

WHETHER TO REGULATE NON-J.D. PROGRAMS: CONSIDERING THE WHATS, WHYS, AND HOWS

John B. Thornton

Northwestern University Pritzker School of Law

THE “WHATS”: THE NUMBER AND SCOPE OF NON-J.D. PROGRAMS

Almost all U.S. law schools have at least one non-J.D. program.

- Number of LL.M. programs: 396 (120 general LL.M.s for international lawyers, 5 Executive LL.M.s, 28 Tax LL.M.s, many subject-specific LL.M.s) (compiled from ABA list of graduate programs). Some schools have one or two programs; others have many.
- 60 S.J.D./J.S.D. programs for future academics; 5 Ph.D.
- 129 “Non-lawyer” programs for baccalaureates without a law degree (MSL/MS/MPS/MJ/JM etc.)

THE NUMBER AND SCOPE OF NON-J.D. PROGRAMS

Size of the programs

- Some law schools, mostly in U.S. News' top 20 ranking, have very large international LL.M. programs (e.g., Harvard, Georgetown, NYU, Hastings, and Northwestern all have programs with students from 50 countries or more).
- As Camille DeJorna showed, most growth is in the post-baccalaureate and online programs, not post-law graduate programs like LL.M.s.

THE “WHYS,” PART ONE: WHY THE RECENT GROWTH OF NON-J.D. PROGRAMS?

- To fill educational and societal needs (e.g., bad fit between legal service providers and client needs due to high legal costs may lead states to allow non-lawyers to provide certain limited legal services, analogous to nurse practitioners or physician assistants in the medical field)
- To increase understanding of and respect for U.S. law in an increasingly international world, and to expose our students to international lawyers
- **To provide badly-needed revenue, especially with the projected demographic decline of 20% of the student-age population**
- Increased revenue from non-J.D. programs needed to weather the projected downturn in student populations. Many law schools are still financially insecure after the Great Recession.

THE “WHYS,” PART TWO: RATIONALES FOR REGULATING NON-J.D. PROGRAMS

Unlike J.D. programs, which are regulated and accredited by the ABA, these programs have no national regulation or accreditation program.

- Regional accrediting bodies, state education departments, university requirements, and even the requirements for LL.M.s to take the New York bar exam (re credit hours, the types of courses, and how they are delivered (no online courses)) do provide certain requirements and varying extents of regulation for these programs, however.

THE “WHYS,” PART TWO: RATIONALES FOR REGULATING NON-J.D. PROGRAMS

The traditional rationale, to protect the public from incompetent lawyers, is not a good fit with non-J.D. programs.

- Most international LL.M.s return home to practice, even if they pass a state bar exam, although some obtain one-year internships in the U.S.
- The MSL/MS/MJ, etc. students are not lawyers in the U.S. or their countries and cannot practice law.

RATIONALES FOR REGULATING NON-J.D. PROGRAMS

Another rationale: protecting students

Likely a better fit for non-J.D. programs

- Currently, there's no national regulation of non-J.D. programs and little, if any, guidance re what good programs should look like or what best practices are.
- Some say that it's a "Wild West" out there.
- With new online programs and new non-J.D programs offered every year, how will students know which programs are worthwhile?
- Regulation can provide schools with guidance and guideposts, to help them follow best practices and keep them honest—i.e., avoiding ill-prepared programs designed to generate revenue.

POTENTIAL CONCERNS RE REGULATING NON-J.D. PROGRAMS

- Limiting or stifling innovation in new kinds of programs, if the requirements are too rigid
- Re-enforcing the dominance of the usu. well-financed “name-brand” schools by making, e.g., expensive resource or staffing requirements
- Given the often-new and still-developing nature of many of these programs, will evaluators have sufficient expertise to evaluate programs? Can we even agree on the metrics?

ISSUES TO CONSIDER RE DEVISING A REGULATION SYSTEM FOR NON-J.D. PROGRAMS

1. The scope of what we regulate

If the primary purpose is protecting the public, not the student:

- Do we regulate all non-J.D. programs, even ones with certificates instead of degrees?
- Should we only regulate programs where graduates might practice law in the U.S.?
- What about study abroad or other programs outside the U.S.?
- What about S.J.D.s/J.S.D.s/Ph.D.s who will be academics?
- Is it practical to regulate small programs with only a few students per year, or to send evaluators abroad for overseas programs?

ISSUES TO CONSIDER

2. The scope of how we regulate:

Non-J.D. programs likely have more differences in design and structure from law school to law school than J.D. programs do. Is that bad, and should it change? If so, why, and to what extent?

- Do we even agree on what “best practices” are with some of these degrees and certificate programs? (e.g., programs which integrate international LL.M.s into some J.D. classes v. those who don’t)
- Can and should regulators make specific requirements re issues like this, or provide suggestions with a range of acceptable choices?
- Should regulators demand certain levels of program support (e.g., non-J.D. advisors, writing centers, ESL professionals, etc.)?
- Given the recent origin of some of these newer degrees, who is qualified to make school visits to evaluate programs?

ISSUES TO CONSIDER

3. What kind of “enforcement teeth” will the regulations have?

- E.g., will existing non-J.D. programs at ABA-accredited law schools start out as accredited, and lose accreditation only for “major violations”? Would there be a probationary period? What would constitute “major violations”?
- Could a law school have an accredited J.D. program, and unaccredited non-J.D. programs? Would it be categorical for all non-J.D. programs, or particular to one deficient non-J.D. program? Would losing accreditation for non-J.D. programs affect the reputation of the J.D. program? If so, would cautious schools drop fledging non-J.D. programs to avoid that?

ISSUES TO CONSIDER

Even after many decades of regulation, the bottom-line benchmark for J.D. programs is a simple metric: bar passage rates.

- But bar-passage rates are irrelevant for most non-J.D. degrees: some post-graduate students will have already passed the bar; many international LL.Ms will never take it, or will have trouble passing it for a variety of reasons; and post-baccalaureates cannot take it.
- What bottom-line measure, if any, would or should we use to evaluate non-J.D. programs? Job-placement rates? Would that be useful or acceptable?

CONCLUSION

The wide variety of degrees, programs, and individuals studying in these non-J.D. programs, would make attempts to regulate them by national organizations such as the ABA impractical at best, and potentially disastrous, for several reasons:

- The overwhelming majority of students in these programs will either never practice law in the U.S., or already have a J.D. from a regulated law school, so further regulation is not needed to protect the public from incompetent lawyers.
- It is unclear who would have the expertise and the knowledge to conduct site visits and evaluate these often-new and innovative programs, such as Masters programs for non-lawyers; there is no consensus as to “best practices” for many of these degrees; and it is impractical to send regulators to schools with very small programs or programs abroad.
- It may be prudent, however, for law schools to work together to formulate a voluntary list of best practices, especially if the ABA announces a plan to regulate and/or accredit these programs.