travel when students were told to go home, additional considerations related to their resources affected all students: was home safe? Did it have reliable internet for attending online classes? Did it allow them adequate opportunities to study? Were they caring for others in their home?

<sup>93</sup> We also recognize that law schools may see this as an opportunity to capitalize differently — and more concretely — on the experience of the pandemic by creating new programs that cater specifically to students for whom the advantages of online learning are obvious. This could lead to efforts to develop new models of degree programs that would cater to international students — like international study abroad programs, on-site semesters, etc. — while simultaneously excluding them more and more. Although we do not mean to speak to the veracity of the range of these programs across contexts, and their varied uses by students and affiliates, it is the case that these credentials are not at par with any of these more traditional credentials that these schools might offer their more mainstream students, including the LLM. Rather, they offer a way to buffer one's local credentials to different degrees in their home country conditions, especially among those with knowledge asymmetries.

Still, it requires emphasizing that this is hardly a phenomenon *just* about international students. This article focuses specifically on a particular population of law students — those who identify as international — but it could just as easily aim at other students who are similarly on the periphery of the ideal student orb within these spaces. Rather, we hope this focus on international students allows for an opportunity to revisit approaches and structures in education to provide greater and more equal opportunities for all kinds of marginalized populations.

At the same time, the pandemic was not just about highlighting problems; the crisis also offered new ways to think about solutions. Specifically, the kinds of flexibility that the last year has brought about in legal pedagogy offers some insight into the capacities of institutions to change what they think of as ‘non-negotiables’ when it comes to responding to what they think of as their typical student. As a disabled student in one of our classes lamented, they had spent years petitioning for the kinds of accessible course content that were made available to students during the pandemic, but it took this kind of threat to ‘typical’ law students for schools to take note of it as a serious problem.

Our larger argument is that in dealing with times of crisis, solutions cannot be targeted at only one sliver of a given population. Any solution that attempts to respond too specifically to the problem could miss a larger opportunity to consider structural faults. In the case of post-pandemic law schools, beyond a ‘fix’ or sets of recommendations to make the experience of a particular set of students better, any true response must consider a larger commitment to institutional change. We suggest that there are two main ways to think about this call for an overhaul. The *first* is to consider how even ‘good strategies’ that are meant to help institutions could limit possibilities for certain students. The *second* is to acknowledge the ways in which any given organization privileges its ideal type of student and to work towards changing the norm of response towards the perspective of the most vulnerable student in any situation. We suggest that in approaching equity and change from this ‘universal design’ perspective we would be reworking what commitments to equity can look like across a wider range of parameters. Finally, we end by reinforcing that solutions

for diversity, no matter the minority population in question, cannot be a one-stop solution. Drawing from other work on these kinds of variations between experiences of minority students, we conclude by offering that intra-group variations in the category of students that are seen as diverse are all together so vast that any real fix is going to need more intimate policy calibrations.

### **A. Good Strategies: But for Whom?**

One of the many trends in higher education (and business) has been the emphasis on design, and we see these comments from architectural designers Alex O'Briant and Tomas Rossant, who work with universities, as providing helpful framing for thinking about how the pandemic affected legal education:

[b]eing apart has helped focus us all on the value of being together. And I think that's the incredible moment for campuses, which are so steeped in the concept of place, and in-person learning and interaction. There is an opportunity to really evaluate where we can get the most benefit culturally and educationally from being in person, because the thing we've learned in the last year is how to not be together . . .

I think the real value of being in a learning culture physically in place is all the ad hoc critical dialogue, all the spontaneous interactions, what we call learning outside the classroom. And, ideally, we should still have that. Higher education should be focused on being in a place, but I think what we have ask, do I have to be in that place 24-7? Do I have to be in that place for the whole semester? Can I say, hey, this semester it's just freshmen, right, who are on campus? And this next semester, it's seniors. And what does that do to the efficacy of learning and teaching?<sup>94</sup>

By focusing on gains from interaction — whether spontaneous or by design — and “learning outside the classroom”, O'Briant and Rossant highlight a central reason why students from around the world have seen it as worthwhile to travel for higher education to locations far from their homes, and why law

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<sup>94</sup> Rossant and O'Briant are with Ennead Architects, which works with universities and colleges on design needs, Doug Lederman, “The Future of the Physical Campus” (16 July 2021) *Inside Higher Ed*.

schools and other parts of society attempt to encourage diversity in their populations. Many of the gains that international students have described as worth that investment of time, money and energy relate to the everyday interactions, observations, soaking up culture, language and experience that is the norm for US students attending a US law school. The very core of the US law school experience reflects these elements of observation, participation and interaction, as students are put through what some have described as a form of educational hazing that is common to first-year law students around the country.<sup>95</sup> Moreover, some of the most important regulatory authorities representing major legal markets reinforce the centrality of physical presence by privileging it in bar eligibility requirements, as well.<sup>96</sup> Similarly, the ideal of a diverse workforce is that everyone gains from bringing together different perspectives; the interaction presumed in O'Briant and Rossant's statements holds the promise of better decisions and outcomes if emanating from a diverse and interactive group.<sup>97</sup>

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<sup>95</sup> See e.g. Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford: Oxford University Press, 2007).

<sup>96</sup> For example, the New York State Board of Law Examiners states, in its explanation of section 520.6, that:

[a]ll coursework to be completed in the United States. All coursework must be physically completed at the campus of the ABA-approved law school in the United States. ANY course taken at a law school's campus in a foreign country does NOT qualify toward the 24-credit requirement for the LL.M. degree. No credit is allowed for distance, correspondence or external study or for an on-line program or course" [emphasis in original],

"Foreign Legal Education" online: The New York State Board of Law Examiners <[www.nybarexam.org/foreign/foreignlegaleducation.htm](http://www.nybarexam.org/foreign/foreignlegaleducation.htm)>.

<sup>97</sup> See e.g. "Nasdaq to Advance Diversity through New Proposed Listing Requirements" (2020), online: Nasdaq <[www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01](http://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01)> (in announcing the proposal, the President of Nasdaq said "[c]orporate diversity, at all levels, opens up a clear path to innovation and growth. We are inspired by the support from our issuers and the financial community with this effort and look forward to working together with companies of all sizes to create stronger and more inclusive boards"); David Rock & Heidi Grant, "Why Diverse Teams Are Smarter" (4 November

But our studies of international law students and international legal education tells us that the benefits of in-person education that O'Briant and Rossant describe also are particularly challenging for certain students to attain and that in contrast, online pedagogy has offered certain advantages,<sup>98</sup> while in-person education, at least over the last many fraught months, held particular challenges for at least certain international students.<sup>99</sup> Still, as we experience increasingly more open and in-person classrooms and schools, the strategies of many schools are to return to the past and ditch the online experiment, with few exceptions, which, it likely will be argued, is a rational response to exogenous forces.<sup>100</sup> These decisions have important implications for ensuring there are enough in-person students regularly attending to have a 'normal' classroom and law school experience, and making exceptions may feel threatening to the way law school traditionally has been done. But they also implicate considerations of how to think about pedagogy and participation from the perspective of these precarious students.

While the expectation of interaction and participation is an important element of the social capital emanating from US legal education for

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2016) Harvard Business Review; and Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt & Sara Prince, "Diversity Wins: How Inclusion Matters" (2020), online: McKinsey & Company <[www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters](http://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters)>.

<sup>98</sup> Some of these include the shift to using writing for participation instead of limiting participation to in-class speaking only, which may benefit at least some international students, among others. But at the same time, we acknowledge that in-person learning also can serve as at least a superficial equalizer in terms of providing students with the physical space quiet enough to study and take exams, and for relying on a stable internet.

<sup>99</sup> This was particularly difficult for Asian students — including of course students who do not identify as international — because of the hate they encountered on US streets and in encounters with everyday Americans, or even within their law schools. See *supra* notes 53, 67-72.

<sup>100</sup> See *supra* note 60 (discussion of bar regulations and ABA accreditation rules regarding limitations on online education. There is some indication that the ABA Council may amend its position on this topic).

international students, the fact is that for certain students — including many international students — participation and interaction with US law students, faculty and lawyers can be challenging, if not downright disappointing. For one, many international students feel isolated within law school settings, and there is some corroboration that they are not just imagining this parallel law school experience that many of them suggested having. Even when they are aware of the diversity within their classrooms and hallways, however, the interaction between American students and international LLMs along the lines that O’Briant and Rossant consider foundational to the in-person experience can be difficult. This is not unique to US law schools; rather, it is a characteristic of international higher education generally, and particularly acute where differences in degree programs result in differences in incentives and opportunities.<sup>101</sup> Our earlier work found that international LLMs tend to interact most frequently and meaningfully with other international students.<sup>102</sup> For some, this is further focused on international students from the same home country or region, as Ben Zhang described: “I did not have a lot of communication with JD students, and when I had, it’s also between me and a Chinese JD. I did not have a lot of communication with foreign JDs”.<sup>103</sup> Qiang Bai, another international LLM, described a similar experience:

[s]o basically the international students will talk to international students and mostly will talk to the students that come from the same country as we were. So, for me, I talk to Chinese students, Japanese students, Korean students. I have some pretty good memories with South American students, as well. I’m still trying to think whether this is an intentional choice or it’s just how things go, because, at first, it’s justifiable, because we will not stay here in the United States. That’s a pretty big basic mindset for many of the international students, that we’re not here to stay. So, we will concentrate, or at least pragmatically speaking, more of our efforts on the people who we might encounter again when we go back to practice. I had that thought, but I don’t know the

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<sup>101</sup> Silver, “Getting Real”, *supra* note 5.

<sup>102</sup> Silver, “Agents of Globalization in Law”, *supra* note 6.

<sup>103</sup> Interviews, *supra* note 24, G1767.

consequence of the situation now, whether it's intentional or it's just how things go.<sup>104</sup>

These are typical comments based on our ongoing research, and they suggest that the kind of interaction in in-person law school contexts results in quite distinct patterns for international LL.Ms.<sup>105</sup> At the same time, the social capital derived from the LL.M. is strengthened, in the views of many students, prospective employers and even LL.M. program directors, not only by such interaction with American students but also by a period of practice in the US following graduation. But getting this sort of employment is extraordinarily competitive, depending on myriad factors including connections from a student's home country to global US-based law firms (so-called political hires by the firms); the need for a student's expertise in their home country law, which reflects the volume and nature of US business with the student's home country; and the ease of hiring American JD graduates who can satisfy employers' needs.<sup>106</sup> In other words, the ideal of easy interpersonal relationships and exchanges embedded in O'Briant and Rossant's descriptions are far from the reality for students who do not 'naturally' feel equipped with the social capital that is embedded in the hierarchy of law school, especially when such capital is expected to be inherited from sources that are external to the school rather than achieved through the process of the school. And virtual realities held other kinds

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<sup>104</sup> Interviews, *supra* note 24; I1552, *supra* note 88.

<sup>105</sup> From the perspective of JD students, the perception of this LL.M. graduate rings true. Earlier work by Silver based on a survey of JD students revealed that a full 30% of the 6893 respondents at 21 law schools indicated their uncertainty about whether any international LL.Ms were even enrolled in their law school, Silver, "Getting Real", *supra* note 5 at 479. See also above text following note 73.

<sup>106</sup> See Silver, "Case of the Foreign Lawyer", *supra* note 27 at 1076–77 (describing law firm recruiting in Canada and Australia during times of extreme competition for top American JDs). See also Silver, "States Side Story", *supra* note 23 at 2404–405 (describing Silver's finding that the most likely LL.Ms to secure positions in the US — apart from political hires — are those who most easily can blend into the mainstream of US lawyers, which means they are White men from English-speaking common law countries).



of advantages that are not necessarily recognized as capital yet: easier participation through blue hands, reviewing recorded classes,<sup>107</sup> some designed interaction through break-out rooms and using writings on discussion boards and even in a Zoom chat as an alternative way of participating. Still, neither students nor schools can afford to ignore this ideal of interaction because it involves a kind of capital that is in demand in the market that continues to privilege normative markers of achievement.

Finally, one example of schools attempting to consider the interests of their students while also keeping one eye on the job market for them (which in turn links to reputation) was the adjustment to grading that occurred during the spring of 2020 when the pandemic first caused schools to move online. Nearly all US law schools adopted a pass/fail system in recognition of both the pressures and very challenging circumstances under which students were operating and the uncertainties surrounding the administration of exams online, from internet problems to exam security.<sup>108</sup> One study conducted to assess students' responses

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<sup>107</sup> As Susan Yang, one of our international JD interviewees, explained:

[v]irtual learning. It's actually better for me, because a lot of my professors speak pretty fast, and if I'm in class trying to take notes, I am bound to miss something. But with the virtual stuff I can rewind. Because it's all recorded, anyway. That's actually really good for me. I know some people don't like it, because they can't focus as much. But I think I actually focus better on virtual stuff, because I listen to a lot of podcasts. Maybe my professors would be offended to hear this, but I focus really well for podcasts—because then I can wash dishes, and listen. If I have something to do with my hands, I think I focus better

Interviews, *supra* note 24, I2047B. See generally Leonard Baynes, "Predictions On Pandemic's Lasting Impact On Legal Education" (2 June 2021) *LAW360* (commenting on recordings of classes as helpful for all students).

<sup>108</sup> Karen Sloan, "Pass/Fail Grading in Law School Gets Mixed Marks From Students" (17 June 2020) *Law.com* (law school administrators reasoned that the simplified grading scheme would reduce some of the pressure and anxiety law students were feeling at a time of uncertainty, and would level the playing field for students who were attending class and studying under challenging conditions). On the variations in these systems, see John Bliss, David Sandomierski & Tayzia Colleso, "Levelling the Field? An Equity Analysis of the COVID Disruption in Law School Grading", (paper delivered at the Law & Society Association Annual Meeting, 2021) [unpublished] at 5 ("[n]early

to the shift to pass/fail found important differences in students' sense of whether the change helped them. Women generally reported feeling more burdened by the shift than men, and minorities were more likely to see it as an advantage.<sup>109</sup> According to the study, minority women reported more negative feelings about the impact of the shift than women generally.<sup>110</sup> In interviews we conducted with international LLM students following the spring 2020 semester, the grading shift generally was perceived as negative. Students emphasized the importance of grades for home-country employers to which they would return,<sup>111</sup> and for purposes of trying to find a position in the US, where US employers are accustomed to relying on them.<sup>112</sup> All of this is to say that the paternalistic response of schools was based on their assumption that students fell into neat categories, perhaps based on the year in law school or socioeconomic backgrounds, but this approach ignores the reality of the subgroups that schools fail to recognize, much less of individual students with different agendas and capital to draw on. A better approach would have enabled more adaptability, even if it complicated the comparison that is at the heart of so much of the organizational structures of the schools.

## **B. The Institutional Case for Universal Design**

While in an absolutely perfect solution, each students' needs would be met individually, organizations cannot practically afford to curate their cultures

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three quarters of all US law schools adopted a mandatory Pass/Fail for Credit/No Credit system; nearly one fifth of US schools instituted an optional Pass/Fail or Credit/ No Credit System”).

<sup>109</sup> Bliss, Sandomierski & Colleso, *ibid* at 11.

<sup>110</sup> *Ibid.*

<sup>111</sup> Interviews, *supra* note 24, I2019B.

<sup>112</sup> *Ibid*, I2053B:

I obviously think it's important to point out that it matters a lot more to traditional legal candidates—you know, any person who is doing an LLM program, you know? Because they are looking to utilize their LLM grades as an entry gateway to impress a US law firm, in saying: “Listen, we came here. We studied well and we can perform here”.

based on specific individual needs. But swapping the idea of the ideal or typical student with the construct of the most precarious student could offer an important change in perspective to inform how we think of doing better equity in law schools. When we start by making law schools more accessible to the most vulnerable students in any situation, the futures that such a space can create change alongside it.

Scholars of education and disability studies have long proposed the idea of *universal design for learning/instruction* (“UDL/UDI”) — a model that drives product and environmental design that is usable by all people without the need for adaptation.<sup>113</sup> Although initially seen as a model of norms that would be adaptable from equitable architecture to education,<sup>114</sup> over the years, universal design has become central to accessible education and pedagogy theory.<sup>115</sup>

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<sup>113</sup> “What is Universal Design?” (2022), online: The Center for Universal Design <[www.universaldesign.org/definition](http://www.universaldesign.org/definition)>, the Center for Universal Design, About UD:

[u]niversal design is the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. —Ron Mace; The intent of universal design is to simplify life for everyone by making products, communications, and the built environment more usable by as many people as possible at little or no extra cost. Universal design benefits people of all ages and abilities.

See also “The Principles of Universal Design Version 2.0” (1997), online: The Center for Universal Design <[www.projects.ncsu.edu/ncsu/design/cud/about\\_ud/udprinciplestext.htm](http://www.projects.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm)>.

<sup>114</sup> Margaret King-Sears, “Universal Design for Learning: Technology and Pedagogy” (2009) 32:4 *Learning Disability Quarterly* 199 (“these principles are played out in both technological and pedagogical ways[:] . . . equitable use, flexibility in use, simple and intuitive use, perceptible information, tolerance for error, low physical effort, and size and space for approach and use”, citing “The Principles of Universal Design Version 2.0” (1997), online: The Center for Universal Design <[www.projects.ncsu.edu/ncsu/design/cud/about\\_ud/udprinciplestext.htm](http://www.projects.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm)>.

<sup>115</sup> See Jeanne L Higbee & Emily Goff, eds, *Pedagogy and Student Services for Institutional Transformation: Implementing Universal Design in Higher Education* (Minnesota: Center for Research on Developmental Education and Urban Literacy, 2008) (describing a case study demonstrating “how developing

Unlike ‘deficit’ approaches that assume that the classroom is set up for those who are ‘able’ and needs special accommodation for those who are diverse, a more inclusive model *starts* with the assumption that everyone is diverse and then makes accommodations that allow for such diversity to be responded to in the most equitable way.<sup>116</sup> Central, of course, to this is the research-ratified assumption that belonging and feelings of connectedness make for better classes not just for those who newly feel connected but for others who can learn from such connected peers.<sup>117</sup> As Dr. Catherine Sanger, a teaching and learning expert

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accommodations for a student with multiple disabilities benefit the entire class” in higher education contexts).

- <sup>116</sup> Catherine Shea Sanger, “Inclusive Pedagogy and Universal Design Approaches for Diverse Learning Environments” in Catherine Shea Sanger & Nancy W Gleason, eds, *Diversity and Inclusion in Global Higher Education* (Singapore: Palgrave Macmillan, 2020) at 31.
- <sup>117</sup> This relationship, between belonging, learning and academic success, is supported by research, including Terrell L Strayhorn, *College Students’ Sense of Belonging: A Key to Educational Success for All Students* (New York: Routledge, 2018); Joan M Ostrove & Susan M Long, “Social Class and Belonging: Implications for College Adjustment” (2007) 30:4 *The Review of Higher Education* 363; L R M Hausmann, J W Schofield & R L Woods, “Sense of Belonging as a Predictor of Intentions to Persist Among African American and White First-Year College Students” (2007) 48:7 *Research in Higher Education* 803; P Yi, “Institutional Climate and Student Departure: A Multinomial Multilevel Modeling Approach” (2008) 31:2 *The Review of Higher Education* 161; Isabel Moallem, *A Meta-Analysis of School Belonging and Academic Success and Persistence* (PhD Dissertation, Loyola University Chicago, 2013) [Loyola eCommons, 2013]; S J Spencer, C M Steele & D M Quinn, “Stereotype Threat and Women’s Math Performance” (1999) 35:1 *Journal of Experimental Social Psychology* 4; J Aronson & M Inzlicht, “The Ups and Downs of Attributional Ambiguity: Stereotype Vulnerability and the Academic Self-Knowledge of African-American Students” (2004) 15:12 *Psychological Science* 829; and J Aronson, C Fried & C Good, “Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence” (2002) 38:2 *Journal of Experimental Social Psychology* 113. In the law school context, see Carole Silver, Louis Rocconi, Heather Haeger & Lindsay Watkins, “Gaining from the System: Lessons from the Law School Survey of Student Engagement about Student Development in Law School” (2012) 10:1 *University of St Thomas Law Journal* 286 (using LSSSE data in

at what was one of the world's most internationally diverse and innovative programs, Yale-NUS College,<sup>118</sup> suggests:

UDL [Universal Design for Learning] was initially focused on supporting students with varied learning abilities, but lends itself naturally to culturally diverse and international learning contexts. Most tactics that benefit one group or type of learners benefit others as well. For example, complementing verbal lectures with visual aids helps not only students who may have hearing impairment but also those who are unfamiliar with the professor's accent or vocabulary. UDL is sometimes misunderstood as advocating hyper-individualized support. This is not the case. The idea behind UDL is not to apply resource-intensive 'spot treatments' for individual student needs. Instead, UDL integrates broader structural changes that make our classes more engaging and accessible for all, regardless of specific student needs or required accommodations.<sup>119</sup>

This flipping of our starting points from the 'ideal student' to the more peripheral student is helpful because needs that could include students at the periphery are likely to subsume interests for those at the core. International students with language cleavages might be more likely not to follow sarcasm or

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analyzing the relationship between students feeling comfortable and supported in law school and academic gains:

[t]he positive impact of a supportive law school environment suggests that students who feel comfortable and supported by their schools are better able to thrive academically. While this finding makes intuitive sense, it stands in contrast to the traditional image of law schools—also typical in media portrayals—as fostering competitive and intimidating experiences.

<sup>118</sup> On National University of Singapore's decision to close Yale-NUS College, see David Bloom, "The Yale-NUS Closure's Unanswered Questions" (2021) online: Surface <[www.globalist.yale.edu/2021-2022-issues/the-yale-nus-closures-unanswered-questions/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=the-yale-nus-closures-unanswered-questions](http://www.globalist.yale.edu/2021-2022-issues/the-yale-nus-closures-unanswered-questions/?utm_source=rss&utm_medium=rss&utm_campaign=the-yale-nus-closures-unanswered-questions)>.

<sup>119</sup> Sanger, *supra* note 116 at 35. UDL also relates to social justice initiatives, see e.g. Mirko Chardin & Katie Novak, *Equity by Design* (California: Corwin, 2020); Soung Bae, Nicole S. Ofesh & Jose Blackorby, A Commitment to Equity: The Design of the UDL Innovation Studio at the Schwab Learning Center, White Paper (2018), <https://slc.stanford.edu>.

humor in a classroom, they might benefit most from recordings, and following a range of cultural logics, they might feel most conscious about raising their hand and aggressively participating in a law school classroom as Socratic pedagogy demands. But from a universal design standpoint, rethinking pedagogy to assess whether such diversions are actually serving the intended audience might have important implications for more than just the international students in question. What is more, doing so following a model of universal design rather than as an accessibility response allows for the very students who are likely to be siloed as ‘other’ to not stand out quite as much.

Although our extension of these principles to international students expands the idea of who needs accommodation (and how accommodation should even be thought of),<sup>120</sup> we are certainly not the first scholars to suggest the relevance of UDI for law schools and the profession.<sup>121</sup> Research has pushed back against the ‘accommodations model’ for legal education and urged law schools to consider the importance of UDI principles as foundational for pedagogy in classrooms and student assessments well beyond the functional model of providing access to students with disabilities,<sup>122</sup> as well as for students with neuro-divergent learning styles and ESL backgrounds.<sup>123</sup> Research also has made the case for considering UDI as a way to promote self-efficacy, a value venerated in law school, especially as it pertains to millennial (and GenZ!) learners who now predominantly populate these schools.<sup>124</sup> More recently,

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<sup>120</sup> But see Bae, Ofiesh & Blackorby, *ibid* at 10 (recognizing non-native speakers of English as one sector of students included generally within UDL).

<sup>121</sup> See *e.g.* Meredith George & Wendy Newby, “Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design” (2008) 69:3 *University of Pittsburgh Law Review* 475; Jennifer Jolly-Ryan, “Bridging the Law School Learning Gap through Universal Design” (2012) 28:4 *Touro Law Review* 1393; and Matthew L Timko, “Universal Design in Law Schools” (2018), online: *SSRN* <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3183987](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3183987)>.

<sup>122</sup> George & Newby, *ibid*.

<sup>123</sup> Jolly-Ryan, *supra* note 121.

<sup>124</sup> Higbee & Goff, *supra* note 115.

research has made the connection to neurodiversity and the legal profession, noting that:

attorneys with disabilities are viewed by . . . the profession as a mental health and wellness issue, rather than what it really is: a diversity, equity and inclusion issue . . . the pivot to remote work has been hugely beneficial to many attorneys with disabilities . . .<sup>125</sup>

During the pandemic, these notions of the relevance of UDL were brought home more directly as faculty were guided in revising courses to teach online, with UDL principles serving as a framework for considering issues of access that were seen as generally relevant to the student population. Although the focus in these arguments remains on domestic law students, the imminent rise in the demographics of the international student population in US law schools demands a response that both takes more seriously this line of research and extends it more broadly to students who are in the periphery of their environments, regardless of attribute.

The experiences of the pandemic might have accidentally laid the groundwork for reconceiving legal education. Remote learning and the Zoom-sphere not only changed the power dynamics between a range of actors, but it also forced people to think about how they engaged with their pedagogic model and who they sought to serve. At our own law schools, for example, the summer of 2020 was filled with an unprecedented collective effort to adapt to teaching online, including tens of workshops along with shared materials, new technologies and consulting with experts in course design. Principles of UDL were very much a part of these conversations, although some law faculty did not recognize its relevance, much less its importance. But for many, this was the first time they considered processes of teaching over substance. This shock has been helpful to what could have otherwise stayed an inert academic community that

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<sup>125</sup> Zack Needles, “Haley Moss on Disability as a Diversity Issue and Why Remote Work Makes Her ‘Incredibly Hopeful for the Future’” (23 June 2021), online (podcast): *Law.com* <[www.law.com/2021/07/23/haley-moss-on-disability-as-a-diversity-issue-and-why-remote-work-makes-her-incredibly-hopeful-for-the-future/](http://www.law.com/2021/07/23/haley-moss-on-disability-as-a-diversity-issue-and-why-remote-work-makes-her-incredibly-hopeful-for-the-future/)>.

consistently has rewarded research over pedagogy and teaching within its hierarchies.<sup>126</sup> Instead of reverting to a pre-pandemic norm, we have a chance to offer more opportunities for different kinds of students who otherwise have not, and likely cannot, gain from the pre-pandemic version of law school. Naturally, this cannot be a wholesale fix of the entire market. It needs to be an individual and institutional introspection about what it would look like if each school prioritized its most precarious first and made that the model of their pedagogic policies.

The inequalities that the pandemic has made stark have always existed, and the diversities in these inequalities are important to keep in mind. All diversity cannot be clubbed together for ease in order to facilitate the same one-stroke fix. Rather, these variations in diversity can allow for more comprehensive models for the ways in which inequality seeps into the institutions we inhabit and inherit. By questioning the ways in which our environments privilege majority actors — however construed within the logics of our environments — we are offered a unique insight into the ways in which our ideal solutions respond to ideal types of actors. Instead, we could use this shock that has made us do the ‘extraordinary’ this past year to reconsider, rethink and restart our commitments. Responding to this call with agentic action could be of imminent value as we consider creating the futures of legal education that we desire and deserve.

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<sup>126</sup> See Rachel López, “Unentitled: The Power of Designation in the Legal Academy” (2021) 73:1 Rutgers University Law Review 101 (describing the two-tiered hierarchy of the legal academy). On the question of faculty status and teaching quality, see David N Figlio, Morton O Schapiro & Kevin B Soter, “Are Tenure Track Professors Better Teachers” (2013) National Bureau of Economic Research Working Paper No 19406 at 15, (study of Northwestern undergraduate first-year students “suggest[s] that non-tenure track faculty at Northwestern not only induce students to take more classes in a given subject than do tenure line professors, but also lead the students to do better in subsequent coursework than do their tenure track/tenured colleagues”). See also Elie Mystal, “Does Tenure Hurt Students?” (2013), *Above the Law* (reporting on a blog post by Harvard Law Professor I Glenn Cohen advising that focusing “too much on teaching or service” is one step towards not getting tenure).



## V. Conclusion: The Problem with One-Stop Diversity

The pandemic upended the world for so many people in many different and similar ways. Our concentration here on international students and their navigation of law school is but one example of how focusing on actors that are most on the periphery can give us insight into the problems most central to the systems in which they are embedded. Globalization might well have required the “potential for geographic mobility”.<sup>127</sup> But, like most, this mobility comes at the cost of inclusion that does not really center the very actors that seek it the most or have to travel the farthest to gain it.<sup>128</sup>

This, of course, is not to say that schools do not already work in ways that are committed to what they think of as ‘best’ for their students. Schools, in fact, do what they *see* as best for their own students, usually predicated on what they think of as the intended model of the typical or ideal student, allowing for exceptions as they think of ‘outliers’ who are more diverse. Often, internal decisions of schools made in the context of what’s best for students are juxtaposed against the very real fact that students then emerge and interact within a single legal market, facing unequal consequences and environments based on what their other competitor cohorts’ schools did. As a result, no matter the internal decisions, there also are severe external factors of the market arising from each law school’s reputation and ranking, for example, that administrators and advisors have to consider while pivoting during times of crisis.

At the same time, a single measure for ‘all students’ or even all ‘diverse students’ is unlikely to be able to do the work of changing the culture in these spaces, much less serving in ways that the universal design principle suggests. In other work, we show how inter-group variations in minorities are crucial for understanding differences in student experiences and suggest that resultant

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<sup>127</sup> Silver, “Agents of Globalization in Law”, *supra* note 6.

<sup>128</sup> Caitlin Dickerson, “My World is Shattering: Foreign Students Stranded by Coronavirus” (25 March 2020) *The New York Times*. See discussion and notes, *supra* notes 54-59.

policy should think about diverse groups at a more micro-level for ‘good inclusion’ to serve the groups it purports to serve.<sup>129</sup> But just like ideal students, ideal solutions are dangerous because they presuppose a certain kind of institution, yet another category that is not generalizable. Instead, what is being called for here is a reckoning on one’s own institutional terms to think about cultures of schools, needs of diverse students, and importantly, *differences* rather than similarities in those needs. We suggest that when motivated in this way, the solutions that are institutionally evolved to target the needs of the interactionally-most-precarious student are most likely to be effective for everyone else who is likely to be included in it.<sup>130</sup> This way of thinking about institutional diversity from the ground up is how law schools can build not just for themselves but contribute effectively towards a better and more equitable legal profession.

Of course, when dealing with schools, there are market considerations and competition perspectives that complicate these decisions,<sup>131</sup> but global market considerations might also be an incentive for schools to start and do things differently.<sup>132</sup> Instead, the suggestion is that a more granular student-centric

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<sup>129</sup> Our other work shows how similar patterns of isolation and varying social capital are inherent in networks of other kinds of minority groups, too. See Paik et al, *supra* note 79. On the theory of “rethinking inclusion”, see Swethaa Ballakrishnen, *Rethinking Inclusion* (LSI 2021 under review).

<sup>130</sup> For example, reconsidering bar regulations, solving the challenges posed to international LLMS because of the pandemic would also have solved the challenges posed to American JDs, but the reverse — which was the focus — did not extend a fix to the LLMS. See *supra* note 63. Similarly, reconsidering discussions of inequality in law school and higher education generally must begin with the question of who is within the frame of reference, and whether all students — including international students — are visible to those leading these discussions.

<sup>131</sup> For law schools, rankings — and particularly US News — is the overwhelming consideration. See Espeland & Sauder, *supra* note 21.

<sup>132</sup> That is, the global competition for internationally mobile students exerts an influence on schools’ approaches. In some instances, this takes the form of collective outreach that includes funding for travel, for example, which not only defrayed costs incurred because of the pandemic but also signaled the

approach is more likely to build strong institutions if we truly are committed to their equity. Reshaping our structures with this directive could offer new energy to the modifications we strive to make following the intuitions gained from this traumatic pandemic experience. If we are lucky, with enough institutional buy-in and momentum, they could change the cultures of the institutional fields and frameworks that house them. This may call for reallocating resources to maintain course design specialists who can work with faculty and are attuned to issues of diversity and inclusion generally to support the continual rethinking of teaching. It might involve initiatives to press for a reconsideration of the regulatory approach to LLM programs or other spheres that house important populations of students in precarious positions, in recognition that excluding them from the focus of regulation has not supported them. It almost certainly should include an institutional commitment to taking a different approach to diversity and inclusion, including rethinking who is included and excluded at a particular school and the implications for teaching, student organizations and

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importance of this group to the university and its community. Amy Walker, “Over 7,000 Chinese students flown into Manchester on 31 specially chartered flights” (11 November 2020) *Manchester Evening News* (describing an initial transport of 7,000 students organized “by a working group set up initially in Manchester including representatives from Greater Manchester’s universities, Greater Manchester Combined Authority, Manchester Airport Group, the Manchester China Forum and student accommodation providers”). This sort of collaborative effort generally has not been pursued by US law schools. See also “Queen’s University Belfast Charters Plan to Bring 369 Chinese students Back to UK Campus” (20 September 2020) *CGTN*. But see Julie Hare, “Return of International Students Under Threat, Again” (5 July 2021) *The Australian Financial Review* (describing “another aborted plan” to bring international students back to Australia); Karin Fischer, “American Attitudes Toward International Students Are Warm but Wary” (14 May 2021) *Chronicle of Higher Education* (describing survey results that show a substantial portion of respondents being concerned about the motives of international students, particularly from China); and Danny Vesurai & Alex Wong, “New Technology Fee for International Students Triggers Intense Backlash” (16 November 2018) *The Daily Northwestern* (describing imposition of a fee for software to facilitate visa reporting being imposed only on international students).

other matters.<sup>133</sup> Lastly, they might develop organizational structures that reach beyond the university — much less law school — walls to provide support to students that cannot be provided by a single school, no matter how well-intentioned.<sup>134</sup> Overall, though, we see this as an opportunity for a collective shift, where the market, regulators and schools come together for coordinated solutions to the challenges we have outlined here.

As we write, the world of higher education — like many of its contemporary institutions — is poised to enter another phase of ‘reopening’ in response to the ongoing pandemic. What this reopening means in the everyday might differ based on each school, its priorities, capacities and context. But one thing remains true for them all: in reopening, if law schools revert to their pre-pandemic approaches entirely, or even if they stick to pandemic measures just as a way to react rather than evolve, they will re-cement the past, including the inequality embedded in law school structures and interactions.

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<sup>133</sup> For example, faculties might consider implementing annual workshops on the backgrounds of their students as a sort of know-your-audience initiative that attends particularly to diverse students, broadly conceived, where they could routinely consider the particular interests and challenges of the students in their law school. On feelings of being ‘othered’ generally, see Ballakrishnen & Silver, “New Minority”, *supra* note 8; and Vesurai & Wong, *ibid* (in reacting to a fee imposed only on international students, one student commented: “I’m already aware of my otherness, of being an alien, of being suspected and scrutinized,” said Niki Charlafti, a third-year doctoral music composition student on an F-1 visa from Greece. “This fee makes me feel very unsafe on top of all of the other challenges”).

<sup>134</sup> See Walker, *supra* note 132.

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