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Will The Income-Based Repayment Program Enable Law Schools To Continue To Provide "Harvard-Style" Legal Education?

IHELG Monograph

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WILL THE INCOME-BASED REPAYMENT PROGRAM ENABLE LAW SCHOOLS TO CONTINUE TO PROVIDE "HARVARD-STYLE" LEGAL EDUCATION?

by

Gregory Crespi[1]

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ABSTRACT

Legal education provided in the prevailing "Harvard-style" now costs students on average between $160,000 and $250,000 for their three years of study, the precise amount depending on the law school attended, the alternative employment opportunities foregone, and the amount of scholarship assistance provided. However, the median starting salary for full-time, entry-level legal positions has declined in recent years to only $60,000/year, and upwards of 45% of recent law graduates are now unable to obtain full-time legal employment, and this dismal employment situation is unlikely to significantly improve over the next few years. While the attractive job opportunities still available to graduates of the elite law schools justify the large majority of those graduates incurring the high costs of legal education, even under unsubsidized federal student loan terms, the far more limited job prospects facing the majority of graduates of non-elite law schools do not justify their incurring those costs on those terms. However, the existence of the Income-Based Repayment ("IBR") program as implemented by the Obama Administration's new Pay As You Earn ("PAYE") rules may significantly change this situation for those latter students.

In this article I conduct several different detailed analyses of the IBR program under the liberalized PAYE rules, and of the related and even more generous Public Service Loan Forgiveness ("PSLF") program. My conclusion is that the IBR loan repayment and debt forgiveness provisions are sufficiently attractive so that Harvard-style legal education is now again a financially viable proposition for many law students, not only for those students attending the 10 most elite law schools but also for many students attending non-elite law schools, specifically those students who will graduate in the upper half of their class or better at the 40 or so upper- or mid-tier non-elite law schools, and also for those students who will graduate in the upper quarter of their class or better from one of the more than 150 lower-tier law schools. For most other law students, however, who in the current employment market have only a slim chance of obtaining a full-time entry-level legal position paying even $60,000/year, and who have virtually no chance of obtaining a qualifying public service legal position under the PSLF program, attending law school is no longer economically justified even with the IBR and PSLF loan repayment options.

The continuation of Harvard-style legal education at the non-elite law schools will depend to a large extent upon the willingness of their students to

continue to borrow the large sums needed to pay for this expensive education and then enroll in the IBR or PSLF programs to reduce the burden of repaying those debts. My analysis leads me to somewhat optimistically conclude that many prospective law students considering attending upper- or mid-tier non-elite law schools should go ahead and matriculate, taking out the needed student loans and then enrolling in either the IBR or PSLF programs to contractually lock in these favorable repayment and loan forgiveness terms. If they choose to do so then these schools should be able to continue to offer Harvard-style education, albeit probably with significantly smaller enrollments and in a moderately more financially stringent manner. Whether these prospective students will in fact be willing to attend and enroll in the IBR or PSLF programs on a large scale in the coming years, however, is for several reasons yet uncertain. On the other hand, I conclude more pessimistically that attending lower-tier law schools can no longer be financially justified even under the IBR or PSLF programs for any but the best of their students, and consequently the longer-term prospects for the survival of those many law schools is not very promising.

Finally, one should not assume that the IBR and PSLF programs will necessarily continue to be available for law students indefinitely. The taxpayer subsidies of uncertain but possibly substantial size that these programs provide to law students, a group of people that are drawn disproportionately from upper-income socioeconomic groups, and indirectly to law schools, generally relatively affluent institutions, and to relatively very affluent law faculty makes these programs an attractive target for political leaders who are looking for opportunities to reduce federal deficits, particularly at a time when there is a pronounced oversupply of new lawyers relative to the employment opportunities.

The elite law schools will surely survive in any case, but law school deans and other legal education leaders may only have a relatively short period of time to take proactive steps that will significantly reduce law school costs and tuitions for the upper- and mid-tier non-elite schools so that those schools can survive should the IBR program be substantially curtailed or even eliminated for law students. The substantial curtailment of the IBR program for law students would, however, probably lead to the closing of many if not most of the lower-tier law schools no matter what efforts they may undertake to try to avoid this fate.

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I. INTRODUCTION

The unfavorable job market that new law graduates now face, coming after decades of steady increases in the real costs of attending law school, has resulted in a serious financial crisis for legal education.[2] The basic problem is easy to understand but very difficult to solve. A typical law student who now graduates with an average amount of undergraduate and law school student loan debt, and who then obtains a full-time legal position paying the current median $60,000/year entry-level salary for such positions,[3] cannot afford to service that debt even under an extended 25-year repayment schedule.[4] This debt service problem is even more severe for those numerous law graduates with larger than average student debt loads, and for those many law graduates who are only able to obtain full-time legal positions that offer starting salaries of less than $60,000/year, and of course is even worse for those graduates with both large student loan debts and low starting salaries. Moreover, the situation is absolutely dire for most of the now approximately 45% of recent law graduates who are unable to obtain a full-time legal position.[5]

The prevailing model of legal education in the US that has contributed to this financial crisis is what I will here label "Harvard-style" education. By this phrase I am referring generically to the instructional approach originated at Harvard Law School in the late-19th century and since then very widely replicated. This approach requires three years of full-time legal study or the part-time equivalent thereof over a longer period, where the instruction is provided by research-oriented faculties comprised primarily of well-paid, mostly tenured scholars with relatively light teaching loads, and which includes large and expensive clinical programs and library facilities, and extensive student services, and which makes only relatively modest use of inexpensive adjunct instructors or on-line courses. This expensive approach is designed primarily to prepare students for either prestigious public sector positions, highly remunerative associate positions with prominent private law firms, or academic positions, often after a short term after graduation as a judicial clerk.

As I will discuss below, the high cost of Harvard-style legal education can still be financially justified by its benefits for the large majority of those students who attend one of the 10 elite law schools[6] and who even in the current depressed job market still generally have excellent employment prospects upon graduation. However, this education is now overpriced relative to its benefits for many if not most students at the 40 or so upper- or mid-tier non-elite law schools[7] who will probably not be able to obtain such positions upon graduation. It is significantly overpriced for all but the best students at one or another of the more than 150 lower-tier law schools[8] since these students now have only a slim chance of obtaining such attractive positions.[9] Absent a major increase in the demand for new lawyers for sophisticated legal work which would sharply increase the number of large-firm, entry-level associate positions paying six-figure starting salaries ranging up to $160,000/year, something no serious observer expects to occur anytime in the foreseeable future,[10] the recent sharp decline in the number of law school applicants[11] is likely to persist and may even worsen further over the next few years as the current employment market realities for young lawyers become ever more widely appreciated.

Our law schools collectively have substantial overcapacity relative to student demand for law degrees at current tuition levels and given the currently limited employment opportunities. Even if the number of law school applicants stabilizes at the current level and does not continue to decline, a number of informed observers are of the view that the situation is unsustainable and will necessitate a rather drastic restructuring of legal education of one sort or another to substantially reduce costs and tuitions.[12] There have been offered quite a number of controversial suggestions as what forms this restructuring should take.[13]

The discussion that is now taking place regarding the merits of the various proposals that have been suggested for restructuring legal education so as to significantly reduce its costs and tuition levels is certainly important. However, I will not attempt to directly contribute to this discussion in this Article. I would instead like to focus on one aspect of the related threshold question of whether such a fundamental restructuring is really needed at all. In particular, what is often lacking in these discussions of which radical changes of one sort or another are called for is a comprehensive assessment of how significantly the financial problems of Harvard-style legal education that are motivating such proposals have been alleviated by the federal government's Income-Based Repayment ("IBR") program[14] under which student borrowers are offered generous loan repayment and debt forgiveness terms, particularly under the Obama Administration's new Pay as You Earn rules (the "PAYE rules") that have made those terms substantially more advantageous to qualifying borrowers.[15] This Article is an attempt to provide such an assessment of the IBR program.

As I will demonstrate below in (perhaps excruciating) mathematical detail, the IBR program as implemented by the PAYE rules has a rather dramatic effect on the affordability of Harvard-style legal education, but that effect will likely vary greatly across the different reputational tiers of law schools. The impact of the IBR program upon students attending the handful of elite law schools[16] will probably be relatively minor, since attending one or another of those schools still generally leads to very attractive employment opportunities for the large majority of graduates. Probably between about 80% and 90% of those graduates obtain full-time legal employment,[17] and the large majority of those positions will pay at or above the $60,000/year median salary,[18] with a significant percentage of those positions being with large law firms and paying six-figure starting salaries ranging upwards of $160,000/year. The costs of elite law school attendance can still be financially justified for almost all students even absent the generous IBR provisions.[19] The IBR program will, however, further encourage elite law school attendance at least to a modest extent because it will reduce somewhat the now no longer negligible financial risk of having relatively unattractive employment prospects after graduation as a result of doing poorly in one's studies.

The impact of the IBR program for students attending any of the more than 150 lower-tier law schools[20] will probably also be relatively minor, but for a very different and more depressing reason. Even under the generous IBR program terms attending one or another of these schools is still not financially justified for the large majority of their students, given the relatively poor employment prospects that they will later face upon graduation.[21] A student who does not graduate in the top 10% of their class, or at the very least in upper quarter of the class, at most of these schools has poor prospects for obtaining full-time legal employment at a $60,000/year or better starting salary. I hope that prospective students considering attending one or another of these lower-tier law schools come to better appreciate these difficult odds they would face.

The IBR program is likely to have its most dramatic impact on the students attending and the viability of the 40 or so upper- and mid-tier non-elite law schools.[22] As I will demonstrate below, under the IBR loan repayment provisions Harvard-style legal education remains a financially viable proposition for the many prospective law students who will be better-than-average students at one or another of those schools. Those students will have reasonably good prospects for obtaining full-time legal positions upon graduation that will pay at or above the current $60,000/year median starting salary, even in the current depressed job market.[23] I will show in Part III of this Article that this seemingly rather modest starting salary is clearly insufficient to repay the costs of law school if a student finances all of those costs with unsubsidized federal student loans, even under an extended 25-year repayment schedule. But as I will also demonstrate in some detail in Parts IV and V this salary is arguably sufficient to justify these students who reasonably expect to obtain a median or better salary incurring even relatively large student loan debts when they can be repaid under the terms of the IBR program, or under the even more generous terms of the closely-related Public Service Loan Forgiveness ("PSLC") program. I would hope that prospective applicants to these upper- and mid-tier law schools will be able to realistically and accurately assess their prospects for doing well enough academically – to be able to graduate at least in the upper half of their class, if not a little better than that[24] -- to justify incurring the costs of law school under IBR or PSLF program terms.[25]

If law students in the coming years prove willing to increasingly utilize the IBR program, which as I will also discuss below in Part VI is a matter of some uncertainty,[26] then legal education may be sustainable indefinitely in its current Harvard-style format, surely at the elite law schools whose students are not dependent on IBR program largesse, and probably also in a moderately downsized and more financially stringent manner at the upper- and mid-tier non-elite schools that still offer their better graduates a realistic prospect of obtaining full-time legal employment paying the median or better starting salary. The prospects here for members of this latter group of schools are more promising for those law schools that are fortunate enough to have large endowments to help them remain solvent while they make the necessary longer-term cost structure adjustments to balance their budgets with significantly smaller enrollments and somewhat lower tuition levels, or that are state university law schools that will probably have access to at least temporary emergency funding support during this extended adjustment period.

However, the longer-term financial situation for the over 150 lower-tier law schools which most law students now attend is far more problematic even with the availability of the IBR and PSLF programs for their students. Even under the generous IBR and PSLF program terms the poor employment prospects that the large majority of graduates of those schools now face do not justify the substantial costs of attendance. Most of these lower-tier law schools are likely to sharply contract or even close altogether in the coming years, particularly those schools that are not unusually well-endowed nor part of state university systems that are willing to continue their operations at much lower tuition levels and absorb significant losses on a regular basis.

The elite law schools and their students will probably do just fine, even in this difficult environment, and as a result of the IBR and PSLF programs the wolf may not yet be at the door for most of the upper- and mid-tier non-elite schools. With some fairly significant reductions in their class sizes, and with some moderate adjustments in their operations so as to reduce their costs and limit their future tuition increases, those latter schools will probably be able to continue to offer Harvard-style education indefinitely if their students prove willing to utilize these loan repayment programs. However, it should surely be of serious concern to the deans of those more fortunate schools and others with an interest in the long-term viability of legal education that the Harvard-style instructional approach is now no longer financially viable for the large majority of law students at upper- and mid-tier non-elite law schools unless they enroll in the IBR or PSLF programs. Once one leaves the rarified world of the elite law schools, legal education, even at the well-regarded upper- and mid-tier non-elite law schools, is now unfortunately in roughly the same position as the ethanol or wind power or maritime shipping industries; an industry now essentially dependent on federal largesse to survive. And even with those generous subsidy programs in place legal education is still not financially viable for the large majority of students at the lower-tier schools, which calls into question their ability of those many schools to survive over the longer term.

Moreover, even if law students at non-elite schools will prove to be willing on a large scale over the coming years to take on large loan debts in the expectation of later IBR or PSLF program enrollment, which for several reasons that I will later discuss in Part VI is far from certain,[27] the perpetual continuation of these federal programs for law students cannot be taken for granted. There are strong and persistent political pressures to reduce federal budget deficits. Given the widespread perception that through the IBR and PSLF programs large federal subsidies are being provided to law students and indirectly to law professors, [28] persons that are disproportionately drawn from upper-income socioeconomic groups, and this during a period of time when there is clearly a significant surplus of new law graduates relative to their employment opportunities,[29] as I will discuss in Part VII the IBR and PSLF programs could well become political targets for deficit hawks and be cut back substantially or even eliminated altogether for law students in coming years.[30]

If the IBR and PSLF programs are significantly curtailed in some fashion with regard to their availability or generosity for law students this would surely force an immediate and drastic response by all law schools except for the handful of elite schools. Those upper- and mid-tier non-elite law schools that are fortunate enough to have access to the substantial financial resources necessary to allow for their making an orderly transition over several years to a significantly smaller student body, and a more sustainable cost and tuition structure, would likely survive the loss of IBR program support. However, those schools in that group that lack the resources to run significant deficits during an extended transitional period would face major problems that might even threaten their survival. In addition, any substantial curtailment of the IBR program for law students would probably lead to the relatively rapid closing of many or even most of the lower-tier law schools, many of which as I have noted are unlikely to survive over the longer term even with the IBR program in place.

Given this hanging Sword of Damocles presented by the potential loss of IBR program support legal education leaders would be well advised to be proactive while there is still time available for making significant cost reductions and tuition level adjustments in a measured and thoughtful fashion. Law school deans and other interested faculty members should work together with the American Bar Association Section of Legal Education and Admissions to the Bar and with the American Association of Law Schools and the various state Supreme Courts to try to implement some of the suggested fundamental reforms that might significantly reduce the costs of legal education, and therefore may enable a significant number of non-elite law schools to survive if the IBR program is significantly curtailed with regard to law students.

The main focus of the remainder of this Article will be on the question of the financial viability of legal education for those prospective law students who are considering attending a non-elite law school, and who because of the relatively high prestige of the school which they have been invited to attend, and/or their relatively strong academic capabilities, are fortunate enough to have reasonably good prospects for obtaining after graduation a full-time legal position paying at or above the median $60,000/year starting salary.[31] I am here referring specifically to those students who will likely graduate at least in the upper half of their class at an upper-or mid-tier non-elite law school,[32] or in the top 10% or at least in the top quarter of their class at a lower-tier law school.[33] I will focus only limited attention on the situation facing those prospective law school applicants who will not do this well academically, and who consequently will not have nearly as good employment prospects upon their graduation, because the conclusion here is unfortunately very simple and straightforward: the costs of law school cannot be financially justified for those students even under the generous IBR and PSLF programs.

To render my analysis more comparable with earlier efforts to assess law school affordability along the lines of work done by Paul Campos, Phillip Schrag and Brian Tamanaha I have chosen to focus primarily on the situation facing a typical law student seeking to obtain a full-time, entry-level position paying at or above the median starting salary, rather than starting with the well-known bimodal distribution of full-time starting salaries in recent years[34] and then analyzing the prospects for a graduate obtaining a position with a six-figure starting salary that is located in the right “hump” of this distribution, and not in the $40,000/year - $65,000/year left hump. However, given that only approximately 15% of class of 2011 law graduates were able to obtain starting salaries in excess of $100,000/year,[35] the results that I would have reached following this approach are very likely to be the same as the conclusions that I have here reached.

Let me provide a brief road map to the remainder of this Article. In Part II I will present some illustrative calculations regarding the current costs of Harvard-style legal education. These calculations are necessarily based on a number of simplifying assumptions and should be regarded as establishing only the general contours of the range of costs borne by typical law students at various public and private law schools, and with different levels of scholarship assistance, rather than as an attempt to precisely estimate any particular student's burden. However, my calculations are nevertheless robust enough to allow me to demonstrate in Part III that given the current depressed state of the market for full-time entry-level legal positions expensive Harvard-style legal education is no longer financially viable for the large majority of law students at non-elite law schools under unsubsidized loan repayment terms, even under extended 25-year debt repayment plans.

In Part IV of this Article I will describe the main features of the IBR program under the PAYE rules, and demonstrate how this program significantly alters the calculations regarding the balance of the costs and benefits of law school for many but not all prospective law school applicants, and how it preserves financial viability for not only the elite law schools but perhaps also for the upper- or mid-tier non-elite law schools, but unfortunately not for most lower-tier law schools. I will also briefly discuss the related PSLF program and demonstrate its financial advantages and disadvantages for law graduates. In Part V I will broadly consider the affordability of legal education, given the IBR and PSLF programs and given the current $60,000/year median salary for full-time entry-level legal positions, conducting the analysis using several different complementary approaches to assess affordability, and making various assumptions about salary and price inflation trends. I will also there consider the magnitude of the governmental subsidies provide to law students and indirectly to law schools and law faculties by those programs.

In Part VI of the Article I will address some concerns regarding whether prospective law students may be reluctant in the coming years to rely upon either the IBR or PSLF programs as a basis for borrowing heavily to finance their legal education, despite those programs' generous terms. In Part VII I will discuss whether the IBR and PSLF programs' generous terms are likely to continue in force for law student borrowers in the coming years, given the strong political pressures to reduce federal government deficits, and given the various legitimate criticisms that can be made of these programs. Part VIII will present a brief conclusion to the Article.

II. THE COSTS OF LAW SCHOOL

One major shortcoming of the recent literature addressing the financial problems of legal education is that the various attempts to determine the cost of legal education for law students, which is obviously needed as a baseline for determining the size of their debt obligations upon graduation, and their consequent starting salary requirements, are often fundamentally flawed from an economic perspective. Many of these writers measure the cost of legal education by simply adding up the required tuition and fees, the costs of books and other law school supplies, and the estimated living costs of a law student over their period of legal education.[36] A cost estimate calculated in this rather simplistic manner is seriously flawed in that it is both over- and under-inclusive.

Such an estimate is significantly over-inclusive in that the living costs of a law student are not a marginal cost attributable to law school attendance. Those living costs would have to be incurred whether or not the person attended law school, and therefore should not be included as a cost of law school. In addition, a cost estimate calculated in this way is also significantly under-inclusive in that it does not reflect the three years of lost income that a typical full-time law student who has alternative employment opportunities based on his undergraduate degree would forego to attend law school.

A properly calculated estimate of the costs of attending law school should include the after-tax portion of that foregone income, after adjusting for federal and state income taxes, Social Security taxes, Medicare taxes, and state and local sales taxes that would be paid from that income, but should not include living costs during the period of attendance. The combined effect of these two offsetting errors is generally to underestimate the costs of law school, since the foregone after-tax income that a typical law student could have earned over those three years based on their undergraduate degree is generally larger, sometimes substantially so, than a typical law student's living expenses during law school.[37]

My estimate of the full costs of a three-year private school legal education for a law student commencing their legal education in the fall of 2013 and graduating in the spring of 2016, properly calculated as noted above, is approximately $250,000. Let me explain in some detail how I have calculated this number, which may initially strike some readers as too high, but is actually a relatively conservative estimate.

I first added up three years of private law school tuition, at an estimated $45,000/year for the 2013-2016 period,[38] for a total tuition cost of $135,000. I then added an estimated total expenditure of $5,000 for books, computers and other supplies over the three years of studies. I then added the estimated forgone after-tax income of $30,000/year for three years – the approximately $45,000/year average income now earned by college graduates in their initial year of full-time employment,[39] minus estimated combined federal and state income taxes, federal Social Security and Medicare taxes, and state and local sales taxes of 33% of this sum[40] -- for a total foregone after-tax income of $90,000. This foregone after-tax income is just as much a cost of law school, when viewed in economic terms, as are the out-of-pocket tuition and books and supplies expenses.

These various costs considered so far total $230,000. I then added the estimated $25,875 of interest obligations that will accrue on a $230,000 federal student loan debt during law school and for six months after graduation before repayment of the loan commences under the federal student loan rules, assuming for now that both these law school expenses and the forgone after-tax income that would have been used for living costs are financed by student loans, and that this borrowing is done in regular installments throughout law school under the available federal loan programs at an average blended annual interest rate of 7.5%.[41] I also added $6,740 to reflect the 4% surcharge that is imposed by the federal government on the $168,500 portion of this loan financing that would be made through the Grad PLUS loan program, once the total $61,500 overall three-year limit on lower-cost federal Stafford loans has been reached.[42] I then subtracted a total of $10,000 of after-tax income that could be earned by a law student from summer employment during one or more of the summer terms.[43] The total of all of these costs therefore comes to $230,000 + $25,875 + $6,740 - $10,000 = $252,615. Given my somewhat general and imprecise cost projections, and for simplicity of exposition, I will instead use a slightly lower round number of $250,000 for the full costs of a private legal education in all of my subsequent affordability calculations.[44]

This $250,000 cost estimate is admittedly a broad generalization, given the substantial variation in private law school tuitions, and in the alternative employment opportunities available to different prospective law students in different regions and with different undergraduate backgrounds, and in the summer employment opportunities available to law students, but it is nevertheless accurate enough to support the conclusions that I will later reach. If a student instead attends a somewhat lower-cost but still relatively expensive public law school, without scholarship assistance, or attends a private law school but with a 33% scholarship discount on their tuition, this will reduce the overall cost of law school to approximately $200,000.[45] Attending an unusually low-cost public law school with a modest 10% scholarship, or attending a relatively high-cost public law school with a 33% scholarship, or attending a private law school but with a substantially more generous 55% scholarship award, would each further reduce the overall net cost of law school to as low as $160,000 or so.[46] Law school is now an expensive proposition.[47]

Most law students have exhausted their financial resources prior to attending law school, and have already incurred a fairly significant amount of undergraduate loan debt,[48] and then have to finance all of their law school tuition expenses and books and supplies and living costs through a combination of additional student loans and reductions in their financial standard of living from what it would have been had they been employed rather than attending law school. Other more fortunate students are able to finance some or all of these costs of law school though use of their own funds, or family funds, and so do not have to incur this much debt and/or suffer such significant reductions in their financial standard of living during law school. From an economic point of view, however, the use of one's own funds to pay for law school is economically equivalent to borrowing the money, since it is done at the opportunity cost of not having those same funds available for investment, resulting in a stream of foregone investment returns that are economically equivalent to debt repayments.[49] Similarly, financing the costs of law school partially through reducing one's standard of living imposes an immediate opportunity cost on one that is economically equivalent to borrowing funds to maintain consumption levels and then making the necessary sacrifices later to fund repayment of that debt.[50]

For ease of exposition I will therefore assume for all of my following detailed affordability calculations that all of the expenses of law school will be financed by law students solely through federal Stafford loans and Grad PLUS loans, loans that accrue interest during law school and thereafter but which do not require repayment to start until six months after graduation. This simplifying assumption will obviously result in some overstatement of the actual out-of-pocket loan repayment costs for some graduates, to the extent that those graduates have used their own or family funds and/or have curtailed their living expenses rather than use student loans to pay for law school expenses.[51] Those students will to that extent bear future costs of a foregone income nature, rather than of a debt repayment character.

This assumption will also result in a (much more modest) overstatement of the overall economic burden of law school for those students that have financed part or all of their costs of legal education with their own or family funds, or through reductions in their standard of living while in law school. This is because I estimate that those students will bear only an approximately a 4.1% annual after-tax rate of return opportunity cost as a result of expenditures of their own funds or consumption curtailments,[52] a cost that is significantly lower than the rather high 7.5% blended annual interest rates now charged law students on government student loans of this magnitude. But these calculations will still be accurate enough with regard to the full economic costs of attending law school that this minor overstatement of those costs for those students who utilize their own or family funds or curtail consumption to some extent to pay for their law school expenses will not affect the conclusions that I will reach regarding whether the benefits of Harvard-style legal education for law students justify its costs for different students with differing academic capabilities and attending law schools of varying prestige.

III. PAYING FOR LAW SCHOOL UNDER UNSUBSIDIZED FEDERAL STUDENT LOAN TERMS

The federal government is currently the main provider of law student loans, although students sometimes also borrow from private lenders. Some of these federal loans, the (unsubsidized) Stafford loans, are made available to law students and other graduate students at a 6.8% annual interest rate, up to an annual loan cap now set at $20,500,[53] and the remainder of those loans, the Grad PLUS loans, are made available at a higher 7.9 % annual interest rate.[54] Many law students therefore have a blended annual interest rate obligation on their federal government student loans from these two sources in the neighborhood of 7.5%.[55] A law school graduate with a $250,000 debt on these terms who attempted to repay this obligation over the standard 10-year repayment period would have to make monthly principal and interest payments of over $3,000/month, over $36,000/year,[56] payments that are not tax-deductible. This would obviously would be far too large a debt repayment burden for the large majority of new law school graduates to bear, certainly for the many graduates who now take jobs that pay only in the $40,000-$65,000 annual salary range,[57] even if they are fortunate enough to be among the only approximately 55% of graduates that the most recent American Bar Association and National Association on Law Placement reports indicate are able to find full-time legal work within 9 months of graduation,[58] or among the relatively few law graduates who are able to obtain part-time legal positions or non-legal positions paying $60,000/year or more in salary.

Even those fortunate graduates who are able to obtain those fabled associate positions at leading law firms that pay a starting salary of upwards of $160,000/year[59] would still have to pay a full 22.5% of their income in debt service,[60] a perhaps tolerable burden given the high salary, but still probably uncomfortably large given that many of those high-paying associate positions are located in large cities with relatively high costs of living. Even under an extended 25-year repayment schedule the required monthly principal and interest payments on such a $250,000 loan debt would be over $1,860/month, over $22,000/year, fairly easily affordable for the lucky few with $160,000/year salaries[61] but well beyond the capability of most new law graduates to service.

The financial situation posed by standard federal loan repayment terms is also untenable for most graduates even with somewhat smaller loan obligations. A student with a $200,000 loan debt, at a 7.5% annual interest rate on a 10-year repayment schedule, would have to pay over $2,400 month, over $28,000/year, and even on a 25-year repayment schedule would have to pay $1,488/month, over $17,000 year, more than 28.3% of the $60,000/year median starting salary.[62] For a student with a $160,000 loan debt the corresponding amounts would be $1,920/month (over $23,000/year) and $1,190/month (over $14,000/year), the latter being more than 23.3% of the median starting salary.[63] Such large loan repayment obligations obviously could not be met on a $60,000/year salary without unreasonable sacrifices.[64]

The discussion above has thus far ignored any debt burdens that law graduates may bear from their earlier undergraduate education. However, a substantial proportion of law graduates do also have additional undergraduate student loans to repay which would further increase their overall debt burden,[65] making it even less feasible to repay those debts out of a $60,000/year salary.

IV. THE IBR PROGRAM, THE PAYE RULES, AND THE PSLF PROGRAM

The rather depressing conclusions reached above regarding the inability of a law school graduate that has taken a full-time legal position paying the median

$60,000/year starting salary to service the debt incurred to pay for even $160,000 of law school costs are significantly impacted by the IBR program under the new PAYE rules, and by the PSLF program. Let me first provide an overview of the main provisions of those programs and rules, and then I will analyze in Part V in some detail their impact upon the affordability of law school.

A. General Description of the IBR Program, the PAYE Rules, and the PSLF program.

Under the federal government's original IBR program, as it existed after its adoption in 2007[66] and prior to its 2010 amendment[67] and the Obama Administration's subsequent PAYE rules changes in the program,[68] a graduate could elect to have their monthly loan payment obligations over a 25-year repayment term capped at an amount equal to 15% of the difference between their monthly adjusted gross income[69] and 150% of the poverty line monthly income for a family of the same size as is being supported by the graduate's income.[70] This cap provided for a very large reduction in the borrower's monthly payment obligations compared to what they would been outside the IBR program even under an extended 25-year repayment schedule.[71] These reduced payments, however, are for most law student borrowers not anywhere near large enough to cover even the interest owing on the outstanding debt,[72] leading to negative amortization and continued growth in the size of that debt over time due to accrued unpaid interest. The remaining unpaid debt obligation, however, will then be forgiven after 25 years,[73] although with the very important proviso that the forgiven debt obligation will be regarded as taxable income that is subject to ordinary income tax liability at the taxpayer's applicable marginal rate at the time of debt forgiveness.[74]

There are, however, some provisions of the IBR program that substantially curtail the growth in the outstanding debt that would otherwise occur from this negative amortization payment schedule, and that consequently will substantially reduce the borrower's income tax liability after 25 years. First of all, the federal government pays the unpaid portion of the interest owed for the first three years after repayment commences, so that unpaid interest will accrue for at most only 22 years.[75] Second, for the remaining years after the first three years in which the borrower makes their payments under the IBR program, whether the borrower continues in the program for the remainder of the 25-year period, or instead leaves the program early if their income increases to the point where their making the IBR program required payments is no longer advantageous to them, the unpaid interest will accrue but will not be capitalized into the outstanding loan principal, so that there will be no compound interest effect but only the accrual of unpaid simple interest on the original amount owing at the time of the borrower's initial repayment obligation.[76] These favorable unpaid interest accrual provisions together obviously made the original IBR program's debt forgiveness provision even more attractive to prospective borrowers than it would otherwise be.

Under the PAYE rules adopted to implement the 2010 legislative changes in the IBR program, effective in 2012 and thereafter for most borrowers,[77] the monthly payment obligations are now capped at only 10% of the difference between the graduate's monthly adjusted gross income and 150% of the poverty level income.[78] The required payments are thus now only 2/3 as large as were required under the original IBR program prior to the PAYE rules. For virtually all borrowers these required payments will now be far less than even the interest owing on their loans.[79] In addition, the remaining debt obligations will now be forgiven after only 20 years rather than 25 years, although the forgiven debt will still be regarded as taxable income at the time of forgiveness.[80] The PAYE rules do not alter the IBR provisions under which the government will pay the unpaid interest for the first three years after the borrower's payment obligation commences, and under which the unpaid interest after that date will accrue but will not be capitalized into the outstanding loan principal.

There is one interesting and arguably economically inefficient impact of the IBR program in terms of the incentives created for borrowers, an impact that is made more significant by the PAYE rules. The amount that the borrower must repay each month under the IBR program, as I have noted above, depends only on the difference between their adjusted gross income and 150% of the poverty level income, and usually is not sufficient to cover even the interest owed on the loans, let alone repay any of the loan principal. The amount of the monthly payment obligation is therefore completely independent of how much money the person has borrowed and how much they owe in interest payments, except for the tax obligations imposed after 20 years in connection with the final debt forgiveness. These provisions therefore create a powerful incentive for borrowers to borrow as much money as they can qualify for,[81] whether or not they actually need the money for their legal education.

The only consequence under the IBR program for borrowers of engaging in additional borrowing beyond their immediate law school financial needs is that they will then have to pay some additional income taxes when that extra borrowing (and the accrued unpaid interest thereon) is forgiven 20 years later. One can easily and with relatively little financial risk “game” these provisions by initially setting aside a sufficient portion of this extra borrowing, or periodically setting aside sufficient sums from one’s later earnings, into a conservatively invested escrow reserve account to later pay these deferred taxes, and then correctly and cheerfully regard the rest of the extra borrowed funds as being “free money” from the taxpayers that will never have to be repaid.[82] The IBR program does not merely provide for a deferral of taxes, such as is allowed for qualifying retirement contributions or capital gains appreciation. The extra borrowing, beyond the proportion that needs to be set aside either initially or over time to pay the eventual debt forgiveness tax bill, is truly free money from the government with no repayment obligation ever!

Let me try to make this point even clearer with a simple illustrative calculation. Consider an IBR enrollee who owes $250,000 at the time they commence their loan repayments six months after graduation. For virtually any salary they might receive in their initial position their IBR repayments will not be sufficient to cover the interest owing on their loan, and there will be to that extent negative amortization and growth in their outstanding debt over probably all of the final 17 years of the 20-year loan repayment term.[83] If that person has now engaged in a small amount of additional student loan borrowing beyond this $250,000 sum, so that at the time their repayments commence they would owe an additional $1,000, that additional $1,000 debt will also accrue unpaid simple interest at the 7.9% Grad PLUS loan rate for the final 17 years of the loan term, leading to additional debt at the time of debt forgiveness of $3,642.[84] At a 33% combined federal and state income tax rate on that forgiven debt[85] the IBR enrollee would then owe additional taxes of $1,214 on this additional debt. Assuming that the enrollee has available the opportunity to earn a 4.1% after-tax annual rate of return on invested funds over the 20-year loan period [86] it would only be necessary for that person to initially invest $543 of the additional $1,000 of borrowed funds in an escrow account over that 20-year loan term to build up the $1,214 fund necessary to discharge that additional tax liability when it comes due.[87] The remaining $457 of the initial $1,000 loan, which is a full 45.7% of that additional borrowing,[88] is "free money" entailing no repayment obligation.

Given this feature of the IBR program that to a large extent (although not completely, as shown above, because of the debt forgiveness tax obligation) severs the normal linkage between the amount borrowed and the size of one's repayment obligations, the conventional advice that is given to student borrowers to be prudent and conservative with regard to the mount of their student loan borrowing is completely inapposite. A student planning to enroll in the IBR program should borrow as much in federal student loans as they possibly can under their school's "authorized educational expenses" IBR loan limits, even if they have the wherewithal to pay for some or all of their law school expenses out of their own or family funds, and/or are prepared to live frugally as students, and then invest the appropriate portion of the loans that are not needed for educational purposes in an escrow account dedicated to later paying the debt forgiveness taxes on this extra borrowing, regardless of their financial circumstances.

This feature of the IBR program also creates a perverse incentive for law schools to estimate the amount of "authorized educational expenses" that a typical student would need to spend to attend their program as high as they can possibly justify,[89] so as to allow their students to borrow as much as possible on these very favorable terms. A high estimate of these expenses will provide those schools with a competitive advantage in recruiting students over other otherwise comparable schools that may estimate these expenses more conservatively. I would hope that the US Department of Education is alert to this possibility and periodically reviews the authorized educational expenses claimed by the law schools and used for IBR loan limits purposes for their accuracy.

B. The Public Service Loan Forgiveness Program.

Closely related to the IBR program is another program that was created by the same legislation that created the IBR program, the PSLF program. That program provides that if a graduate[90] takes a qualifying full-time public service legal position, beyond the fact that the required monthly loan repayments (also calculated on IBR/PAYE program terms) will likely be very low, given the generally rather modest salaries paid for most qualifying public service positions, the remaining unpaid principal and accrued interest balance owing is forgiven after only 10 years rather than after 20 years as for IBR program borrowers who qualify for PAYE rules treatment.[91] In addition, this forgiven debt, unlike the debt for IBR program borrowers, is <u>not</u> regarded as taxable income when forgiven.[92] Such loans terms are obviously extremely advantageous and have resulted in very intense competition among graduates for the relatively small number of qualifying public service positions.[93]

A law student who has some interest in and, more importantly, a well-grounded confidence in their ability to later obtain one of these desirable qualifying public service positions should once again take out as much as possible in government student loans, regardless of whether they have an immediate need for those funds. Moreover, unlike an IBR enrollee they will not then need to set aside any of these borrowed funds or any of their later earnings to cover later debt forgiveness tax liabilities. The PSLF program is therefore arguably the "best deal in town" for those recent law graduates who are able to obtain qualifying positions, at least for those persons who regard the additional satisfaction they will obtain from doing such public interest legal work in comparison to the lesser satisfactions they feel that they will obtain from private legal practice as roughly sufficient to offset the extra after-tax income they might be able to earn in private practice.

As noted above in connection with the IBR program, the treatment of debt forgiven under the PSLF program gives law schools an incentive to estimate their "authorized educational expenses" to be as large as possible so as to further advantage those of their students who may considering enrolling in this program after graduation. The incentive here is even stronger than with regard to IBR program enrollees given the much larger benefits associated with the PSLF program's completely untaxed debt forgiveness,[94] suggesting even more strongly a need for periodic federal review of these educational expenses estimates for their accuracy.

V. ANALYSIS OF THE AFFORDABILITY OF LAW SCHOOL

Having briefly discussed the main features of the IBR and PSLF programs, I would now like to analyze in some detail the question of the affordability of law school both under unsubsidized federal student loan terms and under the IBR and PSLF programs. I will conduct this analysis by separately taking several different approaches and comparing the conclusions reached.

First, I would like to consider, for a law graduate taking a full-time, entry-level legal position paying the current $60,000/year median salary, what percentage of their income would be required to repay their law school loans under varying assumptions regarding the amount of their debt, whether or not they enroll in the IBR or PSLF programs, and if they do so enroll then taking into account their family size circumstances. This "debt servicing burden" analysis will closely track the "Sarah" hypotheticals extensively explored by Brian Tamanaha and Phillip Schrag.[95]

Second, I will also conduct what I will describe as a "salary premium" analysis. This analysis is intended to identify how large a salary premium a law graduate would have to earn each year, over and above what a comparable person who had only an undergraduate degree would be able to earn, during their loan repayment period to justify various levels of law school debt, first under unsubsidized debt repayment terms and then under the IBR and PSLF programs. Finally, I will also conduct a "present value" analysis that will attempt to identify the present value of the costs of law school, given various levels of law school debt, and under unsubsidized loan repayment terms and then under IBR and PSLF program repayment terms, as well as attempt to ascertain the size of the governmental subsidies these programs provide.

All of these alternative analyses will point to roughly the same conclusions regarding the current affordability of law school. First of all, even under standard 10-year federal loan repayment terms, and certainly under extended 25-year loan repayment terms, law school is still cost-justified for almost all students attending the elite law schools because of the attractive employment opportunities those students will generally have upon graduation. However, attending law school under those unsubsidized loan repayment terms no longer makes financial sense for most prospective applicants to non-elite law schools. But I will show that under the generous IBR program terms, and certainly under the extremely favorable PSLF program terms, law school is also at least a borderline financially viable undertaking for many law students attending upper- or mid-tier non-elite law schools, specifically those better students who are likely to graduate in the upper half or so of their classes and will therefore have good prospects for obtaining $60,000/year or more starting salaries.[96] As a result of the IBR program those schools are likely to be able to still enroll enough students to survive and to continue to offer Harvard-style education, although they are likely to have to significantly downsize and therefore engage in at least some modest restructuring over time to reduce costs and hold down tuition levels.

Finally, however, even under the generous IBR or PSLF program terms law school is now clearly an uneconomic proposition for any but the very best students attending one or another of the many lower-tier law schools, given the extremely poor employment opportunities that graduates of those schools now face. Even with those programs available the majority of the lower-tier law schools will probably not be able to continue to enroll sufficient numbers of students at high enough tuition levels to cover the costs of providing Harvard-style legal education. Except for those few lower-tier schools that are fortunate enough to be able to draw upon substantial endowment earnings, or upon large state subsidies, to cover their losses these schools will probably have to drastically downsize and either undergo drastic restructuring of their programs to sharply reduce their costs and tuition levels, or else close their operations.

A. The "Debt Servicing Burden" Approach.

Both Brian Tamanaha and Phillip Schrag consider at some length the loan repayment obligations of a hypothetical law student "Sarah" who graduates and then takes a full-time entry-level legal position paying the class of 2010 median starting salary of $63,000/year.[97] Let me here carry out the same sort of mathematical analysis as they undertake for each of the three different substantial law school loan amounts that I am here considering, and in each instance do the calculations for two different family situations, either single or supporting a family of three persons, but instead using the updated and slightly lower current $60,000/year median starting salary. I will then carry out a comparable analysis regarding the PSLF program.

1. Sarah under the IBR program

First of all, if Sarah borrows the full $250,000 cost of a private legal education through unsubsidized federal student loans, repayable over an extended 25-year term at a blended annual interest rate of 7.5%, her principal and interest payments would then be over $1,860/month, an obviously unaffordable 37.2% of her modest $5,000/month before-tax salary. Under the IBR program and the new PAYE rules, however, if she were a single graduate supporting only herself then her initial monthly loan payment obligations would be only 1/12 x 10% x ($60,000 - $16,335) = $364/month,[98] and if she supports a family of three persons her initial monthly loan repayments would be only 1/12 x 10% x ($60,000 - $27,465) = $271/month.[99]

The rate at which Sarah's required loan repayments will increase over time depends on the rate at which her adjusted gross income will increase over time, and the rate at which the definition of the poverty income level increases. One can of course only speculate regarding how rapidly the salaries of typical young lawyers and the poverty level income are likely to increase over the next 20 years; that will obviously depend upon the average rate of overall price inflation over that period as well as upon other factors. Any calculations and projections will have to be based upon some assumptions in these regards.

I will therefore make the following (hopefully reasonable) assumptions for this hypothetical, and for all of my many other illustrative hypotheticals, that Sarah will receive 5% average annual raises over the next 20 years after commencing her loan repayments under the IBR program, while the average annual rate of inflation over that time period will be 3%/year, so that Sarah will be receiving approximately 2%/year average annual increases in her "real," inflation–adjusted income over that time period. I will also assume that the definition of the poverty level income will also increase by an average of 3%/year over that same extended time period to accurately reflect overall price inflation. Under these assumptions Sarah's required monthly payments under the IBR program would then gradually increase by about 5.7%/year[100] from the initial $364/month to about $635/month by the 10th year,[101] and to about $1,109/month by the 20th year, if she remains single throughout that time period,[102] and by about 6.6%/year[103] from the initial $271/month to about $512/month by the 10th year,[104] and to about $967/month by the 20th year, if she supports a family of three persons over that time period.[105] As I have noted earlier, her monthly payment obligations depend only upon her adjusted gross income and the poverty level income and are no larger for her having $250,000 in outstanding loan debt upon commencing repayments under the IBR program than if her debt at that time had been far smaller[106]

Under the IBR program after 20 years Sarah's remaining debt would be forgiven, and the forgiven debt would be regarded as taxable income at that time. That tax bill will obviously be rather large. To precisely calculate just how large, one would need to first determine how large her debt would be that would be forgiven after 20 years, and then determine what tax rate would apply to that forgiven debt income. Let me first of all calculate the size of Sarah's unpaid debt after 20 years, under various simplifying assumptions, and then I will turn to the much more difficult question of determining the applicable tax rate.

I will first assume that Sarah is single, owes $250,000 in loan debt at the time she commences her loan repayments under the IBR program, and that she takes a position upon graduation paying the median $60,000/year starting salary, and that as assumed above in connecting with determining her monthly IBR repayments her salary then grows at an average of 5%/year over the next 20 years, while the poverty level income is only raised an average of 3%/year in line with general price inflation that is also assumed to average 3%/year over that period.

Under these assumptions her monthly loan repayments would start at $364/month and also grow steadily at about 5.7%/year, and she would have therefore have to make payments averaging roughly $635/month -- the 10th year payment obligations – over the entirety of that 20-year time period.

The monthly interest payment alone due on a $250,000 loan at a 7.5% annual interest rate is approximately $1,563.[107] With Sarah's monthly payments averaging only $635/month over the 20 years her unpaid interest will average $928/month.[108] Under the IBR program the government will forgive this unpaid interest for the first three years after her repayments commence, and then there will accrue as part of her growing debt the $928/month on average of unpaid interest over the next 17 years,[109] for a total unpaid debt at the time of debt forgiveness of about a rather substantial $439,312.[110] If Sarah had instead been supporting a family of three persons over this time, under these same assumptions her monthly IBR payments over the 20-year time period would instead have started at $271/month and averaged only about $512/month over that period, leading to accruing unpaid interest of an average of about $1,051/month,[111] and to a larger total unpaid debt at the time of debt forgiveness of about $464,404.[112]

If Sarah was single and had instead owed only $200,000 upon her enrollment in the IBR program, under these same assumptions her unpaid interest would accrue at a rate averaging $615/month,[113] leading to an unpaid debt at the time of debt forgiveness of $325,460,[114] and if she instead supported a family of three persons then her unpaid interest would accrue at a rate averaging $738/month,[115] leading to an unpaid debt at the time of debt forgiveness of $350,552.[116] Finally, if Sarah was single and had instead owed only $160,000 upon her enrollment in the IBR program, under these same assumptions her unpaid interest would accrue at a rate averaging $365/month,[117] leading to an unpaid debt at the time of debt forgiveness of $234,460,[118] and if she instead supported a family of three persons then her unpaid interest would accrue at a rate averaging $488/month,[119] leading to an unpaid debt at the time of debt forgiveness of $259,552.[120]

These are all rather substantial amounts of taxable income, and the resulting tax burdens will be large. Before I turn to estimating Sarah's tax rate on that income so that her tax liability can be determined, let me first briefly note the considerable difficulties that any particular IBR enrollee will have in predicting with any confidence exactly how large a debt forgiveness tax bill they are likely to face in 20 years.

That person will first of all have to estimate how large their unpaid debt will be at the time of forgiveness, which as discussed above will require them to estimate how rapidly their adjusted gross income will grow over the next 20 years, as well as how rapidly the poverty income level will increase over that time, which will in turn require them to estimate the amount of inflation of the price level that will take place over the next 20 years. After estimating the size of their debt burden at the time of debt forgiveness, the IBR enrollee will then have to determine what marginal tax rate will be applied to that debt forgiveness income. This will depend, first of all, on how much other income they will have in that 20th year,[121] and then upon what the structure of federal income tax brackets will look like in 20 years after any intervening changes that may have been made in the relevant tax rates, and also will depend upon how much adjustment upwards of the various tax bracket cut-offs has taken place over that period to offset the impacts of inflation of the general price level over that time.[122] There will also generally be a significant state income tax imposed on local state residents on this debt forgiveness income, at least for the majority of states that have an income tax regime, and so the person will also have to project what state they will be residing in in 20 years, and what the applicable marginal tax rates will be for that state at that time. Would you like to attempt these calculations?

Let me return to the more manageable circumstances of our hypothetical Sarah, with her $60,000/year starting salary that is assumed to grow at an average annual rate of 5%/year over the 20 years after commencing IBR repayments, and with both the poverty level income and the overall price level projected to increase by an average of 3%/year. Under these assumptions her salary in year 20 will be approximately $159,198.[123] I will further assume that she will pay taxes under the tax rate structure applicable to a single person,[124] and that the various marginal tax rates will be unchanged from current rates except for the fact that each of the tax-bracket cutoffs will be raised by 80.6% to reflect the cumulative effect of 3%/year average annual price inflation over those 20 years.[125]

I have calculated earlier that under these assumptions if Sarah is single and owes $250,000 at the time her loan repayments commence she will have a debt of $439,312 after 20 years.[126] She will therefore owe federal income taxes of $133,386 on this amount,[127] a 31% federal tax.[128] If she instead supports a family of three persons her debt after 20 years will be $464,404,[129] and she will owe federal income taxes of $144,666 on this amount,[130] a 31.2% federal tax.[131] If Sarah is single and only owes $200,000 at the time her loan repayments commence she will have a debt of $325,460 after 20 years.[132] She will therefore owe federal income taxes of $98,815 on this amount,[133] a 30.4% federal tax.[134] If she instead supports a family of three persons her debt after 20 years will be $350,552,[135] and she will owe federal income taxes of $107,095 on this amount,[136] a 31.2% federal tax.[137] Finally, if Sarah is single and only owes $160,000 at the time her loan repayments commence she will have a debt of $234,460 after 20 years.[138] She will therefore owe federal income taxes of $68,785 on this amount,[139] a 29.3% federal tax.[140] If she instead supports a family of three persons her debt after 20 years will be $259,552,[141] and she will owe federal income taxes of $77,065 on this amount,[142] a 29.7% federal tax.[143] Since all of the above applicable tax rates bunch closely between 29.3% and 31.2%, I will assume for ease of exposition for these hypotheticals that Sarah will pay in all instances about a 30% federal tax rate on her debt forgiveness income.

Determining the appropriate state income tax rate to apply to this hypothetical income is more difficult, since there is very large variation among the states as to the applicable upper brackets marginal tax rates.[144] For the purpose of these illustrative hypotheticals I will simply assume that Sarah will be subject to a 3.33% marginal state tax rate, giving rise to an overall one-third (33.33%) combined federal and state income tax on her debt forgiveness income.

This 33.33% figure is a useful round number for planning purposes. If Sarah owes $250,000 when commencing her repayments, for example, this will lead to a state income tax bill of $14,629[145] when her debt is forgiven under the IBR program, if she is single, for an approximate total federal and state income tax liability at that time of $146,437.[146] She will owe a state income tax bill of $15,465[147] if she supports three persons, for an approximate total federal and state income tax liability of $154,801.[148] If Sarah instead owes $200,000 when commencing repayments this will lead to a state income tax bill of $10,838[149] if she is single, for an approximate total federal and state income tax liability of $108,378,[150] and to a state income tax bill of $11,673 if she supports three persons,[151] for an approximate total federal and state income tax liability of $116,734.[152] If Sarah instead owes $160,000 when commencing repayments this will lead to an a state income tax bill of $7,808[153] if she is single, for an approximate total federal and state income tax liability of $78,075,[154] and an a state income tax bill of $8,643[155] if she supports three persons, for an approximate total federal and state income tax liability of $86,431.[156]

It is certainly possible that the IBR provisions may be amended at some point to eliminate the taxation of forgiven debt under the program, so as to parallel the current debt forgiveness provisions of the PSLF program. Some knowledgeable commentators have called for legislation to this effect.[157] Moreover, then-Senator Hillary Clinton unsuccessfully introduced legislation in 2007 that would have accomplished this end,[158] and now the Obama Administration has included such a provision in its proposed fiscal year 2014 budget.[159] There is, however, no assurance that such legislation will be adopted given the currently very partisan and gridlocked Congressional legislative process, and given the great political sensitivity of tax law changes. Our Sarah would be wise to assume for now that these tax obligations will remain in force, and to provide for them well in advance by either setting aside and conservatively investing some significant portion of her initial loans, or by making regular monthly payments over the first 20 years of her employment into a conservatively invested escrow account.[160] Please be patient while I engage in some further illustrative calculations of the size of these amounts.

Let me initially assume that Sarah needs the entire law school loan amount for her legal education, and therefore instead regularly contributes to this escrow account out of her later monthly earnings after graduation. Let me also conservatively but realistically assume that she will be able to earn only a modest 5%/year average before-tax return on her investment portfolio, which is here assumed for simplicity to consist only of a conventional diversified portfolio of common stocks or stock mutual funds, with 2%/year of this return on the portfolio assumed to be dividends, and the remaining 3%/year consisting of capital appreciation. There will be a 20% income tax imposed each year on these dividends, with the after-tax portion of the dividends then assumed to be reinvested in the portfolio, and no capital gains taxes will be imposed on the capital appreciation until the assets are later sold. This will lead to a 3% + 1.6% = 4.6% average annual after-tax rate of return on the portfolio prior to its liquidation. After 20 years the portfolio will be liquidated to pay the debt forgiveness taxes, long-term capital gains taxes at the 20% rate will now be paid on the portion of the sale proceeds that reflect stock appreciation, leading to about an overall 4.1% average annual after-all taxes rate of return for the portfolio over the 20-year period, [161] and the remainder of the proceeds can then be used to pay the debt forgiveness tax liability.

Under these simplifying assumptions, for Sarah to be able to pay the debt forgiveness federal and state tax bills when they come due 20 years after her IBR repayments commence, assuming for the moment that she wants to make equal-sized payments each month into the escrow account over the 20 years, Sarah would need to make 240 monthly payments of the following sizes to the account, the amounts depending on the amount of loan debt she initially owes when she commences the repayments, and also depending upon whether she is single or instead supports a family of three persons:[162]

Required Monthly Equal-Sized Tax Liability Escrow Deposits

Amount initially owed	If single	If supporting three persons
$250,000	$486/month[163]	$514/month[164]
$200,000	$360/month[165]	$387/month[166]
$160,000	$260/month[167]	$287/month[168]

Given that Sarah's income is assumed to grow at an average of 5%/year over the 20-year period, however, it would make much more sense for Sarah to make a stream of deposits in her tax liability escrow account that grew 5%/year over time, rather than equal-sized payments, so as to lighten her burden during her early years of lower income. For a $250,000 initial debt, if she is single, her escrow payments could then start at only $298/month, growing over the 20 years to $792/month, and would be sufficient at a 4.1% average annual rate of return to build up the fund to meet the eventual tax liability. If she is supporting three persons the corresponding initial escrow payment would be $315/month, growing over the 20 years to $838/month. For a $200,000 initial debt if she is single her escrow payments could then start at only $221/month, growing over the years to $588/month, and if she supports three persons they could start at start at $238/month, growing over the years to $632/month. Finally, for a $160,000 initial debt if she is single her escrow payments could then start at only $160/month, growing over the years to $424/month, and if she supports three persons they could start at $176/month, growing over the years to $468/month.

Pulling all of these various calculations together, if Sarah borrows $250,000 to finance her legal education and remains single then the total cost to her under the IBR program, considering both the required monthly loan repayments and the necessary growing contributions to the escrow account for covering the eventual debt forgiveness tax bill, would initially be about $364 + $298 = $662/month, only about 13.2% of her initial $5,000 monthly income, and under the assumptions of 5% average annual salary growth and 3% annual increases in the poverty level income this would gradually rise over the next 20 years, along with her income, to about $1,109 + $792 = $1,901/month. If she instead supports a family of three persons then under the IBR program the total initial cost to her would be about $271 + $315 = $586/month initially, only about 11.7% of her income, gradually rising, along with her income, to about $967 + $838 = $1,805/month in year 20.

If she instead borrows only $200,000 and remains single then the total cost to her under the IBR program, considering the eventual debt forgiveness tax bill, would initially be about $364 + $221 = $585/month, about 11.7% of her income, and gradually rising over the next 20 years, along with her income, to about $1,109 + $588 = $1,697/month, and if she instead supports a family of three then under the IBR program the total cost to her would be about $271 + $238 = $509/month initially, about 10.1% of her income, gradually rising over the next 20 years, along with her income, to about $967 + $632 = $1,599/month.

Finally, if our Sarah instead borrows only $160,000 and remains single then the total cost to her under the IBR program, considering the eventual debt forgiveness tax bill, would initially be about \$364 + \$160 = \$524/month, about 10.5% of her income, and gradually rising over the next 20 years, along with her income, to about \$1,109 + \$424 = \$1,523/month, and if she instead supports a family of three then under the IBR program the total cost to her would be about \$271 + \$176 = \$447/month initially, only about 8.9% of her income, gradually rising over the next 20 years, along with her income, to about \$967 + \$468 = \$1,435/month.

I have surely obscured my central points with all of these detailed hypothetical calculations, so let me here attempt to succinctly summarize the results and implications of these mathematical machinations. If a graduate who owes \$250,000 in law school debt takes an entry-level, full-time legal position paying the current median \$60,000/year starting salary – a salary of \$5,000/month before taxes -- that graduate under the IBR program will initially have to make combined debt repayment and tax liability escrow payments of approximately \$624/month,[169] approximately 12.5% of their income. However, only between \$271/month and \$364/month of that sum, depending on her family status, will be mandatory loan repayments – only between 5.4% and 7.3% of the borrower's income -- and the remainder will be in discretionary (but highly advisable) tax liability escrow deposits. A $200,000 debt level will instead require that graduate to make initial monthly debt repayment and tax liability escrow payments of approximately $547 month,[170] approximately 10.9% of their income. Again, only between $271/month and $364/month of that sum, depending on her family status, will be mandatory loan repayments -- again between 5.4% and 7.3% of the borrower's income – and the remainder will be in discretionary tax liability escrow deposits. A $160,000 debt level will instead require that graduate to make initial monthly debt repayment and tax liability escrow payments of approximately $486/month,[171] approximately 9.7% of their income. Once again, the required loan repayments will only be between $271/month and $364/month, depending on her family status – only 5.4% to 7.3% of the borrower's income – and the remainder will be discretionary tax liability escrow deposits.

Debt repayment burdens of these sizes, ranging from 9.7% to 12.5% of her before-tax income, are surely manageable on Sarah's salary, particularly since the tax liability escrow deposit portion of the monthly burden is not mandatory and can be deferred if necessary to deal with financial exigencies. Of course, if a student also has substantial undergraduate student loans to repay[172] then even the mandatory loan repayments under the IBR program could be difficult to afford on a median $60,000/year entry-level salary,[173] and the additional tax liability escrow deposit obligations could possibly make law school unaffordable. But thanks to the IBR program a law student who is not burdened by unduly large undergraduate debts, and who due to the stature of their law school and/or to their strong performance in law school realistically expects to earn at least the current median starting salary of $60,000/year or more upon graduation, can afford to borrow $160,000 and perhaps even as much as $200,000 or $250,000 to pay for law school, if they are willing to devote a relatively modest 9.7% to 12.5% of their income to debt repayments and tax escrow deposits, and if they have the financial self-discipline to regularly make the necessary escrow account deposits over the next 20 years.[174]

The analysis above suggests that the high costs of law school may be justified for those prospective students who reasonably expect to do well enough at a non-elite law school, given the relative stature of the school they attend, to be able to obtain a full-time legal position paying at or above the $60,000/year median starting salary. However, as I have noted earlier only about 55% of law graduates are now able to obtain such full-time legal positions, and of course half of those positions will pay less than the median starting salary, sometimes significantly less, so I am here referring to less than one-third of law students. And even students with well-grounded expectations of excelling in law school sometimes do not perform nearly as well as they had hoped. Given these grim facts, as Brian Tamanaha makes clear in Failing Law Schools, and Paul Campos makes clearer than clear, if that is possible, in Don't Go to Law School (Unless), there is therefore a significant financial risk now involved in attending law school, even for students attending well-regarded schools, and even given the IBR program.[175]

This risk is relatively small (although non-negligible in this difficult employment market) for students attending one of the elite law schools. But for those students who attend an upper- or mid-tier non-elite law school and who do not graduate in at least the upper half of their class, or who do not interview very well with potential employers, or both, and for those students who attend a lower-tier law school and who do not graduate in the top 10% or at least in the top quarter of their class, nor have influential hiring connections at a local law firm, the risk of a very long period of financial difficulty after graduation is substantial.

Let me revisit our Sarah one last time to illustrate this sobering point. Let me assume that she attended an upper- or mid-tier non-elite private law school with a substantial 33% scholarship, and therefore graduated with $200,000 in debt at the time that she commenced repayments under the IBR program.[176] Assume also that Sarah is single, graduated in the lower half of her class academically, and is only able to obtain a full-time legal position with a small law firm paying a modest salary of $45,000/year, a salary of $3,750/month, or is unable to obtain full-time legal employment at all and therefore has to settle for a paralegal (or retail store assistant manager, schoolteacher, etc.) position paying the same $45,000/year, the typical salary now paid to a person starting out on their career with only an undergraduate degree.[177]

Assuming that Sarah keeps this job and obtains average annual raises of 5%/year over the next 20 years, and that the poverty income level increases by an average of 3%/year over that time, Sarah's monthly IBR payments will start at $239/month[178] and gradually increase to $728/month over the 20 years, averaging about $484/month. Her unpaid interest will therefore average about $1,079/month,[179] and her unpaid debt at the end of the 20 years will be about $470,116,[180] leading to a combined federal and state income tax liability on her forgiven debt of about $156,705,[181] requiring her to set aside monthly tax liability escrow deposits of about an average of $525/month[182] over the 20-year loan term.

If she structures her escrow deposits as discussed earlier to grow by 5% year along with her income, as before, her total combined monthly loan repayments and escrow deposits will start at $239 + $322 = $551/month, about 14.7% of her $3,750 monthly income, and gradually grow with her income over the 20 years to about $728 + $856 = $1,584/month, averaging about $484/month + $525/month = $1,009/month.

So our Sarah will now have to set aside about 14.7% of her modest $3,750/month income for a full 20 years, and under these salary assumptions she will not have gained any offsetting financial benefits at all from attending law school. In fact, her starting salary of $45,000/year is likely to be about $5,000/year less than the comparable salary of a person who had taken a typical $45,000/year undergraduate degree-based position starting three years earlier, an 11.1% salary differential[183] that likely to persist over the years. The after-tax portion of that lost $5,000/year of income, on a monthly basis, would start at about $278/month,[184] growing to about $737/month after 20 years and averaging about $452/month over that time period. That is approximately another 7.4% of her salary. So the total impact upon Sarah of attending law school at a cost of $200,000, and then obtaining a $45,000/year legal position, or a $45,000/year non-legal position paying no more than a position she could have obtained on the basis of her undergraduate degree alone, is a burden of about 22.1% of her current salary, and about 20% of the slightly larger salary that she would have earned over the years had she not attended law school, for the next 20 years!

The bottom line for Sarah is that law school was a very risky gamble that she unfortunately lost, and that ended up costing her in one way or another about one-fifth of her income for the next 20 years, even under the generous IBR program provisions. Given what Paul Campos describes as the "Special Snowflake Syndrome"[185] -- the tendency of law students and others who have had some early success in life to regard themselves as being less likely to experience adverse events than the relevant statistical probabilities would indicate – there are unfortunately likely to be quite a few law graduates in Sarah's position in the coming years.

2. Sarah under the PSLF program.

Let me now consider the situation if our Sarah takes a qualifying public service position which under the PSLF program allows for IBR program-level capped debt repayments as well as debt forgiveness after only 10 years, and without any tax liability being imposed on the forgiven debt. Let me first assume that Sarah is single, borrows an amount somewhere between $160,000 and $250,000 to finance her legal education, and then takes a qualifying public service position paying the median $60,000/year starting salary, and let me again assume that her salary will increase by an average of 5%/year over the next 10 years while the poverty level income will be increased by an average of 3%/year. Her initial monthly payments under the IBR program will as discussed above be only $364/month, rising gradually by about 5.7%/year[186] to $635/month by the 10th year. The government will pay the unpaid portion of her monthly $1,563 interest charges on her loans for the first three years after her IBR repayments commence, and for the next seven years her unpaid interest averaging about $853/month over that seven-year period[187] will accrue but will not be capitalized. Her total unpaid debt after 10 years will be $321,652,[188] which will then be forgiven without any tax liability being imposed. Her required monthly repayments will only initially comprise 9.7% of her income, and will under these assumptions of 5% average annual salary growth and 3% annual increases in the poverty level income will remain at roughly that same percentage of her income level for the 10-year period, an entirely feasible burden for her to bear.

The results for Sarah under the PSLF program will be very similar if she supports a family of three persons. Her initial monthly payments under the IBR program will as discussed above be only $271/month, rising gradually by about 6.6%/year[189] to $512/month by the 10th year. The government will pay the unpaid portion of her monthly $1,563 interest charges on her loans for the first three years after her IBR repayments commence, and for the next seven years her unpaid interest averaging about $1,140/month over that seven-year period[190] will accrue but will not be capitalized. Her total unpaid debt after 10 years will be $345,760,[191] which will then be forgiven without any tax liability being imposed. Her required monthly repayments will only initially comprise 7.2% of her income, and will under these assumptions remain at roughly that same percentage of her income level for the 10-year period, again an entirely feasible burden for her to bear.

Let me once again emphasize that if Sarah will be taking a qualifying public service position after graduation she should borrow just as much in federal government student loans as she possibly can, regardless of her financial needs, since her required monthly payments will be exactly the same amount no matter how much she borrows, and for qualifying public service positions there is not even a deferred tax liability on debt forgiveness to be concerned about. Any such extra borrowing can be invested, possibly in a 10-year annuity with the monthly annuity payments offset against her already rather small monthly loan repayments. Again, if one is inclined to a public service legal career, and if one has the opportunity to take a PSLF program-qualifying position, this very generous program is indeed “the best deal in town.”

However, this simple analysis of law school affordability under the PSLF program is incomplete in an important regard. One also needs to take into account the fact that many qualifying public service positions pay less than the current median \$60,000/year starting salary, sometimes significantly less. For those law graduates who regard the perhaps substantial sacrifice in income that they will have to bear to take a public service position as being fully justified by the extra satisfaction they will obtain from doing that sort of work, rather than engaging in private legal practice or taking another non-qualifying position, the straightforward analysis conducted above will apply. But one should also consider the situation of a law graduate who accepts a qualifying public service position paying only, say, \$45,000 annually,[192] but who would not have accepted such a position with such a low salary rather than a private legal position paying the median \$60,000/year starting salary if it were not for the substantial PSLF program advantages.

For that graduate, the cost of law school is not merely the modest monthly loan repayments that they will have to make for 10 years – which under those $45,000/year salary assumption would only start at $239/month for a single person,[193] about 6.4% of their income, gradually climbing under these assumptions by about 5.7%/year to about $373/month by the 10th year, averaging about $306/month over that period – but also some portion[194] of the $10,000/year in after-tax income[195] that the graduate has forgone each year for at least 10 years of public service practice by accepting the lower-paid position and keeping it (or holding other qualifying positions) for a total of 10 years. However, even if a graduate was just barely willing to accept a $45,000/year public service position, rather than a $60,000/year non-qualifying position, so as to avail themselves of the PSLF program, and thus regarded virtually the entire $10,000/year -- $833/month – of forgone after-tax income as an additional cost of the PSLF program, the program is still a pretty good deal. The net cost to them initially would only be $239/month + $883/month = $1,122/month, a fairly substantial 22.4% of the hypothetical $60,000/year alternative starting, but that would only be for 10 years rather than 20 years as under the IBR program, and only $239/month (gradually climbing to $373/month by year 10) of this sum would be an out-of-pocket repayment obligation. This is an entirely feasible way to finance a $250,000 (or more) legal education leading to a public service career for at least 10 years before other career options are possibly pursued.

3. The Effects of Inflation on the Debt Servicing Burden

For long-term credit relationships the size of the "real" burden to the debtor, and the corresponding size of the "real" benefit to the creditor, are generally influenced by the extent to which there is inflation in the general level of prices over the term of the loan. Sometimes the payment obligations under such relationships are linked in some manner to a price index in an attempt to maintain the real value of these burdens and benefits over time, but more often they are not so indexed, and sometimes they are partially but not fully indexed in a manner that can create a complicated relationship between price level changes and the real benefits or burdens.

I would like to briefly compare the effects of inflation on the real burdens to student borrowers and the real benefits to the federal government of unsubsidized student loans, and also of loans made under the IBR or PSLF programs. Since this is already a relatively long and complicated Article in the interest of economy I will do so only for one possible loan arrangement – a law student borrower who is and will remain single, and who takes out $250,000 in student loans – but the conclusions I will reach would equally apply to loans of other amounts, or to loans made to borrowers supporting other family members as well as themselves.

Let me first consider the effects of inflation on an unsubsidized $250,000 federal student loan made at a 7.5% blended annual interest rate, and with a 25-year repayment term. This loan would obligate the borrower to repay approximately $1,860/month over its 25-year term. Any long-term loan made at a fixed interest rate constitutes a mutual gamble, with the borrower gambling that there will be future price inflation at a rate in excess of what the parties expected and provided for in the loan repayment terms at the time that the loan was entered into, excess inflation that will gradually reduce the real burden of their fixed payment obligations, while the lender is similarly gambling that the rate of inflation will be less than their initial mutual expectations embodied in the contract terms.

In my prior calculations I have consistently assumed a 3% annual inflation rate. Over a 25-year loan term this would reduce the real value of the loan repayments on a $250,000, 7.5% annual interest rate loan, measured in dollars of the purchasing power they have at the time the loan was entered into, from the initial $1,860/month down to $888/month,[196] averaging in size about $1,285/month over the loan term.[197] If, however, the rate of price inflation over that 25-year period actually averaged only 0%, then the real burden of that debt to the borrower and benefit to the government would remain at $1,860/month throughout the loan term, significantly greater than $1,285/month. On the other hand, if actual inflation averaged a higher 6%/year over that 25-year time period, then the real burden and benefit of those $1,860/month repayments would then only average $951/month over the loan term.[198] Long-term student loans taken out at a fixed interest rate are therefore relatively risky to both the borrowers and the lender with regard to future rates of inflation.

The effects of inflation on the burdens and benefits of IBR program loans are far more complex and interesting. One portion of the loan obligations – the monthly repayment obligations over the 20-year loan term – are approximately (but not exactly) as a practical matter indexed to inflation rates, while the debt forgiveness tax liability portion of the IBR repayment obligation is not so indexed.

The assessment here of the effects of unanticipated inflation is therefore made substantially more complicated than for a fixed interest rate loan, since the monthly repayment obligations and the tax liability escrow deposit requirements under the IBR program are very differently affected by inflation.

Let me consider how different rates of price inflation over the 20-year loan term would affect the real burdens and benefits of a hypothetical IBR loan. Let me assume again that a $250,000 loan is taken out by our Sarah, who then obtains upon graduation a full-time legal position paying $60,000/year. Under the prior assumptions of subsequent 5%/year average annual salary growth and 3%/year average increases in the price level and in the poverty income level, and escrow deposits structured to grow by 5%/year in size over the loan term, as discussed above Sarah would have initial combined debt repayment and tax liability escrow account obligations of $364/month + $298/month = $662/month, with this monthly amount then increasing at about 5%/year[199] along with her assumed annual salary increases of that amount, remaining at approximately $13.2% of her monthly income over the 20-year loan term. Her eventual debt forgiveness tax liability will be $146,437,[200] which her tax liability escrow account, assuming again a 4.1% annual after-tax rate of return,[201] would then accumulate to by the end of the loan term.

Consider now the situation that would result if there was no price inflation at all over that 20-year term. This would likely be reflected in her salary now increasing by an average of only 2%/year, rather than 5%/year,[202] and in the poverty level income now remaining unchanged over time, and in her escrow account now only yielding a 1.6% average annual after-tax rate of return on the dividend payments, and with no capital appreciation.[203] Her loan repayments would again start at $364/month, but would now increase by only approximately 2%/year.[204] The monthly repayments portion of her IBR obligation is essentially indexed to inflation, since both increases in her adjusted gross income and the poverty level income will likely roughly reflect the actual rate of inflation over time.

These monthly loan repayments would under a 2%/year salary increase only average $444/month over the entire 20-year loan term,[205] leading to unpaid interest on her loan accruing at the higher rate of $1,119/month[206] for the final 17 years, leading to a total debt obligation after 20 years of a now-larger $478,276,[207] and a combined state and federal income tax liability on that forgiven debt of about

$159,425.[208] This is a modestly larger tax obligation than the $146,437 that would be owing under the 3%/year inflation assumption and, much more importantly, the escrow account would now grow at a much slower 1.6%/year average annual after-tax rate over the loan term rather than at a 4.1% average annual after-tax rate. The monthly escrow deposits that would have to be made to cover this eventual tax liability would consequently have to be very significantly increased to be sufficient to meet this tax liability obligation.

On the other hand, let me instead assume for a moment that inflation proceeds at a higher 6% annual rate over the 20-year term of an IBR loan, and that the annual salary increases that Sarah receive correspondingly increase to an average of 8%/year, and that the poverty level income now increases by 6%/year, and that the escrow account now grows at an approximate annual rate of 6.5%/year.[209] Sarah's monthly loan repayments will again start at $364/month, but will now increase rapidly by about 8%/year,[210] averaging about $786/month over the loan term.[211] Her unpaid interest will therefore only accrue at a lower average rate of $777/month,[212] leading to a final debt obligation of about $408,508[213] and a federal and state income tax liability of only about $136,169. This is a somewhat smaller tax obligation than the $146,437 she would have owed under the 3%

annual inflation assumptions and, much more importantly, with the escrow account now growing at a rapid 6.5% average annual after-tax rate, rather than a 4.1% average annual after tax rate, the size of the necessary monthly escrow payments would be substantially reduced.

Finally, let me consider the circumstances of a $250,000 loan to Sarah made under the PSLF program. The analysis here is much simpler; the real burden of the loan to Sarah and benefit to the government lender would be essentially unaffected by the rate of inflation. The monthly loan payments would be essentially indexed to inflation, as they are under the IBR program, but under the PSLF program there is no tax liability owing at the end of the loan term to complicate things. This reveals yet another advantage of the PSLF program to borrowers; the repayment obligations are essentially fully indexed to inflation so that they do not have to bear inflation risk in the same manner that they do under unsubsidized loans, or under even under IBR loans.

In summary, the government lender and the student borrower are each taking a substantial risk with regard to future price inflation differing from their expectaions in an adverse manner when they enter into a long-term, unsubsidized, fixed-rate student loan contract. Under the IBR program, however, the size of the monthly loan repayments are essentially indexed to inflation, removing this risk for both parties with regard to those repayments. However, the final debt forgiveness tax liability obligation under the IBR program is not indexed to inflation, and moreover the different rates at which unpaid interest will accrue under different assumptions about inflation, and the different rates of return likely to be earned on the escrow accounts dedicated to paying that tax obligation, work together to magnify the impact of variations in the inflation rate on the size of the borrower's practically necessary escrow deposits. The government bears no inflation risk here, except for that risk that stems from the fact that the real value of the final tax payment will depend upon the rate of inflation over the loan term, but the borrower who must accumulate enough in their escrow account to pay that tax liability, regardless of the rate of return they earn on their investments, bears a very substantial inflation risk under the IBR program terms. The PSLF program, in contrast, essentially indexes repayment obligations to inflation, making them stable in real terms and removing inflation risk for both borrowers and the lender.

B. A "Salary Premium" Approach to Assessing the Financial Viability of Legal Education.

The several Sarah hypotheticals discussed above are illuminating, but there is another approach one can take in considering the financial viability of legal education under current conditions that provides some additional insights, and which reaches comparable conclusions, an approach that I will label the "salary premium" approach. How large of a salary premium over the starting salary that a typical prospective law school applicant with only an undergraduate degree could immediately obtain would the entry-level salary for a full-time legal position have to be to justify that applicant incurring the substantial costs of law school?

1. The Required Salary Premium under Unsubsidized Loan Terms.

Let me first conduct this analysis for unsubsidized federal student loans, without regard to the IBR and PSLF program options. If one assumes that a graduate who borrows $250,000 for law school at a blended 7.5% annual rate on unsubsidized 25-year repayment terms subsequently has a 25-year legal career, then that person would have to earn approximately an extra $22,321/year after taxes, over and above what he would have earned in a position that he could have obtained and kept without the law degree, over that 25-year period to pay off those loans.[214] Assuming again a combined 33% overall marginal tax rate for all taxes that would be imposed on this person's income,[215] this would mean that additional income averaging $33,482/year over that period would be required to be able to make those loan repayments.[216]

Let me further assume that a typical prospective law student who does not attend law school could earn an average starting salary of approximately $45,000/year,[217] rising gradually by a total of about 11.1% over the next three years of employment to about $50,000/year.[218] This would mean that a starting salary for a law graduate of approximately $83,482/year would be required to justify the costs of law school.[219] Only those students who attend elite law schools and perhaps a few other outstanding or well-connected students at non-elite schools should plan on being able to obtain such well-paid positions. The comparable required starting salary to justify a $200,000 law school loan debt would be approximately $76,786/year,[220] and to justify even a $160,000 loan debt would be approximately $71,428.[221] All of these required salaries are well above the current $60,000/year median starting salary.

Viewed in this rather simplistic fashion, the current median starting salary therefore does not financially justify most prospective law students who are considering attending non-elite schools investing in a legal education, even at the lower $160,000 cost level, absent substantial loan repayment subsidies.[222] This is a point repeatedly emphasized by Brian Tamanaha in Failing Law Schools. However, this pessimistic conclusion is implicitly based upon the assumption that the initial annual salary differential will persist between the two career tracks being compared over the 25-year period, but will not widen further. This assumption, however, appears to me to be somewhat implausible. One would expect the differential between a full-time legal position paying the median entry-level salary and a typical non-legal position paying the median undergraduate degree-based salary to widen over the years as both salaries increase, certainly in absolute terms if not also in proportional terms. To the extent that a typical law graduate's salary differential over the typical non-legal alternative salary increases over the years this would narrow the initial starting salary differential needed to justify attending law school, perhaps significantly so.

For example, let me assume for the sake of illustration that both the average legal starting salary and the average undergraduate degree-based salary (after three years of employment) will then each increase by an average of 5% year over the relevant 25-year period, so that the salary differential between the positions will gradually widen in absolute terms (although not in proportional terms, remaining at a 5% differential). Under this assumption the initial salary differential will also grow by an average of 5%/year, compounded annually, and initial salary gap will therefore have increased by a total of approximately 239% by year 25.[223] Under this alternative assumption the initial full-time starting salary needed to justify borrowing $250,000 to finance a legal education would only need to exceed the alternative $50,000/year undergraduate degree-based starting salary by about $15,254/year,[224] implying a total required starting salary of about $65,254/year.[225] To justify $200,000 in loans the required initial starting salary under these assumptions would be about $62,203/year,[226] and to justify $160,000 in loans the required initial starting salary would about $59,762/year.[227]

Under these more encouraging and, in my opinion, more realistic assumptions regarding comparative legal and non-legal salaries over the course of a 25-year legal career Brian Tamanaha's pessimistic conclusion that the costs of attending law school cannot be justified for a law student who expects to earn the class of 2010 median starting salary of $63,000/year for a full-time entry-level legal position is somewhat overstated. That $63,000/year salary under these salary growth assumptions would not appear to justify incurring $250,000 or even $200,000 of law school debt on unsubsidized repayment terms, but might just barely justify a $160,000 debt. His conclusion is somewhat more accurate with regard to the class of 2011's slightly lower $60,000/year median starting salary, although it is still a very close call whether student who can reasonably expect to obtain the median or better starting salary upon graduation may be justified in investing in an unsubsidized $160,000 legal education.

2. The Required Salary Premium under the IBR and PSLF Options.

Given the IBR provisions to justify the costs of law school the incremental after-tax income attributable to the law degree will now only have to be enough to cover the more modest combined IBR repayment obligations and debt forgiveness tax liability escrow deposit requirements. The IBR program is revealed to be somewhat of a game-changer here as to the affordability of law school, although it does not change the calculations quite as dramatically as one might have expected.

Let me attempt to demonstrate this point. Consider a student who incurs $250,000 of law school debt, enrolls in the IBR program, and remains single. Assume also that this student obtains a full-time legal position upon graduation, and that their income will again increase thereafter by an average of 5%/year, as will the alternative non-legal salary, and that the poverty level income and the general price level will increase by an average of 3%/year. For this student, as I have calculated above for the various Sarah hypotheticals, the combined monthly loan repayment and escrow deposit obligations (again making escrow deposits that grow 5%/year in size along with the graduate's income) would start at only about \$364/month + \$298/month = \$662/month, growing over the 20-year term along with her income to \$1,109 + \$792 = \$1,901/month. This would initially require additional after-tax income of \$662 x 12 = \$7,944, and if one assumes again a 33% overall marginal tax rate this would require additional taxable income over the assumed alternative non-legal salary of \$50,000/year only approximately \$11,916/year.[228] In other words, the \$250,000 debt obligation could be justified by an initial starting salary of only \$61,916/year.[229] A \$200,000 debt obligation for a comparable student would be justified by only a \$60,530 starting salary,[230] and a \$160,000 debt obligation would be justified by only a \$59,432 starting salary.[231]

This last set of calculations reveal that under the IBR program law school appears to remain at least a borderline financially viable proposition for many prospective law students, surely for those who are able to attend elite law schools, as well as those who attend an upper- or mid-tier law non-elite law school and do relatively well academically, where the prospects for obtaining a \$60,000/year or better starting salary upon graduation are then relatively good.[232] But as discussed above with regard to the Sarah hypotheticals, a student should not attend an upper- or mid-tier law school unless they have a solid basis for expecting to do well enough academically to graduate at least in the upper half of their class, and should definitely not attend a lower-tier law school unless they have reasonable expectations of graduating in the top 10% or at least in the top quarter of their class, or have the necessary local connections to obtain an attractive position upon graduation even if they do not do exceptionally well in their classes.

For a graduate taking a qualifying public service position, the forgiveness of the remaining debt without tax liability after only 10 years under the PSLF program substantially reduces the required salary premium to justify the costs of law school. A single law graduate who had borrowed somewhere between $160,000 and $250,000 would only have to make monthly payments starting at $364/month, and averaging about $401/month over the 10-year repayment term, assuming once again 5% average annual salary increases and 3% annual increases in the poverty income level line.[233] He would therefore only need to earn an average of $7,218/year[234] in before-tax income over and above the assumed $50,000/year undergraduate degree-based employment alternative, a total starting salary of only \$50,000/year + \$7,218/year = \$57,218/year, and this (growing at an assumed average rate of 5%/year) only for 10 years, to justify the costs of law school.[235]

Most qualifying public service positions, however, currently pay less than \$57,218/year[236] so that the costs of a legal education usually could not be justified solely on the basis of the salary premium earned over only 10 years. However, most law graduates who complete 10 years of public service practice will then go on continue to practice in public service or in the private sector for a number of additional years, often at a substantial salary premium over the undergraduate degree-based alternative, and will eventually more than make up for any education costs not recovered during the first 10 years of practice. Once again the PSLF program is revealed to be a very good deal, certainly for anyone with an interest in a public service legal practice and with an ability to obtain such a position.[237]

C. A "Present Value" Approach to Assessing the Financial Viability of Legal Education

A third approach to assessing the financial viability of legal education, one closely related to the previous "salary premium" approach and leading to similar conclusions, would be to first calculate the "present value" of the cost of legal education, and then use that figure to determine what annual salary premium over and above the typical salary that would be obtainable with only an undergraduate degree would justify incurring those costs, in the context of a given loan repayment period. This approach will also provide some insights regarding the cost to the taxpayers of the federal subsidies provided by the IBR and PSLF programs.

The present value of the cost of repaying the loan debt undertaken to pay for law school would be the sum of the discounted present values of each of the required loan repayments, with the appropriate discount rate to apply, in my opinion, being the average annual after-tax rate of return one could expect to obtain on one's own conservatively invested capital.[238] The current blended 7.5% annual rate for government loans to law students is very high relative to the current interest rate environment, and is well above the annual after-tax rate of return one could realistically hope to obtain on conservative investments.[239] A more realistic figure for the average annual rate of return, before taxes, that one could hope to achieve without undue risk over a 20- to 30-year period on a conventional, conservatively invested common stock or stock mutual fund portfolio might be in the neighborhood of about 5%,[240] leading to an average annual after-tax return of about 4.1%.[241] I will use this latter interest rate for present value discounting purposes.

For an unsubsidized $250,000, 7.5% annual interest rate, 25-year term loan, a loan requiring monthly principal and interest payments of about $1,860/month, the present value of those repayment obligations when calculated using this 4.1% discount rate is about $344,844.[242] For a $200,000 loan the comparable monthly principal and interest payments would be $1,488/month, and the discounted present value of those obligations at a 4.1% annual discount rate is about $275,875,[243] and for a $160,000 loan the comparable monthly principal and interest payments is $1,190/month, and the discounted present value of those obligations at a 4.1% annual discount rate is about $220,626.[244] Law school paid for by money borrowed at a 7.5% annual interest rate that far exceeds currently available after-tax rates of return on relatively conservative investments is very expensive if the loans are not subsidized!

For loans repaid under the IBR program, in contrast, the present value of a $250,000, 7.5% annual interest rate loan, including the present value of the future debt forgiveness tax liability, is much lower. Consider an IBR program borrower of that amount as I have discussed above in the Sarah hypotheticals, given the assumed 5% average annual salary increases and assumed 3% average annual increase in the poverty level income. That person, if single, would have to make monthly payments starting at $364/month and averaging about $635/month over the 20-year repayment period, and then would owe federal and state income taxes of $146,437 on the discharged debt after the 20 years.[245] The present value of these combined monthly repayment and tax liability obligations, calculated at a 4.1% annual discount rate, is only about $168,398.[246] For a $200,000 loan, the comparable present value figure would be $151,347,[247] and for a $160,000 loan the comparable figure would be $137,772.[248] For a borrower supporting three persons, the corresponding present value amounts would be $152,234,[249] $135,170,[250] and $121,604[251] respectively.

If one calculates the average annual salary premium over the typical undergraduate degree-based salary that one would have to earn over a 20-year legal career that would have the same present value as the present value of the costs of law school as calculated above under the IBR program, using the same 4.1% annual discount rate, one reaches the following rather encouraging conclusions. To justify a single borrower taking out $250,000 in law school loans under the assumption of a 5%/year average annual growth in the differential between the two salaries, only a starting salary of about $61,369/year would be needed.[252] For a $200,000 loan debt the comparable required starting salary is only $59,095.[253] And for a $160,000 loan debt the comparable required starting salary is only $57,276.[254]

This "present value" approach once again strongly suggests that a student who realistically expects to obtain a full-time starting salary of $60,000/year or better can afford to pay for law school through use of the IBR program, even if this requires incurring $200,000 or perhaps even as much as $250,000 of loan debt. The IBR program terms are generous indeed. But they do not appear to be generous enough to justify those students who will perform below average academically at an upper-or mid-tier non-elite law school, or who will do anything short of top quarter work at a lower-tier school, to incur the high costs of law school given their bleak employment prospects.

Let me also briefly consider the circumstances of a single graduate who borrows $250,000 to pay for law school, and then takes a qualifying public service position initially paying $60,000/year. That person will initially have to pay

$364/month under the PSLF program, and with their income assumed to increase an average of 5%/year while the poverty level income increases 3%/year their payments will gradually rise by about 5.7%/year to about $635/month by year 10, averaging about $500/month over that 10-year period. The remaining debt obligation is then forgiven without tax liability. The present value of these loan repayment obligations over the 10 years, again calculated using this 4.1% annual discount rate, is only about $48,420.[255] The comparable present value figure for a person supporting a family of three persons on this salary is only $31,182.[256]

If that person instead takes a qualifying public service position paying only $45,000/year, a more likely starting salary, with the same 5%/year average salary growth assumptions, they will have to initially make payments of $239/month, gradually increasing by the 10th year to $497/month, averaging about $306/month. The present value of these loan repayment obligations, calculated at a 4.1% annual discount rate, is only about $29,633.[257] The comparable present value figure for a person supporting a family of three persons on this salary is only $19,368.[258] The costs of law school under the generous PSLF debt repayment terms are quite modest indeed.

The present value approach to analyzing law school affordability also sheds light on another interesting and important question: how large a government subsidy is being provided to all of the IBR or PSLF law graduate enrollees by the favorable monthly repayment and debt forgiveness terms? While this question can be answered reasonably well for a particular individual enrollee for which one has quite a bit of information, it is a very difficult question to answer in the aggregate because of the uncertainty as to what proportion of IBR or PSLF law graduate enrollees would still be willing to borrow on unsubsidized federal student loan terms to finance their education if the IBR and PSLF programs were not available, as opposed to forgoing law school or other graduate training altogether.[259]

Let me initially assume, for the purpose of a hypothetical loan-to-loan comparison, that a law graduate with a $250,000 loan debt then obtains a full-time legal position with a $60,000/year starting salary, that salary then subsequently growing at an average of 5%/year while the poverty level income and the price level each increase by 3%/year, and enrolls in the IBR program. Let me also assume for now (perhaps somewhat unrealistically) that such a graduate would have borrowed that exact same amount from the federal government at a 7.5% blended annual interest rate on a 25-year repayment schedule if the IBR program was unavailable. Let me assume also that the federal government can obtain the funds to finance this $250,000 loan by selling as necessary 10-year US Treasury bonds, or perhaps a mixture of 10-year and shorter maturity, lower-yielding bonds, at an overall 2% average annual interest rate.

Under this 2% annual cost of capital assumption the present value to the federal government of a $250,000, 25-year term loan yielding a 7.5% annual interest rate is about a rather substantial $185,445.[260] The present value of the loan under IBR repayment and debt forgiveness terms, however, falls to negative $33,253,[261] reflecting the fact that the very low monthly loan repayments and the final debt forgiveness federal tax payment are not together sufficient even to cover the government's costs of funding the loan, even when this funding is done through selling US Treasury bonds at a low 2% annual interest rate.

When the government provides $250,000 of student loans under IBR program terms, rather than under unsubsidized 25-year repayment terms, it therefore costs the government, combining the foregone revenues on $250,000 of 7.5% annual interest rate loans not made with the subsidies by the IBR loan, approximately a total of $185,445 + $33,253 = $218,698 in present value terms. In other words, the cost to the government of making $250,000 in loans under the IBR program, if the available alternative is making those same loans on unsubsidized 7.5% annual interest rate terms, is approximately 87.5% of the face amount of those loans![262] If, however, the particular IBR enrollee would not have been willing to take out that $250,000 loan on unsubsidized terms, so that no profitable unsubsidized loan to that graduate was therefore precluded by enrolling that graduate in the IBR program, then there is no foregone income and the subsidy cost to the government of extending IBR program terms to that enrollee is only $33,253, only 13.3% of the loan's face amount.[263]

Let me briefly also consider the government subsidy aspects of a $250,000 student loan made to a person who upon graduation obtains a public service position with a starting salary of $45,000/year, increasing by an average of 5%/year for 10 years, and who enrolls in the PSLF program. The results here are rather striking. That person, if single, will again initially owe repayments of only $239/month, with the repayments averaging $306/month ($3,672/year) over the 10-year repayment period. The annual payments needed for the government to amortize a $250,000, 10-year bond debt at a 2% annual interest rate is approximately $27,778/year, much larger than these small annual loan repayments received under PSLF program terms. The present value of that loan to the government, with those large net annual subsidies again discounted at a 2% annual interest rate, is a very substantial negative $216,952.[264]

When the government provides $250,000 of student loans under PSLF program terms, rather than under unsubsidized 25-year repayment terms, it therefore costs the government, in combined foregone revenues on $250,000 of 7.5% interest rate loans, and in PSLF loan subsidies, approximately a total of $186,732 + $216,952 = $403,684 in present value terms. In other words, the cost to the government of making loans under the IBR program, again <u>if</u> the available alternative is making those same loans on unsubsidized 7.5% annual interest rate terms, is approximately 161% of the face amount of those loans![265] If, however, the particular PSLF program enrollee would <u>not</u> have been willing to take out that $250,000 loan on unsubsidized terms, so that no profitable unsubsidized loan to that graduate was therefore precluded by the availability to him of the PSLF program, then the subsidy cost to the government of extending PSLF program terms to that enrollee is still a substantial $216,952, a full 86.8% of the loan's face amount.[266]

The IBR and PSLF programs thus each provide very substantial benefits from the point of view of the enrollees, particularly for graduates who take qualifying public service positions. As noted above, viewed from the perspective of a borrower $250,000 in unsubsidized federal loans taken out at the current relatively high 7.5% blended annual interest rate has a present value of $344,844, when the loan repayment and tax liability obligations are discounted at a 4.1% interest rate that more realistically reflects existing the graduate's after-tax return possibilities. Under the generous IBR program repayment terms the present value of that debt obligation is reduced to $168,398, a very substantial reduction of over 50%. But under the terms applicable under the PSLF program for qualifying public service positions the present value of that same $250,000 debt obligation for a single person is reduced from $344,844 to only between about $31,764 and $48,420, depending upon the public service position's salary within the $45,000/year - $60,000/year annual range, and to only about between $19,368 and $31,182 for a person supporting a family of three persons, over a 90% cost reduction! Who says that we don't sufficiently encourage public service?[267]

In addition, when these same loans are looked at from the point of view of the government, as noted above, the subsidies provided to borrowers by the IBR program are fairly modest for those enrollees who would not have been willing to borrow on unsubsidized federal student loan terms, but are quite substantial with regard to those borrowers who would have been willing to borrow on unsubsidized terms if that were their only option. The subsidies provided by the more generous PSLF program are quite substantial in either case.

D. Summary.

The existing literature on the law school financial crisis does not adequately recognize the very substantial impact that the IBR program under the new PAYE rules and the closely-related PSLF program have on the financial aspects of the decision whether to attend law school. Responding to some criticisms in this regard,[268] Brian Tamanaha has since conceded that his seminal work Failing Law Schools, which has clearly become the definitive point of departure for all later assessments of the financial problems of legal education, did not adequately take into account the impact of the original (pre-PAYE rules) IBR loan repayment option on student debt repayment burdens, and also did not adequately take into account the far more generous terms now offered under the IBR program under the PAYE rules.[269] The voluminous writings by Paul Campos on these questions also fail to adequately assess the significance of the IBR program for those students who will do well enough academically to obtain attractive legal positions upon graduation.[270]

The extensive hypothetical calculations that I have carried out, first in the context of the "debt servicing burden" approach and then under the "salary premium" and "present value" approaches, respectively, demonstrate that the IBR program as implemented under the PAYE rules indeed has a substantial impact upon the financial viability of Harvard-style legal education. Many prospective law students, particularly those who are considering elite law schools or upper- or mid-tier non-elite law schools, may find that even in the current depressed employment market the costs of even a private $250,000 legal education are justified, especially if they have realistic plans to pursue a public service career for at least 10 years. However, even with the generous IBR provisions law school is not cost-justified for the large majority of students who are considering attending one or another of the many lower-tier law schools, or for the students who are considering attending upper- or mid-tier non-elite law schools but who would likely graduate in the lower half or so of their class if they do so. Those students would not have sufficiently promising prospects for obtaining either full-time legal positions paying at least the current $60,000/year median starting salary, or public service positions that would qualify for the PSLF program, that would justify incurring the costs of law school.

VI. WILL PROSPECTIVE LAW STUDENTS UTILIZE THE IBR PROGRAM ON A LARGE SCALE?

While the IBR and PSLF programs each appear to be generous enough to justify many (although not most) prospective law students undertaking an expensive Harvard-style legal education, it is not clear how many students will be willing to pursue one of these debt repayment options. Relatively few law graduates have enrolled in the IBR program to date.[271] Law graduate enrollment may now substantially increase given how much more generous the IBR program has now become after the adoption of the PAYE rules,[272] but then again it may not.

Let me first of all discuss some of the reasons why law graduates may not choose to enroll in the IBR program on a large scale over the next few years. I will then briefly discuss a possible simple reform of the program that would encourage increased enrollments, but which also reveals some of the difficulties involved in achieving this objective in light of the tensions and trade-offs that are inherent in the IBR and PSLF programs.

A. Factors that May Limit IBR Program Enrollment by Law Graduates.

There are quite a number of possible reasons why the currently low rate of IBR program enrollment by law graduates may persist. First of all, the problem may simply be that many law students and recent law graduates are not aware of the details of the IBR and PSLF programs and their large financial advantages since the adoption of the PAYE rules.[273] They may not be being provided with clear information regarding the contours of what are rather complex programs that require considerable financial acumen to fully understand and evaluate. If not, this would limit the extent to which the programs are utilized even if much broader use is justified by their generous provisions.[274] It may also be the case that law students, being primarily young academic over-achievers, tend to be an over-optimistic group who generally assume without much investigation and reflection that they will be able to obtain high-paying legal positions after graduation and therefore will have no need to avail themselves of subsidized loan repayment programs, and therefore do not pay much attention to IBR or PSLF program brochures or other information.[275]

One would think that law schools would find it to be in their interest, as well as in the interest of their students, to publicize how difficult it will be for many graduates to repay their large law school debts on unsubsidized terms, and to advertise the advantages of the IBR and PSLF programs and encourage and facilitate their students' enrollment in those programs. Some law schools are apparently rather aggressively promoting these programs.[276] However, it is not really possible to make the details of these programs clear to prospective or current law students without at the same time communicating the unpalatable message that legal education no longer makes economic sense for many students at even the better non-elite schools, nor for the large majority of students at the lower-tier schools, absent a large taxpayer subsidy, a message that many law schools may be understandably reluctant to endorse.[277] In addition, many law school financial aid officers may be relatively unaware of (or in denial about)[278] the need for and the advantages and details of these programs.

Second, even prospective law students who fully understand these loan repayment programs may still be reluctant to rely upon them, for one reason or another. There are a considerable number of uncertainties to ponder. First of all, many prospective students considering attending non-elite schools may be unsure whether they will do well enough academically to be able obtain a position with a median or better starting salary that would justify incurring such large loan debts. Such concerns are quite legitimate, given the relatively large proportion of law graduates who are unable to obtain full-time legal positions at the median or better starting salary, even if they have graduated from upper- or mid-tier non-elite law schools,[279] and given the uncertainty that most prospective law students face (or at least should face) as to whether their academic success at the undergraduate level will translate to success in law school. Other prospective students may be uncomfortable with the debt forgiveness tax liability aspects of the IBR program, given how difficult it will be for an enrollee to precisely determine how large their unpaid debt obligations after 20 years are likely to be, and how difficult it will be to determine the precise tax rate that will be applied to that forgiven debt at the time of discharge,[280] and also given the substantial risk they face that their escrow deposits may have to be increased to be sufficient to meet the eventual tax liability obligation if inflation rates and the rate of return they can expect on their escrow account are substantially lower than they originally expected.

Some persons may see the balance of advantages of enrolling in the IBR or PSLF programs, but be of the opinion that one should fully repay their debts, and therefore will be unwilling to enter into arrangements that would shift much of their debt repayment burden onto taxpayers.[281] Some other persons may fear the consequences for their credit ratings and later access to mortgage financing or other important loans of having such a large debt burden that continually grows through negative amortization,[282] perhaps thinking back to the severe difficulties that the recent financial crisis imposed on many persons who had taken out negative amortization home mortgages. Other prospective students may fear, perhaps with good reason, that they may lack the financial self-discipline to make (without being legally compelled to do so) the regular and substantial escrow deposits over 20 years that will be necessary to eventually have a fund sufficient to pay a potentially large debt forgiveness tax liability. Or they may even fear that the top-bracket marginal tax rate that will likely be applicable to most or all of their forgiven debt may be significantly increased over the next 20 years back to the much higher levels that formerly prevailed during much of the mid-20th century, perhaps rendering their escrow account financial provisions inadequate to meet their tax obligations.

Some prospective law school applicants, particularly those who are already inclined to "think like lawyers" and anticipate and provide for possible adverse contingencies, may question whether a person who enrolls in the IBR program can rely upon the important debt forgiveness provision still being in force in 20 years[283] when they seek to discharge their remaining unpaid debt that as I have shown may approach as much as $500,000 by that time. This question of the reliability of the IBR program promises is often overlooked by analysts of the program. Even Phillip Schrag, who far more than any other writer shows a detailed understanding of the operation of the IBR program under the PAYE rules, does not adequately address this question. Does a borrower who has enrolled in the IBR program face some risk that this debt forgiveness provision might be made less generous – or even abrogated entirely – by subsequent Congressional or Presidential action prior to their debt discharge date? In other words, is the current debt forgiveness provision a fixed, unalterable contractual obligation of the federal government, at least with regard to those persons who have already enrolled in the IBR program, or is that debt forgiveness potentially subject to change with regard to those borrowers by a Congress or Administration that is seeking to increase federal revenues?

Paul Campos in his <u>Don't Go to Law School (Unless)</u> book states that the IBR program "doesn't create any contractual rights, and could be changed or eliminated at any time,"[284] and he has also made statements elsewhere along the same lines.[285] Campos is apparently of the view that an IBR enrollee faces the risk that the debt forgiveness provision applicable to their loan could be legislatively changed even after their enrollment in the program, potentially subjecting them to having to fully repay the up to perhaps $500,000 of outstanding debt that may have built up after many years of accruing unpaid interest. Moreover, if Campos is correct then the total debt that an IBR program enrollee might have to repay in a lump sum after 20 years could even be significantly larger than $500,000 if the government not only eliminates the debt forgiveness provision but also eliminates the provisions requiring it to pay the unpaid accrued interest for the first three years after he repayment obligations come due, and/or the provision preventing the capitalization of accrued interest after that three-year period, which the government could presumably also do if it is not contractually committed to those initial loan repayment terms.

If enrollment in the IBR program actually poses a risk of such a financial catastrophe for the enrollees then many prospective law students would wisely choose not to pursue that option. However, Schrag in his 2013 article flatly disagrees with Campos on this point and rather summarily claims in a footnote that the current IBR program debt forgiveness provision is <u>not</u> subject to change with regard to those borrowers who have already enrolled in the program and thus have relied upon it.[286] Schrag cites in support of this claim the text of the Master Promissory Notes for the IBR program and some explanatory materials relating to those Notes that are all available on a U.S. Dept. of Education website.[287] However, I have reviewed those materials and they are far from being models of clarity, and standing alone they may not be sufficient to support Schrag's claim and allay any possible borrower concerns in this regard.[288] But if one also looks at the PAYE rules themselves,[289] or at some other more current Dept. of Education advisory materials that are available online and that reflect the impact of the PAYE rules, one finds much clearer support for the position that the current generous IBR program terms regarding debt forgiveness after 20 years, and the federal government's payment of accrued unpaid for three years after the IBR repayments are first due, and the subsequent non-capitalization of unpaid accrued interest after the first three years of repayment, will all be regarded by the federal government (and, if necessary, also by the courts) as binding contractual commitments, at least for those graduates who have enrolled in the IBR program prior to any subsequent legislation or administrative measures that would change those terms.[290] My conclusion is that Schrag is correct here, and Campos is wrong, and that an IBR or PSLF enrollee need not have any real concern as to whether the government will honor its commitment to forgive the remaining debt obligation after 20 years (or 10 years under the PSLF program) if the enrollee has complied with all of the program requirements.[291]

Finally, a prospective law school applicant may be concerned that they are vulnerable to adverse modifications of the IBR or PSLF programs that might occur during the several years after they begin to incur substantial law school debts but prior to their enrollment in the program. This appears to me to be a legitimate concern,[292] but it is a problem that can apparently be avoided for the IBR program by a student enrolling in the program at the time that the loan debts are first incurred, or very shortly thereafter. It is not clear whether this option would be available as a practical matter for PSLF program enrollees, since those positions are usually not obtained until the final semester of law school or after graduation, long after substantial loan debts will have been incurred.[293]

On the basis of my research it appears clear to me that the large majority of law students should enroll in either the IBR or PSLF programs to repay their debts. Except for those relatively few students who are able to attend one of the elite law schools, or those students who for other reasons have well-grounded expectations of doing well enough at a non-elite law school, or that have sufficiently strong law firm hiring connections, to be confident that they will be able to obtain a legal position upon graduation paying substantially more than the current $60,000/year median starting salary, law students should upon graduation or even earlier either enroll in the IBR program[294] or in the PSLF program. Unless one has a high probability of being able to obtain one of the relatively small number of large firm entry-level associate positions that pay six-figure starting salaries upwards of $160,000/year, or one of the coveted PSLF program-qualifying public service positions, the risk of having to repay out of a relatively low salary upwards of $160,000 to $250,000 in unsubsidized 7.5% annual interest government loans, loans that generally cannot be discharged in bankruptcy, is just too great.

Law students should therefore utilize the IBR or PSLF programs, but should a person attend a non-elite law school at all, even with the availability of the IBR repayment option? That is the more difficult question. As I have demonstrated above in some detail, under the IBR program the costs of attending a non-elite law school appear to be justified, just barely, <u>if</u> one is going to be one of the minority of graduates of those schools who are able to obtain full-time legal positions paying at least $60,000/year. And under the PSLF program the costs of law school appear to be justified for anyone inclined to and, more importantly, able to obtain a qualifying public service position. But as I have also shown there are quite a number of legitimate risks involved in going the IBR route, one major risk of course being the risk of failing to accurately predict just how well one will actually perform academically in law school, something that is very difficult for most people to predict with any certainty, and the other major risk being the several financial uncertainties discussed above that are associated with repayment of the eventual IBR debt forgiveness tax liability. These concerns together should perhaps caution prospective students against enrolling in law school and incurring the large debts involved, even under IBR repayment terms, unless they are quite certain that they will do well enough academically, compared to their class peers, to have excellent employment opportunities available upon graduation. One might well conservatively advise such persons not to attend a non-elite law school unless they reasonably expect to be able to graduate with at least top-quarter rank at an upper- or mid-tier non-elite law school, or with at least top-10% rank at a lower tier school, thereby giving themselves a little margin for error in their academic performance predictions. Whether prospective law students who cannot gain admission into an elite law school will also see it this way in the coming years, and then judiciously choose either to attend a non-elite law school under the IBR or

PSLF program or else seek a different career, is yet unclear.

B. A Possible Reform of the IBR Program to Make it More Attractive to Potential Enrollees.

In Part VII of this Article I will briefly consider the several arguments that can be offered in support of the continued availability of the IBR program for law students, as well as the several counter-arguments that can be made for the substantial curtailment or even abolition of the program with regard to those students. For the remainder of this Part VI, however, I will simply take it as a given that the IBR program as it applies to law and other graduate students is a worthy program that should be continued, and I will briefly consider the complications that would be introduced by one possible alteration of the program intended to make it more attractive to potential enrollees. There are of course other possible modifications of the IBR program that are different from the one that I will here consider. However, I will present a simple and straightforward modification of the IBR program that appears on its face to address the more obvious difficulties that it presents that may be discouraging enrollment, yet which upon closer inspection reveals some of the trade-offs and unintended consequences that one would encounter in attempting to deal with those difficulties.

The IBR program could of course be made more attractive to potential enrollees simply by reducing the monthly payment obligations associated with a given income, or by shortening the period during which such repayments need be made, or by reducing or even eliminating the final debt forgiveness tax burden. However, such changes would obviously increase the cost of the IBR subsidy to the federal government, raising an additional concern. I will therefore limit my discussion here to a proposed change in the IBR program to encourage greater enrollments that would be revenue-neutral in that it would not increase the aggregate subsidy provided by the program to the enrollees.

As I have discussed above, one set of legitimate and related concerns that might be preventing some persons from enrolling in the IBR program is the combination of the uncertain size of their final debt forgiveness tax liability, the uncertain size of the periodic escrow deposits that they would need to make to provide for that tax liability, and/or their lack of confidence in their ability to force themselves to make those substantial escrow deposits on a regular basis over many years absent any legal requirement that they do so. These related problems could all be eliminated by adoption of the following two amendments to the IBR program. First, the final debt forgiveness would be exempted from federal tax liability. Second, there would be a corresponding increase in the percentage of the difference between enrollees' adjusted gross income and the appropriate poverty level income that enrollees would be obligated to repay, an increase from the current 10% figure under the PAYE rules to whatever higher percentage of the difference is necessary to exactly offset in present value terms the cost of subsidizing the additional enrollees who would be likely to enroll given the new tax exemption, but given also the higher repayment percentage imposed, and given the government's eventual loss of the debt forgiveness tax liability payments from the IBR program's enrollees.[295]

At first glance this proposed new arrangement is appealing. Under these provisions the IBR enrollees would now have monthly repayment obligations that were essentially linked to their income and the inflation rate, therefore removing the above-discussed inflation risk that they now must bear with regard to the sufficiency of their tax liability escrow accounts, as well as removing any risk that the applicable marginal tax rates could be changed over time in a manner that is adverse to their interests. It would also legally commit them to make sufficient payments on a regular basis to fully meet their repayment obligations, avoiding the possibility of their falling into arrears for lack of sufficient self-discipline in making the now-discretionary tax liability escrow deposits. The government, in turn, would now receive enough in extra monthly repayments over current IBR loan repayments to offset both the subsidies to additional IBR enrollees and the future loss of debt forgiveness tax revenues, so that the changes would be revenue-neutral.

A little closer scrutiny, however, reveals some difficulties that this particular proposal to encourage IBR enrollment would present. First of all, the new arrangement would create additional cross-subsidies from high-income borrowers to low-income borrowers beyond those inherent in the current IBR provisions. Let me explain this point. For any across-the-board increase in the percentage of IBR enrollees' adjusted gross incomes in excess of the applicable poverty level income from 10% to a higher percentage, the burden of the increase in monthly repayments would be proportionally larger for high-income enrollees than for low-income enrollees that had the same amount of outstanding debt. However, under the current IBR provisions high-income enrollees will have lower amounts of debt at the time of debt forgiveness than will low-income enrollees who have borrowed the same initial amount, since because of their higher monthly loan repayments those high-income enrollees will have accrued less unpaid interest, so they will therefore benefit less from the exemption of debt forgiveness from tax liability than will low-income borrowers whose debt has increased by a larger amount during the loan term. In other words, while increasing the percentage of their income that IBR enrollees would be required to pay could be made essentially revenue-neutral for the federal government, given the appropriate increase in that percentage, it would be non-neutral as to enrollees in that it would reallocate the distribution of the IBR subsidies more towards low-income borrowers and away from high-income borrowers. This proposal would therefore go beyond simply encouraging persons to make greater use of the IBR provisions and would change the distribution of the program's benefits across different classes of enrollees, thereby raising additional and controversial policy issues.

A second difficulty with this proposed change in the IBR rules is that the complete exemption of debt forgiveness from tax liability would exacerbate the perverse incentive that the IBR program now creates for borrowing as much as possible even if the funds are not necessary to pay for the expenses of law school. As discussed above, approximately half of the student loans that an IBR enrollee might now incur beyond their financial needs during law school are essentially “free money,”[296] as are 100% of the comparable loans for PSLF program enrollees who need not provide for future debt forgiveness tax liability. This proposal would increase the incentive of IBR enrollees to borrow as much as they possibly can, regardless of their financial needs, and would consequently place law schools under even greater pressure to exaggerate their “authorized educational expenses” so as to facilitate student borrowing, requiring closer governmental oversight of these figures to counteract.

Brief consideration of this simple IBR program reform proposal that I have set forth above reveals that the program embodies a basic set of tensions that are difficult to resolve through only relatively minor adjustments. First of all, for the IBR program to adequately address the law school affordability problem for most law graduates that is presented by the high $160,000 to $250,000 cost of a “Harvard-style” legal education the required monthly loan repayments payments will have to be set so low that there will necessarily be negative amortization of the loans, and consequently a large unpaid loan debt remaining at the end of the loan term. If that debt is not then forgiven, or even if it is partially forgiven through being treated as taxable income, this then imposes a large and uncertain tax liability on IBR enrollees that will be difficult for them to provide for, thus discouraging enrollment in the program, as well as costing the government money to provide this total or partial debt forgiveness. But on the other hand, to the extent that this debt is wholly or partially forgiven this will create cross-subsidies across different classes of enrollees, as well as creating as previously discussed a perverse incentive for prospective enrollees to borrow as much as they can, even if it is more than is needed for them to cover law school costs. It is not apparent to me how the IBR program might be selectively modified within its current general contours to simultaneously address all of these concerns.

VII. THE FUTURE OF THE IBR PROGRAM

The IBR program under the PAYE rules may enable many upper- or mid-tier non-elite law schools to avoid having to make immediate and drastic changes in their cost structures and tuition charges, if their students in the coming few years prove to be willing to continue to enroll at current tuition levels and incur large loan debts[297] in reliance on the IBR or PSLF program options. But will the IBR program remain as generous for law students as it has now become under the PAYE rules? Or is there a real possibility that the IBR program and/or the PSLF program will be significantly curtailed or even eliminated, at least for for law student borrowers?

The political risk here is considerable, in my opinion. The continuation of the IBR and PSLF programs for law students in their current form is far from certain, for several reasons. First of all, given the controversial nature of persistent large federal government deficits, any federal program that is perceived as significantly increasing those deficits by providing substantial benefits to a discrete group of individuals will remain under continued critical Congressional scrutiny. This will be the case even for those federal programs that seek worthy objectives, and that have had at least partial success in achieving those objectives, such as the IBR and PSLF programs.[298] If the IBR and PSLF program enrollments do grow rapidly in the coming few years, as some predict,[299] the programs will doubtless come under especially close Congressional review.[300]

The IBR and PLSF programs are generally regarded as subsidy programs that cost the federal government money and that therefore have to be justified in light of these costs. But just how substantial are those subsidies with regard to the subset of law student and other graduate student enrollees? This is actually quite a difficult question to answer since it requires a hypothetical counterfactual comparison, and it is a question one that certainly merits a much more detailed empirical inquiry than I am able to here carry out.

Let me briefly outline this conundrum. Graduate student loans at current federal student loan interest rates are clearly profitable to the federal government. The unsubsidized Stafford loans made to law students and other graduate students carry a relatively high 6.8% annual interest rate, and the Grad PLUS loans carry an even higher 7.9% annual interest rate and also require a 4% one-time loan origination fee. Moreover, the federal government is currently able to finance its funding needs by selling 10-year US Treasury bonds paying in the neighborhood of only 2% annual interest rates, and by selling shorter-term US Treasury bonds paying even lower rates. There is therefore a very large spread between federal graduate student loan interest rates and the government's cost of capital that results in considerable profit to the government, even allowing for defaults on a significant proportion of those loans.[301] To the extent that these same loans are made instead under more generous IBR or PSLF program terms those profits will be reduced, since as I have shown the monthly loan repayments will be sharply reduced. Moreover, the IBR debt forgiveness provision will also reduce the final repayment burden of enrollees after 20 years by approximately 67% to only the taxes due on the debt forgiveness,[302] and the PLSF program will forgive the unpaid loan debt entirely after 10 years.

If one simply compares the government's net revenues on unsubsidized graduate student loans with the much smaller net revenues that would result for the same volume of IBR and/or PSLF program loans, as I did in Part VI of this Article, those programs do indeed appear to be rather generous subsidy programs, with the IBR subsidy for a $250,000 loan to a single borrower being approximately 87.5% of the loan amount, as compared to making that same loan on unsubsidized terms, and the PSLF subsidy on a comparable loan being 161% of the loan amount.[303] But is this really the proper comparison to make? Will law students and other graduate students in fact be willing to take out anywhere near the same volume of government student loans on unsubsidized terms in the coming years as they would if the IBR and PSLF programs were available?

Perhaps not; it may be the case that many persons who are willing to borrow to pay for their graduate school education on the generous IBR or PSLF program terms would not be willing to do so under much more expensive unsubsidized 7.5% blended annual interest rate terms. If a substantial number of persons are willing to borrow on IBR or PSLF program terms but are unwilling to borrow on unsubsidized 7.5% annual interest rate terms, then the proper comparison for determining the size of the IBR and PSLF program subsidies would be to compare the government's net revenues on graduate student loans, with the IBR and PSLF programs in force, with the government's hypothetical net revenues on the perhaps significantly smaller volume of graduate student loans that would be taken out on unsubsidized terms in the absence of those programs.[304]

If graduate and law student reluctance to borrow on unsubsidized 7.5% annual interest rate terms is so pronounced that the choice that the federal government actually faces is between making a large volume of modestly subsidized graduate and law student loans on IBR or PSLF program repayment terms, or making very few (though individually highly profitable) graduate student loans on unsubsidized terms, then the total subsidy provided through the IBR and PSLF programs may actually be relatively modest in size.[305] In all likelihood, the substantial curtailment or elimination of the IBR and PSLF programs for graduate students would significantly reduce but not eliminate altogether the volume of graduate student loans. But without knowing how substantial this reduction in loan volume would be one cannot determine how large a subsidy will be provided by the IBR and PSLF programs for law students and other graduate students.

If it can be shown convincingly that the subsidies provided by the IBR and PSLF programs for graduate and law students are actually quite modest in size in the aggregate because sufficiently many prospective students would be unwilling to take out those same student loans under unsubsidized repayment terms, then the deficit hawks will likely move on to other matters, and the more likely political pressures that will be felt here will be to maintain or even further liberalize the IBR program, such as perhaps by eliminating the tax liability on forgiven debt as is now done under the PSLF program,[306] or by simply reducing the interest rates on graduate student loans.

Let me assume for the sake of further discussion that the IBR and PSLF programs are proven to be (or at least continue to be perceived by political leaders to be) on balance a significant taxpayer subsidy of legal education. There then would arise a legitimate question as to whether this subsidy is really good social policy, all things considered, that should be continued.

The major argument in favor of allowing law students to enroll in the IBR program is of course that this facilitates access to legal education for persons of modest means, and that without such a subsidized loan repayment program legal education and the many subsequent professional and political opportunities available to lawyers would be largely restricted to persons from privileged family backgrounds, given legal education's $160,000 to $250,000 cost.[307] The PSLF program can be justified on the same basis, as well as on the basis that it also facilitates the provision of important public services. A second argument that has been made in support of the IBR and PSLF programs is that their impacts in reducing the costs of legal education will not only benefit law graduates but will also indirectly contribute to the broader availability of affordable legal services for currently underserved low-income and middle–class clients.[308] A third argument that can be made in support of these programs, one with admittedly somewhat limited normative appeal but perhaps having some practical force, is a kind of "facts on the ground" argument: given how highly dependent legal education at the many non-elite schools has already and will increasingly become on the flow of subsidized government loans, it would just be too disruptive to too many law schools and law faculty members to now suddenly withdraw that financial support. However, a number of relatively strong criticisms can also be made of these programs.

Let me now turn to some of these possible criticisms. One such criticism focuses specifically upon the interests of IBR enrollees who graduate from law schools, or from other graduate programs that as a practical matter also require students to incur large loan debts. That criticism is that the very low initial payment cap imposed by the PAYE rules for graduates taking low initial starting salaries may induce short-sighted persons into borrowing heavily to finance educational programs that may lead to positions that pay well enough for graduates to meet these low monthly loan repayment obligations, but not paying enough for the borrowers to also set aside sufficient funds in escrow to eventually meet their large debt forgiveness tax liability. This will be the probable unpleasant result for many if not most law students who enroll in the IBR program to finance their legal education at a lower-tier law school, and also for many students at upper- or mid-tier non-elite law schools who graduate with undistinguished records, and the IBR program can be criticized as a means by which the law schools and the federal government each take advantage of these borrowers' short-sightedness and financial inexperience.[309]

In addition, it is beyond argument that law students are disproportionately (although not exclusively) drawn from higher-income socioeconomic groups that are less in need of taxpayer assistance than are some other supplicants that are in far more dire financial circumstances, and that the law schools who indirectly will receive most of the student loan funds as tuition payments[310] are by and large relatively affluent institutions. The law faculty members who will then receive as compensation much of this student debt-financed tuition revenue are obviously also a relatively affluent group. In addition, the Bureau of Labor Statistics has projected that the number of new law graduates is likely to exceed the number of net legal positions available over the next decade as a result of economic growth and retirements by approximately a 2:1 ratio, even under rather optimistic assumptions that the economy will grow relatively rapidly in the coming few years and will reach full employment by 2020.[311] This projected imbalance calls into question the wisdom of subsidizing legal education at the taxpayers' expense at this time, rather than to allow market supply-and-demand forces to operate to eliminate this surplus.[312]

Both Brian Tamanaha and Paul Campos have been highly critical of the IBR program.[313] Each of their critiques focus primarily on what they perceive to be the disadvantages of the IBR program for law graduate enrollees, rather than on the broader social interests that may be thwarted by the use of the program by law graduates.[314] Jason Delisle and Alex Holt in their extensive analysis of the IBR program [315] are also quite critical, particularly of the liberalization of its monthly repayment and debt forgiveness terms resulting from the changes made by the 2010 legislative amendments and the subsequent PAYE rules, but their criticisms focus much more on these broader social concerns rather than on the circumstances of the IBR enrollees.

Besides also noting the perverse incentives that I have discussed that the IBR and PSLF programs' repayment terms create encouraging excessive borrowing,[316] Delisle & Holt emphasize that because of the way that the IBR program is structured it provides the bulk of its benefits to high-income, high-debt borrowers such as law students and other professional students, while its subsidies are far less generous for undergraduates who enroll in the IBR program with much lower debt levels and later obtain lower post-graduate incomes.[317] They criticize this skewed distributional feature of the program as being unfair, as well as making graduate students much less sensitive to tuition costs, thus facilitating further cost and tuition increases by law and graduate schools.[318] They recommend a number of changes in the IBR program designed to remove these disparities in enrollee benefits and these perverse incentives, including among other recommendations a call for restoring the IBR program's pre-PAYE rules payment cap (15% of adjusted gross income minus the poverty level income line) for borrowers whose adjusted gross income is more than 300% of the federal poverty wage,[319] restoring the prior 25-year repayment period before debt forgiveness takes place for persons whose loan balances initially exceed $40,000,[320] and eliminating the federal tax liability on forgiven debt.[321]

In sharp contrast Phillip Schrag mounts a spirited defense of the IBR program, at least in its more restrictive pre-PAYE rule form, emphasizing its role in providing broader access to legal education,[322] and also suggesting as noted earlier that its impacts in reducing the costs of legal education will not only benefit law graduates but may also contribute to the broader availability of affordable legal services for currently underserved low income and middle–class clients. One aspect of his defense is to attempt to refute Tamanaha's specific claims made in <u>Failing Law Schools</u> that enrollment in the IBR program might be unwise for the enrollees,[323] either because of the large size of the total interest payment obligations under the extended repayment terms of the program, or because of possible adverse credit rating implications.[324] Schrag is quite convincing in this refutation of Tamanaha's interest payment burden claims, in my opinion, making many of the same points that I have made in this Article, and also is persuasive in his refutation of the credit rating concerns.[325]

The other aspect of Schrag's defense of the IBR program are his responses to criticisms that the program is an inappropriate public subsidy to legal education,[326] and to Delisle & Holt's more specific criticism that the IBR program, at least since it has been liberalized by the PAYE rules, is unfair in that it diverts taxpayer dollars to relatively wealthy graduate students.[327] Schrag's response to those who criticize the IBR program as an inefficient public subsidy of legal education is simply to point out that there are many other subsidies provided for higher education, both in the US and elsewhere, and that the IBR subsidy is not excessive in comparison.[328] Moreover, in his opinion "American society is laced with subsidies and cross-subsidies; those to higher education are hardly exceptional."[329] This "governments provide subsidies all the time"-type defense is, however, somewhat problematic in that it is unresponsive to critics who would argue that the existence of other inefficient subsidies in higher education and elsewhere does not alone justify yet another inefficient subsidy program, and that an affirmative defense of this particular subsidy program is called for in light of its inefficiencies and costs.

Schrag's rather summary response to the Delisle & Holt equity-based critique of the IBR program, and to their corresponding recommendations for changes, is to criticize their proposed criterion for determining who would qualify as a "wealthy" graduate student who would be limited to the less generous pre-PAYE rules IBR repayment and debt forgiveness terms. In my opinion, however, while Schrag may be correct that Delisle and Holt have set their proposed criterion of 300% of the poverty level income for defining a wealthy borrower[330] a little too low, he does not really attempt to address their well-articulated distributional concerns about the program. Schrag does make the interesting point that the subsidies provided by the IBR program, being larger for graduates with smaller incomes, other things being equal, are actually considerably more progressive in their incidence than is the distribution of "merit" scholarships now provided by law schools, which tend to be focused for U.S, News and World Report annual ranking purposes upon the applicants with the highest LSAT scores and undergraduate grades, students who are also the most likely to end up taking well-compensated positions with large law firms.[331]

My conclusion here is that Schrag is correct in dismissing the various concerns that are expressed by Tamanaha and Campos disparaging the claimed benefits of the IBR program for law graduates, at least for the minority of graduates who will do well enough academically to be able to obtain full-time legal positions paying at least the $60,000/year median starting salary. The IBR program, as I have demonstrated in perhaps excessive detail, is a very good deal for those persons who enroll when compared to the alternative of repaying unsubsidized federal student loans. Tamanaha and Campos are, however, correct in arguing that the costs of law school are not justified even under IBR terms for the large majority of graduates of lower-tier law schools, and even for many and possibly even most graduates of upper- and mid-tier non-elite schools, since those students will be unable to obtain full-time legal positions paying at least in the neighborhood of $60,000/year, and that many prospective applicants will be unable for one reason or another to accurately assess whether their academic and later employment prospects justify enrollment.

In addition, Schrag has not in my opinion adequately refuted the criticism that the IBR program is an inefficient subsidy, nor has he addressed the distributional concerns raised by Delisle & Holt. Moreover, he has not even attempted to address the broader criticism looming in the background of these discussions that even if the IBR program is an effective subsidy program for facilitating broader access to legal education, given the current extreme oversupply of young lawyers this program may not be as effective a use of public funds as would be some other federal programs (or tax reductions).

I will not in this Article take a definitive position on this complicated and controversial question of the overall social merits of the IBR and PSLF programs, since the narrower focus of my analysis here has been on the implications of these programs in their current form for prospective law students and for law schools. However, a discerning reader cannot fail to have noticed that in my opinion these programs raise a number of legitimate concerns that should be somehow addressed, and that as I have noted in Part VI of this Article it will be difficult to amend these programs to adequately address these concerns in a revenue-neutral fashion without fundamentally changing their nature. Nor will I take a position regarding how large are the subsidies that these programs have and will in the future provide to law students and law schools. Answering that question would require a comprehensive empirical assessment of the willingness of law students to continue to take out student loans in the future on unsubsidized terms, which to my knowledge has not been carried out by anyone.

I am of the opinion, however, that if the IBR program enrollment rates for law students do increase sharply in the coming few years, as appears likely once the favorable impact of the PAYE rules on repayment obligations become more widely understood, and if this increase in law student enrollment is perceived by political leaders (rightly or wrongly) as imposing a substantial and growing subsidy cost upon the federal government, this increased cost along with the other concerns that have been raised may result in the IBR and/or PSLF programs being made less generous and/or less available, at least for law student borrowers if not for other types of students as well,[332] perhaps even being eliminated altogether for law students. As I have discussed such a change would likely have immediate and dramatic adverse consequences for non-elite legal education.

VIII. CONCLUSION

Harvard-style legal education now costs students on average between $160,000 and $250,000 for their three years of study, the precise amount for any particular student depending on the law school attended, the alternative employment opportunities foregone, the amount of scholarship assistance provided and the availability of summer employment. But the median starting salary for full-time entry-level legal positions has now fallen to $60,000/year, and moreover upwards of 45% of recent law graduates are unable to obtain full-time legal employment at all. While most students at elite law schools can still justify incurring the high costs of a legal education because of the attractive employment prospects they will have upon graduation, even under unsubsidized federal graduate student loan terms, the current limited job opportunities do not justify incurring those costs on those unsubsidized repayment terms for most students at even the upper-or mid-tier non-elite law schools, nor for the large majority of students at lower-tier law schools. However, the existence of the IBR program as implemented by the PAYE rules significantly changes the financial equation for prospective students considering attending one or another of the non-elite schools.

I have in this article conducted several different analyses of the impact of the IBR program, and of the related and even more generous PSLF program. My overall conclusion is that the IBR program provisions are sufficiently generous so that Harvard-style legal education remains a financially viable proposition for many prospective law students, not only for those persons who are considering attending one of the elite law schools, but also for many persons considering attending non-elite law schools, at least for those students who are reasonably confident that they will be able to graduate in the top quarter or at the very least the upper half of their classes at one or another of the approximately 40 upper- or mid-tier non-elite law schools,[333] and also for those students who are confident they will be able to earn top-10% or at least top quarter of their class grades at one or another of the 150+ lower-tier law schools. For most other law students, however, who in the current depressed employment market have only a slim chance of obtaining a full-time entry-level legal position paying even the modest median starting salary of $60,000/year, and who have virtually no chance of obtaining a PSLF-qualifying public service legal position, attending law school is no longer economically justified even with these heavily subsidized loan repayment options.

The continuation of Harvard-style legal education at many upper- and mid-tier non-elite law schools will depend to a large extent upon the willingness of students at those schools to continue to borrow the large sums needed to pay for this expensive education and then enroll in the IBR or PSLF programs to reduce the repayment burden of those debts. My analysis has lead me to conclude that many (but not all) prospective law students considering attending upper- or mid-tier non-elite law schools should go ahead and matriculate and then enroll in the IBR program, even given the financial risks involved, specifically those students with reasonable expectations of graduating in the top quarter or at the very least the top half of their class. Those students should take out the needed student loans and then immediately enroll in the IBR program to contractually lock in these favorable repayment and loan forgiveness terms. Whether prospective students will do so on a large scale in the coming years, however, is for the several reasons that I have discussed somewhat uncertain, and it is not clear how the impediments to greater enrollment can be easily addressed through relatively minor amendments given the tensions and trade-offs inherent in those programs. Moreover, even with the IBR and PSLF program options available, except for exceptionally able or unusually well-connected students the employment prospects upon graduation for a person attending any of the more than 150 lower-tier law schools simply do not justify incurring the costs involved. There is consequently likely to be a sharp decline in the enrollments at such law schools as these facts become more widely understood, which will probably lead to many of them closing their operations

Finally, as I have also discussed one should not assume that the current IBR and PSLF programs will necessarily continue to be available to law graduates indefinitely in their current form. The taxpayer subsidies of uncertain aggregate size that these programs provide[334] to law students and indirectly to law professors, persons that are drawn disproportionately from the upper-income socioeconomic groups in society, makes these programs an attractive target for political leaders looking for opportunities to reduce federal deficits, particularly that there is now a pronounced oversupply of new lawyers relative to their employment opportunities. There certainly are several arguments that can be made that these programs should be continued with regard to law students,[335] including an under-appreciated argument that the subsidies that they provide to law students and other graduate students are actually relatively modest,[336] but the ultimate fate of these programs is uncertain. They may well be restricted in the coming years in their generosity and/or availability for law students and other graduate students.

The elite law schools will be fine in any case, of course, but the deans of other law schools and other legal education leaders may only have a relatively short period of time to take proactive steps that will significantly reduce law school costs and tuitions for the upper-and mid-tier non-elite schools, so as to keep legal education financially viable at those schools, albeit probably at a significantly reduced scale of operations and tuition levels, should the IBR program be substantially curtailed or even eliminated for law students. And in my opinion the curtailment of the availability of the IBR program for law students would be the death knell for many if not most of the lower-tier law schools.

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2. For comprehensive discussion of the difficult financial situation facing legal education see generally Brian Tamanaha, Failing Law Schools (2012) ("Tamanaha, Failing Law Schools"); Paul Campos, Don't Go to Law School (Unless) (2012) ("Campos (2012)"); Richard W. Bourne, "The Coming Crash in Legal Education: How We Got Here, and Where We Go Now," 45 Creigh. L. Rev. 651 (2012); Steven R. Smith, "Financing the Future of Legal Education: "Not What It Used To Be," 2012 Mich St. L. Rev. 579 (2012). For a briefer summary of the problem see also Steven J. Harper, "Pop Goes the Law," The Chronicle Review (March 15, 2013).

3. National Association for Law Placement Employment Report and Salary Survey for the Class of 2011, available at http://www.nalp.org/starting-salaries_class_of_2011 (Last visited May 14, 2013) ("NALP (2011)"). The "adjusted mean" salary for class of 2011 law graduates who took full-time legal positions, calculated on the basis of the 65% of graduates who obtained such positions and then reported their salary to the NALP, was adjusted downwards from the reported mean salary of about $78,600 to about $74,000 to take into account the likely disproportionate non-response bias for graduates taking lower-salaried positions. Id. This adjusted mean figure is substantially higher than the calculated $60,000/year median salary, primarily due to the approximately $160,000/year starting salaries that were obtained by 14% of the members of that group of graduates who reported obtaining full-time legal positions. Id. The true median salary for all class of 2011 graduates who obtained full-time legal positions may well also be several thousand dollars lower than the calculated $60,000/year median salary because of the same likely disproportionate non-response bias of lower-salaried graduates. See Brian Z. Tamanaha, "The Law School in the New Legal Environment: Legal Educators Defending the Status Quo," 41 Wash. U. J. L. & Pol'y 131 (2013) ("Tamanaha (2013)"), at 137.

It should also be emphasized that these median and adjusted mean figures reflect only the approximately 55% of the class of 2011 who had obtained full-time legal positions as of nine months after their graduation, see infra n. 5, and for that reason alone the $60,000/year figure surely overstates the overall median income of all class members, perhaps by a very substantial amount. While some graduates decline full-time legal positions to pursue other attractive opportunities or for personal reasons, most graduates who do not take full-time legal positions have tried and failed to do so, and must then accept part-time or contract lawyer legal positions at substantially lower salaries, or must accept generally lower-paying non-legal positions, or remain unemployed. In addition, that 55% full-time legal employment figure may itself be somewhat misleading in that it includes one-year judicial clerkships, temporary positions paid for by the law schools, some unpaid public sector positions, and some unsustainable solo or small firm positions. The true proportion of class of 2011 graduates who obtained full-time, long-term legal positions may be as small as one-third. See Paul Campos, "The Crisis of the American Law School," 46 U. Mich. J. L. Ref. 177 (2012) ("Campos, The Crisis"), at 197-202, and therefore perhaps no more than about 20% of the class of 2011 graduates obtained full-time legal positions with starting salaries of $60,000/year or more.

4. See infra Part III.
5. Only 54.9 % of the class of 2011 graduates had obtained full-time legal positions requiring passage of a bar examination by 9 months after their graduation. James Podgers, "Job Market Limbo," ABA Jour. (June 2013), 62, 63. See also "Employment Summary Report," A.B.A. Sec. of Leg. Educ., available at http://employmentsummary.abaquestionnaire.org/ (last visited Aug. 30, 2012) (giving a 55.2% placement rate for the class of 2011). The corresponding National Association for Law Placement calculation of this figure was 56.7%. Press Release, National Association for Law Placement, "Median Private Practice Starting Salaries for the Class of 2011 Plunge as Private Practice Jobs Continue to Erode," (July 12, 2012), available at http://nalp.org/classof2011_salpressrel. The comparable ABA figure for the class of 2012 is 56.2%, Podgers, id.,but that figure includes 1.1% of graduates in employed in temporary law school-funded positions. Id. (citing Kyle McEntee of Law School Transparency).
6. Let me make clear exactly which law schools I am referring to with each of my various law school categorizations. The phrase "elite law schools" is an inherently imprecise one that is used to mean different things by different persons and in different contexts. People sometimes use this phrase to refer to the top-14 schools as listed in the annual U.S. News & World Report law school rankings, while the phrase is sometimes used much more narrowly to refer to only the top five schools in that ranking, particularly when it is used in the affordability and graduate placement context that this article addresses. See, e.g. Tamnaha, Failing Law Schools, supra n. 2, at ___; Campos (2012), supra n. 2, at ___.. When I use the phrase "elite law schools" in this Article I am taking a middle position here and referring specifically only to those law schools regularly ranked among the top 10 law schools in the annual U.S. News & World Report law school rankings: Yale, Harvard, Stanford, Columbia, the University of Chicago, New York University, the University of Pennsylvania, the University of Virginia, the University of California-Berkeley, and the University of Michigan.

When I refer to "upper-tier non-elite" law schools, in contreast I am referring broadly to those non-elite law schools that are at least occasionally ranked among the top 25 law schools in the annual U.S. News & World Report rankings. When I refer to "upper- or mid-tier non-elite" law schools I am referring broadly to those non-elite law schools that are at least occasionally ranked among the top 50 schools in the annual US News & World Report rankings. I include my own law school, Southern Methodist University, in that latter group.

The remaining approximately 150 accredited US law schools and the several unaccredited law schools I will refer to collectively as "lower-tier" law schools. I therefore am using that phrase "lower-tier" broadly to refer to approximately three-quarters of all U.S. law schools, which is broader than the more common use of that phrase as a description of only the very lowest-ranked law schools that are not included among the top 100 or 150 schools. However, I have found it useful for the purposes of this Article to group these 150+ schools that consistently fall outside the US News & World Report top-50 ranking together into one broad category, given the similarly unfavorable employment prospects now faced by the large majority of the graduates at all of these many schools.
7. Id.
8. Id.

9. Tamanaha, Failing Law Schools, supra n. 2, at 112 ("[Most lower-tier law schools], particularly those not located in major legal markets…place fewer than 5 percent, and in some cases none of their graduates in these coveted [NLJ 250] jobs.")
10. See, e.g., Tamanaha, id., at 168-71.
11. The Law School Admissions Council notes that the overall number of applicants to law school declined from a high of 100,600 for the 2004-05 academic year to 78,500 for the 2011-12 academic year, and then further declined another 13.4% to 68,000 for the 2012-13 academic year. LSAC Volume Summary, available at http://www.lsac.org/lasaceresources/data/lsac-volume-summary.asp (last visited May 17, 2013). As of May 3, 2013 only 54,839 persons had applied to law schools for the 2013-14 academic year, another 19.1% decline from the prior academic year. LSAC Current Volume—Three Year Summary, available at http://www.lsac.org/lsacresources/data/three-year-volume.asp. (last visited May 17, 2013).
12. See generally, e.g., Tamanaha, Failing Law Schools, supra n. 2; Tamanaha (2013), supra n. 3; Campos (2012), supra n. 2; Campos, The Crisis, supra n. 3; Ray Worthy Campbell, "Law School Disruption," ___ Geo. J. Leg. Ethics ___ (forthcoming 2013); William Henderson, "A Blueprint for Change," 40 Pep. L. Rev. 461 (2013); Paul Horwitz, "What Ails the Law Schools?," 111 Mich. L. Rev. 955 (2013); Stephen F. Diamond, "The Future of the American Law School or, How the 'Crits' Led Brian Tamanaha Astray and his Failing Law Schools Fails," Santa Clara University Legal Studies Research Paper No. 3-13 (January 27, 2013) (available at http://ssrn.com/abstract=2207749); Bryant Garth, "Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education," ___ Stan. L. & Pol. Rev. ___ (2013); Samuel Estreicher, "The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School," 15 NYU J. Legis. & Pub. Pol. ___ (2012); Kyle P. McEntee, Patrick Lynch & Derek M. Tokaz, "The Crisis in Legal Education: Dabbling in Disaster Planning," 46 U. Mich. J. L. Ref. 225 (2012); Larry E. Ribstein, "Practicing Theory: Legal Education for the Twenty-First Century," 96 Iowa L. Rev. 1649 (2012); Lucille A. Jewell, "You're Doing it Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession," 12 Minn. J. L. Sci. & Tech. 239 (2011); Lloyd Cohen, "Comments on the Legal Education Cartel," 17 J. Cont. L. Issues 25 (2008); Maimon Schwarzchild, "The Ethics and Economics of American Legal Education Today," 17 J. Cont. L. Issues 3 (2008).
13. Some examples of fundamental changes in legal education that have been recently suggested include significantly reducing law school enrollments, allowing law students to take the state bar examinations and quality for legal practice after only two years of law school instruction, law schools providing two-year law degrees that would qualify students to take state bar examinations, eliminating mandatory tenure requirements, sharply increasing faculty teaching loads, making much greater use of adjunct professors, reducing or eliminating ABA library or other facility requirements, imposing more stringent federal loan eligibility requirements, and making greater use of on-line instruction. See generally Tamanaha, Failing Law Schools, supra n. 2, at p. 167-185; see also the other writers cited id. A discussion of the merits of these various proposals for restructuring legal education is outside of the scope of this Article, which considers only the question of the affordability of the current expensive Harvard-style of legal education, offered at current tuition levels, under standard government loan repayment terms and under the more generous IBR and PSLF programs.

14. In 2007 Congress passed the College Cost Reduction and Access Act, which created both the IBR program and the PSLF program. Pub. L. No. 110-84, 121 Stat. 784 (2007). In 2010 Congress passed the Health Care and Education Reconciliation Act of 2010, H.R. 4872 (2010), which made the IBR program more generous, but with a delayed July 1, 2014 implementation date for the changes made. This implementation date was then accelerated to November 1, 2012 by the Obama Administration's announcement of the PAYE rules and the subsequent issuance of the final PAYE regulations. 34 C.F.R. 674, 682, 685, 77 Fed. Reg. 66088-66147 (Nov. 1, 2012).

15. 34 CFR 674, 682, 685, 77 Fed. Reg. 66088-66147 (Nov. 1, 2012). The PAYE rules apply for loans taken out beginning in January, 2013, but those provisions are only applicable to borrowers who did not take out any federal student loans prior to October, 2007. The PAYE rules will thus apply to the large majority of law students enrolling in 2013 or later. For a comprehensive discussion of the evolution and features of the IBR program, and of the Obama Administration's PAYE rules that have made that program far more generous to law students, see generally Phillip G. Schrag, "Failing Law Schools – Brian Tamanaha's Misguided Missile," ___ Geo. J. Leg. Ethics ___ (forthcoming 2013) ("Schrag (2013)"); Brian Z. Tamanaha, "The Problems with Income Based Repayment, and the Charge of Elitism: Responses to Schrag and Chambliss," ___ Geo. J. Leg. Ethics ___ (forthcoming 2013) ("Tamanaha, Problems With Income Based Repayment"); Phillip G. Schrag, "Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations," 36 Hofstra L. Rev. 27 (2007) ("Schrag (2007)"); Jason Delisle & Alex Holt, "Safety Net or Windfall: Examining Changes to Income-Based Repayment for Federal Student Loans, New America Foundation (October 2012) ("Delisle & Holt").

16. See supra n. 6.

17 A recent paper by Deborah Merritt sheds light on the different placement results for the different tiers of law schools. See Deborah Jones Merritt, "The Job Gap, The Money Gap, and the Responsibility of Legal Educators," 41 Jour. L. & Pol. ___ (forthcoming 2013), available at http://ssrn.com/abstract=2229821 ("Merritt (2013)"). Merritt breaks down the approximately 55% overall rate at which class of 2011 graduates obtained full time legal positions by different reputational tiers of schools, and determined that the 35 schools ranked between 16 and 50 in the latest U.S. News and World Report rankings had an average placement rate in such positions of 59.1%, while a stratified sample of 15 lower-tier law schools had an average placement rate in such positions of 46.1%, each figure calculated after school-funded positions were excluded from the calculations, Id. at 7-11, which may lower placement rates by approximately 1.1%. Podgers, "Job Market Limbo," ABA Jour. (June 2013) 62, 63, supra n. 5. My definition of "upper- and mid-tier" law schools is broader than Merritt's and includes also those prominent schools ranked 11 to 15 in those rankings, each school with likely somewhat higher placement rates than 59.1%, suggesting an average placement rate for the entire group of 40 upper- or mid-tier law schools of about 60%. The difference that she found in placement rates in full-time legal positions between the different reputational tiers of schools does not differ as much as one might expect, which she explains as a consequence of the generally local and regional rather than national character of law firm hiring practices. Id. at 11.

Merritt did not determine the comparable placement rates for the group of 10 elite law schools, but her calculation of 78.9% for the 10th ranked school would suggest a placement rate in such full-time legal positions for the elite law schools of between 80% and 90%, say about 85%, probably with a significant fraction of those graduates that do not take such positions doing so out of choice, rather than involuntarily.

18 Merritt, id., did not attempt to determine how the distribution of salaries for these positions might vary between the different tiers of law schools. Surely a far higher proportion of elite school graduates taking full-time legal positions would obtain salaries about the $60,000/year median than would be the case for the upper- or mid-tier law schools, and those latter schools are in the same advantageous position with regard to the graduates of the lower-tier schools. I have not seen a detailed study of this question, but my admittedly somewhat impressionistic estimate here is that about 90% or more of those elite school graduates who take full-time legal positions will earn starting salaries at or above the $60,000/year median starting salary, and that this is also the case for about 70% of the graduates of the upper- or mid-tier law schools, but only about at most 40% or so of the graduates of lower-tier schools who obtain full-time positions will receive starting salaries at or above this median salary.

19 "[S]tudents [at elite law schools] on a whole obtain a positive economic return at current tuition levels…elite schools are not yet producing large streams of economic casualties." Tamanaha, Problems With Income Based Repayment, supra n. 15, at ___.

20. See supra n. 6.

21 Deborah Merritt estimates that only 46.1% of the graduates of those lower-tier schools are able to obtain full-time legal employment. Merritt (2013), supra n. 17, at 11. My estimate is that only about 40% of those positions will pay at or above the $60,000/year median starting salary, see supra n. 18, so I therefore estimate that only about 46.1% x 40% = 18.4% of the graduates of those lower-tier schools will be able to obtain full-time legal positions paying $60,000/year or more. Therefore students attending a lower-tier school need to graduate at least in the upper-quarter of their class, if not somewhat higher, to have reasonably good prospects for obtaining such positions.

22. See supra n. 6.

23 Deborah Merritt estimates that 59.1% of the graduates of those 35 schools ranked between 16 and 50 in the most recent U.S. News & World Report rankings are able to obtain full-time legal employment. Merritt (2013), supra n. 17, at 10. For the entire group of 40 upper- and mid-tier non-elite schools I estimate the comparable percentage at a slightly higher 60%. See supra n. 17. My further estimate is that about 70% of those positions will pay at or above the $60,000/year median starting salary, see supra n. 18, so I therefore also estimate that about 60% x 70% = 42% of the graduates of those upper- or mid-tier non-elite law schools will be able to obtain full-time legal positions paying $60,000/year or more. Therefore students graduating in the upper half of their classes or better at upper- or mid-tier non-elite law schools will have relatively good prospects for obtaining such positions.

My estimates of 90%, 70% and 40% for the proportions of those graduates from each of the three tiers of law schools who are able to obtain full-time legal positions, and then receive salaries at or above the overall median salary, see supra n. 18, is roughly consistent with the overall numbers of law school graduates and overall starting salary distribution. There were 44,495 law graduates in 2011, Merritt (2013), supra n. 17, at 3, an average of approximately 222 graduates for each of the about 200 law schools (although the schools vary considerably in size). About 55% of those 44,495 graduates were able to obtain full-time legal positions, see supra n. 5, a total of about 24,472 positions. About half of those positions – 12,236 jobs – paid at or above the median $60,000/year starting salary.

If 90% of 85% of the approximately 2,220 graduates at the 10 elite law schools took full-time legal positions paying at or above the median starting salary, that is a total of 1,698 positions filled. If 70% of 60% of the approximately 8,880 graduates of the 40 upper- or mid-tier law schools took such positions, that is another 3,730 positions filled. If 40% of the 46.1% of the approximately 33,300 graduates of the 150 lower-tier law schools took such positions, that is another 6,908 positions filled. 1,698 + 3,730 + 6,141 = 11,569 positions. I attribute the minor discrepancy between this 11,569 figure and the 12,236 such positions estimated by the ABA, supra n. 5, to pay at or above the median starting salary at least partially to the fact that Merritt's estimated percentages exclude school-financed full-time legal employment, while the ABA figures include such employment. Id. at 08.

24 Id.

25 But see Campos (2012), supra n 2, at 15-21) (discussing the "Special Snowflake Syndrome" whereby law students and others high-achievers tend to regard themselves as much less likely to suffer adverse events than the relevant statistical evidence would indicate).

26. See infra Part VI.

27. Id.

28. Whether the IBR program over the coming years will actually provide subsidies to law students and law schools rather than be a net revenue generator for the federal government, relative to unsubsidized federal graduate student loan programs is open to some debate. This question is discussed infra at Part VII.

29. Under relatively optimistic assumptions of 3% annual Gross Domestic Product growth from 2010-2020, with the economy assumed to reach full employment by 2020, the Bureau of Labor Statistics ("BLS") still predicts that only 73,600 new lawyer jobs will be created between 2010 and 2020. C. Brett Lockard & Michael Wolf, "Occupational Employment Projections to 2020," Monthly Labor Review (January 2012), at 94. The BLS also projects that only an additional 138,400 lawyer jobs will be made available by lawyers leaving practice through 2020, Matt Leichter, "BLS Updates its 2020 Employment Projections: For Law Students, It's Very Bad," The Law School Tuition Bubble (December 3, 2012), available at http://lawschooltuitionbubble.wordpress.com/2012/03/12/bls-updates (last visited May 18, 2013). Even the BLS itself admits that these economic assumptions may be overoptimistic, see Merritt, supra n. 17, at 4. Even under these optimistic assumptions these projections total to only 212,000 lawyer job openings over the 2010-2020 period, about 21,200/year, which is only about half as many openings as the 40,000 to 45,000 or so law students that are expected to graduate each year over that time period, suggesting that the current 55% rate at which graduates are able to obtain full-time legal employment may further decline.

30. See infra Part VII.

31 Let me again note that only about 55% of class of 2011 graduates were able to obtain full-time legal positions, see supra n. 5, so that only about ½ x 55% = 27.5% of that class were able to obtain full-time legal positions paying $60,000/year or better starting salaries. So my main

analytical focus group excludes over 70% of law students.
32 See supra n. 22.
33 See supra n. 20.
34 [cite]
35 Tamanaha, Problems With Income Based Repayment, supra n. 15, at ___, n. 11.
36. For example, even as knowledgeable an analyst as Brian Tamanaha is guilty of these errors of counting living expenses as a relevant cost of law school, and of omitting foregone after-tax income:

"Considering the full cost of attendance, Columbia Law School is the most expensive law school in the country in 2012, with an estimated out-of-pocket cost totaling $81,950, including tuition ($53,636), living expenses ($19,894), health insurance ($2,981), books, computer and supplies ($3,520), and miscellaneous fees ($1,133)."

Tamanaha (2013), supra n. 3, at 134. As another example, in an illustrative calculation done for a hypothetical student at Fordham Law School Paul Campos correctly includes as a cost, at least conceptually if not quantitatively, the foregone after-tax income that a law student sacrifices, but then errs by also including the living expenses that are borne by the student as a cost of law school, thus overestimating the costs of law school. Campos (2012), supra n. 2, at 54-55.
37. For example, even the high annual living costs (including health insurance) for Columbia Law School students living in New York is estimated by Tamanaha (2013), id., at roughly $23,000 is substantially lower than their estimated average annual foregone after-tax income of $30,000. See infra n. 39
and the associated text.
38. The average private law school tuition in 2011-2012 has been estimated by the American Bar Association's Legal Education and Admissions to the Bar Section at $39,184, and this private school tuition has been increasing by between 5% and 8%/year for the last seven years. A.B.A. Legal Education and Admissions to the Bar Section, "Legal Education Statistics: Law School Tuition 1985-2011," available at
http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf (last visited Oct. 2, 2012). If one projects that private law school tuition will continue to increase at 5%/year through 2015-2016, then the average private law school tuition for the three-year 2013-2016 period will be $45,396/year. For ease of exposition I have used an estimate for $45,000/year for private law school tuition and fees charges for my subsequent affordability calculations.
39. The National Association of Colleges and Employers estimates the average starting salary for college graduates in the class of 2013 at $44,928/year. NACE Salary Survey (2013), available at http://www.naceweb.org (last visited May 18, 2013). This figure is an overall average of the various starting salaries for graduates in several different disciplines, which range from a high of $62,535 for engineering graduates and $54,234 for business majors down to a low of $37,058 for humanities and social science majors. Id. For ease of exposition I have used an estimate of $45,000/year for the typical undergraduate degree-based starting salary for my subsequent affordability calculations.
40. This 33% estimated marginal tax rate is convenient for these illustrative calculations, and

fairly accurately reflects the combination of an estimated 7.65% federal Social Security/Medicare tax rate on income and an estimated 25.35% combined marginal federal and state income tax rate and marginal state and local sales taxes on those earnings when spent.
41. $230,000 + (($230,000) x (.075) x (the 1.5 years on average of interest accruing on law school loans prior to the commencement of repayment 6 months after graduation)) = $230,000 + $25,875 = $255,875.

Let me further explain my choice of this 7.5% blended annual interest rate. A typical law student will first borrow each year the maximum allowed $20,500/year from the federal Stafford loan program at an annual interest rate of 6.8%, for a total loan amount of $61,500, then will borrow the remaining $168,500 of the needed $230,000 from the federal Grad PLUS program at a 7.9% annual interest rate, plus a one-time 4% charge at the time of disbursement of those Grad PLUS funds. If a student borrows this $230,000 in regular installments during law school in this fashion, then their blended interest rate on these loans will be ($61,500 x 0.068 + 168,500 x 0.079)/$230,000 = 7.60%. If they borrow only $185,000 during law school, then their corresponding blended interest rate will be 7.54%, and if they borrow only $155,000 during law school, then their corresponding blended interest rate will be 7.15%. Throughout this article for ease of exposition I will consistently use a blended interest rate of 7.5% for my loan repayment calculations.

This 7.5% blended annual interest rate is a little higher than the 7.25% or 7.3% blended annual interest rate often used for such illustrative calculations of law school borrowing costs, but in my opinion this 7.5% figure better reflects the true costs of the increasingly large and increasingly Grad PLUS loan-financed debts that law students will have to bear for the 2013-2016 period. Whether the federal government should be charging such a high 7.9% interest rate, plus a significant Grad PLUS loan disbursement fee, for law student loans that are not dischargeable in bankruptcy, when the U.S. Treasury can sell 10-year bonds in virtually unlimited amounts at annual interest rates in the neighborhood of 2%, and when most undergraduate federal student loans are offered under the subsidized Stafford loans program at a much lower 3.4% annual interest rate, is a separate and troubling question that is beyond the scope of this Article. Some knowledgeable observers have called for sharp reductions in student loan interest rates. See, e.g., Joseph E. Stiglitz, "Student Debt and the Crushing of the American Dream," NYTimes.com (May 12, 2013).
42. Id.
43 Assuming approximately $12,000 in summer earnings, with a low combined total income, Social Security, Medicare and state income and sales tax of 17% on this sum reflecting the student's low annual income.
44 The $90,000 foregone after-tax income component of this estimated $252,615 overall cost is based upon an assumed $45,000/year average starting salary for a typical person with an undergraduate college degree. As noted above in supra n. 39 this average starting salary masks a broad range of starting salaries that are available to college graduates in different disciplines. A typical law student with an engineering degree, for example, would instead incur larger foregone after-tax income costs of approximately $62,535 x .67 x 3 = $125,070, while at the other extreme a typical humanities graduate would only incur smaller foregone after-tax income costs of

$37,058 x .67 x 3 = $74,116. Therefore the costs for a typical law student pursing this private school option, given this disparity in foregone income across different undergraduate degrees, would range between approximately $246,731 and $297,685 rather than being a precise $252,615.

45. This lower $200,000 figure assumes that the tuition cost of the relatively more expensive public law schools would be approximately $30,000/year, rather than the $45,000 tuition assumed for the private law schools, or that a private school charging $45,000/year annual tuition would provide the student with approximately a 33% tuition discount down to $30,000/year. This estimate of $30,000 for the 2013-2016 period tuition cost of these relatively more expensive public law schools appears to be reasonable since the ABA Section on Legal Education and Admissions to the Bar has estimated that the average resident tuition cost in 2011-2012 for public law schools was $22,116, and for non-residents was $34,865, and that public law school tuitions have also been rising appreciably more rapidly in recent years than private law school tuitions, A.B.A. Section on Legal Education and Admissions to the Bar, "Legal Education Statistics: Law School Tuition 1985-2011," available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf (last visited Oct. 2, 2012). The accrued interest during law school and for the following six months after graduation on the now smaller required ($30,000 x 3) + $5,000 + ($30,000 x 3) = $185,000 in student loans would be correspondingly reduced from the $25,875 that would accrue on $250,000 of loans down to approximately $20,581, and the Direct PLUS 4% loan disbursement fee on the loan amounts over $61,500 would be reduced from $6,740 down to $4,940. I have again assumed after-tax summer earnings of $10,000. The total cost would therefore now be $90,000 + $90,000 + $5,000 + $20,581 + $4,940 - $10,000= $200,221.

When one also takes into account the range of possible starting salaries available to undergraduates in different disciplines, and the corresponding variation in foregone after-tax income, see supra n. 39, this leads to a range of total costs between $183,337 and $235,291 rather than a precise figure of $200,221. To again be conservative here, given my somewhat imprecise cost projections, and for simplicity of exposition I have instead used a lower $200,000 figure for my subsequent affordability calculations.

46. This lower $160,000 figure assumes that the annual net tuition cost for the lower-cost public law schools, after a 10% scholarship discount, would be approximately $20,000/year for the 2013-2016 period, rather than the $30,000/year charged by the relatively expensive public schools, or the $45,000/year assumed for the private law schools. This figure is based on a $22,000 estimated annual tuition charge over the 2013-2016 period. This is a relatively conservative figure for these lower-cost public schools, given the data provided by the ABA that the average tuition charged in-state residents for all public law schools in 2011-2012 was $22,116, and that public school tuitions have been rapidly rising in recent years, see supra nn. 38, 45. If one assumes that the lower-cost public schools provided the student with a 10% scholarship this would reduce the net tuition cost to about $20,000/year. That would be approximatley the same $20,000/year net tuition cost charged by a higher-cost public law school charging $30,000/year tuition and offering a 33% scholarship, or by a private law school charging $45,000/year tuition but providing the student with an approximately 55% tuition

scholarship.

This $160,000 estimate cost figure also again assumes that the student is able to obtain a total of $10,000 of after-tax summer earnings over the several summer terms during their period of enrollment, and that the accrued interest during law school on the now smaller required ($20,000 x 3) + $5,000 + ($30,000 x 3) = $155,000 in student loans would be correspondingly reduced from the $25,875 that would accrue on a $250,000 loan amount down to approximately $17,244, and that the Direct PLUS 4% disbursement fee on the potion of the loans exceeding $61,5000 would be similarly reduced from $6,740 down to $3,740. The total cost would therefore now be $60,000 + $90,000 + $5,000 + $17,244 + 3,740 - $10,000 = $165,984.

When one also takes into account the range of possible starting salaries available to undergraduates in different disciplines, and the corresponding variation in foregone after-tax income, see supra n. 39, this leads to a range of total costs between $150,100 and $201,954 rather than a precise figure of $165,984. To again be relatively conservative here, given my somewhat imprecise cost projections, and for simplicity of exposition I have instead used a lower $160,000 figure for my subsequent affordability calculations.

47 Some readers may be concerned at this point whether my projected 2013-2016 law school costs of $160,000 to $250,000 are consistent with well-known ABA statistics showing that the average debt for private law school graduates in 2011 was only a much more modest $124,950, and for public law school graduates was only $75,728. Tamanaha, Problems With Income Based Repayment, supra n. 15., at ___. There are several reasons for this seeming discrepancy. First of all, average student debt loads have been rising rapidly in recent years and the average debt of graduates will surely be much higher by 2016 than it was in 2011. Second, some of the costs of law school are as I have noted financed by student or family funds or curtailed consumption during law school, rather than by borrowing, and are therefore not reflected in average debt statistics. Third, the reported ABA average debt figures only relate to the originally incurred debt and not the significant amount of interest on that debt that accrues during law school and after until repayment commences. Id.

The foregone after-tax income component of law school costs ranges from $90,000/$250,000 = 36% of those costs up to $90,000/$160,000 = 56.3% of those costs. For a prospective law student who for some reason does not have the opportunity to accept alternative employment, rather than attend law school, the costs of law school will therefore be substantially reduced. However, while in the current relatively high unemployment economic environment there are a significant number of college graduates who have some difficulty finding employment, given that typical prospective law students generally have better-than-average academic credentials they would be unlikely to be unable to find alternative employment, and if they did have some difficulties they would likely be unemployed only for some months of job searching rather than for all three years that they could be attending law school. I have therefore not made any downward adjustments in my estimate of foregone after-tax income to reflect the unemployment of some college graduates.

48. A high proportion of law graduates also have undergraduate student loan debts, and for those students the average amount undergraduate loan debt is about $25,000 and growing. Tamanaha

(2013), supra n. 3, at 135.

49. It is true that the foregone investment income when a student spends his own funds on law school expenses are economically equivalent to making loan repayments on borrowed funds. However, government law school loans now carry a high interest rate relative to the structure of expected returns now available on reasonably conservative investments, and moreover the loan repayments are not tax-deductible while the investment income that one foregoes when spending their own funds on law school is taxable income when realized. These two factors complicate the comparison of debt repayments to foregone income. For example, a $1,000 government student loan taken out at a 7.5% annual interest rate would require annual repayments of $145.56 on a standard 10-year amortization schedule, and annual repayments of $89.29 on an extended 25-year repayment schedule (this calculation does not include the Grad PLUS loan initial 4% disbursement fee). If, however, a student instead spent $1,000 of his own funds for law school expenses, thereby foregoing the purchase of a $1,000 investment in a common stock portfolio yielding a more realistic 4.1% after-tax annual rate of return over that same time period, see infra n. 52, that student would then have foregone the equivalent annuitized stream of payments of only $123.92/year on a 10-year annuity, or only $64.72/year on a 25-year annuity.

For a student utilizing the extended 25-year repayment option on federal student loans, therefore, the economic burden of borrowing funds for law school expenses and then making loan repayments is $89.29/year per $1,000 borrowed, compared to only $64.72/year of foregone after-tax income per $1,000 spent by the student using his own or family funds for those expenses. The economic burden imposed by the use of 25-year term loan financing at the current blended 7.5% student loan interest rate, given the much lower after-tax returns that are currently available on reasonably conservative investments, is therefore roughly about 38% greater than the economic burden of using one's own money. The calculations I present in this Article therefore will slightly overstate the economic burden of law school for students who utilize to some extent their own funds or family funds to pay for law school expenses, thus to that extent sacrificing 4.l% average annual after-tax returns, rather than borrowing at a 7.5% annual interest rate to cover those costs.

That all being said, as will be later discussed in some detail these complications in determining the economic burden of law school that are introduced by students' use of different financing methods are to a very large extent mooted by the IBR program, which severs the linkage between the amount borrowed and the amount of monthly repayments, although the fact that the tax obligation on the final debt forgiveness after 20 years under that program will be larger for larger initial loan amounts, due to larger amounts of unpaid interest accruing at 7.5%/year, still enables students who are able to finance on their own some of the expenses of law school to save some money.

50. The same complications noted above, id., will impact the comparisons between borrowing money and reducing living expenses as alternative means for financing some of the costs of law school.

51. This is the case for repayment of unsubsidized student loans. Under the IBR program, as will be extensively discussed below, the amount of debt undertaken will not affect the size of the monthly loan repayment obligations. However, the amount of debt will affect the size of the

final debt forgiveness and the consequent size of the tax liability for this debt forgiveness.

As a brief example of this point, consider a typical student for whom the total cost of law school, including $30,000/year of foregone after-tax income, is $200,000. If that student incurs living costs of only $20,000/year, thereby foregoing $10,000/year of consumption expenditures or investments that they could have made had they been employed, the student would thereby be able to avoid taking out 3 x $10,000 = $30,000 of student loans, thereby reducing their overall loan debt by 15% to about $170,000. As a result their total unpaid debt at the time of forgiveness would also be about 15% smaller, meaning that they could reduce the size of their monthly escrow deposits needed to build up a fund sufficient to cover this eventual substantial tax liability by 15%. For more discussion of the escrow deposits necessitated by the IBR program, see infra at the text corresponding to nn. 152-166.

52. Let me explain my calculation of this 4.1% annual expected after-tax rate of return. I have conservatively but realistically assumed that a law student who pays for law school expenses out of their own or family funds would alternatively be able to earn only a modest 5%/year average annual before-tax return on a conventional diversified portfolio of common stocks or stock mutual funds, with 2%/year of this return assumed to be dividends, and the remaining 3%/year assumed to be capital appreciation. There will be a 20% annual income tax imposed on those dividends, reducing the average annual appreciation, assuming dividend reinvestment, to 4.6%. When the portfolio is later liquidated a number of years later, long-term capital gains taxes at the 20% rate will now have to be paid on the portion of the portfolio that reflects stock appreciation, resulting over time in about a lower 4.1% average annual after-all-taxes rate of return over that time period. I will consequently use this 4.1% after-tax rate of return figure throughout this Article when needed to calculate rates of return on invested funds, or to calculate present values.

As noted above, id., this overstatement of costs with regard to students who utilize their own funds or sacrifice consumption to help pay for law school rather than borrow is much less when borrowing takes place under the IBR program than for unsubsidized loans.

53. William D. Henderson and Rachael M. Zahorsky, "The Law School Bubble," ABA Journal (January 2012) at 34.

54. Id. The Grad PLUS loans also require a 4% one-time disbursement fee. Id.

55. See supra n. 41.

56. As noted above, some students are able to utilize their own funds or family funds for some or all of the costs of law school, and thus would to that extent not have to make loan repayments of that size, although they would still bear the opportunity costs of the lost investment income on the funds so used, and therefore still bear relatively comparable (though somewhat smaller) overall economic costs of their legal education. See supra nn. 49-50.

57. National Association of Law Professionals, "Salary Distribution Curve – Class of 2011," available at http://www.nalp.org/salarydistrib. The strikingly bimodal distribution of entry level salaries that is revealed by the NALP data for the class of 2011 and also for several earlier graduating classes is by now very well known, thanks in large part to the efforts of William Henderson.

58. See supra n. 5.

59. According to National Association of Law Professionals statistics for the class of 2011,

NALP (2011), supra n. 3, no more than 14% and perhaps as few as 10% of those graduates who obtained full-time legal positions received these high salaries. Given that only about 55% of class of 2011 graduates were able to obtain full-time legal positions, id., this means that no more than 7.7% and perhaps as few as 5.5% of those graduates received these $160,000 starting salaries.

60. $36,000/$160,000 = 22.5%.

61. A graduate who obtains a $160,000/year starting salary would have a debt burden of only about $22,000/$160,000 = 13.75% of their income, a relatively affordable burden given that large salary.

62. $17,000/$60,000 = 28.3%.

63. $14,000/$60,000 = 23.3%.

64. Although on a $160,000/year starting salary the debt repayment burden for a graduate with $200,000 of 25-year term, 7.5% blended annual interest rate student loans would be only $17,000/$160,000 = 10.6% of their income, and for a student with $160,000 of comparable loans the burden would be only $14,000/$160,000 = 8.75% of their income. These are entirely manageable debt burdens. Harvard-style legal education remains financially viable at least for those law graduates who are able to obtain these high paying entry-level positions (and are able to keep them indefinitely, or are able to later move to other, comparable positions, obviously not a sure thing).

65. The average undergraduate student loan debt for those undergraduates that did incur such debt is about $25,000. Tamanaha (2013), supra n. 3, at 135. Much of this loan debt is, however subsidized Stafford loans that currently carry only a 3.4% interest rate, much lower than the interest rates charged on federal loans to law students and other graduate students.

66. Pub. L. No. 110-84, 121 Stat. 784 (2007).

67. H.R. 4872, 111th Cong. Section 2213 (2010).

68. U.S. Dept. of Education, "Final Regulations, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Loan Program," 77 Fed. Reg. 66088 (Nov. 1, 2012).

69. Which for many attorneys will be significantly less than their gross income due to contributions to retirement savings accounts and various other expenditures from one's gross income that are not included in adjusted gross income. See Delisle & Holt, supra n 15, at 4 for more discussion of this point.

I will not address in this Article the adjusted gross income measurement issues presented by a married borrower whose spouse also earns taxable income. For discussion of this issue see generally Schrag (2007), supra n. 15, at 52-55.

70. Schrag (2007), supra n. 15, at 35-36.

71. For example, consider a law school graduate who is single, and obtains a $60,000 starting salary, and has a $250,000 debt at a 7.5% blended annual interest rate. That graduate would then owe over $3,000/month in principal and interest payments if on a standard 10-year repayment schedule, and over $1,860/month even if on an extended 25-year repayment schedule, but would under the original IBR program (prior to the PAYE rules) would only have to make monthly repayments of 1/12 x 15% x ($60,000 - $16,335) = $546/month, only about one-third of the amount required to repay even only the $1,563/month interest owing on a 7.5% annual interest,

25-year term loan of that size, let alone repay any of the principal sum. For an otherwise identical law school graduate with a family of three persons, their IBR program repayment obligations would only be 1/12 x 15% x ($60,000 - $27,465) = $407/month, only about one-quarter of the amount required to repay even the interest owing on a 7.5% blended annual interest, 25-year term loan of that size, let alone repay any of the principal sum.

For a comparable law school graduate with a $200,000 debt at a 7.5% annual interest rate, the repayment obligations on a standard 10-year repayment schedule would be about $2,400/month, and on an extended 25-year repayment schedule would be about $1,488/month. The annual interest alone owing on such a $200,000 loan would be $1,250/month. For a comparable law school graduate with a $160,000 debt at a 7.5% annual interest rate, the repayment obligations on a 10-year repayment schedule would be about $1,920/month, and on a 25-year repayment schedule would be about $1,190/month. The annual interest alone owing on such a $160,000 loan would be $1,000/month. However, the monthly repayment obligations for each of these persons with smaller outstanding loan balances under the IBR program would be exactly the same as noted above for the $250,000 borrower, despite the lower outstanding loan amounts, since the size of the IBR loan repayment obligations are determined only by the adjusted gross income of the borrower and not by the amount borrowed or the interest rate on the loan.
72. Schrag (2007), supra n. 15, at 35-36.
73. Id. at 37.
74. Id. at 38.
75. Id. at 35.
76. Id.
77. Id. at the text corresponding to n. 44-49.
78. For example, a law school graduate who is single and who has a median $60,000/year starting salary, and a $250,000 debt at a 7.5% annual interest rate, and who would therefore owe over $3,000/month if on a 10-year repayment schedule, and over $1,860/month even if on an extended 25-year repayment schedule, would under the new PAYE rules only have to make monthly repayments of 1/12 x 10% x ($60,000 - $16,335) = $364/month. For an otherwise identical law school graduate with a family of three persons, their IBR program repayment obligations would only be 1/12 x 10% x ($60,000 - $27,465) = $271/month. Monthly payments this small, less than one-quarter of the $1,563 monthly interest accruing on a $250,000, 25-year term loan with a 7.5% interest rate, will lead, as I will later discuss, to rapid growth of the outstanding balance of that loan over the 20-year IBR repayment period to a sum approaching $500,000, even under the "no capitalization of unpaid interest" IBR program provision, and even were the capped monthly payments to gradually increase as the graduate's income grew over time.
79. Id.
80. Under the closely related PSLF program law graduates who take certain qualifying public service legal positions will have their unpaid loan balances forgiven after only 10 years, and moreover without that forgiven debt being regarded as taxable income. This program is clearly "the best deal in town," so to speak, for people with some interest in and ability to obtain public service legal work, and its generosity has led to very intense competition among graduates for the relatively few qualifying positions.

81. The IBR program rules, however, only allow borrowing for "authorized educational expenses" determined by the law school that the borrower attends, so the amount that can be borrowed is limited by the particular law school's estimate of the combined amount of law school tuition and fees and related expenses and living costs.
82. Delisle & Holt, supra n. 15, at 12.
83 For example, even if a single enrollee obtains a $160,000/year starting salary their initial IBR monthly loan repayments of (($160,000 - $27,465) x .10)/12 = $1,104/month, far short of the $1,563/month interest accruing on a $250,000, 25-year term loan at a 7.5% blended annual interest rate.
84 $1,000 x (1 + (.079 x 17) = $3,642.
85 See infra at nn. 121-145 and the associated text for an extensive discussion of the justification for using a 33% tax rate on forgiven debt.
86 See supra n.52 for discussion of the justification for using this rate of return figure.
87 (1.041)^20 = 2.234, and $1,214/2.234 = $543.42.
88 $457/$1,000 = .457.
89 See supra n. 81.
90. The PSLF program also applies to non-lawyers who take qualifying public service positions.
91. Schrag (2007), supra n. 15, at 41.
92. Tamanaha, Failing Law Schools, supra n. 2, at 122.
93. See, e.g., Campos (2012), supra n. 2, at 49-50:

"[P]ublic interest jobs [that would qualify under the PSLF program], which are already extremely competitive, are becoming even more difficult to acquire, as lawyers in such jobs who carry large debt loads become increasingly unwilling to leave them, so that they can take advantage of PSLF's favorable terms."

See also Tamanaha, Failing Law Schools, supra n. 2, at 122:

"Competition for these [PSLF} positions is keen—it is the final hope of a reasonable escape from debt for the multitude of heavily indebted graduates who do not secure corporate law jobs."

Tamanaha also makes the point that a student seeking a PSLF-qualifying job would likely have to take a substantial risk by first turning down opportunities that usually present themselves, if at all, during the fall of the second year to take an attractive position with a large law firm, because the public service jobs usually cannot be obtained until the second semester of the third year or even after graduation. Id. at 183.
94 Under the PSLF program all of the additional borrowing can be regarded as "free money," rather than only 45.7% of that additional borrowing as under the IBR program, see supra n. 88.
95. Tamanaha, Failing Law Schools, supra n. 2, at 111-112, 119-125; Schrag (2013), supra n. 15, at ___.
96 See supra n. 23.
97. Tamanaha, Failing Law Schools, supra n. 2, at 111-112, 119-125; Schrag (2013), supra n. 15, at ___.

98 The poverty level income for a single person is now set at \$16,335/year.
99 The poverty level income for a person supporting a family of three persons is now set at \$27,465/year.
100. ((\$60,000 x 1.05) – (\$16,335 x 1.03))/(\$60,000 - \$16,335) = 1.0573, a 5.73% annual increase.
101. \$364 x (1.0573)^10 = \$635.45.
102. \$364 x (1.03)^20 = \$1,108.55.
103. ((\$60,000 x 1.05) – (\$27,465 x 1.03))/(\$60,000 - \$27,465) = 1.0657, a 6.57% annual increase.
104. \$271 x (1.0657)^10 = \$512.06.
105. \$271 x (1.03)^20 = \$967.43.
106. As long as the IBR program loan repayments are less than what the combined principal and interest payments would be on an unsubsidized 25-year term loan then the IBR program would be advantageous for a borrower. For a single borrower with a \$60,000 annual salary who would be required to initially repay ½ x 10% x (\$60,000 - \$16,335) = \$364/month the IBR program would initially be advantageous even if the person had borrowed only about \$43,600 in Stafford loans at the applicable 6.8% annual interest rate. Any borrowing beyond this \$43,600 level would not affect the size of the monthly IBR payments due, but only the size of the eventual tax liability for the forgiven debt. Similarly, for a borrower supporting a family of three persons with a \$60,000 annual salary who would be required to initially repay ½ x 10% x (\$60,000 - \$27,435) = \$271/month the IBR program would initially be advantageous even if the person had only borrowed about \$35,000 in Stafford loans.
107. \$250,000 x (0.075/12) = \$1,563.
108. \$1,563/month - \$635/month = \$928/month.
109. But which will not be capitalized into the unpaid principal, avoiding the compound interest effect.
110. \$250,000 + (\$928 x 12 x 17) = \$439,312.
111. \$1,563/month - \$512/month = \$1,051/month.
112. \$250,000 + ((\$1,051) x 12 x 17) = \$464,404.
113 \$1,250/month - \$635/month = \$615/month.
114. \$200,000 + (\$615 x 12 x 17) = \$325,460.
115 \$1,250/month - \$512/month = \$738/month.
116. \$200,000 + (\$738 x 12 x 17) = \$350,552.
117. \$1,000/month - \$635/month = \$365/month.
118. \$160,000 + (\$365 x 12 x 17) = \$234,460.
119 \$1,000/month - \$512/month = \$488/month.
120. \$160,000 + (\$488 x 12 x 17) = \$259,552.
121 If, for example, a person has a large enough income from other sources to put them into the top 39.6% marginal tax bracket, then the entire forgiven debt will be taxed at this 39.6% rate. If, however, the person's other income is less than this, then each portion of the forgiven debt will be taxed at the marginal tax rate applicable to that particular "slice" of the debt forgiveness income, with the overall tax rate on that debt forgiveness income then being a weighted average of the different applicable marginal tax rates.
122 Tax bracket cut-offs are often either systematically or on an ad hoc basis adjusted upwards

to prevent “bracket creep” from price level inflation that does not reflect real income gains.
123 $60,000 x (1.05)^20 = $159,198.
124 That set of tax brackets now imposes a 25% marginal tax on income between $36,250 and $87,850, 28% on income between $87,850 and $183,250, 33% on income between $187,350 and $398, 350, 35% on income between $398,350 and $400,000, and 39.6% on income over $400,000. Tax Rate Schedule X, IRS Code Section 1(c)
125 (1.03)^20 = 1.806, an 80.6% increase, leading to the following new projected structure of tax rates in 20 years: a 25% marginal tax rate imposed on income between $65,468 and $158,657, 28% on income between $158,657 and $330,950, 33% on income between $330,950 and $719,420, 35% on income between $719,420 and $722, 400, and 39.6% on income over $722, 400.
126 See supra n. 110.
127 (($330,950 - $159,198) x .28) + (($439,312 - $171,752) x .33) = $133,386.
128 $133,386/$439,312 = 0.3104, a 31.0% tax rate.
129 See supra n. 112.
130 (($330,950 - $159,198) x .28) + (($464,404 - $171,752) x .33) = $144,666. If Sarah is filing using married filing separately tax status her tax rate would be slightly higher, and if she is filing using married filing jointly tax status her tax rate would be slightly lower. I will ignore these filing status complications for these tax rate hypotheticals.
131 $144,666/$464,404 = 0.3115, a 31.2% tax rate.
132 See supra n. 114.
133 (($330,950 - $159,198) x .28) + (($325,460 - $171,752) x .33) = $98,815.
134 $98,815/$325,460 = 0.3036, a 30.4% tax rate.
135 See supra n. 116.
136 (($330,950 - $159,198) x .28) + (($350,552 - $171,752) x .33) = $107,095. If Sarah is filing using married filing separately tax status her tax rate would be slightly higher, and if she is filing using married filing jointly tax status her tax rate would be slightly lower. I will ignore these filing status complications for these tax rate hypotheticals.
137 $107,095/$350,552 = 0.3055, a 30.6% tax rate.
138 See supra n. 118.
139 (($330,950 - $159,198) x .28) + (($234,460 - $171,752) x .33) = $68,785.
140 $68,785/$234,460 = 0.2933, a 29.3% tax rate.
141 See supra n. 120.
142 (($330,950 - $159,198) x .28) + (($259,552 - $171,752) x .33) = $77,065. If Sarah is filing using married filing separately tax status her tax rate would be slightly higher, and if she is filing using married filing jointly tax status her tax rate would be slightly lower. I will ignore these filing status complications for these tax rate hypotheticals.
143 $77,065/$259,552 = 0.2969, a 29.7% tax rate.
144 For example, while some states (such as Texas) have no state income tax at all, other states (such as New York or California) have relatively high marginal state income tax rates for upper-income taxpayers. [cite]
145 $439,312 x.0333 = $14,629.
146 $439,312 x 0.333 = $146,437.
147 $464,404 x.0333 = $15,465.

148 $464,404 x 0.333 = $154,801.
149 $325,460 x.0333 = $10,838.
150 $325,460 x 0.333 = $108,838.
151 $350,552 x .0333 = $11,673.
152 $350,552 x 0.333 = $116,734.
153 $234,460 x .0333 = $7,808.
154 $234,460 x 0.333 = $78,075.
155 $259,552 x .0333 = $8,643.
156 $259,552 x 0.333 = $86,431
157 See Deslisle & Holt, supra n. 15, at 15.
158 Student Borrower Bill of Rights Act of 2007, S. 511, 110th Cong. Section 6(b) (2007).
159 Ann Carrns, "Budget Would Eliminate Taxes on Forgiven Student Debt," NYTimes.com (April 16, 2013) (available at http://bucks.blogs.nytimes.com/2013/04/16/budget-would-eliminate-taxes-on-forgiven-student-debt).
160. One criticism that might be made of the IBR program is that it is based upon the implicit assumption that those high-debt law student and other graduate student borrowers who will have these large debt forgiveness tax liabilities after 20 years will have the foresight and self-discipline necessary to make over the years the regular escrow deposits necessary to build up a fund of between $100,000 and $200,000 as needed to pay these taxes. Given the extent to which persons often fail to make comparable provisions for their retirement this may be an assumption that is not fully justified, and there may prove to be a substantial number of law student borrowers who find themselves in rather serious financial difficulties with the IRS when these taxes come due. Other law students who might benefit from the IBR program might choose to not enroll because of (perhaps wise) concerns they have that they may lack sufficient self-discipline.

It is also possible that by the time an IBR enrollee's debt is forgiven the law will have been amended to exempt the forgiven debt from tax liability, as it is now for the discharged debt under the PSLF program. There will surely be a number of financially distressed IBR enrollees in 20 years who will lobby strenuously for such a change, and some analysts currently support such a move. See, e.g., Delisle & Holt, supra n. 15, at 15. However, I suspect that the political reaction to a proposed tax law amendment that called for foregoing substantial amounts of tax revenues, with the benefits to be apportioned to tens of thousands of mid-career attorneys and other professionals in $100,000 - $200,000 amounts would likely be unsympathetic. Current IBR enrollees surely should not count on there being such a favorable change in the law, and should make provision for eventually paying those taxes. They perhaps should even take into account the possibility that the top bracket marginal tax rates applicable to such large amounts of taxable income may be increased over the next 20 years, perhaps even to a level approaching the 70% level that was in force during much of the 20th century, and they may want to set aside extra escrow deposits to address that eventuality.

Let me also note here in passing a little-noticed aspect of the IBR program. While federal student loan debts are generally not dischargeable in bankruptcy, once the remaining unpaid balance of the loan debt is forgiven under the IBR program after 20 years, and the borrower now has a tax liability obligation on this discharged debt, the debt is now technically a tax debt rather than a student loan debt, and as a result that debt may now be discharged in bankruptcy, although the bankruptcy provisions regarding the discharge of tax debt are also onerous and require prior exhaustion of retirement accounts.

161. When the escrow account is liquidated most of the proceeds will be either a return of initial deposits or of reinvested after-tax dividends. Only about 25% of the value of the account after 20 years will be long-term capital gains that are subject to a 20% tax rate. This will reduce the amount of net proceeds by .20 x .25 = 5%. This capital gains tax will lead to an average annual after-all taxes rate of return on the portfolio over that period of about 4.1%. This is down from the 4.6% average annual after-tax rate of return over that period after each year's taxes on the dividends have been paid, but before payment of the final capital gains taxes.

162. This table is based upon the assumption that Sarah has financed all of her law school costs, including the forgone after-tax income, through borrowing. To the extent that she has financed some of those costs through use of her own funds, or through spending less on annual living expenses than her assumed $30,000/year foregone income, her final debt obligation that is forgiven and the corresponding required monthly escrow deposits to pay the taxes on this forgiven debt will be reduced in the same proportion. So, for example, if her full costs of law school were $200,000, but she was able to reduce her debt upon commencing IBR repayments by 15% to $170,000 through reducing her law school living expenses to $20,000 each year, she would only have to make monthly escrow payments 15% lower than those set forth in the table for an initial $200,000 loan debt.

163. A stream of 240 monthly payments of $486 each, invested at a 4.1% annual after-tax interest rate, compounded annually, will grow to a sum of $146,437 at the end of 20 years.

164. A stream of 240 monthly payments of $514 each, invested at a 4.1% annual after-tax interest rate, compounded annually, will grow to a sum of $154,801 at the end of 20 years.

165. A stream of 240 monthly payments of $360 each, invested at a 4.1% annual after-tax interest rate, compounded annually, will grow to a sum of $108,378 at the end of 20 years.

166. A stream of 240 monthly payments of $387 each, invested at a 4.1% annual after-tax interest rate, compounded annually, will grow to a sum of $116,734 at the end of 20 years.

167. A stream of 240 monthly payments of $260 each, invested at a 4.1% annual after-tax interest rate, compounded annually, will grow to a sum of $68,785 at the end of 20 years.

168. A stream of 240 monthly payments of $287 each, invested at a 4.1% annual after-tax interest rate, compounded annually, will grow to a sum of $77,065 at the end of 20 years.

169. This $624/month is the average of the required $662 and $586 initial monthly payments and tax escrow deposits for single borrowers and borrowers supporting a family of three members.

170. This $547/month is the average of the required $585 and $509 initial monthly payments and tax escrow deposits for single borrowers and borrowers supporting a family of three members.

171. This $486/month is the average of the required $524 and $447 initial monthly payments and tax escrow deposits for single borrowers and borrowers supporting a family of three members.

172. The average undergraduate who graduates with outstanding student loans now owes over $25,000 in federal student loans. Tamanaha, Failing Law Schools, supra n. 2, at 110.

173. On the other hand, to the extent that the graduate has financed the cost of law school with his own or family funds then the debt repayment burden would be less than this, although the overall economic cost including foregone income would be largely unaffected. See supra nn. 49,

50.
174. Although these latter large amounts of debt would surely render it difficult for the graduate to keep up with the tax escrow payments, at least for the first few years after graduation.
175 Tamanaha, Failing Law Schools, supra n. 2, at 119-125; Campos (2012), supra n. 2, at 46-51.
176 See supra n. 45 and the associated text.
177 See supra n. 39.
178 ($45,000 - $16,335) x .10 x 1/12 = $238.88.
179 $1,563/month - $484/month = $1,079/month.
180 $250,000 + ($1,079 x 12 x 17) = $470,116.
181 $470,116 x .0333 = $156,549. Sarah's tax rate may actually be slightly less than 33.3% because her income will be somewhat smaller after 20 years, having started at $45,000/year, than if she had started at $60,000/year, thereby lowering slightly the tax rate applicable to some of the discharged debt income.
182 A stream of 240 monthly payments of $525 each, invested at a 4.1% annual after-tax interest rate, compounded annually,will grow to a sum of $156,705 at the end of 20 years.
183 $50,000/$45,000 = 1.111, an 11.1% increase.
184 ($5,000 x .67)/12 = $278.
185 Campos (2012), supra n. 2, at 15-21.
186. See supra n. 92.
187. Her average monthly payment over the final seven years of her 10-year payment obligation will be about $710/month. $1,563/month - $710/month = $853/month.
188. $250,000 + ($853 x 12 x 7) = $250,000 + $71,652 = $321,652.
189. See supra n. 95.
190. Her average monthly payment over the final seven years of her 10-year payment obligation will be about $423. $1,563/month - $423/month = $1,140/month.
191. $250,000 + ($1,140 x 12 x 7) = $250,000 + $95,760 = $345,760.
192. $45,000 was the median annual starting salary for class of 2011 graduates taking positions with public interest organizations. NALP (2011), supra n. 3.
193. 1/12 x 10% x ($45,000 - $16,635) = $239.
194. The proper measure here of the annual lost income cost to a graduate taking a qualifying public service position is the after-tax portion of the difference between the starting salary for the public service position and the lowest salary that the graduate would have accepted to take the public service position were there no special loan repayment terms for public service positions that differed from the normal IBR terms. For example, if the graduate who took the $45,000 starting salary public service position would have taken that position only for a minimum starting salary of at least $54,000/year if there were no special loan repayment terms for such a position, then taking that public service position would impose an additional after-tax cost on that person of ($54,000 - $45,000) x 2/3 = $6,000/year for the duration of their public service career, probably growing over time as the salary difference between the two career tracks widened.
195. ($60,000 - $45,000) x 2/3 = $10,000.
196 (1.03)^25 = 2.094. $1,860/month/(2.094) = $888/month.
197 (1.03)^12.5 = 1447. $1,860/month/(1.447) = $1,285/month.
198 (1.06)^12.5 = 1.955. $1,860/month/(1.955) = $951/month.

199 Her debt repayment obligations would actually increase by a slightly larger 5.73%/year, see supra n. 92, but I will overlook this slight complication in this illustrative analysis.
200 See supra n. 146.
201 See supra n. 52.
202 The 5%/year salary increase assumptions incorporates an expected 3% annual inflation rate.
203 The lack of price inflation would presumably mean that the 3%/year annual appreciation of the stock values would not take place, leaving only the 2%/year x .80 = 1.6%/year annual after-tax dividend yield.
204 (($60,000 x 1.02) – ($16,335))/($60,000 - $16,335) = 1.0275, a 2.75% annual increase. Her debt repayment obligations would therefore actually increase by a slightly larger 2.75%/year rather than 2%/year, but I will overlook this slight complication in this illustrative analysis. See supra n. 191.
205 (1.02)^10 = 1.219, a 21.9% increase.
206 $1,563/month - $444/month = $1,119/month.
207 ($250,000) + ($1,109 x 12 x 17) = $478,276.
208 $478,276 x .33 = $159,425.
209 The account would presumably grow by 1.6% + 6% = 7.6%/year, with a 20% capital gains tax due after 20 years on now a very substantial portion of the account, given the raid rate of inflation, reducing the overall after-all-taxes rate of return on the account to something in the 6.5%/year-to-7%/year annual range. I will assume a 6.5% annual rate of return here for my subsequent calculations.
210 (($60,000 x 1.08) - ($16,335 x 1.06))/($60,000 - $16,335) = 1.0875, an 8.75% annual increase. Her debt repayment obligations would therefore actually increase by a slightly larger 2.75%/year rather than 2%/year, but I will overlook this slight complication in this illustrative analysis. See supra nn. 199, 203.
211 $364/month x (1.08)^10 = $786/month.
212 $1,563/month - $786/month = $777/month.
213 ($250,000 + ($777 x 12 x 17) = $408,508.
214. Repayment of a $250,000, loan at 7.5% annual interest over a 25-year term would require annual loan repayments of approximately $22,321/year.
215. See supra n. 40.
216. $22,321 x 1.5 = $33,482.
217. See supra n. 39.
218. $50,000/$45,000 = 1.111, an 11.1% increase,
219. $50,000 + ($22,321 x 1.5) = $83,482.
220. $50,000 + (($22,321 x .80) x 1.5) = $76,786. According to the NALP statistics for the class of 2011 only at most 34% of the graduates who reported their salaries had starting salaries over $75,000. See NALP (2011), supra n. 3. Given the non-response bias in the NALP surveys which is recognized to overstate the percentage of graduates earning higher incomes, id., and given that only about 55% of class of 2011 graduates had obtained full-time legal positions 9 months after graduation, see supra n. 5, probably no more than at most about 20% of graduates obtained full-time legal positions paying over $75,000/year.
221. $50,000 + (($22,321 x .64) x 1.5) = $71,428.
222 If, however, a graduate has a legal career that lasts longer than 25 years this would narrow

somewhat, although not drastically so, the annual salary premium required to justify incurring the costs of law school, particularly for a career extending over 35 or 40 years.
223. (1.05)^25 = 3.3869, approximately a 239% increase.
224. $33,482 /((1 + 3.39)/2) = $15,254.
225 $50,000 + $33,482 /((1 + 3.39)/2) = $50,000 + $15,254 = $65,254.
226. $50,000 + $26,786/((1 + 3.39)/2) = $50,000 + $12,203 = $62,203.
227. $50,000 + $21,428/((1 + 3.39)/2) = $50,000 + $9,762 = $59,762.
228 $7,944 x 1.5 = $11,916.
229 $50,000 + $11,916 = $61,916.
230 The initial combined debt repayment and escrow deposit obligation would be $364/month + $221/month = $585/month, growing over the next 20 years to $1,109/month + $588/month = $1,697/month. Therefore she would need a before-tax salary premium of $585 x 12 x 1.5 = $10,530/year to justify this $200,000 cost, a total salary of $60,530/year.
231 The initial combined debt repayment and escrow deposit obligation would be $364/month + $160/month = $524/month, growing over the next 20 years to $1,109/month + $424/month = $1,523/month. Therefore she would need a before-tax salary premium of $524 x 12 x 1.5 = $9,432/year to justify this $160,000 cost, a total salary of $59,432/year.
232 See supra n. 23.
233 $364/month x (1.05/1.03)^5 = $401/month.
234. $401/month x 12 x 1.5 = $7,218/year.
235. If a person's legal career is longer than 10 years, a very likely possibility for most graduates, then a correspondingly smaller salary premium over the $50,000/year undergraduate degree-based hypothetical alternative salary would be required to justify the costs of law school under the PSLF program.
236 $45,000 was the median annual starting salary for class of 2011 graduates taking positions with public interest organizations. NALP (2011), supra n. 3.
237 Although it should be kept in mind that such qualifying public service legal positions are becoming increasingly difficult to obtain, see supra n. 86, and that most such positions pay less than $56,552/year starting salaries, see supra n. 184. If a law graduate accepted such a position paying a smaller salary premium over the $50,000/year undergraduate degree-based hypothetical alternative salary, then a period of employment longer than 10 years would be required to recapture the law school costs incurred under the PSLF program, and if the qualifying position paid less than a $50,000/year starting salary the costs of law school would never be recaptured even under PSLF program repayment and debt forgiveness terms.
238. One could argue that each individual student borrower's personal rate of time preference would be a more appropriate discount rate to use to discount their loan repayment obligations, but this figure would obviously be difficult to determine and would vary between individuals. It is conventional to instead use as a more generic discounting factor some measure of the after-tax rate of return on invested capital for discounting such future cash flows.
239. To obtain a 7.5% after-tax annual return a person at a 33% marginal tax rate would have to earn a 7.5% x 1.5 = 11.25% annual rate of return, obviously an unrealistically high rate of return for relatively conservative investments under current market conditions.
240. This 5% figure is based on an assumed investment portfolio of relatively conservative common stocks or stock mutual funds, paying an average dividend yield of 2%/year, and having

average capital appreciation of 3%/year.

241. The 2%/year average dividend yield is assumed to be taxed at the current 20% dividend tax rate, leading to a 1.6%/year after-tax dividend yield. The 3%/year average capital appreciation, if it is liquidated after one year and the 20% long-term capital gains tax is then paid, would leave a 2.4% after-tax capital gain, leading to a total average gain of 4%/year. If, however, the capital gains on this investment are allowed to accrue for 20 years without realization, this will lead to an average annual after-tax return on the portfolio of 4.6% over the 20 years, with the capital gains portion of the portfolio, at that time being about 25% of its total value, then taxed at a 20% rate when these gains are eventually realized. This deferred capital gains tax will serve to reduce the amount of portfolio proceeds by about .20 x .25 = 5%, which will serve to reduce the average annual after-all taxes rate of return on the portfolio over the 20 years down from 4.6% to about 4.1%. This 4.1% after-all taxes rate of return will therefore be the discount rate that I will apply in this present value analysis.

242. The present value of a stream of 300 monthly principal and interest payments of $1,860/month, discounted at a 4.1% annual rate, is approximately $344,844.

243. The present value of a stream of 300 monthly principal and interest payments of $1,488/month, discounted at a 4.1% annual rate, is approximately $275,875.

244. The present value of a stream of 300 monthly principal and interest payments of $1,190/month, discounted at a 4.1% annual rate, is approximately $220,626.

245. <u>See</u> <u>supra</u> n. 127.

246. This is the present value of a stream of 20 annual debt repayments of $635 x 12 = $7,620 plus a single tax liability sum in 20 years of $146,437, all discounted at a 4.1% annual rate.

247.This is the present value of a stream of 20 annual debt repayments of $635 x 12 = $7,620, plus a single tax liability sum in 20 years of $108,378, all discounted at a 4.1% annual rate.

248. This is the present value of a stream of 20 annual debt repayments of $635 x 12 = 7,620, plus a single tax liability sum in 20 years of $78,705, all discounted at a 4.1% annual rate.

249 This is the present value of a stream of 20 annual debt repayments of $512 x 12 = $6,144 plus a single tax liability sum in 20 years of $154,801, all discounted at a 4.1% annual rate.

250 This is the present value of a stream of 20 annual debt repayments of $512 x 12 = $6,144 plus a single tax liability sum in 20 years of $116,734, all discounted at a 4.1% annual rate.

251 This is the present value of a stream of 20 annual debt repayments of $512 x 12 = $6,144 plus a single tax liability sum in 20 years of $86,431, all discounted at a 4.1% annual rate.

252 $50,000 + ($18,532) /(1.05)^10 = $61,369.

253 $50,000 + ($18,532 x .80)/(1.05)^10 = $59,095.

254 $50,000 + ($18.532 x .64)/(1.05)^10 = $57,276.

255. This is the present value of a stream of 10 annual payments averaging $500 x 12 = $6,000 each, discounted at a 4.1% annual discount rate.

256 This is the present value of a stream of 10 annual payments averaging $322 x 12 = $3,864 each, discounted at a 4.1% annual discount rate.

257. This is the present value of a stream of 10 annual payments averaging $306 x 12 = $3,672 each, discounted at a 4.1% annual discount rate.

258. This is the present value of a stream of 10 annual payments averaging $200 x 12 = $2,400 each, discounted at a 4.1% annual discount rate.

259 <u>See</u> <u>infra</u> the discussion of this question in Part VII.

260 The benefit to the government would be the present value of the stream of net receipts on the 7.5%/year loan, after paying the assumed 2%/year interest cost of the government borrowing those funds to make the loan in the capital market. The 25 annual loan repayments on the 7.5%/year, $250,000 loan would each be approximately $22,331, and the annual repayments needed to fully amortize the 2%/year bond funding costs for $250,000 over the same 25-year term would each be about $12,821, leading to net receipts to the government of about $22,331 - $12,821 = $9,510/year. If one then discounts that stream of 25 net receipts of $9,510/year at 2%/year, reflecting the government's resulting savings in borrowing costs due to those earnings, the present value of that loan to the federal government is about $185,445. This rough estimate does not incorporate any deductions for administrative costs or for losses due to loan defaults.
261 That borrower, if single, would have to make monthly repayments starting at $364/month and averaging about $635/month ($7,620/year) over the 20-year repayment period of this $250,000 loan, and then would owe federal income taxes of $136,386 on the discharged debt after the 20 years, assuming a 30% applicable tax rate. The annual payments necessary for the government to amortize a $250,000, 2% annual interest rate bond issue over a 20-year period would be about $15,244. The government would thus suffer net losses of $7,620 - $15,244 = $7,624/year before receiving the $136,386 tax payment in year 20. If one then discounts that stream of 20 net losses of $7,624/year, and the $136,386 tax payment, at 2%/year, the present value of that loan to the federal government is about $91,781 - $125,034 = -$33,253. The government is thus providing a subsidy to the borrower having a present value cost to the government of $33,253. This rough estimate does not incorporate any deductions for administrative costs or for losses due to loan defaults.
262 $218,698/$250,000 = 87.5%.
263 $33,253/$250,000 = 13.3%.
264 The present value of a stream of 10 annual subsidy payments of $24,105, discounted at a 2% annual rate, is about $216,952.
265 $403,684/$250,000 = 161.0%.
266 $216,952/$250,000 = 86.8%.
267. In fairness, let me note that these PSLF program present value figures reflect only loan repayment costs and do not include any allowance for the additional after-tax foregone income costs borne by a graduate who accepts a public service position at a lower salary than they would have had the PSLF program not existed.
268. Schrag (2013), supra n. 15, at the text corresponding to n. 44-76.
269. "Schrag makes a convincing case [about the advantages of the IBR program under the PAYE rules]…his argument is sound." Brian Tamanaha, "What's Wrong with Income-Based Repayment in Legal Academia: A Response to Schrag," http:/balkin.blogspot.com/2012/11 (Nov. 29, 2012).
270. Schrag (2013), supra n. 15, at n. 65.
271. Rachael Zahorsky, "Why Don't Law Grads Participate in Loan Repayment Programs?", ABA Journal (March 1, 2013) at ___.
272. While a recent study by Barclays projects that half of all student borrowers will be eligible for the IBR program under the PAYE rules, and that the government has underestimated the cost of the IBR program over the next 10 years by $235 billion, the US Dept. of Education estimates that only 6% of student borrowers will actually enroll. Jason Delisle, "Barclays Student Loan

Report: New Income Based Repayment Enrollment to Balloon, $235 Billion in Hidden Cost," New America Foundation (December 13, 2012), available at http://edmoney.newamerica.net/blogposts2012/barclays_student_loan_report. The Barclays study apparently projects much higher IBR enrollment rates than does the Dept. of Education. The Delisle post does not break out the Barclays or Dept. of Education enrollment eligibility projections or enrollment projections separately for law students. Brian Tamanaha projects that "it is likely that many thousands of recent law graduates" will enroll in IBR over the coming years. Tamanaha (2013), supra n. 3, at 137-38.

273. "[L]ack of easy access to distilled details is the greatest barrier for many indebted grads. 'People just don't realize that the federal government has options available to them.'...At many law schools, financial aid offices are...short-staffed and overwhelmed...counselors... [lack]... adequate knowledge about the changing laws regarding repayment options." Tamanaha (2013), id. "Unfortunately, many [IBR] borrowers simply don't receive the counseling they need to understand the choices that are available to them or what they need to do to take advantage of them." Stephen Burd et al., Rebalancing Resources and Incentives in Federal Student Aid," New America Foundation (Jan. 29, 2013) (available at http://edmoney.newamerica.net/publications/policy/rebalancing_resources_and_incentives_in_federal_student_aid).

274. Id.

275. Paul Campos is certainly of this view. Campos (2012), supra n. 2, at 15-21 (discussing "Special Snowflake Syndrome").

276. Campos, id., at 48.

277. As Paul Campos has noted in his inimitable style, "[I]t's politically tricky to advertise that your operation's budget is based on the assumption that taxpayers will pick up the tab for the large percentage of your loans your graduates take out that won't be repaid. That's the kind of thing you probably want to keep on the down low to the extent possible." Paul Campos, "Will IBR Bail Out Law Schools?," Inside the Law School Scam (December 23, 2012), available at http://insidethe law school scam.blogspot.com.

278. "Second, it's important not to underestimate how much denial still grips legal academics. Telling law professors that they're peddling worthless degrees that generate enormous debts that won't be repaid naturally injures their *amour-propre*, so they tend not to believe it, statistics be damned." Id.

279 See supra n. 23.

280 See infra at the text corresponding to nn. 121-145.

281. Id.

282. This concern is noted by Tamanaha, supra n. 2, at 121-122, and by Campos (2012), supra n. 2, at 49. But see Schrag (2012), supra n. 15, at 16-19 (rejecting the validity of such credit concerns).

283. Or can a person rely on the fact that the PSLF program debt forgiveness provisions still being in force in 10 years if the graduate is employed in a qualifying public service position.

284. Campos (2012), supra n. 2, at 49.

285. "Potential applicants are skeptical about whether IBR/PAYE is really going to work as advertised. Perhaps it will be cut back or eliminated altogether over the years, as the political process para-glides over an ongoing series of fiscal cliffs." Campos (2012), supra n. 2, at 133.

"[T]he IBR program creates no contractual rights for those who take advantage of it; as a legal matter the program could be eliminated at any time, leaving those dependent upon it with enormous amounts of non-dischargeable debt." Campos, The Crisis, supra n. 3, at 208.

286. "[T]he income-based repayment plan is in fact built into the master promissory note that a borrower signs and its terms thereby become federal contractual obligations." Schrag (2013), supra n. 15, at n. 65.

287. Id. (citing to US Dept. of Education, "Master Promissory Notes, MPN without data labels," http://www.direct.ed.gov/mpn.html at 7).

288. For example. the "Borrower's Rights and Responsibilities Statement"' for the Federal Direct Stafford/Ford Loan program, and for the Federal Direct PLUS Loan program, cited by Schrag, id., in each case declare that after the expiration of 25 years the unpaid debt under the IBR program "may qualify for cancellation," while the comparable phrasing there used for the earlier and quite different and rarely used Income Contingent Repayment program is that the unpaid debt after 25 years "will be forgiven." This different choice of language for the IBR program as compared to the Income Contingent Repayment program -- the use of the term discretionary term "may" rather than the mandatory term "will" -- suggests that the debt forgiveness feature of the IBR program may possibly be regarded by the government as discretionary rather than as a mandatory contractual commitment. Id. In addition, neither either Master Promissory Note nor the appended explanatory materials to either Note state with any clarity that unpaid accrued interest will not be capitalized after the first three years of loan repayment under the IBR program. Id. These Master Promissory Note materials now available on this website are also somewhat dated in that they make no reference to any of the changes made by the PAYE rules, such as adoption of a shorter 20-year loan repayment term. Id.

289. 34 CFR 674, 682, 685, 77 Fed. Reg. 66088-66147 (Nov. 1, 2012).

290. See, e.g., U.S. Dept. Of Education, "Federal Student Aid," at "Advantages of Pay as You Earn," available at http://studentaid.ed.gov/repay-loans/understand/plans/pay-as-you-earn (last visited May 13, 2013) ("[I]nterest that accrues but is not covered by your loan payments will not be capitalized...any remaining balance will be forgiven after 20 years of qualifying repayments.")

291. Although, as I have noted above, a borrower should not assume that the tax rate applicable to the forgiven debt will necessarily remain unchanged over the years.

292. This is a legitimate concern because it appears unlikely that the incurring of law school debts by a law student, even if those debts were undertaken in the expectation of later being able to enroll in the IBR or PSLF programs under their current terms, would be regarded by courts as creating a promissory estoppel-based vested right to enroll in that specific program on those terms in the face of attempts by the federal government to modify or terminate that program prior to that student's formal enrollment. Courts might well regard such a borrower's expectation that the preferential terms of a federal loan repayment program not be modified during the several years prior to their formal enrollment in that program as not being "reasonable reliance" that would justify imposing on the federal government under an estoppel theory perhaps billions of dollars of foregone tax revenues. A law student taking out student loans prior to IBR or PSLF program enrollment is therefore exposed to the risk of modification or even termination of the IBR or PSLF programs prior to his formal enrollment in one of those programs, but as noted in the text above they can avoid this risk, at least for the IBR program, by enrolling in the program at the time the loan debt is incurred or very shortly thereafter. While some persons advise

students to first consider their repayment options "within a couple of months after graduating," (Heather Jarvis, "Student Loan Timeline for Graduating Students," 41 Student Lawyer No. 7 (March 2013), the above-noted concerns suggest that more prompt IBR enrollment might be advisable to avoid the risk of adverse program changes.

293 See supra n. 93.

294. Assuming that they have the financial self-discipline to regularly set aside sufficient funds so as to be able to pay the eventual large debt forgiveness tax liability.

295 The monthly repayments would need to be increased enough so that the extra repayments required of enrollees would have an aggregate present value, when discounted at the federal government's cost of capital, equal to the combined present value of the of the new subsidies provided to additional enrollees and the lost tax revenues due to the exemption of debt forgiveness from tax liability. This might have to be a fairly substantial increase, perhaps to a percentage rate significantly larger than the pre-PAYE rules level of 15%.

296 See supra n. 104 and the associated text.

297. Estimates of the current amount of federal student loans taken out each year by law students are in the neighborhood of $4 billion/year. Tamanaha (2013), supra n. 3, at 142 ("[A]lmost $4 billion dollars each year…); Campos, The Crisis, supra n. 3, at 204-05 ("[A]pproximately $4.375 billion per year of relatively high-interest federal debt that law students borrow to attend law school.") William Henderson and Rachel Zahorsky estimate that between $36 billion and $72 billion will be borrowed by law students from the federal government between 2010 and 2010. William D. Henderson & Rachael Zahorsky, "The Law School Bubble," ABA Journal (January 2012), at 35.

298 The often-stated primary objectives of the IBR and PSLF programs are to broaden access to higher education, and to encourage public service. See generally Schrag (2013), supra n. 15, Schrag (2007), supra n. 15. They have surely been at least partially successful in achieving these objectives.

299 Tamanaha (2013), supra n. 3, at 137-38.

300 There is already at least one piece of legislation that has been recently introduced in the House of Representatives, the Earnings Contingent Education Loans Act (introduced by Thomas Petri, R-Wisconsin) that would both eliminate the debt forgiveness on IBR loans and discontinue the PSLF program. Thomas E. Petri, "How to Repair Income-Based Repayment of Student Loans," The Chronicle of Higher Education (June 10, 2013).

301 "Owing to high interest rates, the government makes a significant profit on student loans." Tamanaha, Problems With Income Based Repayment, supra n. 15, at ___, n. 41.

302. See supra at the text corresponding to nn. 120-145.

303 See infra at the discussion in Part V corresponding to nn. 248-255.

304 See id.

305 I have calculated that the subsidy percentage for a $250,000 IBR loan to a single borrower would be only 13.3% of that loan, see supra n. 263 and the associated text, and only 86.8% on a comparable PSLF loan, see supra n. 266 and the associated text.

306. This change is proposed by Delisle & Holt, supra n. 15, at 15.

307 See generally Schrag (2013), supra n. 15.

308 Id. at 26-27.

309 Tamanaha, Failing Law Schools, supra n. 2, at 119-125; Campos (2012), supra n. 2, at 46-

51.
310 "In most law schools, federal student loans to the law students near or exceed the total revenue from tuition." Steven R. Smith, supra n. 2, at 592. ""[F]ederal loans have become the lifeblood of legal education…" Id. at 18.
311. See supra n. 29.
312. "Here is a question law schools keep hoping doesn't get asked: if there's a massive oversupply of lawyers in America, to the point where half of all new law graduates aren't getting legal jobs at all, why is the federal government issuing billions of dollars of taxpayer subsidies every year to produce twice as many new layers as the economy can absorb, at a vastly higher price than they would be produced if those subsidies didn't exist?" Campos (2012), supra n. 2, at 51.
313. See. e.g., Tamanaha, Failing Law Schools, supra n. 2, at 119-125; Campos (2012), supra n. 2, at 48-51.
314. Id.
315. Delisle & Holt, supra n. 15.
316. Id. at 12.
317. Id. at 11-13.
318. Id. at ii.
319. Id. at 13.
320. Id. at 13-14.
321. Id. at 15. This last recommendation seems somewhat incongruous given their concerns that the IBR program disproportionately and unfairly benefits high debt borrowers, since eliminating the tax on forgiven student loan debt would appear to worsen those perceived inequities.

If the IBR program is amended to eliminate federal tax liability on forgiven debt, this would presumably presumably still leave IBR enrollees subject to state income tax liability on that forgiven debt, unless the applicable state has also amended its tax laws to conform with the federal law amendment, or unless the federal law changes would be interpreted as preempting state law in this area.
322. Schrag (2013), supra n. 15, at 9-21.
323. Tamanaha, Failing Law Schools, supra n. 2, at 119-125.
324. Schrag (2013), supra n. 15, at 12-19.
325 Id. at 16-19.
326. Id. at 19-20 (responding to various critics that he cites and discusses in n. 77 of his article).
327. Id. at 20-21 (responding to Delisle & Holt, supra n. 15).
328. Id. at 19-20.
329. Id at 20.
330 Delisle & Holt, supra n. 15, at 13.
331 Schrag (2013), supra n. 15, at n. 63.
332. Brian Tamanaha, for example, has called for limits on the availability of federal student loans for law students, based on school-specific indicia of the relative success that the school's graduates have had in the employment market, and also caps on the aggregate student loan debt that would be allowed for the students of any single law school. Tamanaha, Failing Law Schools, supra n. 2, at 177-81.

333 The prospects for students who graduate only in the middle of their classes at upper- or mid-tier non-elite law schools may improve in the coming years even absent job market improvement. I have estimated that approximately 42% of the graduates at upper- or mid-tier law schools will probably now be able to obtain full-time legal positions paying at least the median $60,000/year salary, see supra n. 22. If law school enrollments decline significantly at these schools in the coming few years, as seems likely, a student will not have to do quite as well academically, as compared to his class peers, to have a reasonable possibility of obtaining such a position.

For example, consider such a school that now graduates 225 students each year, and usually places about 42% of those students – 95 graduates – in such positions. If that school now reduces over time the size of its graduating class by 20% to 180 students, now about 95/180 = 52.7% of its graduates should be able to obtain those $60,000/year positions. The risk for a prospective applicant that would be associated with only average or slightly above-average law school academic performance will now be significantly reduced.

334 Which are uncertain in amount, as I have discussed in Part V, infra,, since it is unclear the extent to which IBR or PSLF enrollees would be willing to borrow on unsubsidized federal loan terms.

335 See, e.g., Schrag (2013), supra n. 15, at 9-21.

336 See supra n. 322.