

ARTICLE

OPTIONS FOR STUDENT BORROWERS: A DERIVATIVES-BASED PROPOSAL TO PROTECT STUDENTS AND CONTROL DEBT- FUELED INFLATION IN THE HIGHER EDUCATION MARKET

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After the bursting of the housing bubble and the Great Recession that followed, there has been an increasing focus on improving market transparency and recognizing other potential bubbles. The higher education and student loan markets are under new levels of scrutiny because they display many of the hallmarks of a bubble. The American government's model of freely extending federal loans to students, while improving lower- and middle-class access to higher education, has enabled the formation of detrimental distortions in the higher education market. At the same time, the soaring cost of higher education has saddled a generation of young Americans with unmanageable student loan debt. Evidence is beginning to mount that, for too many, their debt-financed higher education represents a stifling encumbrance instead of the great investment that society's collective commonsense has long suggested.

This Article explores the factors that contribute to the distortions in the higher education market, including (1) the informational asymmetries that exist between the various parties to a typical debt-financed purchase of an education, (2) accreditation rules, (3) the peculiar incentives of school faculties, and (4) widely followed school rankings. Due to nuances between different segments of the higher education market, this Article focuses on one segment for the sake of brevity: law schools. However, the analysis and prescription have more general applicability to all segments of the higher education market.

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After analyzing the causes, this Article draws on enterprise liability theory to propose a derivatives-based approach to stemming the runaway educational costs and improving the value proposition for American students. Specifically, this Article asserts that borrower put rights should be embedded into new student loan contracts. Such put rights could provide any student borrower the right, after a pre-set period of time following graduation, to obtain forgiveness of a portion of her student debt provided that certain objective criteria are satisfied. These criteria would center on whether, and to what extent, a particular student borrower’s aggregate post-graduation income fails to meet or exceed pre-determined benchmarks. The risk and cost of this student borrower put right would be borne primarily by those who, under the current higher education financing model, bear remarkably little of the risk and yet reap the bulk of the benefits of government-backed student loans: schools and lenders. By placing some of the risk of noneconomic student outcomes on the schools and lenders, diligence will be encouraged at a loan’s inception, and a school’s cost increases could only be rationalized if they were likely to return commensurate value to the school’s students.

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“In the simple world of consumer sovereignty the consumer rules and all else flows from that. Every aspect of the firm can be traced back to how it serves the consumer’s interest. But once we move away from that world to one in which private parties use the state to enforce cartels all becomes convoluted and confusing.”¹

– Professor Lloyd Cohen

INTRODUCTION

The recent economic crisis has illuminated major weaknesses in the financing of higher education in the United States. As many college and university graduates struggle to manage onerous student loan payments in the face of the Great Recession,² commentators have focused their attention on the questionable value propositions offered by various American educational programs and institutions.³ Runaway tuitions and the burdensome student debt required for most Americans to obtain a

¹ Lloyd Cohen, *Comments on the Legal Education Cartel*, 17 J. CONTEMP. LEGAL ISSUES 25, 48 (2008).

² For an entertaining exegesis of this term, see Catherine Rampell, ‘Great Recession’: A Brief Etymology, N.Y. TIMES ECONOMIX BLOG (Mar. 11, 2009, 5:39 PM), <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/>.

³ See, e.g., Michael Barone, *The Higher Education Bubble: Ready to Burst?*, RASMUSSEN REP. (Sept. 6., 2010), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_michael_barone/the_higher_education_bubble_ready_to_burst (“The people running America’s colleges and universities have long thought they were exempt from the laws of supply and demand and unaffected by the business cycle. Turns out that’s wrong.”); Mary Beth Marklein, *Grads Taking Law Schools to Task for Poor Job Market*, USA TODAY (Aug. 24, 2010, 1:28 PM), http://www.usatoday.com/news/education/2010-08-24-1Alawchool24_ST_N.htm; Matt Straquadine, *Options for Managing Law School Student Loan Debt*, LAW.COM, (Oct. 5, 2009), <http://www.law.com/jsp/article.jsp?id=1202434253199> (noting that the average law student who graduated from a private university in 2008 borrowed more than \$91,500 toward that degree, and observing that this debt burden and a shrinking job market offer a “surefire recipe for postgrad financial fright”).

post-secondary degree are under scrutiny like never before.⁴ Evidence is beginning to mount that, for too many students, debt-financed education represents a stifling encumbrance instead of the great investment that society's collective commonsense has long advanced.⁵ Such a finding is unsurprising in light of the fact that, for too long, the value of education has been reflexively embraced without adequate examination of its cost.⁶

Federal programs designed to either subsidize private loans or provide direct government-funded loans have achieved their noble goal of making higher education more attainable for students from middle- and

⁴ See, e.g., Karen Sloan, *Going to Law School? Proceed with Caution*, LAW.COM (Dec. 14, 2009), <http://www.law.com/jsp/article.jsp?id=1202436311250> [hereinafter Sloan, *Proceed with Caution*] (suggesting that “would-be lawyers should take a hard look at the benefits and drawbacks of spending three years and upward of \$100,000 to get a law degree . . .”); Mark C. Taylor, *Academic Bankruptcy*, N.Y. TIMES, Aug. 14, 2010, at WK10 (arguing that with the cost of a degree “well into the hundreds of thousands of dollars,” the argument of school as a promising investment “is no longer persuasive”).

⁵ See, e.g., Mary Pilon, *What's a Degree Really Worth?*, WALL ST. J., Feb. 2, 2010, at D6, available at <http://online.wsj.com/article/SB10001424052748703822404575019082819966538.html> (describing how one researcher estimated that the actual lifetime-earnings gap between college and high school graduates is just \$279,893 and observing that “like any investment” the benefits of higher education come with risks, such as graduating in a recession); Herwig Schlunk, *Mamas Don't Let Your Babies Grow up To Be . . . Lawyers* 1 (Vanderbilt Univ. Law Sch., Law & Econ. Working Paper No. 09-29, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497044 (attempting to understand the law degree as an investment in the “hope to spur future generations of potential law school attendees to think about the question rationally”). See also Kevin Carey, *That Old College Lie*, DEMOCRACY 9 (Winter 2010), available at http://www.democracyjournal.org/that_old_college_lie.html (“For the average student, college isn't nearly as good a deal as colleges would have us believe.”); James McCusker, *College's Problem: Cost, Not Dropouts*, HERALDNET (Jan 10, 2010), <http://www.heraldnet.com/article/20100110/BIZ/701109897> (“The costs of higher education continue to rise uncontrollably and borrowing to meet that cost makes little sense for most people.”); Jennifer Millman, *College Grad Can't Find Job, Wants \$\$\$ Back*, NBC N.Y. (Aug. 3, 2009, 1:29 PM), <http://www.nbcnewyork.com/news/local-beat/College-Grad-Cant-Find-Job-Wants-Back-52304162.html> (describing the lawsuit of a recent college graduate suing her college because she failed to secure “solid employment” following her graduation). Cf. Jacques Steinberg, *Plan B: Skip College*, N.Y. TIMES, May 16, 2010, at WK1 (noting that “[t]he idea that four years of higher education will translate into a better job, higher earnings and a happier life . . . has been pounded into the heads of schoolchildren, parents and educators.”); Kate Zernike, *Making College 'Relevant,'* N.Y. TIMES, Dec. 29, 2009, at ED16 (describing how one college advertises itself as “Home of the Guaranteed Job!” and offers free classes and temporary payment of student loans for students who fail to find employment in their chosen fields).

⁶ One study, for example, observes “economic returns make financing a college education a good investment.” SANDY BAUM & JENNIFER MA, EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 8 (2007), available at http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2007/ed-pays-2007.pdf. In its analysis, the study offers forty-two charts and illustrations summarizing the effect of education's benefits on everything from earnings power to voting and smoking patterns. However, only one of these charts examines the benefits netted against the costs of the educational experience.

lower-income families.⁷ The abundance of free-flowing funding for post-secondary education over the past several decades has attracted many to the academy.⁸ At the same time, much as it propelled the housing boom,⁹ government efforts at “access” have spurred a dramatic increase in the cost of education.¹⁰ The cost of attending law school, for

⁷ See Bridget Terry Long, *Do Loans Increase College Access and Choice? Examining the Introduction of Universal Student Loans 1* (New England Pub. Policy Ctr., Working Paper No. 07-1, 2007) (outlining the efforts of the federal government “to increase college access, choice and affordability”). See also Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 269 (2006) (conceding that the ability to borrow the large sums of money necessary to finance a legal education “has made it possible for the vast majority of . . . applicants to attend law school”).

⁸ According to the ABA, the 2008–2009 academic year set records for first-year enrollment (49,414), total J.D. enrollment (142,922), and total law school enrollment (152,033). See *Enrollment and Degrees Awarded 1963–2008*, AM. BAR ASS’N 1 (2009), available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf>.

⁹ See, e.g., ANDREW GILLEN, A TUITION BUBBLE? LESSONS FROM THE HOUSING BUBBLE 8 (2008), available at http://www.centerforcollegeaffordability.org/uploads/Bubble_Report_Final.pdf (discussing the similarities between the housing market and student loans and observing that the “sustained and widespread increases in tuition indicate that they are, like the rise in housing prices, a rational response to the circumstances faced by market participants”); Barone, *supra* note 3 (“Government-subsidized loans have injected money into higher education, as they did into housing, causing prices to balloon.”); Ron Lieber, *Placing the Blame as Students Are Buried in Debt*, N.Y. TIMES, May 29, 2010, at B1 (characterizing the student debt burden of tens of thousands as “an eerie echo of the mortgage crisis”). See also Steve Eisman, *Subprime Goes to College*, Speech at Ira Sohn Conference, slide 29 (May 26, 2010), presentation reposted on SCRIBD, <http://www.scribd.com/doc/32066986/Steve-Eisman-Ira-Sohn-Conference-May-2010> (last visited Sept. 6, 2010) [hereinafter Eisman, *Subprime Goes to College*]; Christine Hurt, *Bubbles, Student Loans and Sub-Prime Debt*, CONGLOMERATE BLOG (Apr. 19, 2010), <http://www.theconglomerate.org/2010/04/death-of-big-law-forum-bubbles-student-loans-and-subprime-debt.html> (briefly examining the comparison between the sub-prime market and the law student loan market).

¹⁰ See, e.g., *The Rising Cost of College Tuition and the Effectiveness of Government Financial Aid: Hearing Before the Comm. on Governmental Affairs*, 106th Cong. 113 (2000) (testimony of David W. Breneman, Ph.D., Dean, Curry School of Education, University of Virginia) (“Most federal loan programs are capped, but with the addition of numerous private loan programs, plus home equity loans, it seems plausible to me that the availability of loan finance has made it easier for some institutions to raise prices.”); BRIDGET TERRY LONG, DANA ANSEL & GREG LEISERSON, PAYING FOR COLLEGE: THE RISING COST OF HIGHER EDUCATION, MASS. INST. FOR A NEW COMMONWEALTH 80 (2006) (observing that “[p]art of the reason college prices have increased is due to the increasing use of financial aid by institutions”); Taylor, *Academic Bankruptcy*, *supra* note 4 (“Students and their parents are carrying unsustainable levels of debt, which is likely to lead to a crisis that will mirror the collapse of the subprime mortgage market.”). Nonetheless, this argument can be asserted separate and apart from the question of whether the Federal Reserve’s monetary policy during the period was too easy. For a discussion of monetary policy issues, see John B. Taylor, *The Fed and the Crisis: A Reply to Ben Bernanke*, WALL ST. J. (Jan. 10, 2010), http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703481004574646100272016422.html (arguing that monetary policy in the early years of the decade was too loose and acted as a subsidy for borrowers). But see Ben Bernanke, Chairman, Fed. Reserve Bd., Speech at the Annual Meeting of the American Economic Association: Monetary Policy and the Housing Bubble (Jan. 3, 2010), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20100103a.htm> (defending the monetary policy of the Federal Reserve as appropriate in light of the available data).

example, has increased at two to three times the rate of inflation over the last three decades.¹¹ The promise of accessible loans has made loan-eligible middle- and lower-income students an easy mark for unabashed, aggressive student-loan marketing.¹² “The end result,” in fact, “has been an unprecedented, debt-fueled wealth transfer from students of modest means to the increasingly prosperous higher education industry and opportunistic student loan lenders.”¹³ The dire unintended consequences of these programs have left the federal government to shoulder an unenviable burden as the underwriter of discontent.¹⁴

For the sake of brevity, this Article will focus on the challenges facing a single segment of the American higher education market of par-

¹¹ By any measure, the numbers are dramatic. For instance, according to the ABA, while the cost of living in America rose 28% from 1992 to 2002, the tuition at public law schools rose 134% for in-state residents and 100% for non-residents. Private law school tuition rose by 76% during the same period. See AM. BAR ASS’N, COMM’N ON LOAN REPAYMENT AND FORGIVENESS, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE* 10 (2003), available at <http://www.abanet.org/legalservices/sclaid/lrap/downloads/lrapfinalreport.pdf> [hereinafter ABA REPAYMENT REPORT]. See also Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1 (“Tuition growth at law schools has almost tripled the rate of inflation over the past 20 years.”); Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 1, 5 (2008) (noting that until the 1980s, law school tuition “did not generally rise ahead of the general rate of inflation”).

¹² See Morrissey, *supra* note 7, at 280 (observing that “the ever-rising tuition that has made possible all of [the] admirable progress [of law schools] has led to serious problems in the very system it has financed”).

¹³ Michael C. Macchiarola, *“Too Big to Fail” Goes to College*, MINDING THE CAMPUS (June 21, 2010), http://www.mindingthecampus.com/originals/2010/06/too_big_to_fail_goes_to_colleg.html. See, e.g., William D. Henderson & Andrew P. Morriss, *The New Math of Legal Education*, 12 YOUNG LAW. 1, 1 (July 2008), available at <http://www.abanet.org/yld/tyl/july08/july08.pdf> [hereinafter Henderson & Morriss, *The New Math*] (noting that “[t]he average debt owed at graduation soared 431 percent between 1987 and 2005, from \$16,000 to \$85,000”); Mary Pilon, *Student-Loan Debt Surpasses Credit Cards*, REAL TIME ECONOMICS—WSJ BLOGS (Aug. 9, 2010, 1:13 PM), <http://blogs.wsj.com/economics/2010/08/09/student-loan-debt-surpasses-credit-cards/>.

¹⁴ As far back as 1987, then-Secretary of Education William J. Bennett lamented the fact that “increases in financial aid in recent years have enabled colleges and universities blithely to raise their tuitions, confident that [f]ederal loan subsidies would help cushion the increase.” William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, at A31. See also Charlotte Allen, *Waste and Folly in Student Loans*, MINDING THE CAMPUS (Jan. 5, 2010), http://www.mindingthecampus.com/originals/2010/01/shortly_after_his_inauguration.html (noting that the “notion of using government aid to support mass higher education as a good thing in itself became permanently entrenched in the public mind,” yet “it is difficult to measure exactly what the programs have accomplished and easy to enumerate a slew of unintended consequences”); Jackson Toby, *Subprime Student Loans*, INSIDE HIGHER ED. (Dec. 23, 2009), <http://www.insidehighered.com/views/2009/12/23/toby> (arguing that an unintended consequence of making financing so easily available for anyone wishing to attend college is that “serious study in high school has become optional.”). For a discussion of the current federal programs that support student borrowing, see *infra* Part I.B.4. For an understanding of the size of the programs, see *infra* Appendix Figure 9.

ticular importance to the legal community—law schools.¹⁵ The cost of a legal education has saddled a generation of lawyers with unmanageable student loan debt.¹⁶ In the process, the current structure of law school financing has jeopardized the survival of many law schools¹⁷ and the long-term supply of competent and willing lawyers,¹⁸ compromised the availability of public service lawyers,¹⁹ and added to the great stress on our nation's already fragile consumer-driven economy.²⁰ Aggravating

¹⁵ While each segment of the higher education industry has its own idiosyncrasies which are beyond the scope of this Article, it is expected that the majority of the analysis and policy recommendations developed herein have broader application to the higher education market as a whole.

¹⁶ Not only has the absolute level of debt increased, but the percentage of students who borrow to attend law school has also seen a dramatic increase. In the mid-1970s, for example, only a modest percentage of students borrowed to pay the costs of a legal education. See ABA REPAYMENT REPORT, *supra* note 11, at 17. The proportion continued to rise steadily throughout the 1980s. In fact, by 2000, nearly seven out of every eight law students were borrowing to finance their law school education. See *id.* During the 1990s alone, the average amounts they were borrowing more than doubled; as of 2001, many law students borrowed more than \$80,000 for law school alone. See ABA REPAYMENT REPORT, *supra* note 11, at 17; Karen Sloan, *ABA Proposes Law Student Loan Relief*, LAW.COM, (Nov. 11, 2009), <http://www.law.com/jsp/article.jsp?id=1202435359338> [hereinafter Sloan, *Loan Relief*] (noting that the average public law school student graduate borrows \$59,324 for law school).

¹⁷ Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 468 (2004) [hereinafter Matasar, *Rise and Fall*] (“The mismatch between the perceptions of what a legal education provides and the actuality of that experience can create significant difficulties that will challenge the sustained viability of substantial numbers of schools.”).

¹⁸ See Schwarzschild, *supra* note 11, at 8 (observing that the current system of law school financing “depends, obviously, on law students and their families continuing to be willing and able to pay”). For an observation of a similar phenomenon in the field of education, see LUKE SWARTHOUT, STATE PUB. INTEREST GRP. HIGHER EDUC. PROJECT, PAYING BACK, NOT GIVING BACK: STUDENT DEBT’S NEGATIVE IMPACT ON PUBLIC SERVICE CAREER OPPORTUNITIES 4 (2006), available at <http://www.pirg.org/highered/payingback.pdf>? (observing that “[t]he prospect of burdensome debt likely deters skilled and dedicated college graduates from entering and staying in important careers educating our nation’s children and helping the country’s most vulnerable populations”). But see Morrissey, *supra* note 7, at 268 (noting that counter-cyclicalities of law school admissions and observing that “[e]ven in times of decreased applications, there have always been more potential students seeking admission to law school than there were positions available”).

¹⁹ See generally ABA REPAYMENT REPORT, *supra* note 11, at 9 (concluding that “many law students find that the rising cost of a legal education forces them to forego any form of public service”). See also NAT’L ASSOC. OF LAW PLACEMENT, FROM PAPERCHASE TO MONEY CHASE: LAW SCHOOL DEBT SUBVERTS ROAD TO PUBLIC SERVICE 6 (2002) (finding that law school debt prevented sixty-six percent of graduates from considering public interest or government employment).

²⁰ See, e.g., Anne Marie Chaker, *Students Borrow More than Ever for College*, WALL ST. J., Sept. 3, 2009, at D1 (noting, in the context of college borrowing, that “[t]he ripple effects for today’s heavily indebted young people are becoming palpable,” and suggesting that “tough loan payments are affecting major life decisions by recent graduates, forcing them to put off traditional milestones—from buying a first home to even marriage and having children”); AM. BAR ASS’N, COMM’N ON THE IMPACT OF THE ECON. CRISES ON THE PROFESSION & LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL 3, available at <http://www.abanet.org/lstd/legaled/value.pdf> (last visited Jan. 14, 2010) [hereinafter ABA, VALUE

the predicament is the fact that, as we awake from our Great Recession, today's students still confront soaring costs, but with less access than ever to traditional sources of credit.²¹ In fact, the thesis of legal education as an investment is now significantly strained for all but a small minority of incoming law students.²²

This Article respects the fact that the decision making of each law school applicant is based on a *sui generis* set of factors and does not attempt to tread in this deeply personal territory.²³ However, certain changes can improve the integrity and transparency of the information available to all prospective law students, and anchor law school costs to the value of student outcomes. In the end, such changes could significantly ensure the sustainability of a legal academy that molds lawyers

PROPOSITION] (“High debt can limit career choices, prevent employment in the public service sector, or delay home ownership or marriage.”) (footnote omitted).

²¹ For a description of the recent unavailability of credit in the student loan market, and the government's response, see *infra* Part I.B.4.ii. See also David Cho, *As College Costs Rise, Loans Become Harder to Get*, WASH. POST (Dec. 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/27/AR2009122702116.html?sid=ST2009122800127> (noting that the “upheaval in financial markets did not just eliminate generous lending for home buyers; it also ended an era of easy credit for students and their families facing the soaring cost of a college degree”). Adding to an already troubling picture is the fact that students pressed to borrow above the federal loan limits have increasingly turned to the private market which, as costs continue to soar, has accounted for an ever-larger percentage of education lending. See John Wasik, *College Loan Market Is Getting Its Own Bailout*, BLOOMBERG (June 2, 2008, 12:01 AM), http://www.bloomberg.com/apps/news?pid=Newsarchive&sid=AR5aM8VhB7y0&refer=Columnist_wasik (noting that, according to the College Board, “private loan volume has quadrupled over the [ten] years through 2006,” to the point where one in five students now have private loans). See also 2008 *FastWeb Student Loan Survey*, FINAID, <http://www.finaid.org/loans/studentloansurvey.phtml> (last visited Aug. 20, 2010) (observing that “[m]ore than a third of students use non-education debt to pay for school, such as borrowing from friends and family, credit cards or personal unsecured loans from a bank”).

²² See ABA, VALUE PROPOSITION, *supra* note 20, at 1 (“The combination of the rising cost of a legal education and the realities of the legal job market mean that going to law school may not pay off for a large number of law students.”); Jack Crittenden, *A Wise Investment?*, NAT'L JURIST, Mar. 2010, at 36 (observing, with respect to law school generally, that “tuition and student debt loads have increased so much that the value proposition indeed appears out of whack, especially given the new realities of lower starting salaries”); Efrati, *supra* note 11 (observing that “economic data suggest that prospects have grown bleaker for all but the top students.”). One law school professor asked:

Is it fair to recruit students into a situation where their economic futures are so perilously mortgaged? And beyond that, is the current system even sustainable if enough potential students come to realize that despite the obvious benefits of a legal education, such a career path may only afford them negative financial returns on their investments?

Morrissey, *supra* note 7, at 255. Cf. Thomas H. Benton, *Graduate School in the Humanities: Just Don't Go*, CHRON. OF HIGHER EDUC. (Jan. 30, 2009), <http://chronicle.com/article/Graduate-School-in-the/44846> (arguing against the return on investment of an advanced degree in the humanities and warning those who would pursue such a degree that “universities recognize that their idealism and energy—and lack of information—are an exploitable resource”).

²³ See, e.g., ABA, VALUE PROPOSITION, *supra* note 20, at 1 (“Choosing to attend law school is a big decision that prospective law students should not take lightly.”).

capable of assuming their place in what de Tocqueville labeled the “highest political class, and the most cultivated portion of society.”²⁴

This Article draws on enterprise liability theory and proposes a derivatives-based approach to alleviating the American law school quagmire.²⁵ Specifically, this Article suggests that borrower “put” rights could be embedded into new student loan contracts. Such rights could allow any law student borrower to obtain forgiveness of a portion of her law school debt after a pre-set period of time provided that the student satisfies certain objective criteria. These criteria would center on whether, and to what extent, a particular student borrower’s aggregate post-law school earnings fail to meet or exceed predetermined benchmarks. The risk and cost of the student borrower “put” right would be borne primarily by those who, under the current law school financing model, bear remarkably little of the risk yet reap the bulk of the benefits of government-backed student loans: law schools and lenders. By placing at least some of the risk of noneconomic student outcomes on the law schools and lenders, diligence will be encouraged at a loan’s inception.²⁶

²⁴ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 355 (Phillips Bradley ed., Henry Reeve trans., John Allyn 1874) (1835). Cf. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH*, act 4, sc. 2, lines 76–77, in *THE RIVERSIDE SHAKESPEARE* (Houghton Mifflin ed., 1974) (“The first thing we do, let’s kill all the lawyers.”).

²⁵ Although derivatives have been much maligned, if properly implemented, they can be instrumental in restoring some balance and logic to this highly distorted market. Again, although this proposal focuses on law schools for the sake of brevity, similar proposals could and should be explored for other segments of the market. Notably, however, the increase in tuition and fees has been more dramatic in the law school setting than in most other professional schools. See GOV’T ACCOUNTABILITY OFFICE, *ISSUES RELATED TO LAW SCHOOL COST AND ACCESS* 16 (2009) [hereinafter GAO, *COST AND ACCESS*] (comparing tuition and fees at professional schools for law, dentistry, veterinary and medical). Perhaps the most high-profile chiding came from the “Oracle of Omaha”:

The derivatives genie is now well out of the bottle, and these instruments will almost certainly multiply in variety and number until some event makes their toxicity clear . . . Central banks and governments have so far found no effective way to control, or even monitor, the risks posed by these contracts . . . In our view, however, derivatives are financial weapons of mass destruction, carrying dangers that, while now latent, are potentially lethal.

Warren Buffett, *Letter to Shareholders*, in *BERKSHIRE HATHAWAY INC.* 2002 ANN. REP. 15 (Feb. 21, 2003), available at <http://www.berkshirehathaway.com/2002ar/2002ar.pdf>. Lest anyone think that even Warren Buffett is beyond the hypocrisy that too routinely accompanies the trading of derivatives, see Duff McDonald, *Unwarranted: Does Buffett Deserve His Outside Rep?*, N.Y. MAG., May 31, 2010, available at <http://nymag.com/news/intelligencer/66190/> (examining Buffett’s various dealings, including his reported lobbying to grandfather his own company’s expansive derivatives portfolio from forthcoming financial regulatory reform rules, and noting that “his outside reputation means he often gets a free pass on behavior that others get called out on”).

²⁶ Because of a recent move toward direct federal lending in response to the increased unavailability of credit, the lender may no longer prove a possible repository of this “put risk”—leaving the law school. See discussion *infra* at I.B.4. In addition, keen observers of our nation’s recent financial crisis will recognize the lack of due diligence at a loan’s inception as a contributing factor to the creation of irresponsible loans in the nation’s mortgage market.

In turn, some rationality will be restored to law schools in particular, and the higher education industry in general, which will help to control the runaway costs and distorted structure of the industry.

This Article proceeds in six Parts. Part I examines the skyrocketing cost of legal education and its causes.²⁷ This Part will briefly discuss the curricular and financing trends that have shaped the current law school landscape, and pulls no punches in laying blame. While there is little sense in dwelling on the past,²⁸ a full accounting of each party's role thus far is necessary in order to proceed with eyes wide open. Ultimately, the verdict for those involved in legal education will not concern the existence of a problem, but rather how it was addressed. In Part II, the Article examines the stresses on the revenue side of the equation for a law school graduate. In large measure, today's newly-minted attorney is not likely to realize the pecuniary benefits that he once envisioned.²⁹ Part III briefly explores the informational asymmetries that exist in the standard

Perhaps the most damning statistics on the deterioration of loan diligence are cited in a recent article which notes that “[i]n 1990, one in 200 home-purchase loans (all government insured) had a down payment of less than or equal to 3 percent. By 2003, one in seven home buyers had such a low down payment, and by 2006 about one in three put no money down.” Edward Pinto, *Subprime 2.0 Is Coming Soon to a Suburb Near You*, BLOOMBERG (Sept. 7, 2010, 9:00 PM), <http://www.bloomberg.com/news/2010-09-08/subprime-2-0-is-coming-soon-to-suburb-near-you-commentary-by-edward-pinto.html>. See also *infra* Parts IV. and V. (describing information-forcing devices that will encourage diligence).

²⁷ An appreciation for (i) the history and development of the law school model and the actions and incentives of its various stakeholders and (ii) the history of federal intervention in student loan markets are essential to understanding how the system has driven itself to the edge of such a precipice.

²⁸ This Article contends, as George B. Shepherd and William G. Shepherd did some twelve years ago, that many of the participants in the system of legal education are “public-spirited and selfless.” However, the current system has imposed large harms. Unfortunately, the observations of twelve years ago largely hold true today:

Existing law faculty have gained, on balance, at the expense of their students, of their universities, and of other potential faculty members to whom the system denies teaching jobs. By suppressing potential new schools that would offer cheaper, more-efficient legal education, the system has excluded many from the legal profession, particularly the poor and minorities. It has raised the cost of legal services. And it has, in effect, denied legal services to whole segments of our society.

George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2094 (1998).

²⁹ While much of this shortfall stems from the current economic lassitude and its effects, a systemically encouraged pattern of obfuscation must also bear a large measure of responsibility for the discontent. The adequacy of the information available to prospective law students is in no way commensurate with the magnitude of their investment decision. Nevertheless, there is a high probability that law students will continue to enroll in large numbers and take on increasingly burdensome education debt loads in the process, resulting in growing strains on the nation's economy. See Sloan, *Proceed with Caution*, *supra* note 4 (noting that the “message of caution doesn't appear to have hit home just yet” as “[a]pplications to ABA accredited law schools increased by 5 percent for this year's incoming class and the number taking the Law School Admission Test this October grew by nearly 20 percent”).

law school bargain: between law students on the one hand, and law schools and student loan lenders on the other. Borrowing from enterprise liability theory, this Part lays the theoretical groundwork for a methodology that places at least a part of the risk of unsatisfactory student outcomes where it belongs—on the lenders and the law schools. Part IV introduces and explains the proposed methodology, highlighting its attempt to alleviate the effects of informational asymmetries and indirectly reshape the legal higher education industry to provide superior value propositions to students. Part V anticipates and answers some of the likely criticisms of the solution proposed by this Article. Finally, Part VI offers a brief conclusion.

I. THE RUNAWAY COSTS OF AMERICAN LEGAL EDUCATION

A. *By the Numbers*

To say that the cost of an American law school education has exploded in recent years is an understatement.³⁰ In the two decades ending in 2007, for example, the American Bar Association (ABA) calculates that the average annual cost of attending a private law school (including tuition and fees) has increased almost fourfold, from \$8,911 to \$32,367.³¹ One recent article observes that the full-time tuitions of private law schools in the top 30 of the *U.S. News & World Report* rankings “range from a high of \$46,670 at Cornell University to a low of \$36,297 at Washington & Lee University, with an average of \$41,181.”³² Expenses, book fees and other incidentals also add significantly to the average law school student’s burden, as does the opportunity cost of foregone employment during the three years of law school attendance.³³

³⁰ See, e.g., Crittenden, *supra* note 22, at 39 (observing that “[l]aw school tuition has been on a mad dash upwards for the last [twenty] years, fueling a dangerous rise in student debt”).

³¹ See *Law School Tuition 1985–2008*, AM. BAR ASS’N 3, <http://www.abanet.org/legaled/statistics/stats.html> (follow “Law School Tuition” hyperlink) (last visited Sept. 30, 2010). During that same period, the increase for nonresident students at public law schools was even more dramatic—growing from an average of \$5,616 to \$26,691. See *id.* at 2. With their average tuition increasing more than six-fold from \$2,398 to \$15,455, in-state residents at public law schools fared worst of all during the period. See *id.* at 1. In fact, the average and median tuition and fees has increased every single year (at both public and private law schools) since 1985. See generally *id.*; see also *infra* Appendix Figures 6 and 7 (illustrating the change over time in mean and median law school tuitions, respectively).

³² Schlunk, *supra* note 5, at 5.

³³ For the “Average Living and Book Expenses for Single Students Living on Campus” from 1990 to 2008, see *infra* Appendix Figure 8. It should be noted that ABA Standard 304(f) limits the outside employment of a student taking twelve or more credits to twenty hours per week, compromising the ability of a student to mitigate some of this cost. See AM. BAR ASS’N, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL FOR LAW SCHOOLS 2009–2010 24 (2010), available at <http://www.>

Not surprisingly, the average amount borrowed by law students seeking to fund their law school education has seen an increase no less dramatic.³⁴ In recent years, students of all kinds have been turning to the unregulated private loan market—the riskiest and most expensive form of debt—in greater and greater numbers.³⁵ If these trends continue unabated, “the consequences will be severe.”³⁶ Increasingly burdensome debt loads may lead student borrowers to defer “major life decisions like the purchase of a first home or marriage,”³⁷ which have broader implications for the nation’s economy. As America struggles to emerge from the Great Recession, “[e]ducational debt hobbles the very group of risk takers and innovators that has historically rejuvenated the American economy when . . . it starts to flag.”³⁸ Today’s would-be trailblazers are joining the postgraduate world saddled with “reduced access to higher education, diminished life choices, and increasing rates of catastrophic loan default.”³⁹

While simple inflation has certainly played a role in the growth of higher education costs (in general) and law school costs in particular,⁴⁰

abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf [hereinafter ABA, LAW SCHOOL APPROVAL, CHAPTER THREE].

³⁴ See *Average Amount Borrowed for Law School 2001–2008*, AM. BAR ASS’N, available at <http://www.abanet.org/legaled/statistics/stats.html> (follow “Average Amount Borrowed” hyperlink) (last visited Sept. 30, 2010) [hereinafter ABA, *Average Amount Borrowed*]. The ABA only provides data back to the 2001–2002 academic year. See *id.* The average amount borrowed to fund a public and private law school education has grown from \$46,499 and \$70,147 in that year to \$59,324 and \$91,506 in the 2007–2008 academic year. For a presentation of the data, see *infra* Appendix Figure 5. And, the story might actually be worse than it appears. See, e.g., Andrew Gillen, *The Amazing College Debt Bubble: Teaching One Student Costs Only \$1,456 A Year?*, MINDING THE CAMPUS (Sept. 20, 2010) http://www.mindingthecampus.com/originals/2010/09/the_amazing_college_debt_bubbl.html (commenting that “[l]argely ignored in the discussion, however, is the shadow debt, which consists of unorthodox methods of borrowing for college, including home equity loans and lines of credit, retirement account loans, credit card debt, and run-of-the-mill bank loans”).

³⁵ See Kevin Carey & Erin Dillon, *Drowning in Debt: The Emerging Student Loan Crisis*, EDUC. SECTOR (July 8, 2009), http://www.educationsector.org/analysis/analysis_show.htm?doc_id=964333 (noting that, in this market, students “have the least protection and pay the highest rates”).

³⁶ *Id.*

³⁷ Elana Berkowitz & John Burton, *Burying College Grads in Debt*, ALTERNET (Nov. 28, 2005), <http://www.alternet.org/wiretap/28641/>.

³⁸ *Id.*

³⁹ *Id.* For a recent exposition of the rising default rate among student borrowers, see Tamar Lewin, *Student Loan Default Rate Is Continuing to Increase*, N.Y. TIMES, Sept. 14, 2010, at A15 (“Education Secretary Arne Duncan said Monday that the overall student loan default rate in the 2008 fiscal year, the latest period for which data is available, was 7 percent, up from 6.7 percent the year before and 5.2 percent in the 2006 fiscal year.”).

⁴⁰ In fact, inflation only explains \$7,353 (31.3%) of the two-decade increase in the cost of attending private law school cited by the ABA. Simply applying the Consumer Price Index for the period suggests that \$8,911 in 1987 would have the buying power of \$16,264 in 2007. See *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited July 5, 2010).

several structural factors unique to the law school model explain the bulk of the increased cost.⁴¹ To understand each of the factors and their respective effects in the proper context, the history and development of legal education and its system of financing must be explored. Each of the factors described in this Part has played an important role in churning the rising tide of tuitions.

B. The Causes: A Combustible Mix of Accreditation, Rankings, Peculiar Incentives and Federal Encouragement

This Article is certainly not the first to contend that the emphasis on the current law school model to the virtual exclusion of alternative forms, and the accompanying protection afforded by the ABA accreditation process, has impeded true competition.⁴² As is invariably the case when competition is stifled, the results have been less than optimal for consumers. In effect, those who wish to purchase a legal education are left little choice in terms of the size and shape of their product, with accredited law schools regulated right down to the number of minutes a student spends in the classroom.⁴³ Such uniform requirements leave substantially diminished room for price differentiation, effectively forcing all consumers to purchase the luxury model.⁴⁴ In addition to the barriers created by the accreditation process, a law school's nonprofit form and its governance structure have resulted in faculty capture, allowed schools

⁴¹ Dean Matasar points out that “[f]or years, the law school market has been protected from fears that they are pricing their product out of reach for most students.” Matasar, *Rise and Fall*, *supra* note 17, at 474. He lists several factors supporting his contention. They include the fact that (i) educational costs are highly-leveraged (i.e. supported by borrowing), (ii) lenders have been very willing to lend, (iii) lenders have been encouraged to be risky in lending funds to students because “substantial portions of students’ loans are federally guaranteed,” (iv) lawyer salaries have been able to support debt burdens, and (v) students have avoided failures by relying on family members for financial assistance. See Matasar, *Rise and Fall*, *supra* note 17, at 474–75. It is clear that many of these factors are under significant strain (or no longer available) in today’s environment.

⁴² Economic theory has long taught that the presence of a cartel brings restricted output, raised prices, reduced cost-efficiency, stunted innovation, and overall unfairness. See Shepherd & Shepherd, *supra* note 28, at 2096–97 & n.5 (citing to various economics texts to describe the effect of cartels).

⁴³ Standard 304(b) requires “as a condition for graduation, successful completion of a course of study in residence of not fewer than 58,000 minutes of instruction time, except as otherwise provided. At least 45,000 of these minutes shall be by attendance in regularly scheduled class sessions at the law school.” See ABA, LAW SCHOOL APPROVAL, CHAPTER THREE, *supra* note 33, at 24.

⁴⁴ As one former law school dean quipped to the Authors, “[W]hy do we insist that all law students buy gold-plated Cadillacs?” For further exploration of this sentiment, see Frank J. Macchiarola & Michael C. Macchiarola, *Does U.S. News Make Law Schools More Expensive?*, MINDING THE CAMPUS (Jan. 11, 2010), http://www.mindingthecampus.com/originals/2010/01/does_us_news_make_law_schools.html (noting that “the virtual monopoly on bar admission accorded to the 200 ABA-approved law schools excludes prospective attorneys who cannot afford the cost of a legal education in the way in which it is currently delivered”).

to make noneconomic decisions, and discouraged behavior responsive to the needs of the law student as consumer. In recent years, the proliferation of law school rankings has only added to this combustible mix by encouraging additional noneconomic behavior at the individual law school level.

Unfortunately, the efforts of the federal government to artificially bolster the student loan market—efforts aimed at access and choice—have facilitated noneconomic behaviors and allowed the costs of ABA requirements, faculty capture, and the rankings tournament to persist. Without the various federal subsidies that foster easy access to financing, market forces would have confronted noneconomic behaviors long ago. Consequently, the bulk of law school applicants (and, as a result, law schools) would have faced difficult value-based decisions regarding their educations. Instead, federal policies have allowed a generation of students to sidestep such choices, in favor of leaving them saddled with what one commentator called “indenture-like loans.”⁴⁵ If the prospective law student ever becomes better informed, his continued acceptance of and acquiescence to the existing model might be in jeopardy.⁴⁶

1. A Brief History of the Law School and Its Accreditation

Law school matriculation has not always been the predominant path to a career as a practicing lawyer in the United States.⁴⁷ In fact, in the early days of our nation, the most common method of preparation for a legal career was through apprenticeships in the offices of members of the

⁴⁵ Jessica Calefati, *Failure Insurance for College Drop-Outs?*, MOTHER JONES MOJO BLOG (Jan. 12, 2010, 1:45 PM), <http://motherjones.com/mojo/2010/01/failure-insurance-would-be-college-drop-outs>.

⁴⁶ Cf. Rebecca R. Ruiz, *Recession Spurs Interest in Graduate, Law Schools*, N.Y. TIMES, Jan. 9, 2010, at A18 (observing a jump in applications to law schools in the face of “the recession and the resulting shortage of good jobs”). For a discussion of how informational deficiencies impair the ability of potential law students to make fully informed decisions about the loan burdens arising in connection with law school matriculation, see *infra* Part III.A.

⁴⁷ See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 2 (“[T]he notion of a ‘law school’ education in the United States is only a few hundred years old, and the requirement that lawyers in this country actually receive a law school education rather than entering the bar after reading law or some form of apprenticeship is not even 100 years old.”).

bar.⁴⁸ The quality of these apprenticeships varied greatly.⁴⁹ Over time, however, “the place of lawyers generally in American society . . . greatly diminished from that which the relatively small number of lawyers had occupied in the early days of the Republic.”⁵⁰ In the period leading up to the Civil War, there was little consensus as to what a lawyer’s education and training should be, how one should go about becoming a lawyer, the scope of a lawyer’s service, and what regulations should apply to lawyers engaged in their profession.⁵¹ Largely in response to this uncertainty, and in an attempt to address the disdain for lawyers that had flourished during the populist era of Andrew Jackson, “groups of lawyers—many of whom had elite practices serving the new economic interests . . . launched a movement to raise standards and to promote a sense of profession.”⁵² Bar associations sprung up at the state and local levels, culminating with the creation of the American Bar Association in 1878.⁵³ The ABA wasted little time in establishing a Standing Committee on Legal Education and charging it with “developing a program which visualized a unitary legal profession with common admissions and educational requirements for the entire country.”⁵⁴

At the same time that the bar association movement was gaining momentum, Christopher Columbus Langdell left the practice of law in New York City to become the Dean of Harvard Law School.⁵⁵ Langdell

⁴⁸ LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 103 (Robert MacCrate ed., 1992) (footnote omitted) [hereinafter MACCRATE REPORT] (describing the beginnings of the United States’ legal tradition, and commenting that celebrated attorneys such as Thomas Jefferson, Daniel Webster, John Adams, John Quincy Adams, and John Marshall all served as apprentices). See also Paul D. Carrington, *Legal Education for the People: Populism and the Civic Virtue*, 43 KAN. L. REV. 1, 7 (1994) (“Some of those who became certified without training taught themselves enough law to become competent and some—Abraham Lincoln being the paradigm became very competent indeed.”); Shepherd & Shepherd, *supra* note 28, at 2120–22 (noting that through the nineteenth century and well into the twentieth century, many fine attorneys entered the field without following the current model of three years of post-undergraduate academic study). Cf. Schwarzschild, *supra* note 11, at 3 (observing that “[a]lmost everywhere else in the world, law is an undergraduate subject, followed by a bar exam and usually some kind of apprenticeship”).

⁴⁹ See Carrington, *supra* note 48, at 7 (“[T]here were surely some citizens who were victimized by the incompetence or venality of counsel who would not have been permitted to practice in a more controlled environment.”).

⁵⁰ MACCRATE REPORT, *supra* note 48, at 104 (quoting L.M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 652 (2d ed. 1985)) (noting that, in the period leading up to the Civil War, the “country was flooded with lawyers who were mediocre or worse”). Cf. DE TOCQUEVILLE, *supra* note 24, at 355 (describing the appropriate social status of lawyers).

⁵¹ See MACCRATE REPORT, *supra* note 48, at 105.

⁵² *Id.* at 105.

⁵³ For a brief history of the ABA, see *History of the American Bar Association*, AM. BAR ASS’N, <http://www.abanet.org/about/history.html> (last visited Dec. 31, 2009).

⁵⁴ See MACCRATE REPORT, *supra* note 48, at 106.

⁵⁵ For a fine account of Langdell’s view of the law, see generally Dennis Patterson, *Langdell’s Legacy*, 90 Nw. U. L. REV. 196 (1995) (arguing that Langdell’s scientific approach to law school study explains the current pedagogical interest in interdisciplinary legal studies).

“believed that law should be studied within the four walls of the university, away from its practice, in much the way that a scientist discovers scientific principles within the sterile confines of the laboratory.”⁵⁶ His achievement was nothing less than the modern law school, in which would-be legal scientists dissected appellate court opinions in order to explore legal doctrines and principles.⁵⁷ In essence, Langdell elevated legal education from a trade to a profession, treating the law as a science to be studied as objective theory.⁵⁸ For a growing bar association movement eager to standardize and legitimize the legal profession, Langdell’s innovation could not have come at a better time. And so, with interests aligned, the strong alliance between the ABA and the modern law school was born:

In 1881 the ABA initiated what became a century-long campaign, passing a resolution recommending attendance at law school for three years and that all states give credit toward required apprenticeship, for time spent in law school. With bar leaders advocating the notion that a uniform type of academic law school was needed to control entry into the bar, a national alliance developed between the newly organized bar and the burgeoning law schools.⁵⁹

The effects of this alliance quickly became apparent. Soon after the establishment of the ABA, the number of law schools and law students began to explode, and the ABA sought to curb the number of attorneys that were flooding the profession by raising the barriers to entry.⁶⁰ In 1920, the ABA established a special committee on legal education, chaired by Elihu Root, to strengthen the alliance between the ABA and law schools.⁶¹ The Root Committee delivered its report in 1921 in which it concluded that “only in law school could an adequate legal education be obtained.”⁶² The Committee suggested two years of college as a pre-

⁵⁶ W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 2 (1997) (footnote omitted).

⁵⁷ See MACCRATE REPORT, *supra* note 48, at 106.

⁵⁸ See Carter, *supra* note 56, at 2 (describing Langdell as “a man who purported to teach law, but despised the practice of it”).

⁵⁹ MACCRATE REPORT, *supra* note 48, at 106.

⁶⁰ Shepherd & Shepherd, *supra* note 28, at 2115 (“From 1890 to 1930, the number of law schools tripled, and the number of law students increased more than eight[-]fold. . . . The new law schools, which were extremely profitable, produced waves of new lawyers who competed with established lawyers.” (footnote omitted)).

⁶¹ For a comprehensive account of the career of Elihu Root, see WARREN ZIMMERMAN, *FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER* 123–48 (2002).

⁶² ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 115 (1983) (quoting Elihu Root, *Report of the Special Committee to the Section*

requisite for law school admission, and that the ABA create a council on legal education charged with the power to accredit law schools.⁶³

The rise of the law school accreditation process hit full stride following the Root Committee's efforts; since then, in aspiring to advance the lawyer's professional stature, the accreditation process has regulated legal training with the dual intentions of ensuring that students receive a quality education and that competent lawyers are available to represent clients.⁶⁴ Perhaps the most effective step to limit entry into the profession was the ABA's lobbying of "state legislatures and supreme courts to require bar applicants to be graduates of accredited law schools."⁶⁵ In effect, the success of this effort "ensured that anyone who apprenticed in a law office or graduated from a proprietary school could not obtain a license to practice law."⁶⁶ Consequently, the ABA's ability to define the baseline for the acceptable level of preparation required for a legal career⁶⁷ had the effect of "wrest[ing] legal education from the control of the practicing profession . . . [and] plac[ing] it increasingly in the law schools."⁶⁸ Today, as a result of these efforts, the educational journey for virtually all lawyers begins at the front steps of an accredited law school.⁶⁹ Nevertheless, it should be noted that the law school accreditation process is a relatively recent, and politically driven, development.⁷⁰

of Legal Educators and Admissions to the Bar of the American Bar Association, 1921 ABA SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR). See also Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 87–90 (1997) (summarizing some of the arguments offered in support of the Root Committee's findings). See generally Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 758–59 (2000) (noting that in the 1920s, elite law schools began to require that applicants have some college education and also experimented with aptitude testing).

⁶³ See James P. White, *The American Bar Association Law School Approval Process: A Century Plus of Public Service*, 30 WAKE FOREST L. REV. 283, 286–88 (1995). See also Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 392 (2006) (citing RICHARD L. ABEL, *AMERICAN LAWYERS* 48–68 (1989)) (noting that the new standards were an attempt to "assuage anxieties about unrestricted access to the profession").

⁶⁴ Moran, *supra* note 63, at 383.

⁶⁵ *Id.* at 392.

⁶⁶ *Id.* (noting that the campaign was so successful that the number of states requiring a degree from an accredited law school as a condition to sitting for the bar exam went from nine in 1935 to forty-one in 1941).

⁶⁷ See Mark Greenbaum, *No More Room at the Bench*, L.A. TIMES (Jan. 10, 2010), <http://articles.latimes.com/2010/jan/08/opinion/la-oe-greenbaum8-2010jan08> ("Unlike other professional fields such as medicine and public health, whose preeminent professional organizations do not have control over the accreditation of schools and programs, the ABA exercises unfettered power over the accreditation of law schools.").

⁶⁸ Moran, *supra* note 63, at 392.

⁶⁹ MACCRATE REPORT, *supra* note 48, at 113. See Denise Rothbardt, *ABA Accreditation: Educational Standards and Its Focus on Output Requirements*, 2 J. GENDER RACE & JUST. 461, 462 (1999) (commenting that "obtaining a J.D. from an ABA-accredited law school is a virtual necessity to practice law").

⁷⁰ Moran, *supra* note 63, at 391.

Advances in legal education itself were slow in coming through the first three-quarters of the twentieth century, and despite a cacophony of criticism,⁷¹ law schools perpetuated Langdell's dual emphases on broad legal doctrine and analysis with near uniformity.⁷² As a result, little time or attention was devoted to specialties or practical expertise; the underlying assumption was that law graduates would learn these skills in "actual practice settings" upon graduation.⁷³ Over time, critiques grew in volume, primarily complaining that the intellectual chasm between the academy and the practice of law actually reduced the academy's influence. District of Columbia Circuit Judge Harry T. Edwards sounded this view rather persuasively in 1992:

Because too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers. The problem is not simply the number of "practical" scholars, but their waning *prestige* within the academy.⁷⁴

For Edwards, Langdell's model had found its limits when the majority of law professors "considered themselves academics first and lawyers only by the sheerest of happenstance."⁷⁵ In such a system, it was unsurprising that law students could "understand and apply a theoretical framework and therefore think beyond the mundane in assessing the work of the legal profession," but consistently underperform when con-

⁷¹ For the best summary of the various criticisms of the casebook method during this period, see Barry et al., *supra* note 47, at 5–9.

⁷² George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 164–65 (1974). For a good summary of the attacks on Langdell and his methods, throughout the better part of the century, see Ronald H. Silverman, *Weak Law Teaching: Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL'Y 267, 272–78 (2000).

⁷³ John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendations for Curricular Reform*, 1 CLINICAL L. REV. 363, 369–70 (1994).

⁷⁴ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (accusing many law schools of "abandon[ing] their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy"). Judge Edwards was not much more forgiving of the behavior of law firms, holding the firms and the schools responsible for causing real damage to the profession:

Many law firms have also abandoned *their* place, by pursuing profit above all else. While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both. This disjunction calls into question our status as an honorable profession.

Id. at 34 (footnote omitted).

⁷⁵ Edwards, *supra* note 74, at 35.

fronted with the realities of legal practice, where theory was of little use.⁷⁶

Over the second half of the twentieth century, and largely in response to criticisms like this one,⁷⁷ the law school curriculum grew by leaps and bounds, with pedagogical change translating into costs both in terms of *what* law schools taught and *how* they taught it. Dean Garvey of Boston College explains the “what” by distinguishing law school from America’s favorite burger joint:

McDonald’s hires more employees as its customer base expands; it builds more and bigger stores as the demand for its hamburgers increases. Law schools grow at a much faster rate than their customer base. To put it in the terms we usually employ, the student/faculty ratio is constantly decreasing.⁷⁸

The ballooning faculty size is dictated by the need to teach a constantly expanding curriculum, and to respond to a widening number of legal specialties. Simply put, “There is much more law today than there was 20, 40, and 60 years ago.”⁷⁹

The “how” of legal education began to come into additional focus in 1987, when the ABA Section of Legal Education and Admissions to the Bar examined the gulf between the academy and the practicing bar. The Section ultimately published its findings as the MacCrate Report.⁸⁰ While the authors of the Report yearned for fundamental practical skills to be taught in every law school,⁸¹ they were cognizant of the costs that this goal entailed.⁸² In reality, few schools can afford to turn a blind eye

⁷⁶ *Id.* at 39.

⁷⁷ See, e.g., Silverman, *supra* note 72, at 274–78 (summarizing the various criticisms of legal education). See also Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. (forthcoming Nov. 2010) (stating that contemporary scholarship has “lost its practical moorings”).

⁷⁸ John H. Garvey, *The Business of Running a Law School*, 33 U. TOL. L. REV. 37, 37–38 (2001) (“One reason for this is scientific progress.”).

⁷⁹ *Id.* at 38.

⁸⁰ The resulting MacCrate Report, published in 1992, defined ten “Fundamental Lawyering Skills” essential for every attorney: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute resolution procedure, (9) organization and management of legal work, and (10) recognizing and resolving ethical dilemmas. See MACCRATE REPORT, *supra* note 48, at 138–40.

⁸¹ *Id.* at 128–29.

⁸² See *id.* at 250–51; Memorandum 93-32 from Carl C. Monk, Exec. Director, Am. Assoc. of Law Schools, AALS Response to the Report of the ABA Task Force on Law School and the Profession: Narrowing the Gap (MacCrate Report) 3 (May 18, 1993).

to the costs attendant to an emphasis on the clinical curriculum.⁸³ The Report, therefore, expressed concern that its Statement of Skills and Values not be narrowly construed as the criterion for a standardized curriculum or the measure of law school accreditation, and that all curricular planning should take place within the context of a particular school's resources.⁸⁴ The ABA has shown less restraint, amending its Standards for Approval of Law Schools in 1996 to require "at least one rigorous writing experience," "adequate opportunities for instruction in professional skills," and "live-client or other real-life practice experiences."⁸⁵ Today, "clinical programs ha[ve] become a part of the curriculum at virtually every law school in the United States."⁸⁶

The increased emphasis on practical learning, advanced by the findings of the MacCrate Report, has been a main culprit in the rise in the cost of legal education.⁸⁷ While undoubtedly improving the overall experience for students and addressing much of the practical learning deficiency that has existed for decades, the clinical education programs that have continued to attach to the law school curricula, both pre- and post-MacCrate, simply cost a great deal more per student hour of contact than the large Langdellian lecture courses. In turn, schools have struggled to address the economics of the corresponding increase in faculty size.⁸⁸

⁸³ See Barry et al., *supra* note 47, at 18 ("[I]t is impossible to imagine the future of clinical legal education without discussing the financial costs.").

⁸⁴ See MACCRATE REPORT, *supra* note 48, at 128.

⁸⁵ See Garvey, *supra* note 78, at 39 & n.4 (citing AM. BAR ASS'N, STANDARD OF APPROVAL FOR LAW SCHOOLS § 302(a)(2)–(3), (d)).

⁸⁶ Barry et al., *supra* note 47, at 21.

⁸⁷ See generally William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 240 (1996) (observing that "[e]ffective skills training tends to be more expensive than other aspects of legal education because of the lower faculty-student ratios generally required to provide necessary supervision and feedback"). However, in the period immediately preceding publication of the MacCrate Report, overall law school expenditures rose 173.9%, whereas expenditures for clinical education programs rose only 92.5%. See MACCRATE REPORT, *supra* note 48, at 249–50.

⁸⁸ One of the more interesting recent examples is the "transactional lab" approach to teaching transactional lawyering skills—an approach that has overcome some of the budgetary pressures with an increased reliance on the generosity of practicing lawyers. See Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221, 222–23 (2009). Most recently, the public law schools have suffered an additional shock in the form of reduced state funding for their programs. As a result, the tuition at some public schools has approached those of some of their private competitors. See ABA REPAYMENT REPORT, *supra* note 11, at 16 (observing that the funding from state legislatures as a percentage of costs has continued to decline at public law schools for some time). See also GAO, COST AND ACCESS, *supra* note 25, at 29 (noting that, in 2008, six public law schools had resident tuition and fees greater than \$30,000); Karen Sloan, *At Public Law Schools, Tuition Jumps Sharply*, LAW.COM (Aug. 3, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432727154&slreturn=1&hblogin=1> [hereinafter Sloan, *Tuition Jumps Sharply*] ("School administrators say that the unusually large tuition hikes for the coming academic year are spurred, for the most part, by cuts in public funding—with endowment losses, initiatives to

Increasingly, the cost-effective law school experience is becoming a thing of the past.

2. The Rankings Game

Cost-effective legal education suffered another setback with the introduction and subsequent proliferation of law school rankings. Perhaps more than any other single factor, the debut of competitive law school rankings by *U.S. News & World Report* in the late 1980s⁸⁹ “set off a frenzied rivalry among law schools.”⁹⁰ Today, law students, prospective law students, deans, professors, and alumni anxiously await delivery of the annual publication of the magazine’s list.⁹¹ Nevertheless, many critiques (and fewer defenses) of the *U.S. News* rankings have come fast and furious in recent years.⁹² Several appraisals resemble those articulated by Dean Cass of Boston University:

The *U.S. News* rankings look at criteria that cannot possibly capture critical aspects of legal education. They do

improve their schools and pressure to keep up with competing institutions also playing a part.”).

⁸⁹ See J. Paul Lomio & Erika V. Wayne, Ranking of Top Law Schools, 1987–2006 8 (March 2005) (unpublished manuscript), available at http://www.law.stanford.edu/publications/projects/lrps/pdf/lomiowayne_rp4.pdf.

⁹⁰ Morrissey, *supra* note 7, at 261. See Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 83 (2008) [hereinafter Matasar, *Academic Fiduciary*] (“Every law school, student, faculty member, or graduate would prefer to have his or her school ‘ranked’ higher.”); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and a Suggestion for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419, 419–20 (2003) (“Nothing has had a more profound impact on legal education in the past generation than the phenomenal prominence of law school rankings, especially the rankings published by [the] *U.S. News & World Report*.”); see also Brian Leiter, *The Most Important Developments (for Good or Ill) in the Legal Academy Since 2000*, BRIAN LEITER’S L. SCH. REP.’S BLOG (Dec. 18, 2009, 4:29 AM), <http://leiterlawschool.typepad.com/leiter/2009/12/the-most-important-developments-for-good-or-ill-in-the-legal-academy-since-2000.html> (declaring *U.S. News*’ law school rankings as the “Condorcet” winner).

⁹¹ See, e.g., Scott Baker, Stephen J. Choi & Mitu Gulati, *The Rat-Race as an Information-Forcing Device*, 81 IND. L.J. 53, 77 (2006) (noting that “[e]ven at top schools, students convene town hall meetings and write op-ed pieces in the student newspapers when the school’s ranking slips,” and that “[m]any law professors look to *U.S. News* when deciding which student journal—from among the hundreds of such journals—to submit [their articles]”).

⁹² For a rather exhaustive list of the scholarship concerning the rankings and their effects on legal education, see Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 493 n.1 (2007). In a recent rebuke of the *U.S. News* rankings, Federal District Court Judge Louis Pollak answered his own question of whether the rankings are a “useful endeavor or a counter-productive one” by declaring them to be “an incubus, bad for the health of legal education.” Louis H. Pollak, *Why Trying to Rank Law Schools Numerically Is a Non-productive Undertaking: An Article on the U.S. News & World Report 2009 List of “The Top 100 Schools,”* 1 DREXEL L. REV. 52, 52–53 (2009) (challenging the *U.S. News* rankings as a non-productive endeavor, yet curiously offering an alternative methodology whereby law school deans and professors assess the relative quality of law schools).

not measure, or even encompass a good proxy for, among other things, the quality of teaching, the scholarly product of a faculty, the mode of instruction, [or] the nature, scope, and organization of the curriculum.⁹³

Apart from any single critique of the *U.S. News*' rankings, the methodology must be understood, first and foremost, as the creation of a profit-making enterprise.⁹⁴ While the ABA's processes are born of a desire for standards and values to protect the consumers of legal education and the public, and are the handiwork of dedicated professionals, the *U.S. News* editors are bound by no such restraint.⁹⁵ To view the two then as moral equivalents would be incorrect.

Aside from objections to the particular ranking variables and their attendant weightings, few can dispute that the various systems offered thus far tend to measure a school's worth based on "input" criteria.⁹⁶ Not surprisingly, LSAT scores and grade point averages of incoming students have come to rule the day in most of these methodologies, with one study suggesting that, for some schools, roughly ninety percent of the difference in *U.S. News*' pecking order is attributable to the median LSAT score of an incoming class.⁹⁷ Of course, the "primary alternative

⁹³ Ronald A. Cass, *So, Why Do You Want To Be a Lawyer? What the ABA, the AALS, and U.S. News Don't Know that We Do*, 31 U. TOL. L. REV. 573, 574 (2000).

⁹⁴ See Scott Jaschik, *Would U.S. News Make Up Fake Data?*, INSIDE HIGHER ED (Mar. 12, 2007), <http://www.insidehighered.com/news/2007/03/12/usnews>.

⁹⁵ The ABA itself has recently taken aim at the *U.S. News* rankings claiming, among other things, that the rankings tend to increase the cost of legal education. See MARTHA DAUGHTREY ET AL., AM. BAR ASS'N, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON THE *U.S. News and World Report* Rankings 3 (2010), available at <http://www.abanet.org/legaled/nosearch/Council2010/OpenSession2010/F.USNewsFinal%20Report.pdf>; Macchiarola & Macchiarola, *supra* note 44.

⁹⁶ See generally THOMAS E. BRENNAN & DON LEDUC, JUDGING THE LAW SCHOOLS (10th ed. 2008) (using criteria such as size of student body, faculty size, and total law school square footage to rank law schools). Rankings that incorporate both "input" and "output" criteria do not typically confine such criteria into a single ranking rubric. See, e.g., *Brian Leiter's Newest Rankings*, BRIAN LEITER'S L. SCH. RANKINGS, <http://www.leiterrankings.com/new/index.shtml> (last visited Sept. 7, 2010) (devising separate rankings for schools based on scholarly impact, student LSAT score, and Supreme Court clerkship placement, among other factors). Rankings based entirely on "output" criteria have ranged from practical to absurd. See, e.g., Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 JURIMETRICS J. 413 (2005) (using placement of law school graduates in elite firms as a means of ranking law schools); Elie Mystal, *Cornell Law Ranked #4 by Cornell Student Who Reads Above the Law*, ABOVE L. (May 24, 2010, 10:50 AM), <http://abovethe-law.com/2010/05/cornell-law-ranked-4-by-cornell-student-who-reads-above-the-law/> (reporting on a "reputational ranking" of certain law schools based on online legal tabloid stories).

⁹⁷ See Marjorie M. Schultz & Sheldon Zedeck, Identification, Development, and Validation of Predictors for Successful Lawyering 86 n.11 (Sept. 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1353554>; see also Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN'S L. REV. 153, 156-57 (2006) (analyzing the LSAT's effect on law school rankings).

to reputational and input criteria is data about outcomes.”⁹⁸ Thus far, however, a reliable outcomes-based system of measurement has failed to win general acceptance,⁹⁹ and, value-added measures comparing outcomes to inputs have also proven elusive.¹⁰⁰

In addition to issues surrounding the *U.S. News* methodology, the very presence of the rankings has launched an expensive tournament among law schools to climb the ladder.¹⁰¹ The rankings have encouraged a “teaching to the test” type of environment, in which schools attend to the qualities that the magazine values in its scheme.¹⁰² This fidelity to the *U.S. News*-prescribed version of quality has shunned a more nuanced, client-centered definition of value.¹⁰³ While difficult to prove, there is anecdotal evidence that the “positional arms race”¹⁰⁴ between the law schools, fueled by the *U.S. News*’ unitary ranking methodology, has driven lower and mid-tier law schools to imitate their top-tier contemporaries.¹⁰⁵ As one law school dean described the rankings’ effect:

We compete on *U.S. News & World Report*’s terms—
offering more high-end and fewer need-based scholar-

⁹⁸ LUKE MYERS & JONATHAN ROBE, CTR. FOR COLL. AFFORDABILITY AND PRODUCTIVITY, *COLLEGE RANKINGS: HISTORY, CRITICISM AND REFORM* 27 (2009) (“Few, if any, other goods are judged by the strengths of the inputs used in their creation rather than the strength of the final output.”).

⁹⁹ *See id.* (offering the subjective nature of such measurements and the “time-lag” problem as two possible explanations). If recent efforts toward a more transparent reporting of student outcomes offer any indication, law schools do not seem entirely interested in a search for objective truth. *See* Elie Mystal, *Most Schools Would Like Law School Transparency to Just Go Away*, *Above L.* (Sept. 14, 2010, 2:16 P.M.), <http://abovethelaw.com/2010/09/most-schools-would-like-law-school-transparency-to-just-go-away/>.

¹⁰⁰ *See* MYERS & ROBE, *supra* note 98, at 27.

¹⁰¹ Another important critique, beyond the scope of this Article, concerns the role of the rankings in encouraging schools to rely too heavily on the LSAT in the admissions process, to the disadvantage of minority applicants. For an outstanding article addressing the lack of diversity in the legal profession generally, see Michelle J. Anderson, *Legal Education Reform, Diversity and Access to Justice*, 61 *RUTG. L. REV.* 1011 (2009).

¹⁰² Cass, *supra* note 93, at 575 (noting that the rankings encourage “all schools to compete along the same lines, to stress the same qualities”); *see also* GAO, *COST AND ACCESS*, *supra* note 25, at 7 (suggesting that “competition among schools for higher rankings” is among the main culprits driving law school costs).

¹⁰³ *See* Matasar, *Academic Fiduciary*, *supra* note 90, at 87 (suggesting the need for “disaggregating our measures of schools of high prestige with high inputs from those who take students more at risk”).

¹⁰⁴ Gene Nichol, *Educating for Privilege*, *NATION*, Oct. 13, 2003, at 22, *available at* <http://www.thenation.com/doc/20031013/nichol>.

¹⁰⁵ *Cf.* William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 *IND. L.J.* 163, 168 (2006) [hereinafter Henderson, *Migration Patterns*] (describing *U.S. News*’ unitary ranking as the “800-pound gorilla of legal education”). Although the Authors are still gathering the data, they are eager to uncover whether tuitions at lower-tier schools have, in fact, increased at a faster rate than at their more highly ranked counterparts.

ships; paying extraordinary salaries to star faculty and deans; spending huge sums on facilities, technology and brochures bragging about our accomplishments—raising the price of education for everyone.¹⁰⁶

The *U.S. News* rankings are not without their benefits, however. While few can argue credibly that the magazine accurately measures what law students and employers seek—the quality of a legal education—“the fact that the ranking is imperfect, imprecise, or just plain bad is not enough to jettison its use.”¹⁰⁷ As Professors Baker, Choi, and Gulati have observed:

If the ranking forces revelation of otherwise hard-to-obtain information about law schools, the objective ranking has value. In other words, the question is not whether the *U.S. News* rankings measure the quality of a legal education, but whether *U.S. News*' ranking process has important information-forcing attributes.¹⁰⁸

Another defense of the magazine's approach has been advanced by Professor Korobkin:

“High Quality” students . . . need a way to signal their quality to employers that cannot be imitated by “lower quality” students. They do this by responding to the rankings. By choosing a school with a high ranking, the student sends an important signal to future employers: he is brainy or clever enough to be accepted by a more selective school.¹⁰⁹

Faced with the classic prisoner's dilemma, few schools have done much productive to escape the rankings' consequence. Instead, the *U.S. News* rankings and the ABA accreditation process have become close

¹⁰⁶ Nichol, *supra* note 104, at 22.

¹⁰⁷ Baker et al., *supra* note 91, at 78 (footnote omitted).

¹⁰⁸ *Id.* (noting that, prior to the *U.S. News* rankings, schools did not share information “about faculty scholarship and hiring, the bar-passage rate and employment status of recent graduates, the number of books in their libraries, or student-faculty ratios”); *see also* MYERS & ROBE, *supra* note 98, at 22 (asserting that the rankings might result, in large part, from the unwillingness of higher education “to put forward its own system of evaluating quality that was relevant or intelligible to consumers”); *cf.* Carey, *supra* note 5 (decrying the lack of “objective, publicly available information about how well colleges teach and how much college students learn”).

¹⁰⁹ Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 409 (1998). Professor Korobkin admits that critics of the rankings are “no doubt correct” when they argue that the rankings fail “to represent fairly the quality of education provided by the ranked institutions,” though this criticism is irrelevant in his view because the purpose of the rankings is not to measure academic quality, but instead to coordinate law student job placement. *See id.* at 404.

cousins. While each has marginally improved the information sharing in the law school market, any benefit has come at great cost. Their effects on the campus cannot be decoupled; each has been instrumental in encouraging schools to undertake costs aimed at satisfying a false idol. Law schools responding to the tastes of the ABA accreditation process or the *U.S. News* rankings have their eye on the wrong ball; they expend their energy promoting a homogeneous law school experience, while casting innovation and customer service aside. In the end,

[N]orms of uniformity and standardization have dominated the world of legal education, substantially limiting law schools' ability to compete against one another Given this framework of comprehensive rules and regulations, no law school has been able to pursue radical innovations without jeopardizing its accreditation, its reputation, and its future. In a world of highly constrained competition, schools have few ways to improve their standing through strategies that upset the prevailing wisdom about how best to deliver legal education. As a result, law school rankings largely remain stable over time, and different methods of ranking overall quality yield similar results. With full-bodied competition curbed by the accreditation process, schools rely on gaming to influence the *U.S. News* rankings rather than strike out in novel directions to gain prominence.¹¹⁰

3. The Peculiar Incentives of the Law School Faculty

While the myriad factors described above have encouraged the runaway costs at America's law schools, the fact that the schools themselves have had little incentive to tap on the brakes is too often ignored. As former Harvard President Derek Bok wrote, "Universities share one characteristic with compulsive gamblers and exiled royalty: there is never enough money to satisfy their desires."¹¹¹ The law school resembles its university parent with a "variety of peculiar and unappreciated financial and political incentives."¹¹² Building on the earlier efforts of

¹¹⁰ Moran, *supra* note 63, at 383 (emphasis added). See also Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is so Difficult in Law Schools*, 81 IND. L.J. 359, 366 (2006) ("Part of the reason law schools don't try to stand out from the pack is that they can't. The tight regulation that comes from the ABA Standards and university accreditation standards sets outside limits on experimentation.")

¹¹¹ DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 9 (2003).

¹¹² Cohen, *supra* note 1, at 29.

Professors George Shepherd and William Shepherd,¹¹³ Professor Cohen's appropriately titled *Comments on the Legal Education Cartel* examines the incentive structure that underpins the decision making in the world of legal education. His article highlights the complicity of law school faculties in encouraging the runaway costs that threaten to swallow a generation of those they have chosen to educate. After establishing that law schools are (i) generally nonprofits, (ii) in effect owned "by a faculty whose claim lasts only as long as their employment and [cannot] be alienated,"¹¹⁴ and (iii) "governed as large equalitarian partnerships of the tenured and tenure track professors,"¹¹⁵ Professor Cohen compares their structure to that of the worker-owned firms in the former Yugoslavia:

Because the workers (faculty) can not take their share of the capital value of the firm with them when they leave, and their retirement wealth is usually held by third parties such as TIAA-CREF, they have little or no interest in constraining costs and accumulating a surplus. The greater their mobility, and the nearer they are to retirement, the less their concern. Their interest is—subject to not killing the golden goose—to take out as much of the capital as possible for themselves over the course of their career. As far as the faculty is concerned the two most important attributes of senior administration is their ability to raise money, euphemistically referred to as 'development'—and their willingness to dole it out to them.¹¹⁶

The peculiar structure of the law school faculty and its governance ensure that the law schools have ample incentive to limit the services provided to law students "thereby allowing more of the revenues to be extracted as rents instead of dissipated as costs."¹¹⁷ Several tangible manifestations of this notion exist on the nation's law school campuses. First, senior faculty salaries have risen far faster than the rate of inflation

¹¹³ Shepherd & Shepherd, *supra* note 28, at 2095 (concluding that the ABA "has exerted monopoly power not only over the market for legal training, but also over three related markets: the market for the hiring of law faculty, the market for legal services, and each university's internal market for funding").

¹¹⁴ Cohen, *supra* note 1, at 29.

¹¹⁵ *Id.*

¹¹⁶ Cohen, *supra* note 1, at 33; *see also* Shepherd & Shepherd, *supra* note 28, at 2096 (observing that "faculty control the law schools, and, consciously or not, they operate them to maximize benefits for faculty").

¹¹⁷ Cohen, *supra* note 1, at 28.

over the past three decades.¹¹⁸ Second, aside from earning more money, teaching loads for law professors have continued to decline.¹¹⁹ Thirty years ago law professors commonly taught six or more courses per year; today, they are more likely to teach two courses in one semester and one course in the other.¹²⁰ More troubling is the evidence that “courses are tilted to what faculty members want to teach, not to what students need.”¹²¹ Finally, in recent years, many law schools have also added to their comforts by increasing the numbers and salaries of administrators and spending lavishly on technology and physical facilities.¹²²

While the benefits to the student body of a new building or improved clinical programs can often be touted by the schools and their faculties, the costs are often far better disguised: washed through a complicated system of financing and subsidies¹²³ that, too often, leaves the students holding the bag with increasing levels of debt that they have not yet fully appreciated. Underpinning this entire edifice, it is the government (i.e. the taxpayer) that bears the risk of student default.¹²⁴ If we hope to preserve accessible legal education, a better response to faculty

¹¹⁸ Schwarzschild, *supra* note 11, at 6 (noting that law professors now earn approximately double that of the average college and university professor generally).

¹¹⁹ A particularly grotesque perversion takes place in the dispensing of teaching loads (under the guise of “productivity” no less). Professor Cohen describes it as follows:

Then there is the question of “productivity.” In the normal profit maximizing firm there is a reasonably clear understanding of the meaning of the term. The value of the marginal product of an input is the marginal product of the input times the price at which the output is sold: number of additional widgets times price per widget. But in the academic world in general, though the word productivity is much used, its referent is something else entirely. It certainly does not mean number of students taught or quality of teaching. Indeed, in the corrupt language of law school it is those faculty members who are deemed least “productive” who are condemned to do the most teaching.

Cohen, *supra* note 1, at 40.

¹²⁰ Schwarzschild, *supra* note 11, at 6.

¹²¹ Matasar, *Academic Fiduciary*, *supra* note 90, at 71; see also Clayton P. Gillette, *Law School Faculty as Free Agents*, 17 J. CONTEMP. LEGAL ISSUES 213, 230 (2008) (“[T]hose [faculty members] who wish to exploit free agency will invest more time in visible scholarship that is highly valued by the hiring school, and less time in improving low visibility institutional service or teaching that is undervalued by the hiring faculty.”); Newton, *supra* note 77 (noting that law schools tend to hire and promote “tenure-track faculty members whose primary mission is to produce theoretical, increasingly interdisciplinary scholarship for law reviews rather than prepare students to practice law”).

¹²² Schwarzschild, *supra* note 11, at 6; see also Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money and Professional Integrity*, 30 HOFSTRA L. REV. 879, 886 (2002) (observing that many law schools have moved from “relatively modest buildings to elegant, spacious, expensive, well-designed structures”); Barone, *supra* note 3 (“People are beginning to note that administrative bloat, so common in government, seems especially egregious in colleges and universities.”).

¹²³ See discussion *infra* notes 137–49 and accompanying text.

¹²⁴ See discussion *infra* notes 161–76 and accompanying text.

capture must begin to take shape. Customer-centered notions must be better developed and must better account for costs.

In sum, a “keeping up with the Joneses” mentality has been burning for some time across the legal academy. If each law school is a stick, the introduction and development of ABA accreditation process bundled the sticks, the *U.S. News* rankings lit the match, and the perverse set of faculty incentives have made for more than adequate kindling. As the next sub-Part explains, the federal government’s expansive loan guarantee and finance programs have poured an ample supply of lighter fluid atop the fire!¹²⁵

4. The Federal Government and the Student Loan Market

i. The Scope of Government Involvement

The federal government’s role in fueling the student loan market has functioned as the perfect complement to the legal education cartel. It serves too as a splendid reminder of the idea that, while economic policy is the politicians’ handiwork, good politics often makes bad economics.¹²⁶ Largely as a result of the efforts of the federal government, law students are left with little choice but to involve themselves in a convoluted and confusing financing system that few can explain, and even fewer can defend.¹²⁷

Until recently, the federal government supported the student loan market through two major program types: the Federal Family Education Loan (FFEL) Program¹²⁸ and the William D. Ford Federal Direct Loan

¹²⁵ One commentator has offered the following description of the federal government’s efforts to promote access without imposing meritocratic conditions and its dramatic effects at the undergraduate level, which unfortunately, remains recognizable at the law school level:

Thus, federal aid to college students removed most financial barriers to attending college. Applications increased as high school students heard the message that college attendance led to well-paid, interesting careers, and was now affordable. Many colleges expanded facilities and lowered academic standards for admission; virtually any high school graduate could get into some college. Students might have had an incentive to work harder in high school if they had *had* to demonstrate academic achievement both to gain admission to college and to obtain financial aid to cover expenses while enrolled. The unintended consequence of failing to set this requirement is students graduating from college without good job prospects, a problem made worse in an economy where the unemployment rate has now risen above 10 percent. The predictable result is a growing rate of student loan defaults.

Toby, *supra* note 14.

¹²⁶ See ALAN S. BLINDER, *HARD HEADS SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY* 3 (1987).

¹²⁷ See Allen, *supra* note 14 (asking “wouldn’t it have been nice if the federal government had never tried to intervene in higher education-financing in the first place?”).

¹²⁸ Federally guaranteed loans were first authorized in Part B of Title IV of the Higher Education Act of 1965 (HEA). For many years, these were termed “Guaranteed Student Loans.” The Higher Education Amendments of 1992 renamed the guaranteed student loan programs the Federal Family Education Loan (FFEL) Program.

(Direct Loan) Program.¹²⁹ Following the recent adoption of portions of the Student Aid and Fiscal Responsibility Act of 2009 (SAFRA),¹³⁰ loans under the FFEL Program will no longer be made after June 30, 2010, with the Direct Loan Program remaining in place and becoming the primary government program.¹³¹ Historically, the government's efforts have been aimed at providing students with financing for higher education at better terms than those available in the private loan market. Loans offered under the federal programs have had the same eligibility rules and the same annual and aggregate maximum amounts.¹³²

Traditionally, the primary difference between the FFEL and Direct Loan Programs was in the source of funds available for borrowers.¹³³ Direct Loans come from the federal government coffers;¹³⁴ loans that were made through the FFEL Program were provided by nonprofit and

¹²⁹ The Student Loan Reform Act of 1993 authorized the Direct Loan Program, which is now Part D of the Higher Education Act. See Higher Education Act of 1965, 20 U.S.C. § 1087a (2006). Other loan programs, such as the Perkins Loan Program, are made under separate administrative structures. For a display of the relative sizes of each of the programs as of 2008, see *infra* Appendix Figure 9.

¹³⁰ H.R. 3221, 111th Congress (2009–2010). For a more detailed exploration of SAFRA, See discussion *infra* at notes 152–67 and accompanying text.

¹³¹ See CASSANDRIA DORTCH, DAVID P. SMOLE & SHANNON M. MAHAN, CONG. RESEARCH SERV., THE SAFRA ACT: EDUCATION PROGRAMS IN FY2010 BUDGET RECONCILIATION 1 (2010) [hereinafter DORTCH ET AL., SAFRA BUDGET RECONCILIATION]. The government also offers aid through the tax code. The Hope and Lifetime Learning Tax Credits provide a benefit to families who paid tuition and have a tax liability. In addition, there are a number of tax benefits in connection with college savings plans. See LONG ET AL., *supra* note 10, at 82 (describing the various federal tax incentives).

¹³² See *Stafford Loans (FFELs and Direct Loans)*, FED. STUDENT AID, <http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp> (last visited Aug. 21, 2010) [hereinafter *Stafford Loans Website*]. The federal government also administers Perkins Loans, but that Program is comparatively small and beyond the scope of this Article. See also Allen, *supra* note 14 (describing the FFEL Program as “designed to make higher education more attainable and affordable to larger numbers of Americans” by encouraging private lenders “to extend credit for college to a cohort of society that would otherwise not qualify for loans”).

¹³³ Education Department data show that 4,463 postsecondary schools participated in the public-private programs of FFEL in the 2008-2009 academic year, accounting for the creation of \$74 billion in loans. See Nick Anderson, *Bill Would End U.S. Subsidy for Lenders of College Aid*, WASH. POST, Sept. 17, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/16/AR2009091603001.html>. The direct lending regime, by contrast, had 1,742 participating schools in the same span, with \$22 billion in loan volume. See *id.*; see also Cole Robertson, *The Student Loan Bailout*, NATION, Jan. 12, 2009, <http://www.thenation.com/article/student-loan-bailout> (attributing \$52 billion and \$12 billion in loans, respectively, to the FFEL and Direct Loan Programs in 2007).

¹³⁴ DORTCH ET AL., SAFRA BUDGET RECONCILIATION, *supra* note 131, at 6–7 (“Under the DL [P]rogram, the federal government essentially serves as the banker and makes loans to students and their families using federal capital (i.e., funds from the U.S. Treasury), and owns the loans.”).

for-profit lenders, such as Sallie Mae,¹³⁵ and were insured by guaranty agencies and subsequently reinsured by the federal government.¹³⁶

Together, the FFEL and the Direct Loan Programs have made the federal government central to the system of higher education financing. And while the government offers several loan options to student borrowers,¹³⁷ the loans are made with little care for the quality of educational

¹³⁵ According to its website, Sallie Mae manages \$182 billion in education loans and serves ten million student and parent customers. *See About Us*, SALLIE MAE, Salliemae.com/about/ (last visited Aug. 21, 2010).

¹³⁶ *See Stafford Loans Website*, *supra* note 132. The rationale for the FFEL loans was that the federal guaranty replaced the collateral typically required for long-term loans from banks and financial institutions. Several thousand financial institutions participated in the FFEL Program. In recent years, some schools even opted to become lenders in the FFEL Program. *See id.*

¹³⁷ The following four types of loans were traditionally available through both the Direct Loan and FFEL Programs (and today remain within the Direct Loan Program):

Subsidized Stafford Loans are awarded to students who demonstrate financial need according to the Program's qualifications. Interest rates are fixed and interest does not accrue while borrowers are enrolled in school at least half-time and during certain pre-described periods of "grace" and "deferment." Instead, the U.S. Department of Education subsidizes the interest. *See Stafford Loans Website*, *supra* note 132. Independent graduate students can qualify for subsidized Stafford loans if they meet financial eligibility requirements, and can borrow up to \$20,500 each year. *See id.* (noting that "[w]hen you graduate with a graduate or professional degree, the maximum total debt allowed from Stafford Loans is \$138,500"). A borrower unable to qualify based on need for a subsidized Stafford Loan may apply for an unsubsidized Stafford Loan, which is not based on need. *See id.*

Unsubsidized Stafford Loans are awarded to students regardless of financial need. Borrowers are responsible for paying the interest that accrues under these loans, including during any period that might otherwise qualify as a grace or deferment period under a Subsidized Stafford Loan. Independent students and students whose parents cannot obtain a PLUS Loan have higher unsubsidized loan limits under this Program. *See id.*

PLUS Loans for Graduate and Professional Degree Students (Grad PLUS) are designed for borrowers who have exhausted their Stafford Loan eligibility. Under the Grad PLUS Program, graduate students can borrow an amount up to the cost of school attendance—including tuition, housing, and other expenses. Grad PLUS Loans, therefore, are not subject to a specific dollar limit like Stafford Loans. Grad PLUS Loans carry a fixed interest rate. Borrowers must generally repay their loans within ten years and, as with Unsubsidized Stafford Loans, remain responsible for the lifetime interest that accrues on the loans. *See PLUS Loans for Graduate and Professional Degree Students*, FED. STUDENT AID, <http://studentaid.ed.gov/PORTALSWebApp/students/english/PlusLoansGradProfstudents.jsp> (last visited Aug. 21, 2010) [hereinafter Grad PLUS Loans Website].

Consolidation Loans allow a borrower to combine one or more federal education loans into a single loan to facilitate repayment. Available after a borrower leaves school, Consolidation Loans generally offer extended repayment terms depending upon the total value of the underlying loans being consolidated. *See Loan Consolidation*, FED. STUDENT AID, <http://studentaid.ed.gov/PORTALSWebApp/students/english/consolidation.jsp?tab=Repaying> (last visited Aug. 21, 2010). Because the repayment period is longer, consolidation loans may reduce the borrower's monthly payments; however, the total interest repaid over the life of the loan is usually higher. The interest rate on a Consolidated Loan is fixed, and is set at the weighted average of the interest rates on the underlying loans. The process of consolidating loans usually does not directly involve the school—as the consolidating lender purchases qualifying student loans from other lenders. *See id.* Passage of SAFRA will not affect consolidation in the short term; "[t]he SAFRA Act amends the eligibility requirements for certain

institutions and their programs.¹³⁸ Moreover, federal policies have failed to examine the appropriateness of particular proposed courses of study for individual students given their unique level of preparedness, ambitions, and other factors.¹³⁹ By encouraging loans in place of grants, for instance, the federal government has embraced a universal and inclusive approach in place of the prior system that rewarded achievement and academic record in dispensing government bounty.¹⁴⁰ Of course, the federal omnipresence in the student loan market means that the government ultimately bears much of the risk of student loans.¹⁴¹

Under the FFEL Program, for example, banks and other lenders were provided two separate subsidies for originating federal student loans: a guarantee against default losses,¹⁴² and a taxpayer-subsidized, guaranteed rate of return.¹⁴³ As if these protections were not enough government involvement, the government, at the time of the FFEL's elimination, subsidized some thirty-four different guaranty agencies to perform specific administrative activities for the FFEL Program.¹⁴⁴ To-

borrowers to obtain DL Program Consolidation Loans during the period from July 1, 2010 to June 30, 2011." DORTCH ET AL., SAFRA BUDGET RECONCILIATION, *supra* note 131, at 9.

¹³⁸ *But see infra* Part I.B.4.iv.

¹³⁹ *See* GILLEN, *supra* note 9, at 8–10.

¹⁴⁰ *See* Toby, *supra* note 14 (arguing that the unintended consequence of failing to set any real entry requirements is students graduating without good job prospects, leading to a growing rate of student loan defaults).

¹⁴¹ *See, e.g.*, Eisman, *Subprime Goes to College*, *supra* note 9, at slide 27 (noting that “the government, the students and the taxpayer bear all the risk and the for-profit industry reaps all the rewards”).

¹⁴² For example, if a borrower defaults on a FFEL loan, the government pays the lender ninety-seven percent of the outstanding principal and all of the accrued unpaid interest, while the lender assumes default risk for only the remaining three percent of the loan principal. *See Federal Student Loan Subsidies*, FED. EDUC. BUDGET PROJECT, <http://febp.newamerica.net/background-analysis/federal-student-loan-subsidies> (last visited Aug. 21, 2010) [hereinafter *Federal Loan Subsidies*]. According to the Office of Management and Budget (OMB), with outstanding FFEL volume totaling \$413 billion, government payments to lenders for defaulted loans totaled \$8.5 billion in fiscal year 2008. *See id.*

¹⁴³ The government paid FFEL lenders a Special Allowance Payment (SAP), to ensure the lender a guaranteed interest rate on its loans. *See Federal Loan Subsidies*, *supra* note 142. The SAP was equal to difference between the fixed interest rate charged on the loan, on the one hand, and the three-month commercial paper interest rate plus a spread, on the other. *See id.* The SAP subsidy structure effectively insulated the lender from interest rate fluctuations over the course of the loan that would otherwise make the interest rate paid by the borrower unattractive, and represented a risk-shifting mechanism that ensured that the government bore the interest rate risk accompanying the loan.

¹⁴⁴ These guaranty agencies are charged with preventing student loans from going into default, collecting on defaulted loans, and carrying out other administrative roles. *See Federal Loan Subsidies*, *supra* note 142. The presence of these guaranty agencies was more historical accident than anything else; they represented the legacy of the failed state-centered federal loan program that Congress originally envisioned. For an excellent description of the history of the guaranty agencies and the record of lack of foresight and misunderstood incentives that has characterized their history, see *Federal Student Loan Guaranty Agencies*, FED. EDUC. BUDGET PROJECT, <http://febp.newamerica.net/background-analysis/federal-student-loan-guar>

day, when an existing FFEL Program loan defaults,¹⁴⁵ guaranty agencies are responsible for administering the default guarantee by paying the federally-guaranteed amount to the lender.¹⁴⁶ The guaranty agencies, in turn, are “re-insured” by the federal government, as the Department of Education reimburses the agencies for most or all default payments made to FFEL lenders.¹⁴⁷ Furthermore, the agencies receive a number of subsidies from the federal government in connection with their role in the FFEL Program¹⁴⁸ and are permitted to retain sixteen percent of any successful collections on defaulted loans.¹⁴⁹

Given the government’s willingness to undertake both the risk of student default and the administrative expenses, it is not hard to imagine that private lenders had little reason to question either the creditworthiness or future earnings prospects of a borrower.¹⁵⁰ In fact, the only limit to student borrowing in the old FFEL system appears to have been educational costs and the student’s own judgment. Therefore, this structure unfortunately placed the bulk of the borrowing decision on the party least equipped to make an accurate value judgment regarding educational options and costs: the student—frequently a young, inexperienced, one-time participant in the higher education market.¹⁵¹

ii. Crisis in the Market and the Emergence of SAFRA

As the credit crisis cascaded through the United States economy in late 2007, cracks began to show in the student loan market.¹⁵² Loan

anty-agencies (last visited Jan. 2, 2010) [hereinafter *Guaranty Agencies*]. See also Toby, *supra* note 14 (noting that “[t]he student financial aid system was created by Congress not as an integrated system but in pieces: to do a variety of things for a variety of reasons”).

¹⁴⁵ Although the FFEL Program no longer originates loans, its existing loans remain. See CASSANDRIA DORTCH, DAVID P. SMOLE & SHANNON M. MAHAN, CONG. RESEARCH. SERV., THE SAFRA ACT: EDUCATION RECONCILIATION IN THE 111TH CONGRESS 6 (2010) [hereinafter DORTCH ET AL., SAFRA EDUCATION RECONCILIATION].

¹⁴⁶ See *Federal Loan Subsidies*, *supra* note 142.

¹⁴⁷ See 34 C.F.R. § 682.404 (2009); GILLEN, *supra* note 9, at 9.

¹⁴⁸ These include a “loan processing and issuance fee,” an “account maintenance fee,” and a “default aversion fee,” each calculated as a percentage of the loan principal. See *Federal Loan Subsidies*, *supra* note 142.

¹⁴⁹ The OMB has pointed out that “federal payments to guaranty agencies totaled \$877 million in fiscal year 2007.” *Id.*

¹⁵⁰ It also does not take much imagination to see how this incentive structure resembles the structure in the mortgage market prior to the recent housing crash. If the mortgage originator retained little or no risk in the mortgage, his attention to diligence suffered. Here too, it is wishful thinking to believe that a lender bearing only three percent of the default risk will be as attentive as might be hoped. See GILLEN, *supra* note 9, at 9; Pinto, *supra* note 26.

¹⁵¹ See *infra* Part III.A.

¹⁵² See, e.g., Associated Press, *Credit Jitters Spread to Student Loan Market*, MSNBC.COM (Dec. 10, 2007), http://www.msnbc.msn.com/id/22188558/ns/business-personal_finance/ (citing rising student loan delinquencies and signs of a slowing demand for securitized student loans); Robertson, *supra* note 133 (offering that the market for student loans “has also been feeling the effects of the ongoing recession”).

origination lagged as lenders were faced with incredible uncertainty resulting from the turmoil in the financial markets on the one hand, and corresponding reductions in lender subsidies under the College Cost Reduction and Access Act of 2007¹⁵³ on the other.¹⁵⁴ With lenders experiencing difficulty in raising capital to continue to originate FFEL Program loans,¹⁵⁵ the federal government moved to buoy the sagging private loan market. In May of 2008, Congress passed the Ensuring Continued Access to Student Loans Act (ECASLA).¹⁵⁶ ECASLA was a “private market financing” vehicle designed to provide up to \$6.5 billion of capital directly to the market’s private lenders. Effectively, the Program created a secondary market for the loans by providing the U.S. Department of Education with temporary authority to purchase federally-backed student loans made by private lenders.¹⁵⁷ Congress opted to leave the new purchase authority largely undefined in the statute, giving the Department of Education considerable discretion over its design and administration.¹⁵⁸ According to Department of Education estimates, approximately eighty percent of the new FFEL Program loans in fiscal year 2009 were financed through ECASLA programs.¹⁵⁹ Despite the government’s efforts, many schools voluntarily switched to the Direct Loan Program in response to the political and economic uncertainties that continued to swirl around the FFEL Program.¹⁶⁰

Faced with this continuing economic maelstrom threatening the long-term viability of the student loan market, the Obama Administration pushed SAFRA through the House of Representatives in September 2009.¹⁶¹ While the bill languished in the Senate for several months, cer-

¹⁵³ 20 U.S.C.A. § 1070a (West 2006).

¹⁵⁴ See GILLEN, *supra* note 9, at 20 (noting that the Act “cut rates for loans made after June 2006 from the current 6.8[%]” down to 6.0%). This “will certainly benefit recent college graduates but will not help future students, as it will encourage schools to raise their tuition even more.” *Id.*

¹⁵⁵ See JASON DELISLE, NEW AM. FOUND., STUDENT LOAN PURCHASE PROGRAMS UNDER THE ENSURING CONTINUED ACCESS TO STUDENT LOANS ACT OF 2008 1 (2009).

¹⁵⁶ 20 U.S.C.A. § 1001 (West 2010).

¹⁵⁷ Stephen Burd, *Obama’s Bold Proposal*, HIGHER ED WATCH BLOG, (Feb. 26, 2009, 3:58 PM), <http://www.newamerica.net/blog/higher-ed-watch/2009/obamas-bold-proposal-10376> (arguing that ECASLA was a product of the fact that “credit market disruptions [had] made the FFEL Program untenable”).

¹⁵⁸ Thus far, the Department of Education has created four separate loan purchase arrangements under ECASLA: a put option, a short-term purchase program, a financing arrangement, and an asset-backed commercial paper support program. See DELISLE, *supra* note 155, at 2 (describing the general terms of each of the programs).

¹⁵⁹ See DORTCH ET AL., SAFRA BUDGET RECONCILIATION, *supra* note 131, at 6.

¹⁶⁰ See DELISLE, *supra* note 155, at 2; Robertson, *supra* note 133 (noting that, between the onset of the financial crisis and January 2009, at least 168 lenders dropped out of the FFEL Program and almost 30% of schools using the FFEL Program contemplated a switch).

¹⁶¹ Despite opposition from conservative lawmakers and private bankers, H.R. 3221 passed in a 253–171 vote on September 17, 2009. Eliza Krugman, *Student Loan Bill Passes in House*, NATIONALJOURNAL.COM (Sept. 17, 2009), <http://www.nationaljournal.com/njonline/>

tain provisions of the bill were incorporated into H.R. 4872, and became law as part of President Obama's health care overhaul embodied in the Health Care and Education Reconciliation Act of 2010 (HCERA).¹⁶² Pursuant to the terms of HCERA, loans will no longer be originated under the government-guaranteed FFEL Program, leaving the government, through the Direct Program, the sole originator of federal loans.¹⁶³ In essence, HCERA shifts student lending entirely into the hands of the federal government,¹⁶⁴ which represents a stark difference from the nation's most recent experience in which private institutions disbursed roughly three-quarters of the student loans.¹⁶⁵ By phasing out public subsidies for lending by private institutions, HCERA does effectively streamline some antiquated, duplicative and unnecessary portions of the existing structure and should ultimately save some money for the federal government.¹⁶⁶ In the end, however, it does little to slow the debt-fueled growth of tuitions and resulting student debt loads, and represents the latest prize for the rent-seeking,¹⁶⁷ higher education complex.

ed_20090916_2914.php (citing Rep. John Kline, R-Minn., as stating that "the bill [is] a 'job killer' that will expand the deficit rather than reduce it"). For a fine description of the original bill, see DAVID P. SMOLE ET AL., THE STUDENT AID AND FISCAL RESPONSIBILITY ACT OF 2009 (2009), available at OPEN CRS, http://assets.opencrs.com/rpts/R40742_20090731.pdf.

¹⁶² Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). On March 30, 2010, President Obama signed H.R. 4872 into law. See Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 31, 2010, at A14.

¹⁶³ See Health Care and Education Reconciliation Act §§ 2201–08. See also Allen, *supra* note 14 (noting that under President Obama's plan the "only role that private banks . . . would continue to play in student lending would be to service some of the loans under contract"). The new law also employs inflation indices to increase the maximum Pell grant over the next decade. See Health Care and Education Reconciliation Act § 2101 (to be codified at 20 U.S.C. § 1070a).

¹⁶⁴ See Health Care and Education Reconciliation Act § 2205.

¹⁶⁵ See U.S. DEP'T OF EDUC., FISCAL YEAR 2010 BUDGET SUMMARY 64 (2010), available at <http://www2.ed.gov/about/overview/budget/budget10/summary/10summary.pdf>.

¹⁶⁶ See CONG. BUDGET OFFICE, COSTS AND POLICY OPTIONS FOR FEDERAL STUDENT LOAN PROGRAMS 14 (2010), available at <http://www.cbo.gov/ftpdocs/110xx/doc11043/03-25-StudentLoans.pdf> (projecting a net savings to the federal government of \$62 billion in the period from 2010 to 2020 by eliminating FFEL and relying exclusively on direct lending by the Department of Education); DORTCH ET AL., SAFRA EDUCATION RECONCILIATION, *supra* note 145, at 3–4.

¹⁶⁷ In economics, so-called "rent seekers" look to transfer wealth rather than create it. "Rent seeking" is a term "designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus." JAMES M. BUCHANAN, RENT SEEKING AND PROFIT SEEKING, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3–4 (James M. Buchanan et al. eds., 1980). Rent-seeking behavior, therefore, represents a waste of resources, whether the firm(s) "seeks an advantage for itself or is simply trying to prevent others for obtaining an advantage at its expense." See STEPHEN J. SPURR, ECONOMIC FOUNDATIONS OF LAW 26 (2006).

iii. Income-Based Repayment and More of the Same

In July 2009, the Obama Administration introduced Income-Based Repayment (IBR), a new payment option for federal student loans.¹⁶⁸ The Program represents the government's attempt to ease the burden of student loan borrowers struggling with their repayment obligations. IBR seeks to keep loan payments affordable for borrowers by imposing payment caps based on their income and family size.¹⁶⁹ To enter the IBR Program, a borrower must first have enough debt relative to income to qualify for a reduced payment.¹⁷⁰ Then, for most eligible borrowers, the Program uses a sliding scale to ensure that ongoing loan payments amount to less than ten percent of a borrower's income.¹⁷¹ After twenty-five years of qualifying payments, the government will forgive any remaining debt.¹⁷²

On the one hand, the IBR Program marks a significant milestone in that the government has begun to realize that thousands of students are struggling mightily under the burden of a stifling debt load. On the other hand, the cost of any student forgiveness under the Program is necessarily borne by the government and, in turn, the taxpayer. Perhaps most disappointing of all, the Obama Administration acknowledges a serious problem—dramatic tuition inflation—yet fails to meaningfully address its continued proliferation. In fact, by transferring some of the risk and burden of student loans from individual students to American taxpayers, the IBR Program may cause additional tuition inflation as more students might be drawn to the academy, and existing students may be willing to take on additional debt. Similar to other policy failings, most notably in

¹⁶⁸ This Program built off of a similar initiative launched near the end of George W. Bush's presidency: The College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007). IBR is now available to federal student loan borrowers in both the Direct and FFEL loan Programs, and covers most types of federal loans made to students, but is not available for loans made to parents.

¹⁶⁹ For a description of the Program, see *Income Based Repayment Plan*, FED. STUDENT AID, <http://studentaid.ed.gov/PORTALSWebApp/students/english/IBRPlan.jsp> (last visited Jan 21, 2010).

¹⁷⁰ The Program is available to borrowers who would have to pay more than 15% of their earnings above 150% of the poverty level to pay off the loans under the standard 10-year loan payment plan. See *id.* at 11.

¹⁷¹ See *id.* Under the plan, a borrower earning below 150% of the poverty level for her family size will pay nothing. See *id.* (comparing loan payment amounts). A borrower earning more will have her loan payment capped at 15% of earnings above that amount. Except for the highest earners, the cap usually ensures that a borrower will pay less than 10% of total income as debt service. See DORTCH ET AL., SAFRA BUDGET RECONCILIATION, *supra* note 131, at 11.

¹⁷² SAFRA amended the IBR plan for new borrowers of the Direct Loan Program after July 1, 2014. According to the amendments, borrowers repaying according to the IBR plan will have monthly payment amounts capped at ten percent of their discretionary income and will be eligible to have any loan balance remaining unpaid after twenty years forgiven at that time. See DORTCH ET AL., SAFRA BUDGET RECONCILIATION, *supra* note 131, at 1–2 (describing the new amendment).

housing, the government's efforts fail to address the notion that an investment in education—like all other investments—must be subject to measurement.¹⁷³

Although entrenched interests in the education industrial complex are often hesitant to say it, education only offers a good investment where its benefits dominate its costs.¹⁷⁴ As the plight of more and more law school graduates becomes evident, law students asking difficult questions about both (i) the costs involved in embarking on a legal career, and (ii) the benefits they are likely to enjoy from such a career, are likely to be unimpressed by the answers. Ultimately, many in the education industrial complex will be held to account.¹⁷⁵ Any rational solution to the higher education crisis must begin with systems designed to provide value measures and make value judgments. The only remaining question is whether the road to such a rational market will be orderly.¹⁷⁶

iv. “For-Profit” Schools and a Way Forward

At the time of this Article's writing, the United States Department of Education was engaged in developing objective criteria for discerning whether certain “for-profit” educational institutions should continue to qualify for the provision of federal aid for their students.¹⁷⁷ Under the Higher Education Act of 1965, federal loans are to be made available to programs that prepare students for “gainful employment in a recognized

¹⁷³ Cohen, *supra* note 1, at 48 (calling the American legal academy a “strange beast” and asserting that once we abandon a world of consumer sovereignty in favor of one where “private parties use the state to enforce cartels all,” the world “becomes convoluted and confusing”); see also Bennett, *supra* note 14 (declaring that “[h]igher education is not underfunded. It is under-accountable and under-productive.”).

¹⁷⁴ See, e.g., Schlunk, *supra* note 5, at 1–4; see also Matasar, *Rise and Fall*, *supra* note 17, at 490 (“By any calculation, if cost exceeds return, legal education is in for rocky times.”); cf. James Vescovi, *Why Does Law School Cost so Much?*, COLUM. L. SCH., http://www.law.columbia.edu/law_school/communications/reports/summer06/lawschoolcost (last visited Aug. 26, 2010) (“It seems clear that a degree from [Columbia] Law School is still viewed as an investment with an excellent rate of return.”).

¹⁷⁵ See, e.g., Efrati, *supra* note 11 (observing that the majority of law school graduates are suffering from a supply-and-demand imbalance that is suppressing pay and job growth).

¹⁷⁶ See Morrissey, *supra* note 7, at 275 (suggesting that “the day may be fast approaching when many would-be law students will be deterred from pursuing such a course of study by the small financial return they can foresee from such a decision”); see also Schwarzschild, *supra* note 11, at 9–10 (“Rising costs may at some point provoke resistance, if not rebellion, among law students, their families, and the public in any event.”).

¹⁷⁷ See Justin Hamilton, *Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Second Track*, U.S. DEP'T OF EDUC., June 16, 2010, <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers>; see also Tamar Lewin, *Student Loan Default Rate Is Continuing to Increase*, N.Y. TIMES, Sept. 14, 2010, at A15 (noting that “[t]he default rate on federal student loans continued to rise last year, with the rate for students at for-profit colleges — already the highest — rising the fastest”).

occupation.”¹⁷⁸ The Department’s most recent “gainful employment” proposal would require for-profit schools that receive federal student loans “to show that former students are repaying their loans or are capable of doing so.”¹⁷⁹ Under the proposal, for-profit schools would fully qualify to provide federal aid to students if either (i) greater than forty-five percent of former students are paying off the principal on loans, or (ii) the debt burden of former students is below eight percent of total income, or below twenty percent of discretionary income.¹⁸⁰

The Department’s recent efforts are to be applauded for the mere fact that, in whatever form they ultimately take, they arise from the premise that the value of an education can be measured by some objective standard. Much of the stifling debt that today’s graduates struggle to repay might have been avoided if education consumers simply understood that education, like every other asset, has a measurable value. Such a simple concession would likely have led to more realistic and sober assessments at the time that education services were purchased. In a sense, the for-profit segment represents the low hanging fruit in the education sector: despite recent growth, it remains a rather small segment of the overall higher education market with its student outcomes among the industry’s most disappointing.¹⁸¹ It is, therefore, discouraging that the government’s efforts have met such strong resistance.¹⁸²

The new approach embodies much of the thinking that this Article espouses, namely, the realization that the education-for-all and the at-all-cost mentality that has characterized the higher education market for the past two decades is meeting its demise. Whether such a mindset persists is no longer a question of policy or politics. In the end, economics dictates that the higher education market simply cannot withstand

¹⁷⁸ Higher Education Act of 1965, 20 U.S.C. § 1001(b)(1) (2006).

¹⁷⁹ Emma Ashburn, *For-Profit Schools Get Report on Loan Repayments*, REUTERS, Aug. 13, 2010, <http://www.reuters.com/article/idUSTRE67D00620100814> (summarizing the Department of Education’s recent efforts, as well as the most recent data estimating student loan repayment rates in the for-profit sector).

¹⁸⁰ See Program Integrity: Gainful Employment, Notice of Proposed Rule Making, 56 Fed. Reg. 43616 (proposed July 26, 2010) (to be codified at 34 C.F.R. § 668); see also Jennifer Epstein, *Closer Look at ‘Gainful Employment,’* INSIDE HIGHER ED (July 26, 2010), <http://www.insidehighered.com/news/2010/07/26/regs> (last visited Aug. 24, 2010) [hereinafter Epstein, *Gainful Employment*] (summarizing the proposed rule).

¹⁸¹ See Ashburn, *supra* note 179 (noting that enrollment in for-profit colleges was 1.8 million in 2008, representing 9% of all institutions that receive federal aid and up from 240,000 students, or 2% of those institutions in 1995). See also *Following Federal Aid Dollars*, EDUC. PORTAL BLOG (Nov. 30, 2009), http://education-portal.com/articles/Following_Federal_Aid_Dollars.html (last visited Aug. 22, 2010) (summarizing the fact that a growing portion of federal aid dollars are going to for-profit schools).

¹⁸² See, e.g., Jennifer Epstein, *Resistance on Debt Proposal*, INSIDE HIGHER ED, Jan. 26, 2010, <http://www.insidehighered.com/news/2010/01/26/employment> [hereinafter Epstein, *Resistance*] (describing forceful opposition of “[a] team of negotiators representing all sectors of higher education”).

noneconomic decisions any longer.¹⁸³ If the government proves successful in slowing the funding mill for the for-profit sector, it will mark real progress toward avoiding some of the most disappointing outcomes for the next generation of education consumers. Unfortunately, however, such efforts offer little consolation for those already confronting their own disappointing reality. Moreover, in the coming years such efforts will have to be redoubled, and aimed far wider than simply at the for-profit segment of the market.¹⁸⁴

II. THE DISAPPOINTING REVENUE PICTURE FOR LAW SCHOOL GRADUATES

Viewing a legal career exclusively through the investment lens, the decision whether to attend law school is rather simple to frame: will a lawyer earn sufficient remuneration to repay the cost expended in the endeavor? In finance parlance, an investment is said to make sense if it provides for a positive net present value.¹⁸⁵ To calculate the net present value of an investment opportunity, the stream of cash flows likely to be realized from the investment is compared to the investment's cost.¹⁸⁶ In the law school context, a student's costs are rather straightforward. Generally, they will include the money spent on tuition (including any interest on debt service), room and board, books, and incidentals. Cost will also include the "opportunity cost" of the earnings that a student will forego during the three years of law school attendance.¹⁸⁷ On the other side of the ledger, the cash flows that a law school graduate will ultimately realize over and above what she might have earned absent a law degree are far from certain. Nonetheless, to determine the net present value of her potential investment, a prospective law student is left to her best forecast. Setting aside larger economic issues and the overall prospects of the job market, which remain largely beyond the individual student's control and are difficult to forecast reliably, expected earnings will

¹⁸³ See, e.g., Eisman, *Subprime Goes to College*, *supra* note 9, at slide 47 (arguing that if nothing is done to rein in this industry, "we are on the cusp of a new social disaster" with estimated defaults of \$275 billion over the next ten years).

¹⁸⁴ See Letter from Michael B. Enzi, Ranking Member, S. Comm. On Health, Educ., Labor and Pensions, to Gene Dodaro, Acting Comptroller Gen., U.S. Gov't Accountability Office 1-2 (Aug. 18, 2010) (on file with author) (suggesting that the Senate should investigate the value proposition across a far wider swath of the education industry).

¹⁸⁵ "Net present value" is normally defined by the present value of cash flows minus investment. See RICHARD A. BREALEY, STEWART C. MYERS & ALAN J. MARCUS, *FUNDAMENTALS OF CORPORATE FINANCE* 181 (5th ed. 2007).

¹⁸⁶ Of course, adjustments are made to the stream of cash flows to account for their timing and the reinvestment opportunities available to the recipient.

¹⁸⁷ See Schlunk, *supra* note 5, at 1-2 (observing that the costs of law school include "the opportunity cost of not entering the workforce immediately after graduation from college, and the out-of-pocket costs, primarily tuition, fees and books, inherent in attending law school").

depend, in large measure, on the quality of the school that the student attends and her rank within her law school class. A deeper look at the prospects for the reasonably prudent, new lawyer reveals some troubling trends.

After absorbing the opportunity cost of three years of lost employment opportunities, bearing a large amount of debt, working diligently through three years of coursework and passing the bar exam (hopefully!), what is the typical young lawyer likely to earn? In a recent paper, Professor William Henderson observed a phenomenon that should give a young lawyer pause. As Professor Henderson explains:

[T]he market for entry level lawyers currently has a bimodal distribution in which approximately 17% of law school graduates are clustered at uniformly high starting salaries. Yet, because of the cliff-like quality for jobs below the right mode (\$135,000 to \$145,000 in 2006), large numbers of law students who barely missed the on-campus interview (OCI) grade cut-offs struggle to find jobs in major markets that pay even 50% of the large firm going rate.¹⁸⁸

Examining the distributions of entry-level–legal salaries today against the same data from fifteen years earlier reveals a drastic change by which the market for starting lawyers has “entered new and completely uncharted waters.”¹⁸⁹ According to the data of the National Association for Law Placement (NALP), approximately 40% of all entry-level lawyers, in 1991, began their career with an annual salary between \$30,000 and \$40,000, with just 6% of new lawyers earning the \$70,000 median starting salary for large law firm associates that year.¹⁹⁰ Thus, the starting salaries distribution curve for the Class of 1991, while not a normal bell shape, “bears some resemblance to one.”¹⁹¹

¹⁸⁸ William D. Henderson, *Are We Selling Results or Resumes?: The Unexplored Linkage Between Human Resource Strategies and Firm-Specific Capital* 21 (Ind. Univ. Sch. of Law–Bloomington, Working Paper Series No. 105, 2008) (footnote omitted) [hereinafter Henderson, *Results or Resumes?*]. In 2010, the National Association of Law Placement reported similar statistics: an adjusted average salary of slightly over \$85,000, with most salaries falling drastically to the right or the left of the curve. See *Salary Distribution Curve for the Class of 2009 Shows Relatively Few Salaries Were Close to the Mean*, NAT’L ASS’N OF L. PLACEMENT (July 2010), <http://www.nalp.org/startingsalarydistributionclassof2009> (last visited Aug. 26, 2010).

¹⁸⁹ Henderson, *Results or Resumes?*, *supra* note 188, at 9.

¹⁹⁰ *Salaries of New Lawyers: How Did We Get Here?*, NAT’L ASS’N OF L. PLACEMENT BULL. (Jan. 2008), available at <http://www.nalp.org/2008jansalaries> [hereinafter NALP, *How Did We Get Here?*]. For a visual representation of this data, see *infra* Appendix Figure 1.

¹⁹¹ Henderson, *Results or Resumes?*, *supra* note 188, at 9.

Throughout the 1990s, sharp salary increases at large firms gradually moved more starting lawyer salaries north of the \$70,000 mark.¹⁹² Despite the shift, “[T]he overall distribution maintained the basic, though lopsided bell shape.”¹⁹³ Salary distributions changed dramatically in 2000, as Internet euphoria buoyed the starting salaries at large firms to \$125,000.¹⁹⁴ While the amount of the increase was dramatic, “[O]f more consequence for the salary distribution was how widespread the increase was.”¹⁹⁵ The result was, for the first time, the two peaks of a bimodal distribution,¹⁹⁶ with nearly 14% of salaries reported at the \$125,000 level and 48% of the new lawyer salaries falling in the \$30,000 to \$50,000 range.¹⁹⁷ Although a greater number of new lawyers continued to earn salaries falling in the left mode (\$30,000 to \$50,000 range), “never before had a single salary so dominated the landscape.”¹⁹⁸ By 2006, the durability of the “obvious and dramatic stratification of the market for new lawyers” was conspicuous, with 44% of new lawyers earning between \$40,000 and \$60,000 and 17% of new lawyers earning the \$135,000 or \$145,000 starting salary common to “big law” practice.¹⁹⁹

The distribution characteristics of entry-level-lawyer salaries should have dramatic effects on the forecasting of a rational prospective law student. As this Article discussed earlier, to determine the net present value of the law school investment, a prospective student will need to forecast expected cash flows (earnings) resulting from a legal career. Before celebrating the substantial increase in starting salaries, a law student should consider NALP’s warning that “the costs of a legal education have risen substantially faster than salaries, and these costs are an important factor in understanding the bigger picture of our current market.”²⁰⁰

¹⁹² The median salary at firms of more than 250 lawyers, for instance, moved from \$72,000 in 1995 to over \$90,000 in 1999. See NALP, *How Did We Get Here?*, *supra* note 190.

¹⁹³ *Id.* For a visual representation of the 1996 version of the distribution, see *infra* Appendix Figure 2.

¹⁹⁴ See NALP, *How Did We Get Here?*, *supra* note 190.

¹⁹⁵ *Id.*

¹⁹⁶ In statistics, a “bimodal distribution” typically describes a continuous probability distribution with two different modes. Bimodal distributions are commonly used as an example of how deceptive summary statistics such as the mean, median, and standard deviation can be when used on an arbitrary distribution.

¹⁹⁷ See NALP, *How Did We Get Here?*, *supra* note 190.

¹⁹⁸ *Id.* For a visual representation of this data, see *infra* Appendix Figure 3.

¹⁹⁹ See NALP, *How Did We Get Here?*, *supra* note 190. For a visual representation of this data, see *infra* Appendix Figure 4; see also David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTG. L. REV. 1127, 1129 (2009) (observing that the legal market’s “new realities have also forced a segmentation of law schools and their graduates along the dimension of the expected starting salaries of their alumni”).

²⁰⁰ *What Do New Lawyers Earn? A 15-Year Retrospective as Reported by Law School Graduates*, NAT’L ASS’N OF L. PLACEMENT BULL. (Sept. 2007), available at <http://www.nalp.org/2007septnewlawyers>.

Moreover, the bimodal distribution that has come to characterize the market should be of particular concern to a forecaster. Faced with such distribution characteristics, the more traditional, popular, and crude tools of modeling, including mean and median, become less reliable. Instead, a good financial modeler should become keenly aware of the “all or nothing quality” of the profile of future earnings created by the cliff effect of the bimodal distribution. While law schools and various rankings attend to reporting the mean and median starting salaries of entry level graduates, the costs of missing the cut off for the right hand mode can be drastic when it comes to the ability to repay student loans.²⁰¹ This reality becomes suffocating when one fully appreciates the dirty little secret that the debt burden is the greatest for those least likely to make it to the right mode because they were also the least likely to receive financial assistance from the law school by virtue of a desirable *U.S. News* input.²⁰² And, on average, the earnings divide “between large and small firm pay tends to widen during the first eight years of legal practice.”²⁰³ Thus, for a student attempting to project likely earnings, mean and median might offer a convenient excuse to assuage her that she stands a realistic chance to make it out the other end of the debt roller-coaster. As a reliable, objective measure of likely success, however, this data is woefully insufficient.

Rather, the appropriate measure would be expected return which, in this instance, would be represented by the product of expected salary multiplied by the probability of earning that salary. If, for instance, a student had a 40% chance of gaining employment offering a “right mode” salary of \$140,000 and a 60% chance of earning a “left mode” salary of \$50,000, her expected earnings would be equal to \$86,000.²⁰⁴ Her actual return will likely vary rather significantly from the expected return in this example, however, as the student is very likely to earn something roughly 50% greater or less than her expected earnings number alone would suggest. Such an example highlights the limited utility of the expected return measure in this context. It tells nothing about variance. The reliability of that input, therefore, in a model of expected earnings is tenuous, say the least.²⁰⁵

²⁰¹ See, e.g., Crittenden, *supra* note 22, at 38 (“[S]tudents who rely on a school’s median or average[] may be disappointed when they graduate and land a job far below that.”).

²⁰² See Morrissey, *supra* note 7, at 269.

²⁰³ Henderson & Morriss, *The New Math*, *supra* note 13.

²⁰⁴ $(40\% * \$140,000) + (60\% * \$50,000) = \$86,000$.

²⁰⁵ Bimodal distributions are a commonly used example of how summary statistics such as the mean, median, and standard deviation can be deceptive when reflexively applied without the benefit of context. In this example, while \$86,000 represents the expected earnings power of the graduating law student, it is not a typical value that the student is likely to earn. The \$62,000 median is also of limited utility. Instead, the characteristics of this distribution for the law student take on an all-or-nothing type quality as a job offering the salary of the

A glossy brochure with mean and median salaries of recent graduates—even if they can be relied on as accurate²⁰⁶—simply will not suffice as adequate disclosure for an appropriately educated investor.²⁰⁷ As Professors William Henderson and Andrew Morriss have plainly observed, “[p]eople contemplating a \$100,000 or more investment in their careers need accurate information and to be able to compare how graduates with similar credentials at different schools fare in the job market.”²⁰⁸

In the securities law context, for example, investors are generally protected from offering documents that provide material misstatements or omissions.²⁰⁹ Further, securities industry leaders have argued that all securities marketing materials should provide a balanced disclosure outlining the product’s risks and rewards to an investor.²¹⁰ Certainly, law school materials do not commonly include something akin to a risk factor warning that the law school and its faculty have a vested interest in

right mode offers the only solution to the debt burden riddle. As one blogger put it: “Let’s face it: \$40K to \$55K per year is just not enough to pay down the avg. \$85,000 debt (especially as interest rates climb) and still enjoy any kind of lifestyle that a professional degree is presumed to confer.” Bill Henderson, *Distribution of 2006 Starting Salaries: Best Graphic Chart of the Year*, EMPIRICAL L. STUD. BLOG (Sept. 4, 2007), http://www.elsblog.org/the_empirical_legal_studi/2007/09/distribution-of.html [hereinafter Henderson, *Salary Distribution*].

²⁰⁶ See *infra* note 224 and accompanying text.

²⁰⁷ See Cass, *supra* note 93, at 575 (bemoaning that “[t]he *U.S. News* methodology counts a counter job at McDonald’s the same as a prestigious judicial clerkship, an associate’s position at Covington & Burling or Skadden, Arps, or another highly prized, top-flight legal job”).

²⁰⁸ Henderson & Morriss, *supra* note 13. See also Patrick J. Lynch & Kyle P. McEntee, *A Way Forward: Improving Transparency in Employment Reporting at American Law Schools* 7 (Apr. 8, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1528862> (arguing that the currently available tools “inadequately serve prospective students striving to take a detailed, holistic look at the diverse employment opportunities at different law schools”).

²⁰⁹ This protection is provided in Section 11 of the Securities Act of 1933. See 15 U.S.C. §§ 77k(c), (e) (2006). In addition, Section 12(a)(2) of the Securities Act also provides an express, private party cause of action for rescission of the sale of a security “by means of a prospectus or oral communication” that includes a material misstatement or omission. See 15 U.S.C. § 77l(2) (2006). Finally, the “reasonable basis” and “customer specific” standards of suitability require a broker-dealer to investigate, refrain from making statements regarding securities without an adequate basis, and only make recommendations in light of an individual customer’s specific financial situation and level of sophistication. For our favorite summary of the protections afforded the customer in connection with the sale of securities, see Michael C. Macchiarola, *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 CREIGHTON L. REV. 29, 59–69 (2008). See also *Rule 10b-5 and Law Schools*, ADAM SMITH, ESQ. BLOG, (May 13, 2010), <http://www.adamsmithesq.com/archives/2010/05/rule-10b-5-and-law-schools.html> (suggesting that law schools be required to make more robust disclosure as part of a “10b-5 Oath”).

²¹⁰ See NAT’L ASSOC. OF SEC. DEALERS, NOTICE TO MEMBERS 03-71, NON-CONVENTIONAL INVESTMENTS: NASD REMINDS MEMBERS OF OBLIGATIONS WHEN SELLING NON-CONVENTIONAL INVESTMENTS 765 (2003), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003070.pdf>.

encouraging students to borrow large sums of money to enroll in the incoming class. Upon inspection, it would not be surprising if some law school sales materials failed to meet minimal consumer protection or fair sales standards.²¹¹

Aside from the structural bias embedded in law school pitchbooks, the current Great Recession is likely to have a profound effect on the attitudes of current and future law students. First, with big law firms in a cutting or no-growth mode, the supply of the coveted “big law” jobs has been limited²¹² with students interviewing in 2009 “competing for half as many jobs at top law firms . . . as last year.”²¹³ This has severely curtailed the number of graduating law students “lucky enough” to grab a coveted “big law” job.²¹⁴ A law student counting on the starting salary

²¹¹ ABA Standard 509 requires law schools to publish “basic consumer information . . . in a fair and accurate manner” and ABA Standard 510 requires a law school to “take reasonable steps to minimize student loan defaults.” See AM. BAR ASS’N, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL FOR LAW SCHOOLS 2009–2010 5–6 (2010), available at <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%205.pdf> [hereinafter ABA, LAW SCHOOL APPROVAL, CHAPTER FIVE]. However, the Standards and the corresponding interpretations do little to articulate any meaningful norm or signal any willingness on the part of the ABA to diligently enforce the requirements.

In this regard, it would be interesting to see how the ABA chose to handle a situation similar to the following hypothetical: Imagine a law school offering merit-based scholarships to seventy percent of its first year students. The school informs the students that they will retain the scholarship in their second year, provided they finish in the top half of the class. Is the school required to provide students with disclosure (i) describing the total number (or percentage) of other students receiving similar scholarships; or (ii) alerting the students to the fact that some students receiving the first year scholarships will necessarily lose them in their second year?

²¹² See Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools*, N.Y. TIMES, Aug. 26, 2009, at B1 (noting that “[t]his fall, law students are competing for half as many openings at big firms as they were last year in what is shaping up to be the most wrenching job search season in over 50 years”). For a summary of the depth of the layoffs, see *The Layoff List: by the Numbers*, AM. LAW., http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202430161161&The_Layoff_List_By_the_Numbers_ (last visited Jan. 10, 2010).

²¹³ ABA, VALUE PROPOSITION, *supra* note 20, at 3 (noting that “many members of the class of 2010 and 2011 may graduate without a job, and those lucky enough to find employment likely will collectively have lower salaries than their predecessors”).

²¹⁴ See, e.g., Lynch & McEntee, *supra* note 208, at 3 (observing that “[t]he recent recession and corresponding reduction of traditionally high-paying entry-level jobs has exacerbated the distance between the cost of a U.S. legal education and expected earnings as a lawyer”). “Fielding complaints from more and more unemployed graduates, frequently drowning in student debt,” schools have become ever more aggressive in their efforts to keep up appearances. Catherine Rampell, *In Law Schools, Grades Go Up, Just like That*, N.Y. TIMES, June 21, 2010, at A1. In fact, the most recent tactic employed by several law schools, in the estimation of one former law school dean, “does damage to our expectation of the rule of law.” Frank J. Macchiarola, *Make-Believe Grades for Real Law Students*, MINDING THE CAMPUS (June 24, 2010), http://www.mindingthecampus.com/originals/2010/06/makebelieve_grades_for_real_la.html. In fact, some of the changes were employed retroactively in an effort to protect the schools’ “own reputations and rankings” and make “students look more attractive in a competitive job market.” Rampell, *supra*.

that these jobs have brought in recent years might also be disappointed by a reduction in the entry-level wage²¹⁵ or a deferral of the starting date.²¹⁶

Perhaps more damaging than the effects of the disappointment brought by the current economic lassitude are the likely effects over the longer term, if these changes turn out to be lasting.²¹⁷ In a sense, a permanent downward adjustment to the starting wage requires all rational investors entering the legal education market to ratchet their after-tax earnings expectations downward.²¹⁸ Absent a commensurate discount in the form of a tuition reduction or other subsidy, the investment thesis of the average prospective student is placed under additional strain.²¹⁹ Professor Schlunk summarizes the effect of such a scenario rather succinctly, offering that it “could easily tip the balance with respect to the investment decision . . . decidedly into negative territory”²²⁰ for more and more students.

III. INFORMATION ASYMMETRIES AND ENTERPRISE LIABILITY

A. *Informational Asymmetries Abound*²²¹

The two sides of the legal education market stand in stark contrast. On one side, the consumers of legal education are, on average, young, ill-informed about legal education, and unsophisticated about the careers and salaries that they are likely to enjoy following law school gradua-

²¹⁵ G. M. Filisko, *How Low Will Pay Go?*, A.B.A. J. (June 1, 2009, 8:40 PM), http://www.abajournal.com/magazine/how_low_will_pay_go/print; see also Schwarzschild, *supra* note 11, at 8 (observing that there is “growing awareness that most law graduates earn far less than the glamorous wages of associates at elite metropolitan law firms”).

²¹⁶ See, e.g., Bloomberg News, *Cravath, a Top Law Firm, to Pay New Hires to Delay Start*, N.Y. TIMES, June 12, 2009, at B2.

²¹⁷ See Larry Ribstein, *The Death of Big Law* 21 (Univ. of Ill. Law & Econ. Research Paper No. LE09-025, 2009) (positing that “big law” is in permanent decline because of a host of factors that have heretofore been “masked by a strong economy . . . which maintained strong demand for high-priced legal services”).

²¹⁸ Schlunk, *supra* note 5, at 14 (suggesting that if the current changes in the market become permanent, future lawyers will need to “ratchet down their expectations not only with respect to first-year compensation, but also with respect to job security and chances for partnership”). Additional taxes and fees that seem to be in the offing, at least in the near future, will also likely take a toll on earnings available to law graduates. See, e.g., Lori Montgomery, *Once Considered Unthinkable, U.S. Sales Tax Gets Fresh Look*, WASH. POST, May 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052602909.html> (describing a “surge of interest” among policymakers in the idea of a VAT).

²¹⁹ See Morrissey, *supra* note 7, at 275.

²²⁰ Schlunk, *supra* note 5, at 14.

²²¹ For a general introduction to the economic theory regarding asymmetric information, see generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

tion.²²² On the other side, the sellers (law schools and lenders) are more sophisticated entities with in-depth knowledge of their business, their industry, and the range of career and salary outcomes of alumni. The schools and lenders are repeat players in this market. Students are one-time participants, purchasing a legal education a single time. The uneven nature of the negotiation is exacerbated when one considers the abundant anecdotal evidence that law schools often entice prospective students with lofty employment and salary expectations by pushing misleading statistics and figures in marketing materials.²²³ One particularly glaring example of law school puffery highlights the broad-based problem:

Tulane University, for example, reports to *U.S. News & World Report* magazine . . . that its law-school graduates entering the job market in 2005 had a median salary of \$135,000. But that is based on a survey that only 24% of that year's graduates completed, and those who did so likely represent the cream of the class, a Tulane official concedes²²⁴

Aside from outright manipulation of the few transparent measures of value available to the prospective law student, as this Article has already explored, the *U.S. News* ranking relied on by so many is deeply flawed.²²⁵ Adding to the brew is the lack of sophistication or outright ineptitude of the average starry-eyed prospective law student and an inflated sense of her own abilities.²²⁶ A recent survey by the test prepara-

²²² See Matasar, *Academic Fiduciary*, *supra* note 90, at 88 (“[M]embers of the public, including applicants to the school and its own graduates do not often have an accurate picture of the school as it actually functions.”).

²²³ See, e.g., Efrati, *supra* note 11 (observing that “[s]tudents entering law school have little way of knowing how tight a job market they might face. The only employment data that many prospective students see comes from school-promoted surveys that provide a far-from-complete portrait of graduate experiences.”); see also Morrissey, *supra* note 7, at 277 (suggesting that the employment statistics routinely published by law schools “fail to state exactly what those jobs are and what their graduates receive in compensation”).

²²⁴ Efrati, *supra* note 11 (italics added). Lest one think the problem is unique to Tulane, the author describes another episode:

A glossy admissions brochure for Brooklyn Law School . . . reports a median salary for recent graduates at law firms of well above \$100,000. But that figure doesn't reflect all incomes of graduates at firms; fewer than half of graduates at firms responded to the survey, the school reported to *U.S. News*. On its Web site, the school reports that 41% of last year's graduates work for firms of more than 100 lawyers, but it fails to mention that that percentage includes temporary attorneys, often working for hourly wages without benefits, Joan King, director of the school's career center, concedes.

Id.

²²⁵ See *supra* Part I.B.2.

²²⁶ For a discussion of the phenomenon that persuades individuals to have an extremely high opinion of their own abilities notwithstanding objective analysis to the contrary, see THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO* 77 (1991). Subjective expectations cer-

tion company Kaplan highlights the lofty expectations or “statistical ignorance”²²⁷ of the latest batch of prospective law students:

A down economy hasn’t dampened aspiring lawyers’ confidence in their ability to get a job in the legal field—just their confidence in their peers’ ability to do so. According to a recent Kaplan Test Prep and Admissions survey of 330 pre-law students, 52% report that they are “very confident” that they will find a job in the legal field after graduating law school and passing the bar, but only 16% say they are “very confident” that the majority of their fellow aspiring lawyers will do the same. In fact, only seven percent of respondents indicated a lack of confidence in their own ability to secure employment upon graduation. Pre-law students’ attitudes are in keeping with research showing that students aged 18–29 are more optimistic about their economic future—despite a sluggish job market—than past generations.²²⁸

Furthermore, the many reasons individuals have for attending law school in general (and a specific school in particular) are often not well developed.²²⁹ In fact, the majority of law students fall into two specific categories: those employing law school matriculation as a “delaying tactic,” and those seeking a “means to an end.”²³⁰ The first group might be described as follows:

They do not know what they want to do. They have graduated from undergraduate school with a major that has not led to employment. They have loans that are coming due (or parents that are ready to toss them out of

tainly play a role in a student believing that he can overcome increasingly difficult odds to enjoy a satisfactory outcome following graduation.

²²⁷ See Elie Mystal, *The Hubris of Would-be Lawyers*, ABOVE L. (Apr. 13, 2010, 10:16 AM), <http://abovethelaw.com/2010/04/the-hubris-of-would-be-lawyers/>.

²²⁸ See *Kaplan Survey: Despite Challenging Job Market, Tomorrow’s Lawyers Appear to Have a Healthy Outlook on Their Own Job Prospects, but not Their Classmates*, BUS. WIRE, (Apr. 12, 2010, 12:16 PM), http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20100412006603&newsLang=en.

²²⁹ See Matasar, *Rise and Fall*, *supra* note 17, at 469–70 (noting that law students “come to achieve wildly different goals” and summarizing several different reasons students cite for their decision to attend); cf. Richard A. Posner, *The Next Generation of Law School Rankings: Framing the Rankings Debate: Law School Rankings*, 81 IND. L.J. 13 (2006) (offering that “one would expect a rational student to invest a significant amount of time in learning about the relevant characteristics of different law schools”).

²³⁰ Matasar, *Rise and Fall*, *supra* note 17, at 469–70.

their homes) and they find law school a relatively painless extension of their student days.²³¹

These delaying tactic students have been encouraged by a law school system that requires no prescribed undergraduate curriculum, provides generous financial aid for students with high LSAT scores, and allows students to “defer making a final decision about what they want to do”²³² when they grow up.

The law students who see law school as a means to an end view their three years as little more than a “hazing ritual” or a “painful step on the way to making a living.”²³³ In fact, this group proves quite pragmatic—in search of the “easiest course load that leads to the highest grades and the quickest exit from school to the working world.”²³⁴ Any remaining students might be sorted as those hoping to go into business, seeking a law school credential to advance in their current job or wanting to become a law school professor.²³⁵

Regardless of the label used to characterize the typical law student, there remains little doubt that her reasons for attending law school are not as well developed as they might be. Thus, it is unrealistic to expect that she will prove able to accurately forecast the expected value of a legal education over the remainder of her lifetime. And, therefore, she will not represent an adequate restraint on the pricing power of a more seasoned lender and law school.

B. *Applying Lessons from Enterprise Liability Theory*

Burdening law schools with the risk of unsatisfactory outcomes resulting from a system crafted by their design and under their control is not without precedent. In fact, some of the basic lessons of enterprise liability theory, a doctrine of modern tort law, are highly relevant in this context and can offer a great deal of guidance.²³⁶ Two tenets lie at the heart of enterprise liability theory:

²³¹ *Id.*; see also David Brooks, *Life Lessons From Watergate*, N.Y. TIMES, June 5, 2005, <http://www.nytimes.com/2005/06/05/opinion/05brooks.html> (“Fear of the unknown sends thousands back to law school.”); Schlunk, *supra* note 5, at n.4 (observing that law school is “a favorite destination for undergraduates who are very bright but who do not have terribly marketable degrees”).

²³² Matasar, *Rise and Fall*, *supra* note 17, at 470.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See *id.* Very humorously, the Dean also describes one student who told him that he enrolled in law school at the University of Florida “in order to maintain his football ticket priority.” *Id.*

²³⁶ See generally Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter Calabresi, *Risk Distribution*] (describing enterprise liability theory and its underpinnings and analyzing related case law through the lens of enterprise liability theory); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault*

First, activities should bear their characteristic accident costs. Fault liability pins the costs of the nonnegligent accidents that are the long-run price of an activity's presence in the world on the random victims of the activity. Enterprise liability pins those accident costs on the activity—the enterprise—which imposed the nonnegligent risks responsible for the injuries at issue. Second, enterprise liability holds that an enterprise's accident costs should be distributed among the members of the enterprise. The costs of an injury should be shared by those who profit from the activity responsible for the injury; they should not be concentrated on the injured party, or be dispersed across unrelated activities.²³⁷

Frequently, enterprise liability theory is associated with the twin economic goals of “allocative efficiency and loss-spreading.”²³⁸ More simply, enterprise liability aims to reduce an accident's costs and compensate its victims by allocating each accident's cost to the enterprise whose activities gave rise to the accident.²³⁹ This reallocation compels the enterprise enjoying the benefits of an activity to internalize the related accident costs, and thus prods the enterprise to make an economic decision about whether to participate in an activity. Specifically, the theory encourages a firm to determine whether a proposed activity is economically viable in light of its likely future accident costs and other concomitant expenses. By reducing the externalities of activities that impose accident costs on society, enterprise liability compels “the market . . . to tell us whether we want an activity despite its accident costs.”²⁴⁰ At the very least, it encourages the market to shape the activity into a more macro-efficient version.

The tenets and principles of enterprise liability form the basis of modern, abnormally dangerous activity law.²⁴¹ In essence, enterprise lia-

Allocation of Costs, 78 HARV. L. REV. 713 (1965) (discussing “a theoretical framework for nonfault liability in which risky activities reflect in their market prices the cost of their accidents”) [hereinafter Calabresi, *Nonfault Allocation*]; Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001) (discussing the history enterprise liability theory). Another prominent doctrine of modern tort law is fault-based negligence. See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001).

²³⁷ Keating, *supra* note 236, at 1286 (footnotes omitted).

²³⁸ *Id.* at 1287 (footnotes omitted).

²³⁹ See Calabresi, *Nonfault Allocation*, *supra* note 236, at 719.

²⁴⁰ *Id.* at 720.

²⁴¹ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 (2004); Calabresi, *Risk Distribution*, *supra* note 236, at 541; Keating, *supra* note 236, at 1318–23; cf. *Indiana Harbor Belt R.R. v. Amer. Cyanamid Co.*, 916 F.2d 1174, 1177–78 (7th Cir. 1990) (not applying strict liability to the transportation of acrylonitrile, a flammabale and highly toxic chemical).

bility dictates that when an abnormally dangerous activity, such as the transportation of gasoline via tractor-trailer,²⁴² results in accidental physical harm to an individual, then the enterprise engaged in (and benefiting from) the abnormally dangerous activity should bear the costs of the accident instead of the individual who was accidentally harmed.²⁴³ Thus, by reallocating the costs of the tractor-trailer explosion from the innocent motorist to the transport company, the company is compelled to reevaluate its transport methods and activities in light of now-internalized accident costs. The alternative would be for the victim to bear the costs of an accident. In such a regime, a non-participant in the dangerous enterprise, powerless to alter or improve operating policies, would bear the accident's burden. Such a system would lack economic efficiency, and instead impose unnecessary and inefficient accident costs on society. As the theory goes, allowing a portion of the enterprise's accident costs to be externalized would skew the enterprise's cost-benefit calculus, making it macro-inefficient.²⁴⁴

By most accounts, higher education does not qualify as an abnormally dangerous activity. And *physical* harm generally does not flow from disappointing post-law school student outcomes. The general principles of enterprise liability theory should not be dismissed, however, because they do provide the foundation for a just, fair and economically efficient method of allocating the risks and costs of higher education failures and shortcomings. Just as businesses can reap profits from useful yet abnormally dangerous activities, the legal higher education enterprise of law schools and student loan lenders invariably profit from successive batches of virgin law students. Law schools and lenders are the sophisticated, well-informed, repeat players in this market. By contrast, the less informed, one-time participants, legal education consumers are often left to handle unmanageable debt loads when the high-paying law firm jobs touted by school marketing materials fail to materialize.²⁴⁵

Applying enterprise liability theory to "accidents" in which student borrowers fail to realize the anticipated benefits of a legal education dictates that the law schools and lenders should bear the costs of accidents—not the student-turned-accident-victim. Relative to law schools and lenders, the student is less able to recognize the risk of failure *a priori* and has less ability to either bear or spread its cost. Furthermore,

²⁴² See *Siegler v. Kuhlman*, 502 P.2d 1181, 1184 (Wash. 1972); cf. *Indiana Harbor*, 916 F.2d at 1178 (holding that the transportation of acrylonitrile through the Chicago metropolitan area is not an abnormally dangerous activity).

²⁴³ See Calabresi, *Risk Distribution*, *supra* note 236, at 1320–22.

²⁴⁴ See Keating, *supra* note 236, at 1287.

²⁴⁵ See ABA, VALUE PROPOSITION, *supra* note 20, at 3 (noting that "[t]he combination of the rising cost of a legal education and the realities of the legal job market mean that going to law school may not pay off for a large number of law students").

because the student is a non-repeat participant in the law school market, allocating the cost to the student would do little to encourage the prevention of future noneconomic law student outcomes. The schools and the lenders, on the other hand, have greater resources, are in a superior position to assess the risks of noneconomic outcomes from the outset, and are repeat players in the law school market. In other words, they have the ability to take significant actions to prevent future student “accidents” and are better suited to bear the costs of sub-par student outcomes.

While certainly not controlling, an analogy to a prominent strict liability torts case is appropriate. *Lubin v. Iowa City*²⁴⁶ applied enterprise liability to homeowner losses arising from bursting water pipes maintained by a municipal waterworks company.²⁴⁷ In that case, the Iowa City waterworks had adopted a cost-saving policy of foregoing regular inspections and repairs of its water pipes in favor of simply waiting for the pipes to burst before replacing them.²⁴⁸ Under the prevalent tort doctrine of negligence,²⁴⁹ this cost-motivated practice “concentrate[d] the costs of inevitable pipe ruptures on those unlucky enough to suffer them.”²⁵⁰ Such a strategy bears a remarkable resemblance to the current model of education embraced by our nation’s law schools. Today, the higher education complex reaps its reward from the debt-financed tuition dollars of its students. Its policies foster average tuitions and fees well beyond the ability of most students to repay without significant difficulty. After pocketing the proceeds,²⁵¹ a system controlled by the schools and the ABA externalizes and concentrates the bulk of the risks and costs of unfavorable, post-law school outcomes on the majority of students “unlucky” enough to not realize the six-figure salaries touted in law school marketing brochures.²⁵² The *Lubin* court might have characterized such a “distribution of burdens and benefits”²⁵³ as “neither just nor reasonable.”²⁵⁴

²⁴⁶ *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964).

²⁴⁷ See Keating, *supra* note 236, at 1321–23. For an interesting article about a different kind of pipe, see Michael C. Macchiarola, *Get Shorty: Toward Resurrecting the SEC’s Ill-Fated Pursuit of PIPE Arbitrageurs*, 4 VA. L. & BUS. REV. 1 (2009).

²⁴⁸ *Id.*

²⁴⁹ RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 18 (2004).

²⁵⁰ Keating, *supra* note 236, at 1321 (discussing *Lubin*, 131 N.W.2d at 770–71).

²⁵¹ Actually, proceeds are either “paid out” in the form of higher salaries or perquisites for faculty, staff and administration, or “plowed back” into the school in the form of various improvements to facilities or endowments.

²⁵² An alternative, but unlikely, policy could be for law schools to charge tuitions commensurate with the expected post-graduation salaries of its indebted students. This policy would decrease the risk of “accidents” in student outcomes but would also likely lead to significantly lower revenues and profits for law schools.

²⁵³ Keating, *supra* note 236, at 1321.

²⁵⁴ *Lubin v. Iowa City*, 131 N.W.2d 765, 770 (Iowa 1964).

As a result of a similar fundamental unfairness, the *Lubin* court applied strict liability to compensate the victim “whose property is damaged without fault of his own” pursuant to enterprise liability theory:

If the City accepts the advantages of lower maintenance costs and other benefits which result from the practice of burying long lasting cast iron pipe six feet underground beyond any reasonable opportunity to inspect . . . it should also expect to pay for the damages resulting from such practice as a cost of its doing business in this manner.²⁵⁵

Today, the *Lubin* decision points the way for higher education reform. As in *Lubin*, if law schools accept the benefits of their policy of inflating tuitions beyond the affordability thresholds of the bulk of their students, they should expect to internalize the costs of accidents caused by such practices. This Article’s proposal asks nothing more than the court did in *Lubin*. Substantial costs are borne in the post-graduation lives of numerous law graduates who fail, despite good faith efforts, to realize income levels sufficient to justify the high tuitions typical among American law schools. These costs should not be borne by the graduates alone—especially when the students interested in eventually practicing law have little choice but to take part in a system the design, control, and cost of which they cannot affect.

IV. THE PROPOSAL: OPTIONS FOR STUDENTS

Five years ago, with the United States economy benefiting from the Great Moderation²⁵⁶ and the corresponding rising tide that seemed to lift all boats, Richard Matasar, the Dean of New York Law School, penned a sobering and prescient assessment of the future of America’s law schools:

The great success of American legal education has been buoyed by cheap money, a perception that there are not many viable alternatives, a sense that a legal education is an excellent long-term investment, students’ belief that

²⁵⁵ Keating, *supra* note 236, at 1321 (quoting *Lubin* at 770–71) (footnote omitted).

²⁵⁶ According to the *New York Times*, James Stock, a Harvard economist, coined the phrase “Great Moderation” to describe the decline in the variability of both output and inflation during the period from the mid-1980s through the first half-decade of the twenty-first century. See *Origins of ‘The Great Moderation,’* N.Y. TIMES, Jan. 23, 2008, http://www.nytimes.com/2008/01/23/business/23leonside.html?_r=1&ref=business. The phrase gained a wider acceptance after Ben Bernanke (then a governor of the Federal Reserve) introduced it in a speech in 2004. See Ben S. Bernanke, Remarks at the Meetings of the Eastern Economic Association: The Great Moderation (Feb. 20, 2004), available at <http://www.federalreserve.gov/boarddocs/speeches/2004/20040220/default.htm> (espousing the numerous benefits of a decline in macroeconomic volatility).

they are the exception to any negative trends, and the historically accurate belief that the legal profession is so robust that it will always outrun the debt that students take to become lawyers. In the years to come, each of these trends will change substantially and jeopardize the legal academy.²⁵⁷

Against his assertion that “high-priced schools, with moderate prestige, will not survive, unless they change,”²⁵⁸ Dean Matasar called for schools like his to take the difficult steps necessary to create real value for students or face extinction.²⁵⁹ In recent years, a slew of commentators have picked up the trumpet to sound the alarm for the law schools.²⁶⁰ To date, however, meaningful progress has largely eluded schools and policymakers alike. The problem is a rather simple one to diagnose: it is the classic sources-and-uses riddle. With sources of funds slowing, in many cases rapidly, and uses (many of which are fixed) showing no sign of retreat, the life of a law school dean ain’t what it used to be.²⁶¹ Not surprisingly, many schools have gone on a diet; responding to the problem with internal efforts at budget restraint and self-improvement. Noble as this work may be, in the long run, many schools will learn that the finance gods do not smile kindly on noneconomic models. All the good intentions in the world will not overcome an inflexible system deeply flawed in its design and incentives. And, thus far, any solution to the external forces supporting the current state of affairs has proven too costly for one entrenched interest group or another.²⁶² It seems that “[a]cademicians are like everybody else—in favor of progress

²⁵⁷ Matasar, *Rise and Fall*, *supra* note 17, at 494.

²⁵⁸ *Id.* at 496; *see also* Schwarzschild, *supra* note 11, at 9 (considering whether the “old school tie” that exists between many lawmakers and the law schools they attended would be enough to generally insulate law schools from legislative change).

²⁵⁹ His prescription is a menu of options by which law schools could choose a viable path, including (i) allowance for accelerated coursework to lower costs, (ii) law schools as “mini-universities” with multiple entry and exit points for students, (iii) membership in international and domestic consortia, partnerships and joint ventures to broaden the legal education, and (iv) mergers, acquisitions and going out of business sales. Matasar, *Rise and Fall*, *supra* note 17, at 498–503; *see also* Garvey, *supra* note 78, at 39 (listing a “dozen strategies for coping” with rising law school costs while remaining faithful to the mission of educating great lawyers).

²⁶⁰ *See, e.g.*, Alex Williams, *No Longer Their Golden Ticket*, N.Y. TIMES, Jan 17, 2010, at ST20; Nando, *Overpriced Legal Education*, THIRD TIER REALITY BLOG (Aug. 29, 2009, 7:40 AM), <http://thirdtierreality.blogspot.com/2009/08/overpriced-legal-education.html>.

²⁶¹ *See generally* Julie Kay, *Wanted: Law School Deans. Lots of Them*, LAW.COM (Feb. 2, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427889176&slreturn=1&hb-xlogin=1> (observing that a great number of law school deanships remain unfilled and commenting that “law school deanships, once highly sought after, are now high-stress jobs, thanks in part to the economy”).

²⁶² *See* Cohen, *supra* note 1, at 27 (“[I]t serves the interest of those in the legal profession that passage through law school is an expensive, time-consuming proposition.”).

but opposed to change.”²⁶³ In short, whether willing to admit it or not, the enterprise is invested in the status quo.²⁶⁴

Instead of cosmetic fixes, a radical change is needed to redirect the academy toward producing value for its students. In the spirit of enterprise liability theory and its underlying societal welfare maximizing principles, a superior model of higher education financing can be designed to replace our current system and reshape the entire American legal education model for the benefit of students. Such a redesign could protect the interests of both the borrowers and lenders. At the same time, such a system could measure the individual law schools’ effectiveness in training lawyers economically. Overall, the current system is more historical accident than anything else. It represents an unintelligible creature: loaded with perverse incentives, inflexible in its application, and immune to any rational measure of performance or value. The improved system this Article offers could both succeed as a credible loss-spreading mechanism and efficiently minimize future “accidents” via reduction of externalities.

Before presenting the proposal, a word of caution is warranted. This work represents the original version of an idea that can, no doubt, be improved by the further attention, analysis, and thoughts of the Article’s authors and others in the academic, legal, and business communities. This Article’s value will, therefore, be in its ability to introduce an alternative framework through which the academy might move toward a more rational and sustainable model. In that regard, this Article might be more a guide to thought than a “do-list item for the next Congressional session.”²⁶⁵ With that said, on to the model.

At the outset, a few financial terms must be introduced. A “put option,” for example, is a financial contract between two parties whereby a put buyer purchases from a put seller the right, but not the obligation, to sell (to the put seller) an underlying security or other item of value at an agreed-upon price.²⁶⁶ This agreed-upon price is typically referred to

²⁶³ Stephen Joel Trachtenberg, *Degrees and the Marketplace*, N.Y. TIMES ROOM FOR DEBATE BLOG (Jan. 3, 2010, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2010/01/03/are-they-students-or-customers/>.

²⁶⁴ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 33 (2007) (observing that “[e]fforts for change, reform and innovation” become struggles against existing constraints, thereby draining “energy and attention from the imaginative work of considering, creating, trying, and evaluating alternative possibilities”) [hereinafter Carnegie Report]; see also Cohen, *supra* note 1, at 29 (“[T]hose who have the power to decide how a law school operates will act purposefully and often in their own narrow self-interest.”).

²⁶⁵ McCusker, *supra* note 5.

²⁶⁶ See RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE 697 (9th ed. 2008).

as the “strike price” or “exercise price.”²⁶⁷ In exchange for this right, the put buyer pays a fee to the put seller. This fee is referred to as the “premium” and is typically paid at the time the parties enter into the option contract.²⁶⁸ A slight twist on the traditional put option is the “cash-settled put option.” Upon a put buyer’s exercise of a cash-settled put option, the put seller pays to the put buyer the cash difference between the value of the relevant underlier at exercise and the strike price, instead of selling the underlier.

Having established the nomenclature and basic operation of a typical put option, the put principles can next be applied to the area of law school financing. In the baseline case, a prospective student, looking to borrow money from a lender, might be offered a put option along with her loan. Specifically, this put option would only be exercisable on an “exercise date” ten years after the borrower’s graduation from law school and then only in the event (and to the extent) that the actual earnings of the borrower fail to exceed some expected earnings amount established concurrent with the borrower’s graduation. A predetermined “Minimum Expected Earnings Amount” would constitute the strike price of the put. The Minimum Expected Earnings Amount would be based upon both (i) the size of the student’s expected debt burden resulting from the financing of her education and (ii) a percentage of a student’s gross professional income that can reasonably be expected to be available for student loan payments. If, for example, a determination is made that fifteen percent of a student’s earnings should be available for debt repayment, the Minimum Expected Earnings Amount will be the quotient resulting from dividing (1) the student’s Expected Burden (discussed below) by (2) fifteen percent. In effect, this mechanism would set a floor for the gross income required during a “measurement period” for a student to comfortably repay the total amount of her law school loans by the measurement period’s conclusion.²⁶⁹ The measurement period would typically extend from the student’s graduation date through the exercise date of the put.

²⁶⁷ See *id.* at 565–69.

²⁶⁸ In the typical case, a put option on a share of stock gives the put buyer the right to sell the stock for the exercise price. In the event that the stock is selling at a price greater than the exercise price, the put will be left unexercised and will expire worthless. If, however, the stock price turns out to be less than the exercise price on the exercise date, the put owner will take advantage of her option and exercise the put, realizing, as profit, the difference between the exercise price and the stock’s lower market price. It should also be noted that some more exotic options can arrange for the premium to be paid in a different manner or at a different time. Accreting strike options, for example, imbed the premium in a strike price that changes over time.

²⁶⁹ When potential mismatches between the timing of actual income flows and the projected timing of loan payments are fully considered, the model requires adjustments for the time value of money that are beyond the scope of this Article’s consideration.

By design, the amount of income earned during this measurement period serves as the chief risk-shifting mechanism in the proposed structure. In the event that a graduate's earnings from employment during the decade following graduation fail to meet the Minimum Expected Earnings Amount threshold, the put will be "in-the-money." That is, the put buyer will be able to exercise her put option. In this case, upon a valid exercise of her option, the put buyer (i.e., the student-turned-lawyer) would be forgiven a portion of her remaining loan obligation.²⁷⁰ Also upon a valid exercise, the law school would be required to publicly disclose the fact that the degree has been "put."²⁷¹

The formula to determine the amount of loan forgiveness (the "Forgiveness Amount") that a borrower would receive upon the valid exercise of a put right is described by the following equation:

$$\text{Forgiveness Amount} = (1 - [\text{Actual Earnings} / \text{Minimum Expected Earnings Amount}]) * \text{Expected Burden}$$

The inputs to the formula are explained below. "Actual Earnings" would be determined from the relevant IRS filings of the borrower during the measurement period and would simply reflect the borrower's employment income during the period.²⁷² The "Expected Burden" would equal the total amount of all loan payments expected by the exercise date and would be determined according to (1) the student's original loan balance at graduation, (2) the projected interest rate(s) on the loan(s), and (3) certain assumptions as to the frequency, size, and timing of loan payments by the borrower.

An example illustrates the new financing structure as it might develop. Assume Ms. Average, representing the average private law school graduate, borrowed \$92,000 to fund her law school education with a direct loan carrying a 6% interest rate.²⁷³ At graduation, assuming

²⁷⁰ The "forgiveness" should come in the form of a reimbursement from the law school. The details of the forgiveness will vary based on the type(s) of financing involved.

²⁷¹ This Article assumes that certain information would be collected and incorporated into the various law school rankings. Such data should include the number and frequency of exercisable puts and the mean and variance of those puts at each school. This information would represent a meaningful measure of 'output' that so many have found missing from the various rankings methodologies that currently exist. In addition, such data should answer many of the concerns surrounding the subjectivity of output measures and could substantially shorten the "time-lag" problem raised by some output naysayers. See *infra* Part V.E.

²⁷² Some additional thought must be given to exactly how this number will be measured and verified.

²⁷³ The \$92,000 amount is derived from the approximate average debt burden of a private law school student as reported by the ABA. See ABA, *Average Amount Borrowed*, *supra* note 34. This example simplifies the standard mechanics of law school student loan disbursement for the sake of readability. Normally, such loan proceeds are spread out over each of the three

her interest was subsidized during her time in law school,²⁷⁴ she would owe \$92,000 at graduation. Around the time of her graduation, the \$92,000 amount and the 6% interest rate would be used to calculate the Expected Burden and, in turn, establish the Minimum Expected Earnings Amount. In this example, the total amount Ms. Average would be expected to pay in principal and interest over the decade following her graduation, the Expected Burden, would be \$122,566.63, assuming 120 equal monthly payments over those ten years.²⁷⁵ Furthermore, one would expect Ms. Average to earn at least \$817,110.87 in the decade following her graduation in order to comfortably repay the original \$92,000 loan amount with interest during the measurement period.²⁷⁶

When the exercise date arrives in the tenth year following graduation, Ms. Average will determine whether the put is exercisable. In the event that her professional pre-tax earnings during the measurement fall short of the \$817,110.87 Minimum Expected Earnings Amount, she will be able to take advantage of her put right. For the sake of the example, assume that Ms. Average was able to earn only \$717,110.87 professionally during the measurement period. In that case, she will have a \$100,000 disappointment compared to the agreed upon Minimum Expected Earnings Amount and will, therefore, have the right to exercise a put that will net a \$15,000.00 Forgiveness Amount.²⁷⁷ A few observations can be made about our example. First, as the magnitude of Ms. Average's professional earnings disappointment grows, the amount of available loan forgiveness also grows. If, for example, her earnings during the measurement period were only \$617,110.87, the Forgiveness Amount available from the put's exercise would be equal to \$30,000.²⁷⁸ Second, the amount of loan forgiveness determined by the formula will not necessarily be sufficient to entirely extinguish the remaining student loan balance of a particular student, because actual payment schedules may differ from the expected payments due to such things as loan deferrals, delinquent payments and penalties, prepayments, and alternative repayment schedules. Finally, in the event that the Forgiveness Amount is greater than the remaining loan balance at the time of the put's exercise,

years of law school with the possibility of different interest rates and other terms applying to the different loans, and disbursed semi-annually to the law school.

²⁷⁴ This is an assumption made for ease of explanation.

²⁷⁵ A simple amortization schedule reveals 120 equal monthly payments of \$1,021.39 representing total payments of \$122,566.63 (of which \$30,566.63 represents interest).

²⁷⁶ For ease of demonstration, this number is simply the quotient of the Expected Burden divided by fifteen percent. The amount is meant to represent earnings that will ensure that the borrower can comfortably repay her loan, using, for the sake of example, fifteen percent of her gross professional income. In reality, the calculation, as well as the determination of Actual Earnings, should include adjustments in respect of the time value of money.

²⁷⁷ Forgiveness Amount = $(1 - [717,110.87 / 817,110.87]) * 122,566.63 = 15,000.$

²⁷⁸ Forgiveness Amount = $(1 - [617,110.87 / 817,110.87]) * 122,566.63 = 30,000.$

the entire remaining loan balance will be extinguished, with the applicable law school (or its insurance provider) paying the borrower any surplus in cash.

Preconditions could be added to the put exercise right, such as a minimum threshold for Forgiveness Amounts that enable exercise of the put in order to reduce administrative costs. A more controversial structure might require, as a condition precedent to the exercise of the put right, that the lawyer borrower be required to renounce her law school degree (and forebear from using any law school credits earned), informing both the law school and the state bar associations of any jurisdictions in which she was licensed to practice law. This condition could prove particularly daunting for borrowers in the legal profession because of the professional licensing requirements unique to the practice of law. Because most jurisdictions require a degree from an accredited law school for bar admission,²⁷⁹ a lawyer deciding to exercise her option in such a regime would ease her debt burden only at the cost of her legal career!²⁸⁰ There seems little room for abuse by the students if this condition is added, as it would take a particularly patient arbitrageur to embark on a three-year course of legal education with the intention of *putting* back the degree some time following graduation. On the other hand, this law school degree renunciation could frustrate the goals of the proposed structure. Renunciation would undoubtedly have the effect of limiting the number of borrowers with positive (perhaps significantly positive) Forgiveness Amounts who would choose to exercise their put rights. To choose to exercise in such an environment, the borrower would have to subjectively value her law degree less than the available Forgiveness Amount. Therefore, the insistence of this condition could lead to the proposed structure having a minimal or insufficient effect on law school bottom lines, and the condition could thus fail to sufficiently reduce the externalities in the legal higher education market. The authors of this Article acknowledge and appreciate the persuasive arguments on both sides of the issue of whether to require renunciation for the put's exercise

²⁷⁹ See Donna Fossum, *Law School Accreditation Standards and the Structure of American Legal Education*, 3 L. & SOC. INQUIRY 515, 517–22 (1978) (tracing the history of law school accreditation and how accredited law school graduation became an eligibility requirement for admission to the bar); see also Cohen, *supra* note 1, at 25, 27 (observing that “[t]he ABA has successfully lobbied legislatures in all but [three] states to prohibit anyone who has not attended an ABA accredited law school from taking the state bar exam”). For an attack on this monopoly restriction on bar admission, see John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Values*, 15 ST. JOHN’S J. LEGAL COMMENT. 269 (2001) [hereinafter Elson, *Classic Rent-Seeking*].

²⁸⁰ See, e.g., Cohen, *supra* note 1, at 27–28. A technical change might need to be explored because most states require graduation from an ABA-accredited school to sit for the bar exam. Here, an on-going requirement might be warranted.

and continue to explore the issue. We most welcome further discussion of this feature within the academy.

The structure proposed by this Article aims to be flexible enough to allow for the posting of collateral during the term of the measurement period. For example, the federal government could require the borrower to “check-in” at annual or biannual intervals, requiring collateral to be posted by the law school or its insurer in the event that the borrower’s earnings are failing to keep pace with those suggested by the original model. Such a collateral posting mechanism might aid in price discovery if and when the law school looks to purchase ongoing hedges or insurance for succeeding classes of students.²⁸¹ In addition, the collateral posting mechanism should have the effect of protecting the federal government (assuming some form of guarantee survives in this market) in the event that a law school ultimately defaults on a put payment and the affected student compels the government to make the affected student whole.

Although raising issues beyond the scope of this Article, this structure should also prove flexible enough to work seamlessly with public service loan forgiveness programs in the event that a lawyer decides to go into public service and qualifies for forgiveness under such a public service program. In effect, a year of qualified public service employment for which the government provides the student with loan forgiveness could reduce the Forgiveness Amount under this model by the amount forgiven under the public service program.²⁸²

The results of a system that allows borrowers to ease their debt burden by exercising put rights against their law school will be quite interesting to observe. Of course, the eventual outcomes cannot be known. Yet, this Article takes comfort in the corollary to that old adage, “if it ain’t broke, don’t fix it.” If it is broke, it must be fixed! Ivory Tower, Inc. continues to show the classic signs of an overbought offering, and its fundamentals might not justify a price that has been driven, in large part, by unsophisticated and leveraged speculators. This proposal aims to protect schools and students alike by offering measures to ensure that price can be supported by fundamental value.

While certainty of outcomes cannot be assured, we can anticipate a few likely outcomes should the government ever adopt the proposal. First, a system similar to the one outlined above would mean that law schools would face an additional, real risk that a portion of the originated

²⁸¹ For a discussion of the potential development of a secondary market through which law schools may decide to hedge or insure their “put exercise risk,” see *infra* Part V.B.

²⁸² Under such a model, obtaining forgiveness under a public service style program prior to the exercise date of the put should result in additional adjustments to the Forgiveness Amount to account for the time value of money.

loan might be forgiven and, therefore, not paid in full. In response, the due diligence performed on prospective students and expenditures should improve to account for the increased risk. This is a very desirable result for all involved in the process, as improved diligence is likely to result in the divergence and customization of law schools to match the educational needs and expected salaries of their students. A one-size-fits-all culture that perpetuates poor value propositions at most law schools might give way to a more nuanced approach that balances costs to the actual expected outcomes of each institution's unique student base. Just as such a system is likely to save some students from the consequences of noneconomic decisions, schools with a conscience should also welcome a system that both compels schools to more critically evaluate the value of expenditures and discourages students for whom the value proposition does not work before they become encumbered with an enormous debt load.²⁸³ Ultimately, such a system should portend a more efficient higher education market—with overly optimistic student expectations tempered by market forces.²⁸⁴

An added benefit of this system should develop over time. With data becoming available as to the frequency of put exercises by the graduates of each of the nation's law schools and the average Forgiveness Amounts granted at each institution (along with distribution data), prospective law students will finally have their long-sought, transparent, non-manipulated measure of value.²⁸⁵ Armed with this information, students should be able to make better matriculation decisions—again, offering a certain self-correction to the distorted higher education market.

V. RESPONSES TO POTENTIAL CRITICISMS OF THE PROPOSAL

Those with a stake in the current system of law school financing are likely to express concern with this Article's proposal. Insiders do not easily examine the limits of the system within which they work. In fact, in the law school context, they have proven remarkably reluctant to scru-

²⁸³ See Bennett, *supra* note 14 (“Our colleges and universities should be more willing to shoulder their responsibilities to students, their families and taxpayers. Too often, these responsibilities have been evaded. This we can no longer afford.”).

²⁸⁴ See, e.g., Cass R. Sunstein, *Ranking Law Schools: A Market Test*, 81 IND. L.J. 25, 27 (2006) (“Perhaps law schools should be ranked through a market test, one that relies on the choices of the people directly involved: students who apply to law schools.”).

²⁸⁵ See, e.g., RYAN C. AMACHER & ROGER E. MEINERS, *FAULTY TOWERS: TENURE AND THE STRUCTURE OF HIGHER EDUCATION* 29 (2004) (“For colleges, the mission is not to maximize profit, but rather, perhaps, to maximize the quality of their educational output over time.”); Cohen, *supra* note 1, at 26 (offering that “there is an inverse relationship between law school rank and the quality of the legal education offered”); Matasar, *Rise and Fall*, *supra* note 17, at 476 (lamenting that “the best metric for assessing the quality of a school would still seem to be ‘outputs’”); Pollak, *supra* note 92, at 54 (referring to current rankings as “a prize that may beguile, but not intelligently inform, those who are planning to study law”).

tinize the productivity of the school in terms of whether it is truly directed to the needs of its paying customer (the student). Indeed, “[a]s entities where self-governance reigns, self-service is rarely questioned.”²⁸⁶ Therefore, several critiques of the proposal can be anticipated.

A. “Creaming” (Version 1)

The main criticism of the proposal is that requiring law schools to bear the risk of their graduates exercising a put right will further drive up costs, discourage law schools from offering admission (and lenders from making loans) to well-qualified students from non-upper-class families and defeat the original purpose of federal student loan programs. However, if the victims of exclusion avoid a clique comprised of law school graduates who are struggling like the dickens to repay their stifling debt levels, an argument rooted in “inclusion” seems rather curious. Moreover, such a “creaming” concern should be tempered by at least two factors.

First, the fact that higher education, unlike most other goods and services, is an “associative” good suggests that top-tier law schools will continue to admit and compete for well-qualified students from lower income brackets.²⁸⁷ In general, when selecting which producer of an associative good to patronize, consumer choice is dictated by “not just the quality and price of the firm’s products, but also . . . the personal characteristics of the firm’s other customers.”²⁸⁸ With the potential student as discerning customer, a law school’s desirability is driven, in large part, by the quality of its other students.²⁸⁹ Professor Hansmann provides an excellent example in the undergraduate context: “Harvard College would be nowhere near so attractive to prospective applicants if Harvard’s faculty, curriculum, and facilities were to remain as they are, but its other students—past, present, and future—were entirely mediocre.”²⁹⁰ Since a school’s desirability to all students (wealthy, poor, and those in between) would be diminished by its exclusion of a qualified penurious applicant

²⁸⁶ Macchiarola & Macchiarola, *supra* note 44.

²⁸⁷ See Henry Hansmann, *Higher Education as an Associative Good* 12–13 (Yale Law, Econ, & Pub. Policy No. 99-15, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=192576 [hereinafter Hansmann, *Associative Good*]. Notably, however, at the lower tiers, higher education tends to shed its “associative” character. At these lower levels, education is increasingly becoming a “commodity.” *Id.* at 12.

²⁸⁸ Henry Hansmann, *Proprieta’ e Concorrenza nell’ Istruzione Universitaria* [Ownership and Competition in Higher Education], 1 MERCATO CONCORRENZA REGOLE [MARKET COMPETITION REG.] 475, 487 (1999) (It.), available at http://www.law.yale.edu/documents/pdf/Faculty/Hansmann_The_State_and_the_Market_in_Higher_Education.pdf [hereinafter Hansmann, *Ownership and Competition*].

²⁸⁹ See *id.*

²⁹⁰ *Id.* at 488.

in favor of a less qualified prosperous one, there exists a natural check on the possibility that law schools would react to this Article's proposal by squeezing out lower income students.²⁹¹

Second, it is likely that a lower-tier of affordable "trade type" schools will develop to fill the void for lower-tier, lower-income students. In fact, it is hoped that this Article's proposal, if adopted, will arm the significant, admirable, and vitally important lobby that argues for the need for additional public service and legal aid lawyers²⁹² with additional ammunition in efforts to break the stranglehold of the ABA- and *U.S. News*-encouraged one-size-fits-all model of legal education!²⁹³ In its current rigidity, the ABA lock on accreditation and bar admission has outlived its useful life.²⁹⁴ Again, "[i]f something cannot go on forever, it will stop."²⁹⁵

B. Law School Budget Forecasting Uncertainties

Another criticism of this Article's proposal will likely focus on the uncertainty that student borrower put rights might bring to long-term law school budgets. Under this line of reasoning, the inability of a school to

²⁹¹ There is evidence that elite higher education institutions in the United States agree to charge full price "to talented students who are prosperous, and [use] the proceeds to improve their student bodies by attracting larger numbers of talented students who are impecunious. Hansmann, *Associative Good*, *supra* note 287, at 12 (using the example of the Ivy League colleges).

²⁹² See, e.g., MELANCA CLARK & MAGGIE BARRON, BRENNAN CTR. FOR JUSTICE, *NEW YORK UNIV. SCH. OF LAW, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 2* (2009) (arguing that too few people have access to qualified legal guidance and, as a result, many homeowners are losing their homes "because they lack the ability to navigate the landscape of our lending laws"); John T. Broderick Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, *N.Y. TIMES*, Jan 1, 2010, at A21 (interviewing the Chief Justices of New Hampshire and California about the challenge of the recent increase in pro se appearances as a result of the worsening economy); John Schwartz, *Cash Squeeze Said to Deny Legal Aid to Poor*, *N.Y. TIMES*, Sept. 29, 2009, at A22 (observing that nearly a million people are being denied representation in U.S. courts because legal aid clinics lack sufficient funding).

²⁹³ There are reams of very interesting scholarship offering alternative models. While beyond the scope of this Article, exploration of these arguments and increased experimentation is welcomed. See, e.g., Stephen M. Johnson, *www.lawschool.edu: Legal Education in the Digital Age*, 2000 *WIS. L. REV.* 85; Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 *WASH. U. L. Q.* 1035 (2001) (describing a no-frills model that could be offered in addition to today's exclusive "elite school" offering); Peter W. Martin, *Employing Technology to Erode Legal Education's Twin Barriers of Distance and Cost*, 61 *RUTG. L. REV.* 1115 (2009) (considering non-law school methods of professional education); Van Zandt, *supra* note 199, at 1143-44; William K.S. Wang, *The Restructuring of Legal Education Along Functional Lines*, 17 *J. CONTEMP. L. ISSUES* 331 (2008) (describing an unbundling of the five distinct education services provided by the law school).

²⁹⁴ See generally Elson, *Classic Rent-Seeking*, *supra* note 279 (arguing that ABA Section of Legal Education might review its law school accreditation standards to allow for more cost-efficient law school models).

²⁹⁵ *Herb Stein's Unfamiliar Quotations: On Money, Madness and Making Mistakes*, *SLATE* (May 16, 1997, 3:30 AM), <http://www.slate.com/id/2561>.

accurately anticipate the frequency and magnitude of future put exercises by its alumni would hinder long-term budgeting capabilities, perhaps even compelling schools to be overly conservative in anticipation of unknown put exercise rates. As the argument goes, this uncertainty might push schools to the point of compromising their educational missions by promoting excessive cuts to essential programs.

Such an argument fails to appreciate the fact that the uncertainty of put exercises can be effectively managed and controlled by law schools. In fact, to hedge their exposure to student put rights that are only exercisable in the somewhat distant future, law schools could purchase insurance or customized derivatives contracts in the over-the-counter market. Through insurance or derivatives contracts with financial intermediaries, law schools could, for an upfront price, hedge all of their exposure to student put rights and thereby gain visibility for budget forecasting purposes.

This secondary market for student put rights would come with an added benefit: market information regarding the varying value propositions offered by different law schools. The upfront insurance or derivatives premiums paid by law schools would vary depending on a sophisticated, independent financial institutions' assessment of the likelihood of put exercise by graduates from a particular school. This variation would provide a neutral appraisal of the differences in the value propositions offered by law schools. Any secondary market resale prices paid by financial institutions or other investors to purchase these hedging contracts would similarly provide an indirect market signal regarding the values offered by various J.D. programs. The potential usefulness of this market data to law students and the publishers of various law school rankings dictates that the pricing data in this secondary market should be required to be transparent and publicly reported.

While the exact nature, permitted participants, regulatory framework, and other details of a robust secondary market for student put right hedging contracts is beyond the scope of this Article, it should be noted that many of the shortcomings of over-the-counter derivatives markets that were exposed by the recent financial crisis can be overcome.²⁹⁶ For example, counterparty credit risk (the risk of default by the financial institution insuring a law school's put risk) can be reduced through the

²⁹⁶ See DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM—A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 2 (2009) *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf [hereinafter *TREASURY WHITEPAPER*]; DARRELL DUFFIE, ADA LI & THEO LUBKE, POLICY PERSPECTIVES ON OTC DERIVATIVES MARKET INFRASTRUCTURE, FED. RES. BANK OF N.Y. STAFF REPORT NO. 424 (2010), *available at* http://www.newyorkfed.org/research/staff_reports/sr424.pdf.

mandated use of central clearing counterparties for all secondary market trades in put right hedging contracts.²⁹⁷

C. “Creaming” (Version 2)

Another version of the creaming argument bemoans the additional cost of law school financing that will result from the law school bearing risk in the process. Under this version, critics may charge that the law school will look to subsidize the cost of insuring against any potential losses resulting from eventual put exercises by embedding the cost of the insurance policy—or, dare we say, a credit default swap—into the tuition of current students. This seems less an argument than an admission that the current model fails to deliver value commensurate with its costs. For, if the value proposition advertised by so many schools is believable, there should be a real absence of put exercise, making the cost of insurance negligible for all but the noneconomic institutions. For a school to admit that the cost of insurance will substantially increase its budget is to openly doubt its own value proposition. If a school doubts its own value proposition, it might think about becoming an unschool; and we will all be better off.²⁹⁸ Schools would also be afforded ample time to prepare for the system proposed here, as any contingent liability would only be realized after a substantial period of time (on the exercise date of the first put right rolled out pursuant to this Article’s proposal).

Does this proposal reduce all of the intangibles of a law school education to a math equation? The answer to this charge is a resounding no; and this proposal does not mean to assert anything close to the contrary.

²⁹⁷ See DUFFIE ET AL., *supra* note 296, at 1; TREASURY WHITEPAPER, *supra* note 296, at 81; see also *Over-the-Counter Derivatives: Modernizing Oversight to Increase Transparency and Reduce Risks: Hearing Before the Subcomm. On Securities, Insurance, and Investment of the S. Comm. of Banking, Housing, and Urban Affairs*, 111th Cong. 8 (June 22, 2009) (Testimony of A. Patricia White, Assoc. Dir., Div. of Research and Statistics, Bd. of Governors of the Fed. Reserve Sys.), available at <http://www.federalreserve.gov/newsevents/testimony/white20090622a.htm> (advocating the use of central counterparties for OTC products). But cf. Darrell Duffie & Haoxiang Zhu, *Does a Central Clearing Counterparty Reduce Counterparty Risk?* 3 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 46, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348343 (arguing that the fragmentation of clearing services erodes any benefits gained through the central clearing of derivatives).

²⁹⁸ In fact, many are starting to understand that there might be an oversupply of lawyers. See, e.g., NAT’L ASSOC. OF LAW PLACEMENT, MARKET FOR LAW GRADUATES CHANGES WITH RECESSION: CLASS OF 2009 FACED NEW CHALLENGES 3 (2010), available at http://www.nalp.org/uploads/Class_of_2009_Selected_Findings.pdf (noting that while the Class of 2009’s overall employment rate was better than that in the economy overall, “we can expect the Great Recession” to continue to have an impact on the employment experiences of the classes that will follow this one”); Greenbaum, *supra* note 67 (observing thousands of unemployed lawyers and wondering whether the federal government should take steps to limit the number of new lawyers in the face of the ABA’s “repeated unwillingness to change to this changing reality”).

Instead, this Article offers an alternative that rationalizes the allocation of risk to those better prepared to shoulder it and better able to make the necessary adjustments in response to observed outcomes. This model offers only a structural alternative, and remains careful to steer clear of any discussion of the intrinsic value of any particular curriculum or pedagogy, a law student's individual circumstances, or a person's self-worth. Simply allocating risk to those who are better prepared to shoulder it and better able to make necessary long-term adjustments based on realized risks and designing a system by which that risk can be measured says nothing about the intrinsic value of a curriculum, pedagogy, individual circumstances, or a person's self-worth. The point is that the market forces introduced by this Article's proposal will compel law schools, in delivering their pedagogical services, to offer value to students while simultaneously improving the availability of relevant information for prospective law students.

The market resulting from the adoption of this Article's proposal will be more Pareto efficient: forcing expensive lower-tier schools to articulate a coherent value proposition or fade away.²⁹⁹ No one should be overly sympathetic to the plight of these schools; expensive, lower-tier schools in their current form never represented a good deal for non-upper income students to begin with. The point is that the market will dictate that these schools either (i) lower their costs to match the expected income of their students (and, therefore, lower the risk of the put being exercised) or (ii) simply fail. Lower-tier expensive schools that do survive will likely be driven into a position as the playground of wealthy, mediocre students.

The market itself is already signaling this type of stratification. The bimodal distribution of starting graduate salaries practically screams for a lower cost solution for those students landing in the left most mode of the distribution.³⁰⁰ In addition, the increasing need for risky, unregulated private loans signals that costs are outpacing even the efforts of the federal government to keep up with them.³⁰¹ The point is that the law schools in their current incarnation, with their insulation from the market risks borne by their students, have not responded, and are not likely to respond, to graduates' lower earnings prospects.

²⁹⁹ In economics, Pareto Optimality is achieved if (i) there is no way to make some individual better off without making someone else worse off; (ii) there is no way to make everyone better off; or (iii) it is not possible to make any trades that are mutually beneficial. See SPURR, *supra* note 167, at 60 (noting that, in general, efficiency is achieved when resources are allocated to their use of highest value).

³⁰⁰ Again, there is ample evidence that the students falling in the left mode are also carrying the greatest debt burden! See Henderson, *Results or Resumes?*, *supra* note 188, at 21.

³⁰¹ See *supra* discussion at notes 20–22 and accompanying text.

The introduction of market forces to law school administrators should slow non-optimal behavior that lessens the value of law school educations for many students. In addition, another benefit of the market proposed by this Article should ultimately be realized in the transparent, value-centric information that it could provide for consumers of legal education. Our proposal embraces the long-accepted notion of the superiority of the price signal in aggregating information.³⁰² Whether an advocate or critic of the *U.S. News* rankings system, it cannot be said that the *U.S. News* methodology addresses the question of whether a single student at a particular school is able to find benefit from his post-graduation experience that outstrips the cost he paid for his degree. Instead of choosing from a homogenous set of law schools based on the deeply-flawed information provided by the *U.S. News* rankings, prospective students would approach the market for legal education services armed with a data set that closely measures the success of a law school's alumni, and therefore puts a school's money where its mouth is in terms of the value it delivers for its students.

D. *Comparisons to Federal Income-Based Repayment Program*

Some will undoubtedly question whether the plan described in these pages is preferable to the ongoing efforts of the Obama Administration to rationalize payments of borrowers based on their income.³⁰³ While those attempts are admirable for the relief they might provide a group of existing borrowers already enticed into unmanageable debt positions, the Income Based Repayment Program does nothing to address the ongoing runaway tuition inflation this Article describes. Any long-term solution to the problem must encourage better cost and value decisions by higher education institutions with respect to proposed expenditures and must discourage reflexive tuition increases by the higher education enterprise. In short, the education enterprise must be encouraged to coordinate the cost and price of its offering with the value that it offers its students. In that regard, this Article's proposal, unlike the Obama Administration's efforts, embodies the view that *ex ante* prevention, not *ex post* redistribution, remains the best medicine.

E. *Issues Raised by the Real Possibility of Non-Income-Maximizing Behavior by Graduates*

The paradigm presented in this Article, like many economic models, generally assumes that law school graduates will act in a profit-maximiz-

³⁰² See, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 525 (1945) (describing the superiority of market choices to other alternatives as a reflection of information).

³⁰³ See *supra* Part I.B.4.iii.

ing fashion following their graduation. In essence, the model assumes that all graduates will seek to maximize their incomes by taking the highest-paying jobs available at all times before the expiration of the put right described in this Article. Such an assumption betrays a certain naïveté, as experience suggests that students are likely to stray from such rigid behavior for any number of reasons, including lifestyle and family planning goals. In addition, certain modern theories of behavioral economics challenge the profit-maximizing assumption by arguing that, in many circumstances, people satisfice, by, for example, favoring a job that pays well enough over one offering the greatest compensation.³⁰⁴

Given the many non-profit maximizing nuances of real human behavior, some, especially law school administrators, will question the wisdom of shifting part of the monetary costs of voluntary non-profit maximizing behavior by law school alumni to their respective law schools via the put right described in this Article. Therefore, safeguards must be designed to ensure that the system suggested here does not devolve into such an indemnity.

One possible form of such a safeguard would be to require all graduates seeking to exercise their put right to make a good faith effort to maximize professional income and to produce documentation and other evidence of this good faith effort satisfactory to a representative of an oversight agency.³⁰⁵ However, a law school graduate with a put right tied to her student loans should not necessarily be barred from seeking employment that pays less but offers nonpecuniary rewards. In fact, in a system with such a requirement, we would be hard-pressed to find the next generation of law professors.³⁰⁶ A more moderate and appropriate solution would be a sliding scale, where non-profit-maximizing decisions of a borrower following graduation might result in a partial or full termination of the put right (varying as a function of the type, degree, and time frame of the non-profit maximizing behavior), an extension of its expiration date, or a number of other adjustments that can be designed to fit particular nuances of possible student behavior. Furthermore, to lighten

³⁰⁴ See, e.g., R.M. HOGARTH, JUDGMENT AND CHOICE: THE PSYCHOLOGY OF DECISION 177–84 (1980); 3 HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON 291–98 (1997); Robert Bordley, *Reformulating Decision Theory Using Fuzzy Set Theory and Shafer's Theory of Evidence*, FUZZY SETS & SYSTEMS, 139, 243–266 (2003); Robert Bordley, & Marco LiCalzi, *Decision Analysis Using Targets Instead of Utility Functions*, 23 DECISIONS IN ECON. & FIN. 53 (May 2000).

³⁰⁵ Such a good faith standard is typical of state unemployment benefit extension rules, which often require documentation and other evidence of adequate job search activities to be produced prior to approvals for extensions of unemployment benefits. See, e.g., *Extensions & FAQs: Frequently Asked Questions*, N.Y. STATE DEP'T OF LABOR, <http://www.labor.state.ny.us/ui/claimantinfo/eucfaqs.shtm#5> (last visited Aug. 22, 2010) (describing New York state's requirements for a twenty-week extension of unemployment benefits).

³⁰⁶ But c.f. *supra* Part I.B.3.

administrative costs, the sliding scale could incorporate certain thresholds where, for example, a certain amount of non-income-maximizing behavior would not require any modifications to the put right. Finally, in a system that requires the borrower to relinquish the law degree in connection with a put exercise, much of the discussion surrounding the noneconomic decision-making of borrowers changes dramatically.³⁰⁷

F. Encouraging Debt for Those Able to Pay in Cash

One of the most unfortunate distortions of the model proposed herein is that it might encourage students otherwise able to pay their law school bill without financing into a position of assuming debt to take advantage of the risk shifting that the model proposes. Under such a scenario, students able to pay their full way through school might nonetheless be attracted to the subsidy offered by the put right accompanying a borrowing. Such a distortion is particularly unappealing for those of us who believe a lack of respect of, and hesitation for, debt encumbrance lies at the root of many of our nation's current economic problems. There are adjustments that can be made to discourage such behavior, but the Article's authors do not consider this a substantial enough risk to address it at any length here.

CONCLUSION

Because "good times breed laxity and . . . a dangerous environment calls for the very best of responses,"³⁰⁸ this Article arises in the service of circumstance. It is high time for all stakeholders in the higher education game to embrace the concept of value. The higher education model that has educated generations of America's best, delivered incomparable achievement, solidified unsurpassed scientific and technological advancement, and improved the social standing of its students, requires a fundamental reexamination. This Article's proposal addresses the external forces that have allowed the current model to grow unresponsive to customer needs and unsustainable for all stakeholders.

Focusing for the sake of brevity on the legal segment of the higher education market, the Article embraces what one commentator called a "less academic and more market-driven model of legal education"³⁰⁹—that is, a more rational model where risks and costs are more transparent, more easily measured, and borne by the appropriate parties. While by no means an exhaustive, final solution to all that ails higher education, providing student borrowers with a put right would represent a significant

³⁰⁷ See *supra* notes 279–80 and accompanying text.

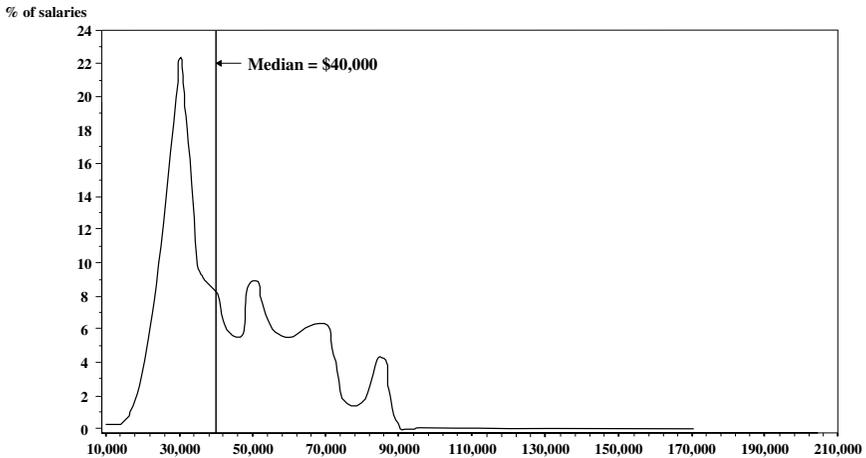
³⁰⁸ Frank J. Macchiarola, *What Are We Doing and What More Has to Be Done?*, 71 U. DET. MERCY L. REV. 531, 532 (1994).

³⁰⁹ Schwarzschild, *supra* note 11, at 10.

step in the right direction. At the very least, this Article stands for the notion that any answers to the economics that threaten the future of legal education would begin with greater fidelity to the consumer's interest and would "surely involve legal academics facing up to various uncomfortable truths about the way we live now."³¹⁰

For the legal academy, no goal is more important than ensuring that the ability to educate and train fine lawyers endures. In short, "[T]he law is what the lawyers are. And the law and the lawyers are what the law schools make them."³¹¹

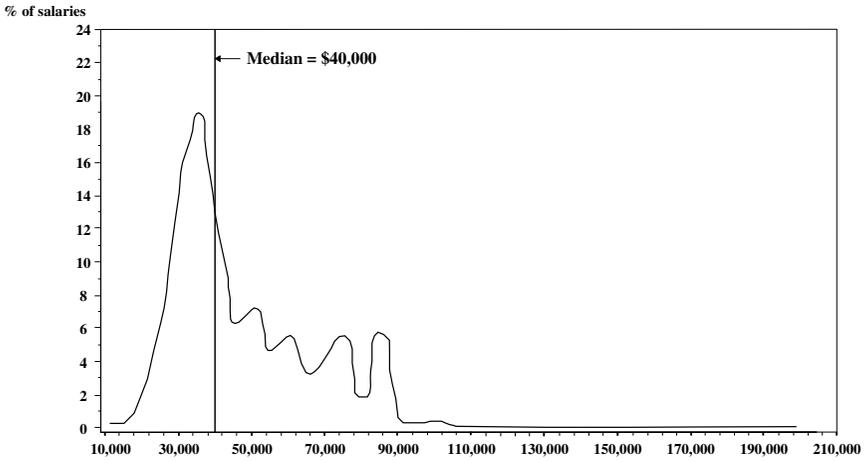
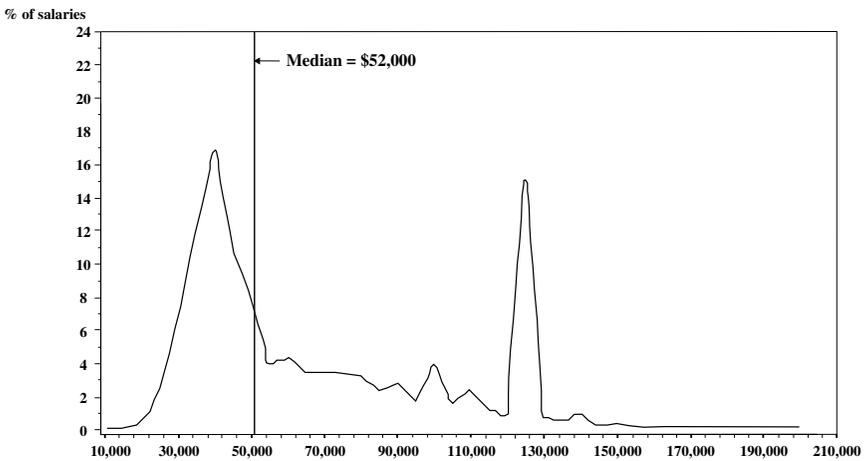
FIGURE 1. DISTRIBUTION OF FULL-TIME SALARIES, CLASS OF 1991³¹²



³¹⁰ Paul Campos, *Shame* 15, 23 (Legal Studies Research Paper No. 08-033, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161241 (depicting several fictional "legal academic characters" and their foibles).

³¹¹ Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927) (Felix Frankfurter Papers, Harvard Law School Library), quoted in RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 156 (1989).

³¹² See NALP, *How Did We Get Here?*, *supra* note 190.

FIGURE 2. DISTRIBUTION OF FULL-TIME SALARIES, CLASS OF 1996³¹³FIGURE 3. DISTRIBUTION OF FULL-TIME SALARIES, CLASS OF 2000³¹⁴

³¹³ See *id.*

³¹⁴ See *id.*

FIGURE 4. DISTRIBUTION OF FULL-TIME SALARIES, CLASS OF 2006³¹⁵

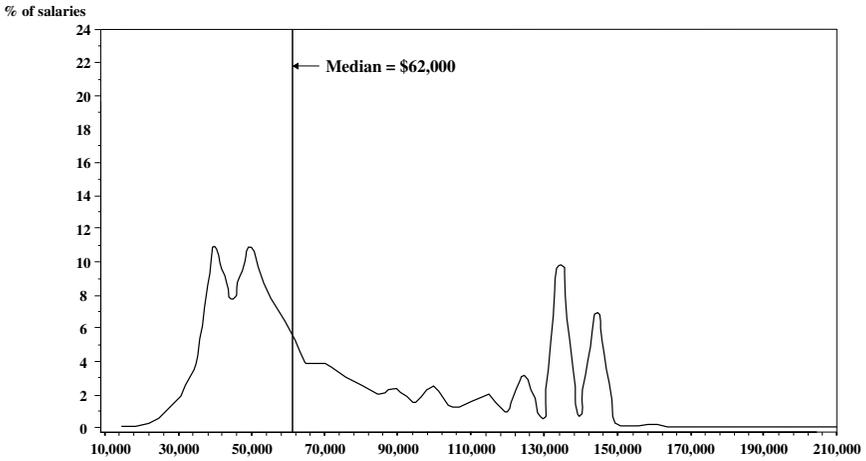


FIGURE 5. AVERAGE AMOUNT BORROWED FOR LAW SCHOOL 2001–2008³¹⁶

Academic Year	Public	Private
2007–2008	\$59,324	\$91,506
2006–2007	\$57,170	\$87,906
2005–2006	\$54,509	\$83,181
2004–2005	\$51,056	\$78,763
2003–2004	\$48,910	\$76,563
2002–2003	\$45,763	\$72,893
2001–2002	\$46,499	\$70,147

FIGURE 6. CHANGE OVER TIME IN MEDIAN LAW SCHOOL TUITION³¹⁷

	1985	1990	1995	2000	2005	2008
Median Public Law School Tuition (Resident)	\$1,792	\$3,012	\$4,897	\$7,201	\$12,107	\$15,621
Median Public Law School Tuition (Non-Resident)	\$4,786	\$7,390	\$11,656	\$16,113	\$23,506	\$26,436
Median Private Law School Tuition	\$7,385	\$11,680	\$16,930	\$21,920	\$28,670	\$33,985

³¹⁵ See *id.*

³¹⁶ See ABA, *Average Amount Borrowed*, *supra* note 34, at 1.

³¹⁷ See *Law School Tuition 1985–2008*, *supra* note 31, at 1–3.

FIGURE 7. CHANGE OVER TIME IN MEAN LAW SCHOOL TUITION³¹⁸

	1985	1990	1995	2000	2005	2008
Mean Public Law School Tuition (Resident)	\$2,006	\$3,236	\$5,530	\$7,790	\$13,145	\$16,836
Mean Public Law School Tuition (Non-Resident)	\$4,724	\$7,365	\$11,683	\$15,683	\$22,987	\$28,442
Mean Private Law School Tuition	\$7,526	\$11,728	\$16,798	\$21,790	\$28,900	\$34,298

FIGURE 8. AVERAGE LIVING AND BOOK EXPENSES FOR SINGLE STUDENTS LIVING ON CAMPUS 1990 – 2008³¹⁹

Academic Year	Expenses
2008–2009	\$12,878
2007–2008	\$12,336
2006–2007	\$11,591
2005–2006	\$11,054
2004–2005	\$11,094
2003–2004	\$10,461
2002–2003	\$13,048
2001–2002	\$13,051
2000–2001	\$12,466
1999–2000	\$8,467
1998–1999	\$8,050
1997–1998	\$8,045
1996–1997	\$7,638
1995–1996	\$7,222
1994–1995	\$6,845
1993–1994	\$6,604
1992–1993	\$6,785
1991–1992	\$6,088
1990–1991	\$5,269

³¹⁸ See *id.*

³¹⁹ See *Average Living and Book Expenses for Single Students Living on Campus 1990–2008*, Am. B. Ass’n, <http://www.abanet.org/legaled/statistics/stats.html> (follow “Average Living and Book Expenses for Single Students Living on Campus” hyperlink) (last visited Sept. 30, 2010).

FIGURE 9. FEDERAL STUDENT LOAN STATISTICS, 2008³²⁰

Program	New Loans (millions)	New Loan Volume (\$, billions)	Average Loan Size (\$)
Stafford Subsidized	7.9	30.4	3,945
Stafford Unsubsidized	7.5	32.7	4,544
PLUS Loans	1.1	11.4	11,114
Consolidated Loans	5.0	14.8	30,206
Perkins Loans	0.7	1.1	2,231

³²⁰ See U.S. DEP'T OF EDUC., FISCAL YEAR 2010 BUDGET SUMMARY AND BACKGROUND INFORMATION 60 (2010), available at U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/budget/budget10/summary/10summary.pdf> (providing information for Perkins Loans); *Student Loan Tables, Number of Loans (in Thousands)*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/budget/studentloantables/10appendixtables/apploantables.pdf> (providing information for Stafford Subsidized, Stafford Unsubsidized, PLUS, and Consolidated Loans).