

THE FEDERAL INCOME-CONTINGENT REPAYMENT OPTION FOR LAW STUDENT LOANS

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Many idealistic law school graduates feel precluded from taking legal aid and other low-paying public service jobs because they have incurred high educational debt, often exceeding \$100,000. In 1993, however, Congress created an “income-contingent” debt repayment option that was intended to enable high-debt, low-income graduates, including lawyers, to afford accepting public service positions.¹ This program caps loan repayments at a reasonable percentage of the graduates’ incomes, and it forgives any remaining balance at the end of twenty-five years.² To date, this program has failed to meet the needs of public interest lawyers. It is rarely used. Law students are largely unaware of it. Those who do know about the program, including law school financial aid advisors and the minority of law students who have heard of the plan, are suspicious of it. The main problem is that the twenty-five year repayment term is too long a period to be considered seriously by people just starting their careers, even though the plan also offers subsidies. This Article argues that the Secretary of Education should use existing statutory authority to shorten the term to a more realistic fifteen years, at a relatively low cost. It also argues for other reforms, including better marketing of this program by the United States Department of Education (“Department”).

Even as presently constituted, this program is potentially valuable for some law graduates who do not presently use it. As a long-term repayment measure, it would be particularly advantageous, offering generous subsidies for those whose schools do not have Loan Repayment Assistance Programs (“LRAPs”) and who start at quite low salaries, expect only modest income increases over time, and want to spend their full careers in public service. For those who want to spend a few years in public service early in their careers, this federal program could be useful as a temporary measure, and it permits students to convert to more conventional repayment plans when their incomes increase substantially.

With assistance from the Author and Tai-yue Hsia, FinAid (a public interest organization that helps students understand the loan system) has created a World Wide Web (“Web”) based calculator that enables readers of this Article to determine for themselves how the income-contingent repayment plan would affect their repayment obligations and

1. See generally *infra* Part III.

2. See *infra* note 180 and accompanying text; discussion *infra* Part III.B.

their total costs. An explanation of this calculator and its location on the Web are included in this Article.

I. INTRODUCTION

Most law students graduate with very high educational debt. For some, the debt can without exaggeration be described as “staggering,” in the sense that repayment according to a “standard” ten-year schedule would leave the graduate with full-time employment but scant discretionary income. Such a graduate can survive only by sacrificing consumer goods and services, postponing having a home and a family, and accruing additional credit card debt. The loan repayment problem is greatest for law students who would like to be self-sacrificing up to a reasonable point: those who decide to go to law school because they want to serve the public as “public interest” lawyers, such as staff attorneys at legal aid organizations. These students enter law school aware that public interest lawyers are paid only a small fraction as much as big-firm lawyers.³ But only as they accumulate law school debt do they realize that loan repayment obligations significantly increase the pressure to take high-paying private sector jobs. As graduation approaches, many of these students feel, with some bitterness, that because of their law school debt, they have no choice but to abandon their original goals and to seek employment with large corporate law firms, where starting salaries (including bonuses) often exceed \$90,000 and now sometimes exceed \$160,000.⁴

Approximately a third of the nation’s law schools have LRAPs to subsidize loan repayment for graduates who decide to work in public interest jobs.⁵ But most law schools do not have such programs, and some programs are not funded well enough to meet students’ needs.⁶

In 1993, with strong encouragement from the newly elected President, Bill Clinton, Congress seemed to come to the aid of graduates who faced the prospect of high debt and low incomes. When it established a program of direct lending to students by the Department, it created an “income-contingent repayment option” through which annual repayment of most educational debt would be capped at a fraction of the

3. See David L. Chambers, *The Burdens of Educational Loans: The Impacts of Debt on Job Choice and Standards of Living for Students at Nine American Law Schools*, 42 J. LEGAL EDUC. 187, 192 (1992).

4. See *infra* note 73 and accompanying text.

5. See discussion *infra* Part IV.B.

6. See discussion *infra* Part IV.B.

graduate's income.⁷ The option would be available to all graduates, not only of law schools, but also of undergraduate colleges and other graduate and professional schools.⁸ Students who paid through this plan for many years might temporarily accumulate mounting indebtedness because of the income-based cap on repayment. But the remaining debt would be canceled after twenty-five years of capped repayments.⁹ Furthermore, the graduates of schools that did not participate in the government's direct lending program could take advantage of the option through a consolidation loan from the federal government after graduation.¹⁰

Shortly after its enactment, this new law was hailed as a "radical" change.¹¹ According to Steven Waldman, the *Newsweek* legislative correspondent who closely followed the progress of this legislation so that he could write a book about its progress through Congress, the law

meant [that] anyone who still hadn't paid off their loan by year twenty-five would get an enormous gift from the taxpayers. The biggest benefit of all would go to . . . doctors who work in low-income clinics or lawyers who become public defenders—in other words, those doing the public service jobs Clinton admired.¹²

Eight years later, despite these apparent attractions, the income-contingent repayment option seems not to have caught on, at least among law graduates. Is neglect of this "program"¹³ justified by its economic disadvantages or the availability of good substitutes? Or is it based at least in part on non-economic factors such as lack of information about its availability, the difficulty of computing the total cost of income-contingent borrowing, distrust of the federal government, or fear of unconventional financial devices? To put it another way, in the

7. See discussion *infra* Part III.B.

8. See 20 U.S.C. § 1091(a)(1) (1994).

9. See discussion *infra* Part III.B.

10. See discussion *infra* Part III.B.

11. See STEVEN WALDMAN, *THE BILL: HOW THE ADVENTURES OF CLINTON'S NATIONAL SERVICE BILL REVEAL WHAT IS CORRUPT, COMIC, CYNICAL—AND NOBLE—ABOUT WASHINGTON* 236 (1995). This book is a study of the interactions between Congress and the Clinton Administration during legislative consideration of two bills: the law establishing a national service corps and the law creating a federal direct educational loan program. See *generally id.* app. at 251-52.

12. *Id.* at 236. At present, the "enormous gift" is taxable, but that aspect can and should be changed. See *infra* notes 394, 446 and accompanying text.

13. In this Article, the option is referred to, for convenience, as a "program," even though the government does not do so. The United States Department of Education ("Department") regards income-contingent repayment as one formula among several others for paying back student loans, and the administration of direct lending and its repayment is the government's "program."

future should law students who are graduating with very high debt loads consider signing up for income-contingent repayment if they would prefer to have public service careers, or jobs in small law firms that serve individuals, rather than working for the large law firms that pay the highest salaries? If the income-contingent repayment option is not living up to its promises, at least for significant numbers of high-debt, low income public servants, how should it be changed?

Part II of this Article explores the amount of indebtedness and the expected incomes of recent law graduates. It examines the historic and recent literature on the extent of their debt, relating the current economic situation of indebted law graduates to the trends of tuition and debt in recent decades.

Part III reviews the objectives and history of the legislation establishing an income-contingent loan repayment option. The legislative history demonstrates a broad consensus in favor of assisting students who planned public interest careers. Part III also explains the mechanics of income-contingent repayment and debt forgiveness under the law and its implementing regulations.

Part IV reports the results of the Author's survey of law students' knowledge of the income-contingent repayment option, and, to the extent that they know about it, their attitudes about this method of payment. Because students in most schools must rely on law school financial aid advisors for information and counseling about loan repayment options, Part IV also reports the results of the Author's survey of law school financial aid advisors' awareness of and beliefs about income-contingent repayment. These surveys provide statistical evidence supporting the hypothesis that this program is poorly understood and little used by one of the important constituencies for whom it was intended.

The surveys reveal that while neither students nor financial aid advisors are well informed about the income-contingent repayment option, those who are informed shun it, though for different reasons. Students dislike it primarily because it requires at least an initial commitment to a twenty-five year repayment schedule. Financial aid advisors are skeptical of it because they believe that few graduates would use it long enough to obtain its promised subsidies. However, 52% of the financial aid advisors believe that income-contingent repayment could be useful for at least 5% of their schools' recent graduates.

Having surveyed in Part IV the background of opinions about this program and the sources of the respondents' misgivings, Part V

considers the income-contingent repayment option from the perspective of some hypothetical recent graduates unhampered by either a lack of information about the program or distortions of its cost. From the perspective of hypothetical law students with high debt and different plans for long-term and short-term public service, Part V demonstrates the advantages and disadvantages of income-contingent repayment compared with standard repayment and with other long-term repayment plans. It also considers the effect of the availability of a law school loan repayment assistance plan, and of marriage, on the value of using income-contingent repayment. In addition, it directs students to a new Web site through which they may make their own personal calculations of how they would fare under the income-contingent plan, and through which they can compare income-contingent and standard repayment. Part V may enable future law students to make more rational debt repayment and career decisions, and it may help financial aid advisors to offer more sophisticated guidance.

Part VI asks why a plan that has been part of the federal law for more than five years, and that could help make loan repayment affordable for law graduates most in need of assistance, is so little understood or used. The existence of alternative payment-reduction plans does not adequately explain the orphan status of income-contingent repayment. Part VI considers, as well, inadequacies in the program itself; the impact of private lender hostility to the program and of partisan politics; and the poor quality of public information issued by the Department.

Part VII makes recommendations to students, to financial aid advisors, and to policy makers in Congress, the White House, and the Department. It offers students some advice on financial planning within the constraints of the existing loan repayment system, and it encourages financial aid advisors to become more familiar with how income-contingent repayment can be useful for graduates with the highest debt and lowest incomes, particularly those who are committed to a lifetime of full-time public service. On the assumption that policy makers are now or will in the future be guided by the same desire to encourage public service that motivated legislators and President Clinton to create income-contingent repayment in 1993, it makes several suggestions for making this program more attractive and more visible to borrowers who desire to become public interest lawyers.

II. RISING COSTS AND RISING DEBT

A. *The Rising Cost of Legal Education*

For nearly fifteen years, observers of legal education have warned that the rapidly increasing cost of becoming a lawyer would eventually have deleterious effects on the profession. In 1987, John R. Kramer, then-Dean of Tulane Law School, noted that from 1974-75 to 1985-86, private law school tuition had increased from an average of \$2305 to an average of \$8286 (259%), and public law school tuition for in-state students had increased from \$716 to \$2135 (198%).¹⁴ During this same period, the consumer price index had risen only by 120%.¹⁵

Kramer projected the trend forward to the year 2000, assuming three different rates of tuition increases: the 11.3% historical rate for private law schools, a more moderate 7% rate, and a low 5% rate.¹⁶ He assumed that students would continue to borrow at the same rate as in the past to pay for legal education.¹⁷ He concluded:

Student borrowing would have to climb to at least \$66,000 to cover the 73% of average private law school attendance costs (at the low predicted rate of inflation in tuition) now covered by the [federal guaranteed student] annual loan limit. . . . Because [the median] starting salary of \$36,000 in 1982 will become \$82,500 in 2003, assuming a 5% annual increase, a \$66,000 debt might be barely affordable.¹⁸

But, he noted, half of the graduates would be earning less than the median.¹⁹

The effect of these escalating costs and debt, Kramer worried, would be that law schools would “be filled with many more students who, as they become lawyers, do so with the single-minded objective of milking the profession for all it is worth in order to be able to pay retrospectively for their legal education.”²⁰ Two years later, he noted that faced with continuing increases in the cost of legal education, some talented college graduates would give up their desire to become lawyers,

14. See John R. Kramer, *Will Legal Education Remain Affordable, By Whom, and How?*, 1987 DUKE L.J. 240, 242-43.

15. See *id.* at 243.

16. See *id.* at 244.

17. See generally *id.* at 250-68.

18. *Id.* at 267.

19. See *id.*

20. *Id.* at 240-41.

and that students who did choose law school would “recoup their investment by ignoring the legal needs of four-fifths of the nation in order to service the one-fifth able to pay sizeable fees.”²¹ “How do you expand the range of career choice for graduating students saddled with tens of thousands of dollars of debt burden,” he asked.²² “Or do you simply tighten the corporate large firm practice noose around their necks and yank?”²³

Professor David Chambers responded contemporaneously “that in some respects Kramer is not nearly gloomy enough.”²⁴ He noted that Kramer failed to explore in any detail the situation of law graduates who incurred the same law school expenses as everyone else but earned well below the median salary.²⁵ Chambers feared that in the future “it may well become harder and harder to attract able beginning lawyers into government, legal services, and ‘public interest’ work.”²⁶ Chambers had some empirical data to support his concern. A survey of Michigan Law School graduates showed that “nearly half of those with debts of \$15,000 or more who were currently working in government, legal services, public defenders or other public interest settings reported that they had experienced moderate to great difficulty in meeting their obligations,”²⁷ and he predicted that with the cost of a legal education rising more quickly than inflation, “the starting lawyer with high debts will be substantially worse off in 1997 than in 1987.”²⁸

Kramer’s 1987 predictions of the cost of attending a private law school in the year 2000 proved accurate.²⁹ By 1999, the average tuition at such a school had become nearly \$21,000,³⁰ and the average annual cost

21. John R. Kramer, *Who Will Pay the Piper or Leave the Check on the Table for the Other Guy*, 39 J. LEGAL EDUC. 655, 655 (1989).

22. *Id.* at 671.

23. *Id.*

24. David L. Chambers, *Educational Debts and the Worsening Position of Small-Firm, Government, and Legal-Services Lawyers*, 39 J. LEGAL EDUC. 709, 709 (1989).

25. *See id.* at 709-10.

26. *Id.* at 710.

27. *Id.* at 719.

28. *Id.* at 722.

29. Kramer predicted annual 2000-01 cost of attendance for private law school in the range of \$29,000 to \$55,000. *See Kramer, supra* note 14, at 245. He put the cost of public law school attendance in the \$16,700 to \$20,200 range. *See id.*

30. The precise private school tuition average was \$20,709. *See* E-mail from Rick L. Morgan, American Bar Association, to the Author (June 13, 2000, 15:02 EST) (on file with author); *see also* Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333, 333 tbl.1 (1999) (displaying the published figures for 1975 and 1997). Olivas (who is the William B. Bates Professor of Law at the University of Houston) was a trustee of the Access Group, a major private lender, and his data was supplied by Access Group. *See*

of attendance (measured by tuition plus living expenses) had risen to \$32,763.³¹ Even by 1997, the cost of attendance at fifty of the nation's 180 law schools had exceeded \$30,000 per year, and several schools were considerably more costly,³² causing one scholar to observe that students entering some law schools in 2002 "will have to shoulder costs of attendance of more than \$155,000 for their three years of schooling."³³ For students attending public law schools in their own states, in which legislative appropriations subsidized their education significantly, the 1999 cost was considerably less than at private law schools; students living off campus paid an average of only \$18,415 for each of their three years.³⁴ But tuition costs at such schools had been rising more quickly than at private law schools.³⁵

B. Debt

Lending is the engine that makes it possible for students to attend law school.³⁶ Approximately 86% of law students borrow to pay for their education.³⁷ Students take out two types of loans: (1) they incur debt that is guaranteed by or extended by the federal government; and (2) they also borrow commercially. Because it is less costly, they borrow first, to the extent permitted by law, through the federal Stafford loan program.³⁸

id. at 333 & n.1. From 1997-98 to 1998-99, tuition at American Bar Association ("ABA") approved law schools increased 6%, compared to a national inflation rate of 1.6%. *See id.*

31. *See* E-mail from Rick L. Morgan to the Author, *supra* note 30 (noting that the cost of living off campus while in law school for a year is an additional \$12,054 (public and private law schools combined)). By another measure, which counts into the cost of legal education the lost wages that the student could have earned while attending law school, the cost of attendance is considerably greater. *See Kramer, supra* note 14, at 247.

32. *See* Olivas, *supra* note 30, at 334.

33. *Id.*

34. *See* E-mail from Rick L. Morgan to the Author, *supra* note 30 (noting the 1999 public law school tuition for in-state residents and off-campus living expenses).

35. Average public law school tuition for in-state residents rose from \$780 to \$6000 between 1975 and 1997. *See* Olivas, *supra* note 30, at 333 tbl.1. Average in-state tuition rose another 6% in 1998 and a further 6% in 1999. *See* E-mail from Rick L. Morgan to the Author, *supra* note 30.

36. Some students receive money from parents for law school attendance, but even in 1987 John Kramer could write that "[m]ost students are given either more than \$10,000 or nothing at all," and that the emergence of a large federal lending program was "encourag[ing] some parents to abandon a previously accepted responsibility," causing students to have "to find money for legal education themselves." Kramer, *supra* note 14, at 252.

37. Eighty-six percent of lawyers graduating in 1996 had borrowed. *See* SAMUEL M. KIPP, III, STUDENT BORROWING, DEBT BURDEN, AND DEFAULT: THE SPECIAL CASE OF FIRST-PROFESSIONAL STUDENTS IN THE 1990S, at 25 (Access Group, Inc. 1998). An increasingly high percentage borrow as the cost of attendance rises; the corresponding percentage for the class of 1993 was 81%. *See id.*

38. *See generally* 20 U.S.C. §§ 1078, 1078-8 (1994 & Supp. IV 1999). Students with exceptional financial need may also borrow up to \$6000 per year (for graduate students) through the

Government-guaranteed Stafford loans can be obtained from banks for undergraduate education, for legal education, or for both, through the Federal Family Education Loan Program (“FFELP”),³⁹ known in a pre-1992 incarnation as the federal guaranteed student loan program.⁴⁰ At some universities, students may borrow directly from the federal government, through its federal direct lending program, rather than from banks.⁴¹ Stafford loans are extended at rates lower than the commercial market would charge, and they are subject to a statutory interest rate ceiling of 8.25%.⁴² Only 1% of law students borrows for college but not for law school.⁴³ Fifty-three percent borrow for law school.⁴⁴ Another 32% borrow for both levels of education.⁴⁵

The Stafford loan program includes two types of loans. The first \$8500 per year that most law students borrow is subsidized,⁴⁶ in that the federal government pays the interest while the student is in school.⁴⁷ After borrowing \$8500 this way, a student may also borrow up to an additional \$10,000 per year in unsubsidized Stafford loans.⁴⁸ As in the case of subsidized Stafford loans, the interest rate is linked annually to the rate for ninety-one day Treasury bills,⁴⁹ but the maximum rate is

Perkins Loan Program, in which the interest rate is capped at 5%. *See id.* § 1087dd(a)(2)(A)(ii), (c)(1)(D) (Supp. IV 1999); *see also* ANNE STOCKWELL, THE GUERRILLA GUIDE TO MASTERING STUDENT LOAN DEBT 50-58 (1997) (discussing the history of financial aid). This manual, written for students, is a well-known introductory orientation to the institutions that manage student loan programs. It contains much useful history of federal financial aid, and it offers considerable help with terminology and concepts. *See id.* However, it does not describe repayment plans in detail.

39. 20 U.S.C. §§ 1071 to 1087-4 (1994 & Supp. IV 1999).

40. *See* STOCKWELL, *supra* note 38, at 59.

41. *See* 20 U.S.C. § 1087a(a) (1994).

42. *See id.* § 1077a(j)(1), (k)(1) (Supp. IV 1999) (describing original loans); *id.* § 1087e(b)(6)(C) (describing consolidation loans).

43. *See* KIPP, *supra* note 37, at 25 tbl.7.

44. *See id.*

45. *See id.*

46. Eligibility rules for subsidized Stafford loans to law students are sufficiently generous that an estimated 95% to 97% of the Georgetown University Law Center (“Georgetown”) law students who borrow receive subsidized Stafford funds. *See* E-mail from Ruth Lammert-Reeves, Assistant Dean for Financial Aid, Georgetown University Law Center, to the Author (July 21, 2000, 12:27 EST) (on file with author).

47. *See* 20 U.S.C. § 1077a(k)(2) (Supp. IV 1999).

48. *See id.* § 1078-8(d)(2)(C). If the student is not eligible to borrow the full \$8500 in subsidized Stafford funds, he or she may borrow that money as part of the unsubsidized Stafford loan. *See id.* § 1078-8(a), (b) (1994 & Supp. IV 1999).

49. The rate is 1.7% more than the ninety-one day rate for the previous May while the borrower is in school and for a short time thereafter, and 2.3% above that rate for the duration of repayment. *See id.* § 1077a(j)-(k) (Supp. IV 1999). For loans that are consolidated, the interest rate becomes fixed; it is the weighted average of the rate being paid for each of the consolidated loans at the time they are consolidated, rounded up to the nearest higher one-eighth of 1%, with a cap of 8.25%. *See id.* § 1077a(k)(1), (4).

8.25%.⁵⁰ However, although a student may defer paying interest on the unsubsidized Stafford loan while in school, the unpaid interest is added to principal (capitalized), so it will cause the size of the loan to increase.

Because the cost of attendance at many law schools exceeds the \$18,500 that may be borrowed through Stafford loans, many students turn to private lenders to make up the difference. Typically, they turn to private lending programs that are specifically geared to law students, such as those offered by the Access Group, a major lender in this field. Because the loans are not government-guaranteed, these programs charge higher rates of interest than the banks or the government charge on Stafford loans.⁵¹ But some students do not qualify to receive sufficient credit from these private lending programs to cover all of their educational expenses. Some students are driven toward still more expensive private borrowing. For example, graduate students in the United States have an average of seven credit cards, and the average cumulative balance on these cards is \$5800.⁵² Credit card interest rates are often 16% to 18% per year.

In 1995-96, approximately one-quarter of all students at private law schools had private loans on top of their Stafford loans.⁵³ This percentage was bound to keep rising, at least until 2003, because while law school costs kept going up, the \$18,500 annual limit on Stafford loans set by Congress in 1992 was not changed in the congressional review of the Higher Education Act in 1997, and is not scheduled for further legislative review until 2002-03.⁵⁴ When the annual Stafford limits are eventually increased, the amount of private lending may fall, but the amount of total borrowing will continue to increase.

50. See *id.* §§ 1077a(k)(1), 1078-8(e)(4) (1994 & Supp. IV 1999).

51. See Jane Bryant Quinn, *New Schools of Thought on College Loans*, WASH. POST, Nov. 14, 1999, at H2.

52. See Michael A. Olivas, Diane L. Saunders & Mel R. Stiller, *The Challenge of Paying for a Graduate or Professional Degree: Trends in Student Borrowing and the Ability to Repay Debt*, in SYMPOSIUM ON HIGHER EDUCATION FINANCING: CRITICAL CHALLENGES IN FINANCING GRADUATE AND PROFESSIONAL DEGREES 47, 57, Access Group, available at <http://www.accessgroup.org/symposium/acrobat/chapt3.pdf> (Sept. 1997) [hereinafter SYMPOSIUM] (providing the comments of Diane Saunders, Vice President of Communications & Public Affairs at Nellie Mae). Nine percent of graduate students have credit card balances exceeding \$15,000. See *id.*; see also Susan Carpenter, *Bankrupt at 24: For More and More Young Adults, Credit Cards, Student Loans and Unwise Spending Add Up to Overwhelming Debt—And Some Are Using a Last-Resort Measure First*, L.A. TIMES, Jan. 23, 2001, at E1.

53. See KIPP, *supra* note 37, at 22 tbl.4.

54. The percentage of law students borrowing from private sources fell (from 36%) after 1992, because in that year, Congress raised the loan limit to \$18,500 and made eligibility criteria much more generous. See *Default Rate Dips Again for Student Loans*, BUFF. NEWS, Nov. 12, 1997, at 10A. “[M]ore than 60 percent of the increase in cumulative federal borrowing . . . was actually the result of substituting lower-cost federal loans for private loans.” KIPP, *supra* note 37, at 21.

The federal indebtedness and the total indebtedness of graduating law students have increased steadily. Table 1 displays this increase.

TABLE 1: CUMULATIVE DEBT OF GRADUATING LAW STUDENTS⁵⁵

Year	Public law schools		Private law schools	
	Average federal loan debt	Average total debt	Average federal loan debt	Average total debt
1987-88				\$28,000 (estimate)
1992-93	\$22,278	\$28,945	\$30,887	\$41,776
1995-96	\$39,337	\$39,987	\$49,043	\$53,036
1999 (conservative estimate) ⁵⁶	\$44,366	\$41,828	\$52,083	\$56,324

From 1988 to 1996, the cost of living increased by 32.6%, so indebtedness of \$28,000 in 1988 would amount (in 1996) to \$37,128 in 1988 dollars. The 1995-96 \$53,036 average total debt of private law school students therefore represents a considerable increase in terms of real dollars. Similarly, the 1992-93 average total private law school debt of \$41,776 should equate in 1996 to \$45,368, not \$53,036, if there had been no real increase.⁵⁷ From 1987 to 1999, the cost of living went up by less than 50%,⁵⁸ but the average debt of students graduating from private law schools doubled.

55. The data from 1992-93 and 1995-96 were derived by Samuel M. Kipp, III from the National Center for Education Statistics' National Postsecondary Student Aid Study 1992-93 and National Postsecondary Student Aid Study 1995-96 databases. *See* KIPP, *supra* note 37, at 21. They understate total indebtedness because they exclude credit card debt. *See id.* Good statistics are apparently unavailable before 1992-93. The 1988 estimate is based on an analysis of the cumulative debt (\$22,000) of students graduating from Tulane Law School that year who had borrowed from Law Access, plus an estimated \$6000 of undergraduate debt with which they arrived in law school. *See* Kramer, *supra* note 21, at 672-73.

56. This estimate was derived only by adjusting for 1996-99 inflation, and assuming no real increase in borrowing, even though borrowing has historically outpaced inflation. United States government statistics show that average indebtedness for all 1997 first-professional (not only law) graduates was \$66,200. *See* SUSAN P. CHOY & C. DENNIS CARROLL, U.S. DEP'T OF EDUC., DEBT BURDEN FOUR YEARS AFTER COLLEGE 56 (NCES 2000-188 2000).

57. Unless otherwise stated, inflation adjustments in this Article were computed using a particularized inflation calculator. *See Consumer Price Index (CPI) Inflation Calculator*, Johnson Space Center, at <http://www.jsc.nasa.gov/bu2/inflateCPI.html> (last visited Feb. 13, 2001).

58. The increase over these years was 46.7%. *See id.*

The \$56,324 estimate of average debt (for students graduating from private law schools in 1999) is based on projections from data self-reported by students in a Department survey, and it may significantly understate the amount of debt. Two recent studies suggest that the debt is actually higher. The National Association of Student Financial Aid Administrators' survey of financial aid administrators found that for law student borrowers graduating in 1998, average cumulative debt (including undergraduate debt) was \$45,536 at public schools and \$63,078 at private schools.⁵⁹ The Access Group, which probably extends the majority of loans to law students,⁶⁰ studied the average indebtedness of 1998 law graduates who had exhausted their three \$18,500 Stafford loans and borrowed at least once from the Access Group.⁶¹ It found that the average indebtedness of these graduates was \$79,851.55, not including accrued undergraduate debt.⁶²

Averages can be misleading. Many schools have higher-than-average tuition or are located in regions in which the cost of living is particularly high. Also, within high-cost schools, students incur a range of debt, in part because some bring with them more family resources than others, and some earn more during summers. It is therefore worth noting that among law students graduating in 1995 from the 10% of law schools with the highest average indebtedness, the average debt was \$68,690.⁶³ Some law schools with high average indebtedness of graduating students in 1998 included California Western School of Law (\$78,350), Catholic University of America, Columbus School of Law ("Catholic") (\$78,500), Georgetown University Law Center ("Georgetown") (\$82,600), George Washington University Law School (\$80,050), Stetson University College of Law (\$91,897), Tulane Law

59. See Kenneth E. Redd, *Policies, Practices, and Procedures in Graduate Student Aid: A Report on the 1998 NASFAA SOGAPPP Survey*, NASFAA'S STUDENT AID TRANSCRIPT, Spring 2000, at 10, 18 fig.4.

60. Telephone Interview with Jeff Hanson, Access Group Analyst (June 29, 2000). Law students probably know this lender by the term "Law Access," its division for law school lending.

61. See *The Price of Law School: An Access Group Analysis*, Access Group, Access Update, at http://www.accessgroup.org/update/3_2000/5.htm (last modified Mar. 2000) (providing a summary of the analysis).

62. See *id.* The components of the indebtedness were: Subsidized Stafford loan borrowed, \$25,500; principal amount of unsubsidized Stafford loan, \$30,000; accrued interest on unsubsidized Stafford loan (at 8.25% per annum), \$5259; principal amount of private loan, \$14,000; accrued interest on private loan (at 8.76% per annum), \$2911; guarantee fee (covers defaults on private loans) due at repayment, \$2181. See Memorandum from Jeff Hanson, Access Group, to interested parties on Average Debt at Repayment, Law School Class of 1998—Revised 2-3 (Jan. 26, 2000) (on file with author).

63. See KIPP, *supra* note 37, at 29.

School (\$96,596), and Whittier Law School (\$82,868).⁶⁴ The average law school debt (that is, excluding college debt) of new George Washington students had increased from \$30,000 to \$71,000 in just eight years.⁶⁵

Many law schools' average debt is lower than these very high figures, but even at schools with lower average debt, some students owe much more. Journalistic accounts report some students graduating from law schools owing \$90,000,⁶⁶ \$100,000,⁶⁷ and \$120,000.⁶⁸

From one perspective, increasing law school costs and the concomitant debt that students incur are unproblematic, because the market will presumably respond appropriately.⁶⁹ Consumers of legal work may pay more for it, making student loan repayment at least as easy in the future as it has been in the past. Alternatively, if consumers believe that legal work is overpriced (in part because legal education is

64. These figures were derived from reports of average 1998 graduating debt supplied by law schools to *U.S. News & World Report* and compiled on its Web site. See *Compare Law Schools*, U.S. News & World Rep. Online, at <http://www.usnews.com/usnews/edu/beyond/grad/gradlaw.htm> (last visited Feb. 14, 2001). The numbers for the schools mentioned in the text above are calculated using this Web site and one additional site. See U.S. News & World Rep. Online, at <http://www.usnews.com/servlets/WorkSheet> (last visited Feb. 22, 2001). The figures reported here are \$9500 higher than those listed on the Web sites, because the magazine requested from law schools only the average debt resulting from law school loans; the data thus excludes outstanding college debt. See E-mail from Ruth Lammert-Reeves, Assistant Dean for Financial Aid, Georgetown University School of Law, to the Author (June 12, 2000) (on file with author). The excluded outstanding educational debt from undergraduate studies was \$9546. See *Lawopoly Clarification*, Nat'l Jurist Online, at <http://www.natjurist.com/meath.shtml> (last visited Mar. 2, 1999). *The National Jurist* data was based on Department statistics. See *id.* For the class of 1999, the average cumulative debt at Georgetown had grown by an additional \$5920, so for that class it was approximately \$88,520 (after a \$9500 upward adjustment for college debt). See E-mail from Ruth Lammert-Reeves to the Author, *supra*.

65. See Ginny Edwards, *Loan Forgiveness: Making Public Interest Law Interesting*, PUB. LAW., Winter 1999, at 6; Kate Ackley, *Til Debt Do Us Part: Some Schools Help Repay Student Loans for Grads Who Take Public Interest Jobs*, LEGAL TIMES, Sept. 6, 1999, at S31. It is not suggested that the average distribution of student indebtedness among institutions deviates from the usual bell curve, but only that policy makers should be concerned, perhaps especially concerned, about those at the high end as well as other parts of the curve.

66. See Ackley, *supra* note 65.

67. For example, Leonard Adler, a Georgetown graduate of 1994, graduated with such debt. See *Financial Aid*, Nat'l Jurist Online, Apr.-May 1998, at <http://www.natjurist.com/financial.html> (last visited June 10, 1998).

68. See Tom Stabile, *Lawopoly: Borrowed Time*, NAT'L JURIST, Apr. 1999, at 14, 14 pt. 2. Bennett Miller, chair of the ABA student division in 1999, knew of one couple who had graduated from Northwestern University Law School owing a combined \$250,000. See Mark Hansen, *And Debt's All, Folks: To New Lawyers Paying Off Student Loans, 'Budget' Is Not a Bad Word*, A.B.A. J., June 1999, at 24, 24.

69. See, e.g., Trish Crawford, *Unequal Justice*, TORONTO STAR, Feb. 6, 1994, at B1 ("Legal services are based on [the] . . . market.") (quoting Osgoode Hall Law School Associate Dean).

too expensive), they will not pay more.⁷⁰ Then some students will see that they cannot afford to become lawyers, and they will pursue other lines of education and employment. Society will have fewer lawyers, and some law schools might close, but those would be desirable consequences of market-based decisions to spend less on legal service.

Indeed, there is evidence that the market has been responding in the first of these ways, by paying lawyers more. Between 1993 and 1999, starting salaries in most sectors of the legal profession rose apace.

TABLE 2: STARTING SALARIES FOR LAWYERS
(THOUSANDS OF DOLLARS)⁷¹

	1993 median starting salary	1999 median starting salary	Percent increase	1999 median starting salary in 1993 dollars	Percent increase in constant dollars
Private practice	48	70	46%	61	27%
Business	40	54	35%	47	17%
Government	31.6	38	20%	33	4.4%
Public interest	27	32	18.5%	27.7	2.6%

Thus, while the average cumulative debt at the nation's private law schools increased from \$41,776 to \$56,324 (35% in current dollars, and 15% in constant dollars), starting salaries for lawyers in private practice and business surpassed the increase in accumulated debt. These two categories account for 69% of all new lawyers.⁷²

The 27% real increase for lawyers in private practice may significantly understate the trend for this group, because a wave of major salary hikes in 1999-2000 apparently produced a further 20% increase, at least for lawyers starting at large corporate firms, just after these

70. See Curtis J. Sitomer, *Burger Urges Lawyers to Polish Ethics, Help Unclog Courts*, CHRISTIAN SCI. MONITOR, Feb. 13, 1984, at 3.

71. See NAT'L ASS'N FOR LAW PLACEMENT, STARTING SALARIES: WHAT NEW LAW GRADUATES EARN, CLASS OF 1998, at 6 (1999). The data for the Class of 1999 were derived from NAT'L ASS'N FOR LAW PLACEMENT, JOBS & J.D.'S: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 1999, at 18 (2000) [hereinafter EMPLOYMENT AND SALARIES 1999].

72. See NAT'L ASS'N FOR LAW PLACEMENT, JOBS & J.D.'S: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 1998, at 13 (1999) [hereinafter EMPLOYMENT AND SALARIES 1998].

statistics were reported.⁷³ Among recent graduates who join private law firms, approximately 25% enter firms of more than one-hundred lawyers.⁷⁴

Within these categories, some new lawyers at the turn of the twenty-first century were being paid at a rate far surpassing the median. Some new lawyers in the year 2000 started at salaries of \$160,000 or more.⁷⁵

The table also shows, however, that government lawyers (12.2% of beginning attorneys) and public interest lawyers (2.6% of such attorneys)⁷⁶ were falling behind the curve. Their real income increases of 4.4% and 2.6% did not keep up with the 15% real average indebtedness increase over the same period of time.⁷⁷ For them, the problem of debt is becoming more severe for each graduating class. It is not simply that the absolute amounts of debt are larger each year; that would not be a problem if salaries were keeping pace. For these graduates, debts are mounting more rapidly than starting salaries.

C. *The Pressure on Public Interest Lawyers*

How much pressure does this mounting debt actually put on new lawyers who seek public service jobs? An analysis of this problem must first take note of the prevalent idea that student loans should be paid within ten years after graduation. This concept is a psychological

73. See Jessica Guynn, *For Bay Area Attorneys, Salaries in Stratosphere: Competition from Internet Start-Ups Prompts Some Big Firms to Pay Their Beginners \$125,000 or More*, CONTRA COSTA TIMES, Feb. 19, 2000, at A01 (noting that the average large-firm starting salaries increased to \$125,000, with some firms offering \$165,000); David Leonhardt, *Law Firms' Pay Soars to Stem Dot-Com Defections*, N.Y. TIMES, Feb. 2, 2000, at A1 (noting top New York firms raising their starting pay to \$160,000, and firms around the country were expected to follow with significant raises); Jeffrey McCracken, *Boom Fuels Lawyer Pay Surge: Local Law Firms Follow Honigman Miller's Lead*, CRAIN'S DET. BUS., Apr. 10, 2000, at 3 (describing Detroit firms raising starting pay by \$20,000 or more in 2000, compared to \$3500 in 1999); David Phelps, *Not Just Pocket Change*, STAR-TRIB. (Minneapolis), Apr. 23, 2000, at D1.

74. See EMPLOYMENT AND SALARIES 1998, *supra* note 72, at 28.

75. See Leonhardt, *supra* note 73.

76. See EMPLOYMENT AND SALARIES 1998, *supra* note 72, at 13.

77. A Department official who read an earlier draft of this Article, including the statistics reported in the table of starting salaries, wrote to the Author that the numbers reported by the National Association for Law Placement for starting and mid-career salaries of government officials "seem[s] erroneously high, particularly based on all the letters my office received from low-paid public defenders and prosecutors earlier this year." E-mail from Daniel L. Pollard, Department of Education official, to the Author (Aug. 1, 2000, 10:33 EST) (on file with author).

assumption on the part of most students.⁷⁸ It is also very nearly a convention in the literature on debt repayment.⁷⁹

As all law student borrowers know, Stafford loans taken out through FFELP must be repaid within ten years, unless the borrower elects an alternative repayment plan.⁸⁰ This maximum ten-year period is, according to the federal statute, the “standard repayment” period.⁸¹ When the federal government lends money to students through the federal direct loan program, it offers other repayment options, but the direct federal lending program also calls ten-year repayment “standard repayment.”⁸² Students have become used to thinking of ten years as the “right” time within which to pay off student loans, even though, because of the existence of alternative repayment plans and subsequent consolidation opportunities, no student is required to do so.⁸³ Authorities on debt repayment also tend to treat ten-year repayment as standard, often not mentioning alternatives.⁸⁴ The popular press read by law students reinforces the holiness of a ten-year schedule. For example, in 1999, a dramatic cover story in *The National Jurist*, a magazine distributed free at law schools, concluded that average debt was so high at twenty-three law schools that graduates entering public practice would actually have a below-zero disposable income after making their loan

78. See, e.g., Kramer, *supra* note 14, at 264.

79. See, e.g., *id.*; see also sources cited *infra* note 84.

80. See 20 U.S.C. § 1078(b)(9)(B) (Supp. IV 1999). Students receive this information in written form from their financial aid offices, from the lenders who handle their loan, or from Web sites. See, e.g., *Federal Stafford Loan*, Access Group, at <http://www.accessgroup.org> (last visited Feb. 21, 2001) (following hyperlinks to Federal Stafford Loan terms stating “[u]p to ten years to repay” and “[f]lexible repayment options and federal loan consolidation also available”).

81. See 20 U.S.C. § 1078(b)(9)(A)(i).

82. See *id.* § 1087e(a)(1), (d)(1)(A) (1994).

83. See *id.* § 1078(b)(9)(A) (Supp. IV 1999) (containing other repayment plans); *id.* § 1087e(d), (g) (1994 & Supp. IV 1999) (explaining that students may consolidate government-guaranteed loans such as Stafford loans into a federal direct loan with a longer repayment term). Private loans typically offer repayment terms longer than ten years. See, e.g., *Law Access Loan*, Access Group, at <http://www.accessgroup.org> (last visited Feb. 21, 2001) (following hyperlinks to Law Access Loan terms).

84. For example, Olivas uses a ten-year repayment table to compute the “[m]onthly payment” for various types of graduate students who owe average debts, without identifying that he is doing so. See Olivas, *supra* note 30, at 338 tbl.2. In his discussion of law graduate debt repayment, Kipp also treats only ten-year repayment, stating: “If they had medium or high debt levels, those on the lowest end of the salary scale would require 26 percent or more of their gross monthly earnings to repay their student loans within ten years.” KIPP, *supra* note 37, at 30. Kipp does not explore longer repayment options. Kornhauser and Revesz analyze debt burdens by reference to both ten-year and fifteen-year repayment schedules, but they do not consider longer repayment terms. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 890 (1995).

payments.⁸⁵ The magazine assumed that students would pay 1.3% of their debt per month, based on the empirical average paid by graduate students, not the lowest amount that students could lawfully pay.⁸⁶ The ten-year term, more than any other factor, makes making ends meet on a low income so difficult.

Experts have offered certain benchmarks as measures of the dividing line between acceptable and excessive debt repayment. Reviewing the literature on debt manageability a decade ago, David Chambers noted: “The principal writers . . . hover within a fairly narrow range in their recommendations.”⁸⁷ Daniere, a leading authority, advised students not to incur indebtedness requiring them to pay more than 7.5% of net (after-tax) income, while Horch, another expert, suggested 9% for higher-income professionals.⁸⁸ John Kramer recommended 8%.⁸⁹ The Department believes that “[t]he median Federal [student] debt burden (yearly scheduled payments as a percentage of annual income) of borrowers in their first full year of repayment [should] be less than 10 percent,” because “[a]s a general rule, it is believed that an educational debt burden of 10 percent or greater will negatively affect a [student’s] ability to repay his or her student loan and to obtain other credit such as a home mortgage.”⁹⁰

Over the years, however, single-digit percentages have been exceeded routinely by law graduates. Rather than lending less money or calling for subsidies, banking industry representatives have made ever-higher estimates of how much debt repayment is tolerable. In the early 1990s, they raised the level to about 15%, and later in the decade, to 20%,⁹¹ though as recently as 2000 some industry officials still recommended an 8% limit on gross income,⁹² which works out, for a person earning \$32,000, to about 9.4% of net income. But *The National*

85. See Jack Crittenden et al., *Lawopoly: Pass Go, Borrow Money, Pay Tuition. Repeat Cycle. Welcome to the Game of Law School Debt—Where the Money Is Real and the Stakes Are High*, NAT’L JURIST, Feb. 1999, at 14, 17-18 pt.1.

86. See *id.* at 18.

87. Chambers, *supra* note 24, at 717.

88. See *id.*

89. See Kramer, *supra* note 14, at 263-64.

90. See U.S. DEP’T OF EDUC., STUDENT FINANCIAL ASSISTANCE POLICY, at K-6 Indicator 1.4, available at <http://www.ed.gov/pubs/AnnualPlan2001/069-red.pdf> (last visited Feb. 20, 2001).

91. See Crittenden et al., *supra* note 85, at 15 (quoting Diane Saunders, Vice President of Communications and Public Affairs at Nellie Mae, a major lender).

92. See PATRICIA M. SCHERSCHEL, USA GROUP FOUND. NEW AGENDA SERIES, STUDENT DEBT LEVELS CONTINUE TO RISE: STAFFORD INDEBTEDNESS: 1999 UPDATE, at 7 (2000) (“Lenders frequently recommend that borrowers limit their monthly student loan payments to no more than 8 percent of their pre-tax monthly incomes. Although arbitrary, this guideline helps ensure that monthly installments remain a manageable share of household budgets.”).

Jurist's calculations (which understated the magnitude of the problem by erroneously excluding undergraduate debt)⁹³ showed that by 1998, seventy-one law schools' new graduates entering the public sector had debt-to-income ratios exceeding 20%.⁹⁴ Using the lower indebtedness figures from 1995, Kipp concluded that graduates with average debts and jobs paying the lowest decile of starting salaries would have to spend at least 26% of their already low incomes for ten-year debt repayment.⁹⁵ Similar students with high debts would have to spend 36% of their incomes to pay back their student loans.⁹⁶ Kornhauser and Revesz concluded: "[A]n individual in these circumstances would accept a not-for-profit job only if she were independently wealthy, benefited from generous [debt relief] assistance [from her law school], or could not secure more lucrative employment."⁹⁷

These payment-to-salary ratios all assume ten-year repayment. But, as noted above, a law graduate could consolidate her loan and pay a lower amount each month. This procedure will, of course, stretch out the number of years during which she will have to pay. Furthermore, deferring payment of much of the debt will significantly increase the amount that has to be paid, because interest will accrue, and compound, for a longer period of time. The amount of additional payment will depend on the interest rate(s) applicable to the loan and the period of repayment. Table 3 assumes that a graduate is repaying \$75,500, approximately the largest amount that he or she is likely to borrow through FFELP.⁹⁸ It assumes that the interest rate on the loan is 8.25%,

93. See *Lawopoly Clarification*, Nat'l Jurist Online, at <http://www.natjurist.com/meath.shtml> (last visited Mar. 2, 1999).

94. See Crittenden et al., *supra* note 85, at 15.

95. See KIPP, *supra* note 37, at 30 tbl.9.

96. See *id.*

97. Kornhauser & Revesz, *supra* note 84, at 890. Law school debt repayment plans are discussed later in the Article. See *infra* Part V.F. Kornhauser and Revesz erroneously believed that they "are now becoming commonplace and quite generous." Kornhauser & Revesz, *supra* note 84, at 890. However, by 1999, only forty-seven law schools (of the 182 law schools accredited by the ABA) had such plans, and they varied considerably in the generosity of their benefits. See *Law Schools with LRAP or Public Interest Scholarship Programs*, Nat'l Ass'n for Pub. Interest Law, Financing the Future, at <http://www.napil.org/SUB-SO/Report2000/REPORTLIST-FM.html> (last visited Feb. 20, 2001). In fact, just six law schools disbursed 70% of all of the benefits offered by the forty-seven loan repayment programs. See NAT'L ASS'N FOR PUB. INTEREST LAW, FINANCING THE FUTURE: NAPIL'S 2000 REPORT ON LAW SCHOOL LOAN REPAYMENT ASSISTANCE AND PUBLIC INTEREST SCHOLARSHIP PROGRAMS 10 (2000) [hereinafter FINANCING THE FUTURE].

98. This assumes approximately \$55,500 in law student Stafford loans, \$5000 in accrued interest and \$15,000 in undergraduate debt. In 1996, the average undergraduate debt for law students was between \$9000 and \$10,000, though the average undergraduate debt for graduates of four-year private colleges was \$14,290. See KIPP, *supra* note 37, at 25, 35. The average undergraduate debt for law students had been falling slightly, perhaps because those with already

the maximum that may be charged on Stafford loans.⁹⁹ It shows the relationship between the duration of the loan term, the monthly payment, and the amount of actual dollars that the graduate will eventually have to pay. It also includes a column showing the value in current dollars of the total repayment, an amount much smaller than the actual dollar cost of repayment because a dollar that must be paid to a creditor after twenty years of inflation is much less valuable than a dollar that is paid immediately. The table discounts the value of money by 5.8% per annum, the rate of interest as of September 14, 2000, on thirty year United States treasury bonds.¹⁰⁰

TABLE 3: COST OF REPAYING A \$75,500 LOAN AT 8.25% INTEREST, OVER VARIOUS PERIODS

	Monthly payments	Annual payment	Total of actual payments, rounded to nearest thousand	Present value of all payments, rounded to nearest thousand
10 years	926	11,112	111,000	83,000
15 years	732	8789	132,000	87,000
20 years	643	7720	154,000	90,000
25 years	595	7143	179,000	92,000
30 years	567	6806	204,000	95,000

The table shows that stretching out a debt from ten years to a much longer period of repayment does reduce the monthly repayment

high debt levels were less likely to continue on to law school. *See id.* at 40. This Article uses many illustrations that assume an accumulated undergraduate debt of \$15,000, in part to adjust the 1996 figures for inflation and in part because of the concern not only with the average student but also with students (such as graduates from four-year private colleges) whose debts are greater than average (and whose incomes are significantly below average).

99. *See* 28 U.S.C. § 1087e(b)(1)-(3) (1994).

100. Because a dollar repaid in the future is less valuable than a dollar that is repaid at once, discounting the stream of future loan repayments to present value (that is, to constant dollars) is important. But selecting the appropriate discount rate for future loan repayments is not simple. The thirty-year treasury bond rate seems a conservative choice, and the tables in this Article use a discount rate of 5.8%, the thirty-year bond rate in September 2000. An appendix to this Article discusses the issue of discounting and the reasons for choosing the thirty-year bond rate. The income-contingent repayment calculator, *infra* note 268, uses the thirty-year bond rate as its default value but allows the user to select any other rate.

significantly, and that, of course, the total amount that must be repaid increases greatly. It also shows that measured in terms of the present value of future payments, the increase in the cost of repayment is not nearly as dramatic as the straight dollar comparison suggests. The fact that they are paying in dollars worth less than in yesteryear may seem cold comfort to students who are actually repaying \$200,000 for a \$75,000 loan, but as John Kramer noted long ago, "the total amount of dollars exacted by the penalty [of paying over a longer period] may overstate the actual burden on the graduate."¹⁰¹

As noted above, students at some major private law schools graduate with debts considerably higher than \$75,500. Because they are unable to borrow more than \$18,500 in government-guaranteed loans, they must borrow the additional funds commercially. Table 4 shows the additional cost of repaying \$30,000 in commercial loans. The interest rate on such loans is not capped at 8.25%. In June 2000, students fortunate enough to obtain a relatively good rate would pay approximately 8.64%, and that is the rate used in this table.¹⁰²

TABLE 4: COST OF REPAYING \$30,000 BORROWED COMMERCIALY

	Monthly payments	Annual payment	Total of actual payments, rounded to nearest thousand	Present value of all payments, rounded to nearest thousand
10 years	374	4488	45,000	34,000
15 years	298	3572	54,000	36,000
20 years	263	3154	63,000	37,000
25 years	244	2930	73,000	38,000
30 years	233	2801	84,000	39,000

A lawyer who graduates owing \$105,500 would combine those shown by Tables 3 and 4, as indicated in Table 5.

101. Kramer, *supra* note 14, at 267.

102. The rates vary slightly by offeror and school of attendance. This is the Law Access Loan offered by the Access Group to Georgetown Law Students. This company offers a rate of 2.75% above the ninety-one day treasury bill rate, which was 5.885% for the second quarter of calendar year 2000. The rate is actually understated, because Law Access also requires a one-time payment of at least an additional 6.9% of the amount borrowed as a "guarantee fee," to be paid just before the last payment is made. See, e.g., *Law Access Loan*, Access Group, at <http://www.accessgroup.org> (last visited Feb. 21, 2001) (following hyperlinks to Law Access Loan terms). Significantly higher rates are imposed on students at other schools. See *infra* note 429.

TABLE 5: REPAYMENTS REQUIRED OF A TYPICAL GRADUATE WHO OWES \$105,500

	Monthly payments	Annual payment	Total of actual payments, rounded to nearest thousand	Present value of all payments, rounded to nearest thousand
10 years	1300	15,600	156,000	117,000
15 years	1030	12,361	186,000	123,000
20 years	906	10,874	217,000	127,000
25 years	839	10,073	252,000	130,000
30 years	800	9607	288,000	134,000

A graduate who owes about \$105,000 could therefore reduce her annual payment from about \$15,600 to about \$9600 (a 38.5% reduction) by stretching out the payments over thirty years, and by agreeing to repay a total of \$288,000 rather than \$156,000 (an 84.6% increase measured in current dollars, though only about 15% more in constant dollars if a 5.8% discount rate is used). But even stretched out loans that lower current payments by 38.5% are not affordable for public interest lawyers. Recall that the median 1999 starting salary for public interest lawyers is \$32,000. Federal tax on that amount for a single filer was \$3784,¹⁰³ taking into account state and local tax, the graduate's after tax income would be about \$27,000. Even the most stretched out repayment of \$9607 annually would require the graduate to pay 36% of her after-tax income toward her student debt, far in excess even of the highest figure (20%) recommended by a banking official. And that stretched out repayment would require the graduate, over thirty years, to write checks for \$288,000 to repay her \$105,500 student loan.

D. The Case for a Subsidy

If stretching out loans is not sufficient to enable law graduates to become public interest lawyers, perhaps public or private subsidies should be encouraged. But before considering the effect of the subsidies

103. This calculation assumes that the taxpayer would take the standard deduction of \$4150 and have a personal exemption of \$2650. The tax here is based on the 1999 federal tax tables. See *2000 Tax Tables*, Digital Daily, Feb. 13, 2001, at http://www.irs.gov/prod/ind_info/tax_tables/dta_035k.html (last visited Feb. 13, 2001) (providing the 2000 federal tax tables).

that are built into the income-contingent repayment option, it is worth taking a moment to return to the idea that if there is a problem here, the market will solve it. The market for corporate legal services already appears to be adjusting to the high cost of education.¹⁰⁴ If salaries for public interest lawyers are too low to enable them to repay their educational debts, perhaps the market is signaling that we have an oversupply of government and public interest lawyers. In this view, the trend in which debt is rising faster than income for public interest lawyers is at worst a temporary problem that will eventually vanish as new lawyers simply reject the less remunerative nonprofit specialties and join the ranks of the corporate world.

From a different perspective, however, governmental or public interest legal services might be regarded as a public good deserving of a subsidy because the market does not value them highly enough.¹⁰⁵ The nation provides many kinds of subsidized services, including some legal services, to its least fortunate residents. Furthermore, a nation that in the short run would rather have more corporate and fewer public interest lawyers may want to pay a modest sum to preserve for another day the strain of idealism and the culture of public service embodied by public interest lawyers and the students who become such lawyers.

A glimpse at what would happen if students who want to become public interest lawyers were not sufficiently subsidized may clarify the cost of treating the market-driven status quo as good enough. We may perceive several effects that some, including the Author, regard as unfortunate.

104. See *supra* text accompanying note 73.

105. In recent years, programs of law school subsidies for students who want to become public interest lawyers have grown dramatically. See FINANCING THE FUTURE, *supra* note 97, at 17 (showing the subsidy growth from 3 million dollars in 1993-94 to 7.5 million dollars, given out through forty-seven law school programs, in 1998-99). This development suggests that within the community of legal educators, there is broad agreement that such subsidies are desirable. Not everyone agrees with this view, however, either within or without the law school community. But even a very strong free market advocate who disapproves of subsidies for public interest lawyers, particularly those serving ideological communities because "there is no guarantee that gains in utility will exceed losses in utility and result in an overall increase in societal welfare," recognizes:

[T]here appears to be a consensus . . . that there is substantial unmet need for civil poverty lawyers and that criminal representation is barely adequate [so a] . . . law school may conclude that both the immediate donees and the public at large would benefit if the law school were to make a charitable contribution that increased legal services for the poor.

Luize E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 GEO. WASH. L. REV. 451, 513-16 (1991).

*E. Effects on Nonprofit Public Service Institutions and
Their Clients*

It is well known that the civil legal needs of the nation's poor are not being met. Attorney General Janet Reno reminded the nation in 1994 "that eighty to ninety percent of the poor and the working poor in America do not have access to legal services."¹⁰⁶ Her conclusion is supported by several academic studies.¹⁰⁷ Legal aid organizations obviously need more public support, either directly through larger federal grants or indirectly through loan repayment subsidies that enable them to spread their scarce payroll dollars among more lawyers.¹⁰⁸ As lawyers' debt burdens rise, fewer graduates will be able to afford to serve in poorly paid public interest jobs that serve the poor and near-poor. In the short run, public interest organizations, such as legal service offices, public defender organizations, and local governments may still be able to fill vacancies, though expansion will be limited. At present, many law students are idealistic and would like to engage in public service,¹⁰⁹ and most nonprofit organizations currently have little trouble attracting applicants for the few jobs that become available.¹¹⁰ However,

106. The Honorable Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 *FORDHAM L. REV.* 5, 12 (1994).

107. See, e.g., FAMILY LAW SECTION, COMM. ON THE PROBATE AND FAMILY COURT, MASS. BAR ASS'N, *CHANGING THE CULTURE OF THE PROBATE AND FAMILY COURT* 26 (1997) (noting that in probate and family court, at least one party is unrepresented in approximately 80% of cases); JANE C. MURPHY & BARBARA A. BABB, *ADVISORY COUNCIL ON FAMILY LEGAL NEEDS OF LOW INCOME PERSONS, INCREASING ACCESS TO JUSTICE FOR MARYLAND'S FAMILIES* 50 (1992) (noting that only 11% of Maryland's poor who have domestic problems receive legal assistance); Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 *BYU J. PUB. L.* 123, 124-27 (1993) (containing a summary of several surveys); William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 19 *S.U. L. REV.* 273, 273 (1992) (noting that "85% [to] 92% of the low income people in Louisiana who had civil legal needs in 1991 were" unrepresented).

108. See, e.g., *More Legal Aid*, *KAN. CITY STAR*, May 1, 2000, at B4 (discussing the urgent need for more funding in legal aid programs).

109. In 1998, in a survey of 548 entering first-year law students conducted by Georgetown, 20% of the respondents said that "public interest" work best described their current plans for using their law degrees; another 16% selected "government practice." *GEORGETOWN UNIVERSITY LAW CENTER, 1998 SURVEY OF ENTERING STUDENTS* (Sept. 17, 1998). These percentages are slightly overstated as students were allowed to select more than one career option, and the total of the percentages selected by all students was therefore 108% rather than 100%. See *id.*

110. Even now, this generalization is not universally true. In 1993, a survey by the Legal Services Corporation found that 57% of Legal Services Corporation field program directors had difficulty recruiting attorneys, and 55% reported educational debt as a constraint on the number of applications. See *NAT'L ASS'N FOR PUB. INTEREST LAW, COMMENTS ON PROPOSED REGULATIONS, CORPORATION FOR NATIONAL AND COMMUNITY SERVICE GRANT PROGRAMS AND SUPPORT FOR INVESTMENT ACTIVITIES* 3 (1994). Some other public interest organizations also experience recruiting difficulty. The ABA operates ProBar, a highly reputed office serving the needs of aliens who need legal representation at the border in Harlingen, Texas. See, e.g., James Pinkerton, *Judge*

to the extent that students at high-cost law schools are unable to consider such employment because the low salaries are insufficient to enable them to repay their loans, these organizations cannot participate in a truly national labor market. In time, their recruiting will be limited to the small proportion of lawyers who are independently wealthy, lawyers who went to state law schools where their educations were subsidized by state taxpayers, and graduates of the minority of law schools (possibly as few as six such schools) that pay generous subsidies through their own loan repayment programs to graduates who perform public service.¹¹¹

Furthermore, the world does not have a static number of public service jobs. The number and variety of such positions expand in part because law students and young lawyers who want to work in such organizations create new positions. Some win "seed money" foundation grants to establish new organizations through which they will be employed.¹¹² Others volunteer with organizations and become so indispensable that the organizations intensify fund-raising efforts to retain them. As debt closes off the opportunity to establish new low-income positions, this pie-expanding phenomenon will be curtailed.

To the extent that increasing indebtedness precludes lawyers from accepting full-time public service employment, the gap might in principle be filled by an increased commitment from law firms to encourage pro bono work by their lawyers.¹¹³ Unfortunately, the world seems to be moving in the opposite direction. As salaries for lawyers have skyrocketed in recent years (reducing partners' profits), the subtle pressure on many firms' associates not to contribute pro bono time has

Grants Orphan-Twins Asylum After Hearing About Abuse by Family, HOUS. CHRON., Feb. 8, 2000, at A15. The ABA began advertising in October 1999 for a lawyer with two years immigration experience to serve in the ProBar office, and the position was still unfilled in June 2000. See E-mail from Carol Wolchok, American Bar Association staff member, to the Author (June 12, 2000) (on file with author).

111. See *supra* note 97.

112. For example, the Vanguard Public Foundation (which contributed \$5000) and the echoing green Foundation (which provided \$25,000) made it possible for Van Jones to start the Ella Baker Center for Human Rights in San Francisco. See Rinat Fried, *Civil Rights Lawyer Fights Police Misconduct*, RECORDER, Sept. 11, 1995, at 2. Three years later, Mr. Jones had succeeded in forcing the dismissal from the police force of an officer who had killed two suspects, and won the Reebok International Human Rights Award. See Susan Gray, *Lawyer's Fight Against Rogue Cop Becomes Crusade for Human Rights*, CHRON. OF PHILANTHROPY, Jan. 14, 1999, at 12. The echoing green Foundation also provided a small grant to enable Eric Rosenthal to start Mental Disability Rights International, now a well-respected human rights organization. See Stacy Weiner, *Speaking Up for the Mentally Disabled: Eric Rosenthal Brings Their Plight to the World*, WASH. POST, Jan. 18, 2000, at C1.

113. See, e.g., Jeff Blumenthal, *Pro Bono Work Benefits Client, Associate: New Wolf Block Program Combines Pro Bono and Professional Training*, LEGAL INTELLIGENCER, Dec. 18, 2000, at 5.

intensified.¹¹⁴ Lawyers at the one hundred top American law firms are now expected to bill for 2200 hours per year compared to 1700 a few years ago, and in 1999, even before major salary increases that took effect in 2000, they spent only thirty-six hours per year doing pro bono work, compared to fifty-six hours in 1992.¹¹⁵

*F. Effects on Individual and Family Consumers of
Legal Services*

As costs and debts rise, not only the very poor (who are often served through nonprofit organizations) but also ordinary families and workers are relegated to an ever-constricting legal market. Like the poor, they will be unable to obtain legal representation,¹¹⁶ or will have to choose among a limited pool of lawyers who, for personal reasons, are not forced by their debts to work for wealthy corporations. Some law students would like to spend their careers representing ordinary Americans with routine legal problems; they seek a practice in which they will serve neither large corporations and their wealthy executives nor the very poor. But the solo practitioners and small firms who have long been the nation's family lawyers are able to pay far less than the large corporate firms. For 1999 graduates, the median starting salary in firms with two to ten lawyers was \$40,000, compared with \$97,000 for firms with more than 500 lawyers and \$92,000 in firms with 251-500

114. Some firms remain strongly committed to a pro bono tradition and count pro bono time toward an associate's billable hours, and in a few cases do not even distinguish the purpose of the hours spent in reports that go to the partners. But such firms appear to be a minority. See, e.g., Daphne Eviatar, *Uncommon Causes*, AM. LAW., Dec. 2000, at 88, 115.

115. See Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1.

116. It could be argued that society should expect a family with modest resources to choose to spend even a high proportion of those resources on expensive legal services, if it needs a lawyer, and to forego alternative spending. But that analysis treats legal services as just another consumption choice, like buying a car or taking a vacation. Frank Michelman has argued effectively that the right to counsel, particularly for purposes of litigation, involves considerations not applicable to ordinary consumer goods and services. See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-77. These include concerns about individual dignity when judicial redress is needed, the citizen's political or governmental participation that is implicit in litigation, the ways in which individual litigation affects the rights of others in society—for example, by deterring civil wrongdoing—and protecting individual rights secured by society. See *id.* The Supreme Court seems to have concluded, at least for the current era, that these interests do not *constitutionally* require states or the United States to provide their impoverished residents with free legal assistance in civil cases. See *Ortwein v. Schwab*, 410 U.S. 656, 659-61 (1973); *United States v. Kras*, 409 U.S. 434, 449-50 (1973). But these considerations may persuade legislatures of the desirability of making such provision. I am grateful to Professor David Luban for referring me to Professor Michelman's analysis.

lawyers.¹¹⁷ If public interest lawyers are driven out of the labor market by rising costs, small firm lawyers may not be far behind.

G. *Effects on Law School and Legal Culture*

Already, lawyers are perceived as wealthy and greedy, an image reflected in thousands of jokes but mitigated in part by frequent news stories of public service lawyers who selflessly serve poor people, death penalty defendants, rejected minorities, and unpopular causes.¹¹⁸ The profession, the community of law students headed for business careers, and the nation would experience a loss if this segment of lawyers and law students were to disappear in favor of more mercenary recruits.

H. *Effects on Law Students*

The extinction of law students who want to become public servants would not occur in one or two years. As the gap between debt and income continues to grow, law students contemplating careers in public service would continue to struggle to live up to their ideals. But life would become increasingly unpleasant for them. Already, some new graduates who chose the nonprofit sector are finding the struggle to repay student loans exceedingly difficult. For example, Stacey Klein, a 1998 Stetson University College of Law graduate earning \$25,000 as a legal services lawyer in Tampa had to take a part-time job as a waitress to make ends meet.¹¹⁹ Marie Tatro, earning \$34,000 at Brooklyn Legal Services, owned no skirts and one pair of black pants for court appearances, and counted on birthday gifts for clothing.¹²⁰ Leonard Adler, \$100,000 in debt and living on \$30,000 that had to cover both his personal expenses and those of his new National Anti-Poverty Organization, lived in an attic with no heating and spent only \$100 a month on food.¹²¹ More generally, students responding to a 1997 survey were much more likely than those responding to the same survey in 1991 to report that student debts had interfered with major life choices

117. See EMPLOYMENT AND SALARIES 1999, *supra* note 71, at 30.

118. See, e.g., Susan Vaughn, *Making It: Lawyer Verges on Sainly in Defense of Los Angeles' Neediest*, L.A. TIMES, Dec. 24, 2000, at W1.

119. See Hansen, *supra* note 68, at 24.

120. See *Financial Aid*, Nat'l Jurist Online, Apr.-May 1998, at <http://www.natjurist.com/financial.html> (last visited June 10, 1998).

121. See *id.*

such as having children,¹²² though even in 1997 it appeared that students as a whole (as opposed to the much smaller group of high-debt, low-income law graduates)¹²³ had not changed their lifestyle because of debt as much as they believed they had.¹²⁴ Borrowers in that survey whose payments exceeded 10% of their incomes (only 18% of whom were law graduates, and whose median total debt was only \$32,500) reported the greatest impact of their debt on their lifestyles. For example, 57% of them reported that their debts had delayed home purchasing (compared with 38% with lower payment to income ratios), 28% reported that debts had delayed moving out of their parents' homes (compared with 12%), and 33% reported that debts had delayed having children (compared with 19%).¹²⁵

Furthermore, many idealistic students do not realize before choosing law as a career that they may have to borrow more than \$100,000 or that starting salaries for public interest lawyers are so low that they will have trouble repaying sums at this level.¹²⁶ Law schools and faculty members are understandably reluctant to advise new students to abandon their goals or their career aspirations.¹²⁷ Accordingly, when students realize part-way through law school the extent of the financial pressure on them to join corporate law firms,¹²⁸ they often become resentful or embittered. This phenomenon will increase unless law schools become more forceful in advertising themselves only as trade schools for business lawyers (except, of course, for those students who are so wealthy that they do not need to borrow).

122. See SANDY BAUM & DIANE SAUNDERS, NELLIE MAE FOUND., LIFE AFTER DEBT: RESULTS OF THE NATIONAL STUDENT LOAN SURVEY 28 (1998). In 1997, 22% of respondents (as opposed to 12% in 1991) believed that debt had delayed them in having children. *See id.*

123. Debtors with doctoral and professional degrees comprised only 7% of the survey population; those with a college degree or less (and therefore presumably much less indebted) constituted 75%. *See id.* at 43 tbl.27b.

124. *See id.* at 29.

125. See SANDY BAUM, NELLIE MAE FOUND., GRADUATE AND PROFESSIONAL BORROWING: ARE EARNINGS HIGH ENOUGH TO SUPPORT DEBT LEVELS? 15 tbl.7 (1999).

126. See Claudia MacLachlan, *Doing Well vs. Doing Good: Students Increasingly Tempted to Forgo Public Service for Law Firm Salaries*, LEGAL TIMES, Sept. 4, 2000, at 50; see also Ann Davis, *Graduate Debt Burden Grows*, NAT'L L.J., May 22, 1995, at A1 (stating that law students could borrow up to \$150,000 in certain cases).

127. See MacLachlan, *supra* note 126 (quoting the director of the office of legal career services at Catholic University's Columbus School of Law ("Catholic") as stating that students consider more than just salaries when selecting their jobs).

128. "[S]tudents often aren't aware of the full extent of that debt—and its impact on their lifestyles—until they start thinking about looking for their first jobs. 'For most students, the light dawns some time in their second year,' said Mary Birmingham, placement director at the University of Arizona . . ." Crittenden et al., *supra* note 85, at 17.

Finally, to the extent that students insist on sticking to their career plans, the default rate is certain to increase.¹²⁹ Defaults will affect the credit histories of the law graduates. In addition, more defaults will increase the cost to the taxpayers who guarantee student loans and cause rate increases or loan denials for future students.¹³⁰ Already, the default rate is at least 15% on the commercial loans that law students take when they exhaust the \$18,500 per year of government-guaranteed loans that are available to them.¹³¹

This description of the costs of allowing the rate at which indebtedness rises to exceed the rate at which income rises may not convince everyone that public interest lawyers, or low-income practitioners who serve individuals and families rather than businesses, should be subsidized. Appreciation of market inefficiencies¹³² may help to justify government intervention, but the key difference between those who might support a subsidy and those who are less likely to do so is a difference of values. Supporters of subsidies are likely to agree that taxpayers should take more responsibility to assist the less fortunate in a nation in which the gap between the rich and the poor is very great and continues to become larger each decade,¹³³ and that those who cannot

129. See Davis, *supra* note 126.

130. Already, at least one major law student lender has tightened credit criteria for law student borrowers. See Stabile, *supra* note 68, at 17.

131. See Jeffrey E. Hanson, *The Challenge to Schools to Reduce Defaults and to Maintain Access*, in SYMPOSIUM, *supra* note 52, at 100, 100, Access Group, available at <http://www.accessgroup.org/symposium/acrobat/chapt6.pdf> (Sept. 1997). In 1996, thirty-six law schools had default rates exceeding 15% and faced restrictions on student borrowing. See Mary Geraghty, *Deep in Debt, More Law-School Graduates Are Defaulting on Their Student Loans*, CHRON. HIGHER EDUC., Aug. 2, 1996, at A27.

132. Such inefficiencies may include, for example, entering students' lack of knowledge about cost and debt, and the possible tendency of some voters to subordinate their long-term desire to promote greater public service to their short-term interest in reducing taxes by paying fewer subsidies.

133. Another way to put the point is that, as every first-year economics student learns, even when markets are efficient, they may not produce "just" results because of an initial or continuing maldistribution of wealth or income. The United States has a huge gap between the wealth of its wealthy citizens and those of its poorest citizens. In 1983, the wealthiest one-half of 1% of the United States population was estimated to own 27% of the nation's wealth, up from 14% in 1976. See KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* app. B at 241 (1990). In 1988, families in the lowest quintile of the population (under \$15,102 annual income) had 4.6% of the income, while the highest quintile had 44%, a gap that was increasing with time. See *id.* at 13. By 1999, the lowest fifth was down to 4% of the after-tax income, while the highest fifth had more than 50%, and the richest 1% (household after-tax income in excess of \$516,000) had as much after-tax income as all of the people in the bottom 38%. See Isaac Shapiro & Robert Greenstein, *The Widening Income Gulf*, Center on Budget and Policy Priorities, at <http://www.cbpp.org/9-4-99tax-rep.htm> (Sept. 5, 1999) (last visited Feb. 14, 2001). Wealth continued to be even more concentrated than income. By 1995, the concentration of

pay their own way in their effort to secure justice should be served by public interest lawyers.¹³⁴ The Author is among those who believe that at least for the present time, some degree of subsidy is warranted. But the Author's personal opinion is not particularly important. The nation as a whole has already addressed the basic question of subsidization for high-debt, low-income graduates, particularly those who desire public service. On this very point, Congress has acted.¹³⁵

wealth (39% of the nation's wealth) in the richest 1% of the population was greater than at any time since the Great Depression. *See id.*

134. For a dated but still excellent account of the realm of public interest law, see Robert Borosage et al., Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970); *see also* Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008, 1016, 1024-25 (1970) (discussing the rise of public interest law and the concomitant changes needed within the legal system).

135. The following discussion pertains to the legislation providing for subsidies for low-income graduates through the income-contingent loan repayment option of the direct lending program, but it should be noted that the much older laws establishing student loan programs such as the Stafford loan programs also include subsidies. Stafford loans have three subsidies: (1) the government pays interest on up to \$8500 (subject to a very generous "need" test) of each year's loan while the student borrower is in school, *see* 20 U.S.C. § 1078(b)(1)(A)(v) (Supp. IV 1999); (2) the next \$10,000 is loaned at an advantageous low rate because the government guarantees the debt, *see id.* § 1078-8(d)(2)(C); and (3) loans are subject to a rate ceiling of 8.25% even if the market rate of interest is higher. *See id.* § 1077a(f)(1), (k)(1) (1994 & Supp. IV 1999). Stafford loans arguably include two additional subsidies, though the point can be debated. The interest paid by Stafford borrowers while they are in school (or in a grace or deferment period) is 0.6% lower than the rate paid during ordinary repayment periods. *See id.* § 1077a(k)(2) (Supp. IV 1999). This lower rate may reflect lower processing costs attributable to this period, but "[t]here was in fact a budgetary basis for this statutory change . . . [which] disproportionate[ly] . . . accrues to borrowers, such as law students, who have the largest loans and stay in school for the longest period of time." E-mail from Daniel L. Pollard to the Author, *supra* note 77. Also, all Stafford loans are extended at the same interest rate, disproportionately benefiting students at schools where banks would otherwise charge higher rates because of higher default rates by alumni. When they make commercial loans because students have reached the ceiling on government-guaranteed loans, banks do in fact vary the rate by school. *See, e.g., Law Access Loan*, Access Group, at <http://www.accessgroup.org> (last visited Feb. 21, 2001) (following hyperlinks to Law Access Loan terms in providing the rates the Access Group offers on Law Access loans to students at different law schools). The 1993 legislation added further subsidies for high-debt, low-income borrowers, as described in Part IV. In addition to these two features, which may or may not be subsidies for all Stafford borrowers, two other features have lower rates for borrowers who obtain funds directly from the federal government rather than through the Federal Family Education Loan Program ("FFELP"). Direct borrowers receive an immediate interest rebate of 1.5% of the loan, though to keep it, they must make their first twelve payments on time. *See* Press Release, Making College More Affordable and Accessible for America's Families (Aug. 10, 2000) (on file with author), available at http://clinton4.nara.gov/textonly/WH/Work/Thursday_August_10_2000.html (last visited Feb. 14, 2001). This rebate is the equivalent of less than 1% over the life of a ten-year loan. *See id.* Second, students who consolidate their loans from FFELP into direct federal loans receive a new interest rate of 0.8 of 1% lower than their current payment; again, they must make the first twelve payments on time to keep the lower rate. *See id.*

III. CONGRESS TO THE RESCUE

A. *The 1993 Legislation*

In 1993, after a considerable legislative struggle, Congress created a new federal program that would compete with the banks offering FFELP loans.¹³⁶ Through the new federal direct lending program, the Department would offer its own loans to students.¹³⁷ Direct loans would eliminate the “middle-man” banking entities that earn substantial federal fees on FFELP loans while taking few risks, since the federal government guarantees the FFELP loans.

Ironically, the policy of making it easier for heavily indebted graduates to engage in public service was a major driving force behind the new law,¹³⁸ though so far there is little indication that the 1993 law is yet serving this purpose. As we shall see, even heavily indebted, socially conscious law graduates, the group that might be most likely to benefit from the novel “income-contingent repayment option” that Congress required for federal direct loans, do not know much about, or want to use, the plan.

The history of the law’s enactment is told in Steven Waldman’s book, *The Bill: How the Adventures of Clinton’s National Service Bill Reveal What Is Corrupt, Comic, Cynical—and Noble—About Washington*,¹³⁹ and summarized for student borrowers in Anne Stockwell’s popular handbook, *The Guerrilla Guide to Mastering Student Loan Debt*.¹⁴⁰ Three factors coalesced during the Bush Administration to start direct lending on a path to congressional enactment. First, the Credit Reform Act of 1990 changed the way that the government accounted for student loans, so that the expense of making good on expected FFELP defaults had to be counted as governmental expenditures in the year that loans were made.¹⁴¹ This law ended a practice under which FFELP loans seemed costless to the government, and it made any future direct loans seem at least

136. See 20 U.S.C. §§ 1077a, 1078(b), 1078-8 (1994 & Supp. IV 1999).

137. See *id.*

138. See WALDMAN, *supra* note 11, at 66.

139. See STEVEN WALDMAN, *THE BILL: HOW THE ADVENTURES OF CLINTON’S NATIONAL SERVICE BILL REVEAL WHAT IS CORRUPT, COMIC, CYNICAL—AND NOBLE—ABOUT WASHINGTON* 66 (1995).

140. See ANNE STOCKWELL, *THE GUERRILLA GUIDE TO MASTERING STUDENT LOAN DEBT* (1997).

141. See *id.* at 86.

competitive, and perhaps more profitable than FFELP loans.¹⁴² Second, Republican Representative Tom Petri, who over the years had become an expert on student loans and a critic of FFELP, began to advocate more vigorously within the Bush Administration for the creation of a direct lending program.¹⁴³ Among Petri's ideas was a concept originally advocated by the conservative economist Milton Friedman,¹⁴⁴ allowing the annual amount of a student loan repayment to depend on the student's income, treating the loan as the lender's investment in the student's future success, on which dividends should be returned if there is enough income to pay them.¹⁴⁵ But Petri believed that income-contingent repayment could only be managed through direct lending, not through FFELP.¹⁴⁶ He believed that the administration of a repayment program linked to income could only be managed by the Internal Revenue Service, to which all income was reported.¹⁴⁷ Third, in the Bush White House, Republican economist Charles Kolb devised the mechanics of a direct loan program under which "the [FFELP] banks would be eliminated [because] Uncle Sam could raise the same money more cheaply The . . . existing program would be replaced by a streamlined system that maximized efficiency and minimized cost."¹⁴⁸ During the Bush Administration, Congress even passed a law through which the federal government would create a federal direct loan demonstration project, in which students at a small number of schools would be able to obtain loans with income-contingent repayment.¹⁴⁹

Just as the ideas of direct lending and income-contingent repayment were gaining currency in Washington, Bill Clinton was on the campaign trail advocating creation of a national public service program (which was eventually enacted and became the AmeriCorps).¹⁵⁰ Late in the campaign, he coupled income-contingent repayments with the idea of national service, reasoning that students resisted public service in part

142. *See id.* at 86-87.

143. *See id.*

144. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 100-07 (1962) (describing a plan whereby money for educational purposes would constitute an investment in human capital).

145. *See* STOCKWELL, *supra* note 38, at 84-85. In his Presidential campaign in 1988, Massachusetts Governor Michael Dukakis had also advocated creation of a federal income-contingent loan repayment plan. *See* Barbara Vobejda, *Dukakis Student Loan Plan Gets Mixed Reviews in Theory, Practice*, WASH. POST, Sept. 9, 1988, at A23.

146. *See* WALDMAN, *supra* note 11, at 203-04.

147. *See id.* at 144.

148. STOCKWELL, *supra* note 38, at 87.

149. *See* Federal Direct Loan Demonstration Program, Pub. L. No. 102-325, 106 Stat. 569-576 (1992) (codified as amended at 20 U.S.C. § 1087a-j (1994 & Supp. IV 1999)).

150. *See* WALDMAN, *supra* note 11, at 11-14, 239.

because they incurred so much debt.¹⁵¹ Clinton suggested that reducing loan repayments would “remove extra weight from the shoulders of someone who is inclined toward a public service career,” and he thought that addressing this problem would particularly benefit graduate students.¹⁵² He deeply believed that “‘people are not really free’ if they [could] not take advantage of their God-given potential,” and that by reducing debt, the government could enable young Americans to serve others.¹⁵³ At a White House meeting during the first month of his administration, his advisors briefed him on the concept of direct federal lending.¹⁵⁴ He responded by lecturing the advisors, saying what was important to him was income-contingent repayment, rather than direct lending.¹⁵⁵ “‘The direct loan is a good thing,’” Clinton argued.¹⁵⁶ “[B]ut that’s not the core of my proposal’ . . . ‘Everywhere we went [in the campaign,] people responded to this’” idea for facilitating public service.¹⁵⁷ Senators who would eventually become leaders in the effort to gain legislative approval of the program agreed with him.¹⁵⁸

Originally, the President wanted a single bill to create a national service corps and an income-contingent repayment plan, but loan reform had to have its own bill because it had to go through a congressional process quite different from the process of setting up a new agency.¹⁵⁹ The loan bill was introduced by Senator Edward Kennedy on May 5, 1993; the bill stated that one of its purposes was to “provide borrowers with a variety of repayment plans, including an income-contingent repayment plan, so that borrowers['] . . . obligations do not foreclose community service-oriented career choices.”¹⁶⁰ In his introductory

151. *See id.* at 6.

152. *Id.* at 31.

153. *Id.* at 32.

154. *See id.* at 47.

155. *See id.*

156. *Id.*

157. *Id.*

158. In 1992, Senator Paul Simon had said that income-contingency “helps to ensure that debt does not drive students into particular professions just so that they’ll be able to pay off their loans.” 138 CONG. REC. S4676 (daily ed. Apr. 1, 1992) (statement of Sen. Simon). When the 103d Congress opened, Senator David Durenberger urged the President’s nominee for Secretary of Education to make an income-contingent loan program a high priority. *See* 139 CONG. REC. S121 (daily ed. Jan. 21, 1993) (statement of Sen. Durenberger).

159. The direct lending bill had to go into the budget reconciliation bill because it saved money that could be used to offset other budget expenditures. *See* WALDMAN, *supra* note 11, at 126, 275 n.126. The national service bill could not go into the reconciliation bill because, under Senate rules, new programs could not be created through a budget reconciliation bill. *See id.*

160. STAFF OF SENATE COMM. ON THE BUDGET, 103D CONG., RECONCILIATION SUBMISSIONS OF THE INSTRUCTED COMMITTEES PURSUANT TO THE CONCURRENT RESOLUTION ON THE BUDGET

remarks, Senator Kennedy stated that income contingency would make it possible for students “to pursue careers and to take lower paying jobs they prefer, including careers in public service and community service.”¹⁶¹ During its progress through Congress, the bill was the subject of heavy attacks from the banking industry, which was intent on preserving the FFELP,¹⁶² but it picked up many supporters who were particularly attracted by the possibility that it could encourage greater public service.¹⁶³

The public service aspect of income-contingent repayment was also highlighted at the hearings of the Senate Committee on Labor and Human Resources (“Senate Committee”). Senator Kennedy called it “a companion feature of the direct lending” and said that “[n]o college student should be forced to become a lawyer or investment banker who would rather be a teacher.”¹⁶⁴ Senator Claiborne Pell said that the repayment plan “could also help encourage students to enter public service occupations which often, and unfortunately, do not carry high salaries.”¹⁶⁵ Deputy Secretary of Education Madeleine Kunin noted that the option “will allow students to enter lower paying community service jobs.”¹⁶⁶ R. Marshall Witten, speaking for the National Commission on Responsibilities for Financing Postsecondary Education, “strongly endorse[d] income-contingent repayment” because it would offer borrowers “loan forgiveness for public and community service.”¹⁶⁷ Claire Roemer, testifying for the National Association of Student Financial Aid Administrators, opposed new direct lending legislation but recognized the value of income-contingent repayment because it would enable “borrowers to consider lower-paying community service jobs.”¹⁶⁸

(H. CON. RES. 64) 453 (Comm. Print 1993) (reprinting report by Senate Committee on Labor and Human Resources to accompany Title XII of the Budget Reconciliation Act).

161. 139 CONG. REC. S5585 (daily ed. May 6, 1993) (statement of Sen. Kennedy).

162. See generally WALDMAN, *supra* note 11, at 131-40, 159-69.

163. See 139 CONG. REC. S5639 (daily ed. May 6, 1993) (statement of Sen. Dodd) (noting that income contingency “will allow many of today’s graduates to consider lower-paying, community-oriented jobs, or career paths that will provide the kind of personal satisfaction that so many seek without necessarily providing the kind of financial success of other more lucrative careers”); *id.* at S5641 (statement of Sen. Jeffords) (“[I]t is naive of us to think that we can attract energetic and bright individuals into community and social service when they have living expenses and education costs to think about.”); *id.* at S5642 (statement of Sen. Wellstone) (“Quite often, if you have a huge loan, you are not going to have the opportunity to do . . . a lot of the kind of work that needs to be done in this country but could not pay much by way of wages.”).

164. *Student Loan Reform: Hearing on S. 920 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 2 (1993) (opening statement of Sen. Kennedy).

165. *Id.* at 5 (opening statement of Sen. Pell).

166. *Id.* at 34 (prepared statement of Deputy Secretary of Educ. Kunin).

167. *Id.* at 76 (statement of Comm’r Witten).

168. *Id.* at 80 (statement of Ms. Roemer).

The Senate Committee recommended passage of the bill, noting that “[i]ncome-contingent repayment will allow students to take lower paying community and public service jobs without the fear of being overburdened with loan debt.”¹⁶⁹ The option “is intended to accommodate borrowers whose income after graduation . . . is low, and thus would be attractive to borrowers who plan to enter lower-paying community service jobs.”¹⁷⁰

Similarly, the report of the House Committee on Education and Labor, incorporated in the report of the House Budget Committee, stated that one of the purposes of the legislation was to provide “an income contingent repayment plan . . . so that borrowers['] . . . obligations do not foreclose community service-oriented career choices for them.”¹⁷¹ The report added that “any student wanting to take a lower-paying job that serves his or her community would be encouraged to do so through flexible and affordable repayment terms for education loans.”¹⁷² The income-contingent option would “permit students to pursue public service either for a few years after completing their education or as a career since their loan burden need never be disproportionate to their income.”¹⁷³

A conference committee reconciled the Senate and House versions of the bill.¹⁷⁴ The real battle between the versions was fought over whether direct lending would entirely supplant FFELP.¹⁷⁵ By contrast, the details of direct lending, such as income-contingent repayment, were uncontroversial.¹⁷⁶ As approved by the conference committee and soon thereafter by both houses of Congress, the legislation created the federal direct lending program, leaving many of the details to be established by regulation.¹⁷⁷ It required the Secretary of Education to offer borrowers

169. STAFF OF SENATE COMM. ON THE BUDGET, 103D CONG., RECONCILIATION SUBMISSIONS OF THE INSTRUCTED COMMITTEES PURSUANT TO THE CONCURRENT RESOLUTION ON THE BUDGET (H. CON. RES. 64) 447 (Comm. Print 1993) (reprinting report by Senate Committee on Labor and Human Resources to accompany Title XII of the Budget Reconciliation Act).

170. H.R. REP. NO. 103-111, at 121 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 489.

171. *Id.* at 112, *reprinted in* 1993 U.S.C.C.A.N. at 480.

172. *Id.* at 106, *reprinted in* 1993 U.S.C.C.A.N. at 474.

173. *Id.* at 107, *reprinted in* 1993 U.S.C.C.A.N. at 475.

174. *See* H.R. CONF. REP. NO. 103-213, at 399 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1088 (reconciling both houses' versions of H.R. 2264, 103d Cong. (1999) (enacted)).

175. *See* WALDMAN, *supra* note 11, at 203-04.

176. The House bill would have replaced the FFELP with direct federal lending immediately. The Senate bill would have allowed 50% of lending to be direct lending. The compromise that emerged allowed a phase-in of direct lending, leading to federal extension of more than 60% of student loans by the fifth year of the five-year legislative authorization. *See id.* at 204, 222, 230, 235.

177. *See* 20 U.S.C. § 1078-3(d)(4) (1994).

four repayment plans: (1) standard ten-year repayment; (2) “extended repayment” over a longer period of time; (3) “graduated repayment,” in which the amount to be repaid would increase as the loan aged; and (4) income-contingent repayment.¹⁷⁸ The income-contingent provision provided that annual repayment amounts would be based on the income of the borrower, giving the Secretary wide latitude to establish repayment schedules.¹⁷⁹ It also specified that the period of repayment was “not to exceed 25 years,” implicitly authorizing the Secretary to cancel or forgive outstanding balances at the end of that period, since Congress did not authorize continuing collection of the debt after twenty-five years.¹⁸⁰

Imposing some limit after which student loans would not be collected was necessary because without it, the amount due on a student loan paid through an income-contingent plan could forever rise, as payments deferred by the income-related cap continued to be added to the remaining principal. Without some time limit, the former student could pay for his or her entire life, and the student’s estate could be liable after that. However, Congress did not give much thought to the length of time after which debts would be forgiven. The bill that the Department had drafted for congressional consideration did not specify this or any other detail, because in early 1993 “the department [as opposed to the President] still didn’t fully buy into the importance of flexible repayment; it viewed direct lending as a major reform, and [income-contingent repayment] as a minor convenience.”¹⁸¹ The House bill did not specify a period. But on this issue, staff members to two Republican senators made an important contribution to the legislation. When the Senate bill was being edited, aides to Senators James Jeffords and Nancy Kassebaum

suggested that no student should have to pay off a loan for more than twenty years. [Senator Simon’s aide] and the other staffers agreed. Although the discussion took about ten minutes . . . these Senate Republican staffers had made the reform dramatically more progressive, establishing a much stronger incentive for public service than Clinton’s own Department of Education.¹⁸²

The conference committee resolved the difference between the House and Senate provisions on income-contingent repayment with the “not

178. See *id.* § 1078(b)(9)(A) (Supp. IV 1999).

179. See WALDMAN, *supra* note 11, at 142-43.

180. See 20 U.S.C. § 1078(b)(9)(A)(iv).

181. WALDMAN, *supra* note 11, at 157.

182. *Id.* at 157-58.

[to] exceed 25 years” formula.¹⁸³ To ensure that any borrower could use income-contingent repayment, even if the borrower had originally borrowed through FFELP rather than through a federal direct loan, Congress also provided that the government had to offer a consolidation loan, repayable through the income-contingent plan, to any FFELP borrower.¹⁸⁴

The debate on final passage added no further relevant legislative history. Senator Simon noted simply that “[a]t the heart of the new program is President Clinton’s promise to allow students to pay off their loans as a percentage of income, so that no one is prevented from serving the country as a teacher, rural health worker, or other valuable yet lower-paying profession.”¹⁸⁵

B. *The Income-Contingent Repayment Formula*

Shortly after Congress passed the law, the Department began a process of fleshing out its details through regulations. They have been amended from time to time, but they have remained substantially similar, and they offer two new subsidies that are not available to Stafford loan borrowers who elect other repayment methods. A borrower may consolidate all government-guaranteed loans (even a single loan) into a federal direct loan and may elect to pay under the income-contingent repayment option.¹⁸⁶ As in the case of all consolidated federal loans, the interest rate is fixed,¹⁸⁷ and it is determined on the date of consolidation by computing the weighted average of the underlying loans.¹⁸⁸ (Until consolidation, the rate on those underlying loans is

183. H.R. CONF. REP. NO. 103-213, at 447 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1088, 1136.

184. Congress did this by providing that a federal consolidation loan should be offered to any borrower who “is unable to obtain a consolidation loan with income-sensitive repayment terms acceptable to the borrower from such a lender.” 20 U.S.C. § 1078-3(b)(5) (1994). Since banks do not offer loan cancellation after twenty-five years, any borrower may obtain federal consolidation by regarding a bank loan without a forgiveness clause as unacceptable. The Department made a decision not to require consolidating borrowers to document their inability to obtain a loan with acceptable terms from a private source. *See* 34 C.F.R. § 685.216(d)(1)(i)(B) (2001) (requiring only that borrowers “assert” that they meet the program’s eligibility requirements). The legislation also provided that federal consolidation “loan[s] shall, as requested by the borrower, be repaid either pursuant to income contingent repayment . . . or pursuant to any other repayment provision” of the new law, thus specifying that consolidated FFELP loans, as well as loans that began as federal direct loans, were eligible for repayment through the income-contingent option. 20 U.S.C. § 1078-3(b)(5).

185. 139 CONG. REC. S10,729 (daily ed. Aug. 6, 1993) (statement of Sen. Simon).

186. *See* 34 C.F.R. § 685.216(a).

187. *See* 20 U.S.C. § 1077a(a).

188. *See* 34 C.F.R. § 685.202(a)(3)(i)(E); *id.* § 685.216(g).

variable and is the ninety-one day treasury bill rate for the last auction during the preceding May, plus 1.7% or 2.3%, subject to the statutory cap of 8.25%).¹⁸⁹ The borrower repays the debt over a twenty-five year period, unless it is paid off earlier than that.¹⁹⁰ But in each and every year, the amount payable is limited to a specified part of the borrower's income for the previous year. The borrower is required to pay only the amount produced by whichever of two formulas produces a lower number.¹⁹¹ One of the two formulas, the "discretionary income" method,¹⁹² produces most of the calculations that are important for high-debt, low-income law graduates.¹⁹³

This method defines the graduate's discretionary income as the borrower's adjusted gross income,¹⁹⁴ minus the federal poverty level for a family of the borrower's family size. The borrower need repay only 20% of discretionary income.¹⁹⁵ The federal poverty level is adjusted annually; in 2000, it was \$8350 for a single person, and \$11,250 for a couple.¹⁹⁶ Thus for an individual with adjusted gross income of

189. See *id.* § 685.202(a)(1)(iii)(A)-(B). Students who consolidate during an "in-school" or "grace" period are able to lock in the lower rate (1.7% above the last auction rate) for the life of the consolidated loan. See *Dear Partner, Colleague Letters*, U.S. Dep't of Educ., GEN-99-17, (June 18, 1999), at http://ifap.ed.gov/dev_csb/new/home (last visited Feb. 14, 2001) (following hyperlinks to *Dear Partner, Colleague Letters*).

190. The regulations provide that the "maximum" period for income-contingent repayment is twenty-five years, implying that a borrower might elect a shorter period, or that the Secretary of Education could agree to a shorter one. See 34 C.F.R. § 685.209(c)(4)(i). But at present, only a twenty-five year loan is eligible for forgiveness of the balance remaining at the end of the repayment period. See *id.* § 685.209(c)(4)(iv).

191. See *id.* § 685.209(a)(2)(i)-(ii).

192. *Id.* § 685.209(a)(2)(ii).

193. The alternative formula caps annual repayment at the amount the borrower would repay annually through twelve-year amortization, multiplied by an "income percentage factor" published annually in a Federal Register table that links this factor to the level of the borrower's income. See *id.* § 685.209(a)(2)(i). This alternative formula is lower than the formula discussed in the text only for certain borrowers with relatively low debts. It has some impact on high-debt, low-income borrowers, however, because toward the end of their periods of repayment, their balances may become low enough that the alternative formula produces a lower repayment amount. The income-contingent repayment calculator described in this Article computes monthly, annual, and total payments based on whichever formula produces lower monthly payments.

194. Adjusted gross income is defined in federal tax law. For most practical purposes, it is the same as gross (pre-tax) income. However, payments of a portion of student loan interest, moving expenses, and alimony payments, as well as a few less frequently encountered expenditures, are deducted from gross income before arriving at adjusted gross income. See I.R.S., YOUR FEDERAL INCOME TAX FOR INDIVIDUALS 116 (Pub. 17, 2000) (listing available deductions), available at <http://ftp.fedworld.gov/pub/irs-pdf/p17.pdf> (providing the 2000 rules) (last visited Feb. 14, 2001).

195. See 34 C.F.R. § 685.209(a)(2)(ii). The borrower must consent to allow the Internal Revenue Service to disclose the borrower's adjusted gross income. See *id.* § 685.209(c)(7).

196. See 2000 HHS Poverty Guidelines, 65 Fed. Reg. 7555, 7555 (Feb. 15, 2000), available at <http://aspe.hhs.gov/poverty/00poverty.htm> (last visited Feb. 14, 2001). For each dependent, \$2900 is added and the numbers are higher in Alaska and Hawaii. See *id.*

\$28,350,¹⁹⁷ the repayment obligation would be 20% of \$20,000, or \$4000 per year (\$333 per month). For a person with \$55,000 of consolidated debt, the \$333 per month repayment obligation is much lower than the “standard” repayment of \$674. Of course, if the borrower’s income rises, the annual repayment will rise, but it will never be more than 20% of discretionary income.¹⁹⁸

The \$333 monthly payment in this example is also lower than the \$434 that would be owing under a simple twenty-five year amortization of the \$55,000. Under income-contingent repayment, the \$101 that is not paid each month because of the income-related cap is added to the principal balance owing. However, once the principal balance increases to an amount that is 10% higher than the borrower’s original balance, the government stops adding the unpaid interest to the balance.¹⁹⁹ Once the principal has reached this 110% level, the interest that is unpaid as a result of the income-related cap is merely accumulated in a dummy account and is not again added to principal. Even after the borrower later works the principal balance down to less than 110% of the original principal, new unpaid interest is placed only in this new dummy account. The borrower owes the federal government the balance in the dummy account, as well as the balance in the regular account, but the dummy account funds are not subject to compounding. If and when the borrower is able to pay more than the amount due for the current month within the limits of his or her monthly income-contingent cap, he or she will begin to work down the balance in the dummy account as well.²⁰⁰ The non-

197. This number was chosen to make the example simple, but it is not an impossibly low salary for a person beginning a public interest job. In the year 2000, 35% of starting salaries in legal services offices were \$29,000 or less. *See infra* text accompanying note 285-88.

198. Because “discretionary income” is defined by the formula and is not the same as after-tax income, payments as a percentage of after-tax income can be slightly higher than 20%. However, as the tables in this Article show, payment obligations higher than 20% are rare, and occur mainly for borrowers with very high incomes, not for high-debt, low-income taxpayers. High-income taxpayers could lower their payments by electing different income repayment plans.

199. *See* 34 C.F.R. § 685.209(c)(5).

200. This unpaid interest will be added to the principal only if the borrower re-consolidates the debt (or in the case of a loan that was a direct federal loan from the beginning, consolidates it), or defaults. *See* Telephone Interview with an anonymous Department of Education official (July 5, 2000). The anonymous official was familiar with the Department’s algorithm for computing the balance due on income-contingent loans, but did not want to be identified by name. *See id.* Neither the combination of two debtors’ income-contingent debts as a result of marriage, nor election of a different repayment schedule, is considered a consolidation. *See id.* However, if the borrower changes repayment plans, the accrued interest in the dummy account must be scheduled for payment. *See id.* Thus, if the borrower moves out of income-contingent repayment and elects ten-year amortization of his or her remaining debt, he or she must pay one-one hundred and twentieth of the balance in the dummy account each month, but the part of the dummy account that is not paid during the first month remains in a special account and still is not capitalized, so it does not

compounding of unpaid interest after the borrower first increases the principal balance by 10% is the first of two additional subsidies²⁰¹ provided to high-debt, low-income borrowers who use the income-contingent plan.

Payments that must be remitted because they are within the income-contingent repayment formula (that is, less than 20% of the difference between the borrower's adjusted gross income and the poverty level) must be paid monthly.²⁰² Because the repayment period is so long, and interest continues to accrue even though it may not be added to principal, the amount of money that will eventually have to be paid is much larger, even taking the subsidy into account, than under standard repayment.

The borrower may switch out of income-contingent repayment, electing standard repayment or a different repayment plan, at any time.²⁰³ If the borrower remains in the income-contingent plan and experiences favorable income increases, the principal balance might be paid off in less than twenty-five years. However, if the borrower is not so fortunate as to pay off the loan within that time, the federal government will forgive the entire remaining balance, including principal and accrued interest, at the end of the twenty-fifth year.²⁰⁴ This is the second additional subsidy built into the income-contingent repayment option, potentially offering significant benefits to graduates who plan entire careers in low-paying jobs.

accumulate additional interest. *See id.* Similarly, if a borrower wins the lottery and decides to prepay the debt all at once, the accumulated additional interest must be paid at that time. *See id.*

201. *See supra* note 135 (providing a description of the three subsidies available generally to Stafford borrowers).

202. These payments would be those that would be due under a twenty-five year extended repayment plan, subject to the income-contingent cap. Within the limit established by the cap, the borrower first pays the interest and principal that would be due under the twenty-five-year extended repayment formula, and if within that limit, any money can be paid from the dummy account created because the borrower's principal had at some point climbed by 10%, that money is due as well.

203. The regulations purport to permit switching from income-contingent to standard repayment only during the first ten years of income-contingent repayment. *See* 34 C.F.R. § 685.210(b)(2)(i). However, "[a] borrower may prepay all or part of a loan at any time without penalty." *Id.* § 685.211(a)(2). So a borrower who wants to elect ten-year repayment after paying under income-contingency for, say, eleven years, could use any Web-based ten-year repayment calculator to compute the monthly payments for the remaining principal balance paid over ten years (rather than the remaining fourteen years), and then make those payments for ten years until the debt was fully repaid. The borrower could make his or her own graduated repayment plan in the same manner.

204. *See id.* § 685.209(c)(4)(iv).

Married borrowers may pool their debts for purposes of income-contingent repayment.²⁰⁵ However, even borrowers who do not elect to pool their debts, and even borrowers who are married but separated, are deemed to pool their income for purposes of determining the monthly repayment obligation.²⁰⁶ Thus the plan includes a significant “marriage penalty” for married two-income, one-debt couples, compared to the repayment obligations of similar couples who do not marry, about which more will be said later in this Article.

Because the income-contingent repayment option offers two subsidies for low-income borrowers, including a potentially very large subsidy after twenty-five years, one might think that law students contemplating low-paying public interest careers would be keenly aware of and interested in this repayment method, which was enacted with people like them in mind. However, nothing could be further from the truth.

IV. WHAT IS REALLY (NOT) HAPPENING OUT THERE

A. *Law Students*

During the spring of 1999, I surveyed law students at Georgetown and Catholic to ascertain what they knew about the income-contingent repayment option, and (whether or not they knew about it before my survey explained it to them) their views about using it to pay off their own debts. Both schools are located in Washington, D.C. Both are private schools affiliated with the Catholic Church. Both have high tuition in an area of the country with a relatively high cost of living. The two schools differ, however, in that Georgetown has a LRAP,²⁰⁷ through which it repays some of the debt of low-income graduates who work in public interest jobs, while Catholic does not.²⁰⁸

Georgetown is one of the nation’s largest law schools. In 1998-99, 1553 full-time students were enrolled.²⁰⁹ The Law Center charged

205. *See id.* § 685.209(b)(2).

206. *See id.* § 685.209(b)(1).

207. *See Ackley, supra* note 65. Georgetown’s program is described in detail on its Web site. *See Loan Repayment Assistance Programs*, Georgetown University Law Center, at <http://www.law.georgetown.edu/finaid/lrap.html> (last modified Aug. 18, 2000).

208. *See Ackley, supra* note 65.

209. *See* AMERICAN BAR ASS’N, OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 182 (Rick L. Morgan & Kurt Synder eds., 2000) [hereinafter ABA APPROVED LAW SCHOOLS] (reporting 1998-99 data).

\$24,530 annual tuition, and it estimated living expenses at \$14,720.²¹⁰ Average debt at graduation was \$82,600 (including an estimated \$9500 of undergraduate debt).²¹¹ Sixty-six percent of its most recent graduates were employed in law firms, 5% in business, 14% in government (other than as judicial clerks), 8% as clerks, and 3% in public interest law.²¹²

At the time of the survey, Catholic had 902 students.²¹³ Its tuition was \$23,898, and living expenses were estimated at \$13,390.²¹⁴ Average debt was \$78,500 (including the average college debt).²¹⁵ Forty-seven percent of its recent graduates worked in law firms, 19% in business, 18% in government, 10% in clerkships, and 3% in public interest law.²¹⁶

At each school, the Author's surveys and a follow-up reminder were placed in each student's individual mailbox, and responses were returned to a central location.²¹⁷ The questionnaires did not include space for the respondent's name or other identifying information, and they were returned anonymously to a central location. At Georgetown, 390 students (25%) responded; at Catholic, 131 students (14%) responded.

Table 6 summarizes certain relevant characteristics of the students who responded. It recapitulates their class in law school; membership in Georgetown's Equal Justice Foundation ("EJF") or Catholic's Students for Public Interest Law ("SPIL"), which promote interest in public interest law;²¹⁸ and intention to go into a government or public interest job immediately after graduation.

210. *See id.* at 183.

211. *See Compare Law Schools*, U.S. News & World Rep. Online, at <http://www.usnews.com/usnews/edu/beyond/grad/gradlaw.htm> (last visited Feb. 14, 2001).

212. *See* ABA APPROVED LAW SCHOOLS, *supra* note 209, at 182.

213. *See id.* at 128.

214. *See id.* at 129.

215. *See Compare Law Schools*, U.S. News & World Rep. Online, at <http://www.usnews.com/usnews/edu/beyond/grad/gradlaw.htm> (last visited Feb. 14, 2001).

216. *See* ABA APPROVED LAW SCHOOLS, *supra* note 209, at 129. There are some slight discrepancies in the data reported to the ABA and the data reported to *U.S. News & World Report*, which could result from somewhat different methods of measurement. According to the *U.S. News & World Report* data, the tuition and fees at Georgetown were \$25,705 and at Catholic, \$25,092. *See Compare Law Schools*, U.S. News & World Rep. Online, at <http://www.usnews.com/usnews/edu/beyond/grad/gradlaw.htm> (last visited Feb. 14, 2001). *U.S. News & World Report* lists Georgetown's percentage of graduates in law firms at 72%, in business at 6%, in government at 8%, in clerkships at 10%, and in public interest jobs at 3%. *See id.* It lists Catholic's equivalent percentages as 38%, 14%, 23%, 18%, and 2%. *See id.*

217. A covering letter from a faculty member (myself at Georgetown, Professor Lisa Lerman at Catholic) explained that the survey would be used in connection with research about the federal income-contingent repayment option.

218. Both of these student organizations raise money for summer stipends for students who take summer jobs in public interest organizations.

TABLE 6: CHARACTERISTICS OF THE RESPONDENTS

	Georgetown (N=390)	Catholic (N=131)
Percentage of respondents who were in each class of law school	1st: 29% 2nd: 32% 3rd: 35% 4th: 4% ²¹⁹	1st: 46% 2nd: 32% 3rd: 22%
Percentage who were members of EJF or SPIL	22%	19%
Students intending to take a public interest job immediately after graduation (or after a clerkship) ²²⁰	23%	43%
Average government-guaranteed debt of public-interest oriented students ²²¹	\$63,095	\$58,064
Average total debt of such students ²²²	\$95,495	\$94,615
Percentage of these students whose debt will fall into each range	Low: 15% High: 32% Very high: 53%	Low: 8% High: 18% Very high: 74%

For those students (about two-thirds of all respondents) who indicated a desire (if debt were not a factor) to spend at least one-third of their careers doing public service, the table also reports average

219. This includes evening students and students in a four-year joint degree program.

220. The numbers reported in this row are higher (and in the case of Catholic, substantially higher) than the actual numbers reported for government and public interest employment to the ABA. See ABA APPROVED LAW SCHOOLS, *supra* note 209, at 129, 183. However, the ABA statistics report judicial clerkships as a separate category of employment, and some of the clerks go on to government or public interest jobs. Also, students while in school may have intentions to do public interest work in the short term that are not ultimately fulfilled. Finally, the sample of students responding to this survey (particularly at Catholic) may have overrepresented students who planned to do public interest work immediately after graduation or a clerkship. If so, this is not a significant problem for the survey research, because the principal goal of the survey was to learn about the knowledge and attitudes of these very students (as opposed to all students) regarding the income-contingent loan repayment program, and most of the questions were directed only to that subgroup.

221. This data was only for respondents who reported a desire, were it not for debt, to spend at least one-third of their careers in public interest work. Those desiring to spend less than this percentage were not asked about debt.

222. This data was only for respondents who reported a desire, were it not for debt, to spend at least one-third of their careers in public interest work. Those desiring to spend less than this percentage were not asked about debt. The comparison of these numbers with those reported by schools to *U.S. News & World Report* suggests that the debts of these respondents may have been somewhat higher than average, perhaps because these respondents are the ones most interested in public service, and they may have earned less money than others in summer jobs during law school. Two other possible factors could account for the differences. First, the *U.S. News & World Report* data for debt reported on the class that graduated in 1998. See *Compare Law Schools*, U.S. News & World Rep. Online, at <http://www.usnews.com/usnews/edu/beyond/grad/gradlaw.htm> (last visited Feb. 14, 2001). Some of the students in my survey would not graduate until 2001, and expenses (and debts) were continuing to rise. Second, students with the highest debts may have been underrepresented in the responses to schools that were reported to the media, rather than overrepresented in my survey.

anticipated government-guaranteed debt (including college debt); average anticipated total debt; and the percentage of respondents whose anticipated total debt (rounded to the nearest \$10,000) was, in the categorization used for purposes of analyzing survey responses, “low” (zero through \$60,000 after rounding), high (\$70,000 through \$90,000), or very high (\$100,000 or more). A few aspects of Table 6 are worth noting. First, the Author was concerned that the sample would be unrepresentative because only the students who most cared about public interest law would respond to the questionnaire, but as measured by affiliation with the public interest student organization, at neither school was the group of respondents top-heavy with students who were members of the relevant core group. Second, among those asked to report debt at both schools, the average anticipated government-guaranteed debt exceeded three times the annual Stafford ceiling on law school loans, reflecting students’ borrowing up to the limit of Stafford loans, accruing some interest on them, and also owing government-guaranteed loans from college. Finally, the total anticipated debt levels were very high, with half of the Georgetown students and three-fourths of the Catholic students expecting to graduate owing at least \$100,000.²²³ Nine percent of each survey’s students expected to graduate owing at least \$130,000.

The Author first sought the respondents’ career choices, because he was interested primarily in learning the views about loan repayment held by students planning careers in public interest law. “Public interest” work was defined as full-time legal work for a nonprofit organization or government agency, and respondents were reminded that these organizations generally had starting salaries in the range of \$25,000 to \$37,000.²²⁴ Respondents were asked: “If the burden of your student loans were not a consideration, what part of your legal career would you like to spend doing full time public interest work?” The results are displayed in Table 7.

223. The tuition and living expenses at the two schools are similar, but Georgetown students may be contributing a bit more to their expenses from family members, savings, or law firm summer jobs. Many Georgetown students (though relatively fewer of those with public interest aspirations) earn more than \$15,000 by working for ten weeks after their second summer for one of the major law firms.

224. See, e.g., Martha Neil, *Noble Ambitions Drive Law Students: Survey*, CHI. DAILY L. BULL., Oct. 21, 1998, at 1.

TABLE 7: PORTION OF CAREER IDEALLY SPENT ON PUBLIC INTEREST WORK (%)²²⁵

	Georgetown (N=387)	Catholic (N=131)
Less than 1/3	33%	24%
1/3 to 2/3	33%	38%
More than 2/3	34%	37%

As might be expected, interest in life-long public interest work (more than two-thirds) was higher among EJF members (41%) and SPIL members (72%) than among respondents as a whole. But there was also a correlation between the size of the anticipated debt (even though students were told to disregard debt repayment) and desire to do such work. At Georgetown, 37% of those with low debt, and only 28% with very high debt, wanted to spend at least two-thirds of their lives in public service (compared to 34% of all respondents). At Catholic, 63% of those with low debt but only 28% with very high debt wanted to perform this work, compared with 37% of all respondents. It is possible that to some extent, anticipated debt load had so pervaded the respondents' self-image and sense of values that they were not able fully to disregard this factor in response to the question.

The correspondence between anticipated debt load and expected first post-law-school employment was considerably more dramatic. Table 8 shows a significant fall-off, as debt rises, in the expectation of doing public service work in the short term.

225. The responses did not vary substantially by class in law school. At Georgetown, for example, the proportion who wanted to spend more than two-thirds of their careers fell only slightly from 39% of the first-year respondents to 32% of the third-year respondents.

TABLE 8: PERCENTAGE AND NUMBER OF STUDENTS WHO EXPECTED TO TAKE A PUBLIC INTEREST JOB IMMEDIATELY AFTER GRADUATION OR A CLERKSHIP, BY SIZE OF ANTICIPATED DEBT²²⁶

	Georgetown	Catholic
Low debt (\$60,000 or less)	77% (13 out of 17)	90% (9 out of 10)
High debt (\$70,000 through \$90,000)	29% (19 out of 66)	77% (17 out of 22)
Very high debt (\$100,000 or more)	18% (51 out of 281)	30% (28 out of 95)

The students who did not want to do public interest work, regardless of debt, were not the principal focus of this research, but the survey was also intended to contribute marginally to the literature on non-debt influences on law students' decisions not to pursue public interest careers.²²⁷ Therefore, respondents who indicated a desire, regardless of debt level, to spend less than one-third of their careers on public interest work were asked: what accounted for their choice. Were they motivated primarily by a desire for the greater remuneration offered by the private sector, or by non-economic factors—for example, interest in business, greater anticipated intellectual stimulation in a law firm, etc.? Table 9 summarizes the quite similar responses of students at the two schools, nearly half of whom reported that they were primarily affected by the huge income differential (even before the large salary jump of 2000) between the private and public sectors. As one student commented:

These [public interest] salaries are simply too low to expect attorneys to want these jobs. . . . Anyone who had a career before [attending] law school . . . probably made the same or more money before starting . . . legal education. . . [so] the price you are asked to pay is simply too high compared to private sector employment.²²⁸

226. As noted above, this data pertains only to respondents who reported a desire, were it not for debt, to spend at least one-third of their careers in public interest work.

227. See Chambers, *supra* note 3, at 226-27; Kornhauser & Revesz, *supra* note 84, at 957-58. See generally ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (Howard S. Erlanger ed., 1989) (discussing how law school instruction and professional socialization contribute to the decrease in preference among law students for public interest jobs).

228. This was a response on one Georgetown questionnaire.

TABLE 9: PRIMARY REASON FOR GREATER INTEREST
IN PRIVATE SECTOR WORK AMONG THOSE WHO DID NOT WANT
PUBLIC INTEREST CAREERS

	Georgetown (N=128)	Catholic (N=32)
“Need or expect more money than public interest jobs pay”	43%	41%
Non-financial reasons	51%	53%
Other	6%	6%

The approximately two-thirds of the respondents who expressed a desire, but for debt, to spend at least one-third of their careers on public interest work were asked many other questions. (All of the remaining tables report responses only from those students who, if debt considerations were disregarded, wanted to spend at least one-third of their careers doing public interest work). First, the counter-factual hypothetical was eliminated so that the focus could be on the impact of debt. Students were asked: “Taking the reality of student loans, along with other financial realities and all other concerns into account, do you actually expect to spend at least one-third of your legal career doing full-time public interest work?” Table 10 shows that when financial realities are factored in, public service falls off by about 50%, though the drop-off rate is less for EJF and SPIL members. The gap between aspirations and expectations is also considerably smaller among those with the lowest debt than among those with the highest debt, providing some evidence challenging the findings of those who have suggested “that, contrary to commonly held beliefs, law school debt does not have a significant effect on attorneys’ first job choice,” and that the more significant influences on public interest career choice are race, pre-existing career plans, law school grades, and relative wages in various sectors of the profession.²²⁹

229. Kornhauser & Revesz, *supra* note 84, at 957; *see also* Chambers, *supra* note 3, at 199. Kornhauser and Revesz’s conclusions were based on data collected from 1987 through 1990, (and Chambers’ data dated from 1989), when debt was much lower. *See* Kornhauser & Revesz, *supra* note 84, at 892. But even they concede that “debt affects an individual’s decisionmaking calculus as a constraint: an individual otherwise inclined to take a not-for-profit job will be deterred from doing so if her disposable income after taxes and debt-service payments is not greater, by some amount, than her living expenses as a student.” *Id.* at 890. Furthermore, they note that their conclusions ought to be reexamined in the coming years . . . [because] debt burdens are continuing to rise in real terms, and the effect of debt at one level may not be the same as

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TABLE 10: OF THOSE WHO WANT TO SPEND AT LEAST ONE-THIRD OF THEIR TIME IN PUBLIC SERVICE WORK, PERCENTAGE WHO EXPECT TO DO SO

	Georgetown	Catholic
All respondents	48% (124 of 261)	47% (45 of 96)
Respondents who were members of EJP or SPIL	59% (43 of 73)	68% (17 of 25)
Respondents anticipating low debt	68% (13 of 19)	73% (8 of 11)
Respondents anticipating high debt	42% (32 of 76)	61% (14 of 23)
Respondents anticipating very high debt	48% (79 of 166)	37% (23 of 62)

The half of the respondents who desired to work as public interest lawyers but did not expect to do so were asked why they lacked that expectation. Specifically, they were asked to identify the factors accounting for at least 25% of their expectation not to do the public service work that they wanted to do. The choices were these:

- I can't afford to take a public interest salary and still repay my student loans. [coded in the table below as "Debt"]
- Even aside from the burden of student loan repayments, I want the higher pay or other tangible or intangible benefits that I think I could get in the private sector. [coded as "Benefits"]
- I can't get or don't expect to be able to get a public interest job that would interest me. [coded as "Qualifications"]

Table 11 shows the spread of reasons, which exceed 100% because students could give more than one reason.

that at a much higher level . . . [and] debt might have a larger effect on career choice than it now has.

Id. at 958.

TABLE 11: STATED SIGNIFICANT REASONS FOR FOREGOING
PUBLIC INTEREST WORK

	Georgetown (N=137)	Catholic (N=51)
Debt	90%	92%
Benefits	53%	49%
Qualifications	6%	4%
Other	10%	16%

This result tends to confirm that debt is by far the most important factor causing law students to abandon public service aspirations. Of course, the data is self-reported, and although students responding to an anonymous questionnaire could gain no benefit by reporting debt rather than salary differentials as the most frequent reason for changing their career plans, they might be deceiving themselves because they feel that wanting more money (rather than rapid debt retirement) is shameful. However, it provides one additional piece of evidentiary support for President Clinton's view that accumulated debt significantly interferes with public service choices.²³⁰

Before turning to questions about income-contingent repayment, students who desired to spend at least one-third of their careers in public interest law were asked one additional question, but a different question was asked at each school because only Georgetown has a school-financed LRAP for those who take public interest jobs. Georgetown has two such programs. LRAP-I is an entitlement program which can pay off all government-guaranteed debts within a few years for students earning less than a specified ceiling in "a non-profit entity which has as one of its primary purposes the rendering of legal services to or on behalf of persons or organizations which could not otherwise obtain like

230. Pay becomes a relatively more significant factor relative to debt as students move through law school. For the first-year Georgetown students, anticipated debt was a significant factor for 94%, and benefits were significant for 42%, but by the third year, these numbers were 84% and 56%. The Catholic students showed a similar trend. For first-year students, the numbers were debt at 91%, benefits at 57%, but for third-year students, they were debt at 78% and benefits at 68%. Students may have become more aware, as they moved through law school, of the huge gap between private-sector and public-sector pay, but debt remained the most commonly cited factor for not following a public interest career. For the Georgetown students, the frequency of mentioning debt did not vary appreciably according to whether the respondent was an Equal Justice Foundation ("EJF") member, with 88% of EJF members and 91% of non-members mentioning debt, and 60% of members and 51% of non-members mentioning pay. For Catholic, the raw numbers were too low to make this comparison.

services.”²³¹ LRAP-II covers students who work at low pay for a government, but it is not an entitlement program; students share, pro rata, in an annual appropriation.²³² At Georgetown, to measure knowledge of a loan repayment plan that was extremely close to home, students were asked whether they were planning to use this program. Five percent planned to apply for LRAP-I, and 3% for LRAP-II. Thus, 93% of students interested in significant public interest law work did not plan to use their own law school’s repayment plan. This 93% (327 students) who responded negatively were asked their reasons, and Table 12 explains them.

TABLE 12: REASONS STUDENTS AT GEORGETOWN GAVE FOR NOT USING LRAP DESPITE WANTING TO DO PUBLIC INTEREST WORK (N=300)

Reason	Number giving this reason (respondents could give more than one reason)
I do not know about those programs	90 (30%)
The work I want to do would not qualify	75 (25%)
The programs would not provide enough money toward meeting my loan repayment needs	47 (16%)
I want to earn a high salary and pay off my student debt before considering public interest work	115 (38%)
Other	22 (7%)

The fact that planned usage of the Law Center’s LRAP is so low may be good news for administrators with limited budgets, but the reasons articulated by those who plan to pass it by must give some pause to those designing loan-repayment programs. It may be that even a well-designed and reasonably generous program (at least when compared to the federal income-contingent repayment option) will reach only the “hard-core” public interest practitioners because large numbers of other would-be public interest lawyers will not find out about the program, or want or need a still more generous program to enable them to follow their dreams. On the other hand, as we shall see, 7% planned usage is

231. *Loan Repayment Assistance Programs*, Georgetown University Law Center, at <http://www.law.georgetown.edu/finaid/lrap.html> (last modified Aug. 18, 2000).

232. *See id.*

probably a much higher level than law student usage of the income-contingent repayment option, so perhaps Georgetown's LRAP offers a benchmark for a federal program that is aimed at encouraging public service by high-debt students.

Catholic students were asked a different but related question: "Which of these statements best reflects the planning that you have done for paying back your student loans?" The choices were:

- When I graduate, I will not have incurred substantial student debt.
- Before starting law school, I computed the amount of debt that I would graduate with and planned how I would repay it and still have the kind of career I want to have.
- While in law school, I have figured out a good way to repay my loans and still have the kind of career I want to have.
- I have not yet figured out a good way to repay my loans and still have the kind of career I want to have.

Table 13 shows that the vast majority had not yet found a way to reconcile their debts with their career aspirations.

TABLE 13: FINANCIAL PLANNING BY CATHOLIC LAW STUDENTS WHO WANTED SUBSTANTIAL PUBLIC INTEREST WORK (N=98)

No substantial debt	6%
Analyzed debt and made plan before starting school	13%
Analyzed debt and made plan during school	12%
Have not yet figured out a plan	68%

Turning to the income-contingent repayment option, a two-sentence description of the federal program without providing any details about its rules was first given, and respondents at both schools were asked whether they had heard of it before receiving the questionnaire.²³³ Table

233. The question read as follows:

The United States Department of Education has a program (called the income-contingent repayment option) through which a graduating student can consolidate his or her government-guaranteed student loans into a single loan from the federal government and pay that consolidated loan back over a long period of time, with limited annual repayments. The repayments are tied by a formula to the income that the graduate

14 shows that only 9% of the respondents had known about the plan even generally, and only an additional 24% to 30% had ever heard mention of it. At each school, more than 60% of these respondents—the target group for a plan to help those with the largest debts and lowest incomes—had never heard of the income-contingent repayment option.

TABLE 14: KNOWLEDGE OF THE INCOME-CONTINGENT REPAYMENT OPTION

	Georgetown (N=255)	Catholic (N=98)
No, never heard of it	62%	67%
Yes, but only vaguely and did not know of its provisions even in general terms	30%	24%
Yes, and knew of provisions at least generally	9%	9%

The low awareness could have been accounted for, in part, by students attending to debt repayment only in their third year of school, when debt repayment loomed. But the survey showed no significantly increasing awareness as the date for repayment neared.²³⁴ Table 15 shows the percentage of respondents who were unaware of the option, by year of law school.

received during the previous year. *Before* receiving this questionnaire, had you heard about this program?

234. At Catholic, the percentage of those unaware had dropped to 47% by the third year, but there were only seventeen third-year respondents at Catholic, eight of whom had not heard of the option. The apparent increase in awareness could be anomalous. Undergraduates are even less aware of the existence of the income-contingent repayment option. In a recent survey of students at fifty-five colleges, 86% of respondents were unfamiliar with the option. See Tracey King & Ivan Frishberg, *Big Loans Bigger Problems: A Report on the Sticker Shock of Student Loans*, Higher Education Project, U.S. PIRG Higher Education Project, at <http://www.pirg.org/studentdebt/> (last visited Apr. 13, 2001).

TABLE 15: PERCENTAGE OF RESPONDENTS UNAWARE OF THE OPTION BY YEAR OF LAW SCHOOL

	Georgetown	Catholic
First year	60%	67%
Second year	61%	77%
Third year	64%	47%

The degree of unawareness may, however, be somewhat related to the amount of debt, with the least indebted students least aware of the option, as shown by Table 16.

TABLE 16: PERCENTAGE OF RESPONDENTS UNAWARE OF THE OPTION BY SIZE OF ANTICIPATED DEBT

	Georgetown	Catholic
Low debt	79%	82%
High debt	56%	65%
Very high debt	62%	66%

About one-third of students who expected at least \$100,000 of debt had heard of the option. However, the percentage of these high-debt students who knew at least generally about its terms was only 8% at Georgetown and 9% at Catholic, no better than the percentage among all respondents at these schools.

The minority of students who had at least heard of the option were asked how they had heard of it and were allowed to respond with as many sources as were applicable. Table 17 shows that most of the information about the option had been received through word of mouth rather than from the government (either through printed literature or its Web site) or from other more channeled sources of information.²³⁵

235. The number of respondents at Georgetown was large enough to investigate the degree of knowledge of the option from the most frequently relied on sources. Among the forty-nine students who had learned of the program through word of mouth, only eight thought that they knew its terms, but among the ten who had learned of it from the United States Government, seven thought that

TABLE 17: SOURCE OF KNOWLEDGE ABOUT THE
INCOME-CONTINGENT OPTION

	Georgetown (N=98)	Catholic (N=32)
Law School Career Services Office ²³⁶	10%	13%
Newspaper or Magazine	8%	3%
United States Government Literature	10%	6%
Word of Mouth	50%	56%
Internet	4%	9%
Other	17%	13%

The one-third of respondents who had heard of the program were asked whether they were planning to consolidate their loans and repay them through this plan.²³⁷ Table 18 shows that fewer than one-quarter of this one-third of respondents were planning to use it, and that a majority did not know enough about it to make such a plan.

they knew its terms. Thus, it may be that if the government did a better job of publicizing income-contingent repayment, students might learn more details of the program than they do from friends.

236. In designing the questionnaire, the financial aid office should have been included as a possible response to this question, since students trying to figure out how to balance their debts against their career decisions could receive advice from either law school office. However, even if all of the students who listed "other" in response to this option had received their information from the financial aid office, a majority would still have learned of it from word of mouth rather than from their law schools. In addition, it should be noted that the data in this table refer only to the approximately one-third of students who had heard of the option at all.

237. Neither Georgetown nor Catholic provided students with the option of borrowing their law student loans directly from the government, through direct lending, so consolidation would be needed to take advantage of income-contingent repayment through the direct lending program.

TABLE 18: PLANS TO USE INCOME-CONTINGENT REPAYMENT,
AMONG STUDENTS WHO HAD HEARD OF IT BEFORE
RESPONDING TO THE QUESTIONNAIRE

	Georgetown (N=97)	Catholic (N=32)
No, because I knew how it worked but decided not to use it	24%	13%
No, because I did not know enough about it	60%	66%
Yes	17%	22%

The small number of students who knew how the option worked but nevertheless had decided not to use it were asked the reasons for their decision. They were permitted to rank their reasons. Only the Georgetown database was large enough to produce a meaningful tabulation to this question.²³⁸

TABLE 19: TOP-RANKED AND THREE TOP REASONS OF STUDENTS
WHO HAD SUFFICIENT INFORMATION BUT HAD DECIDED NOT
TO USE INCOME-CONTINGENT REPAYMENT

	Georgetown (N=21), top choice	Georgetown, top three choices
I have not wanted to agree to long-term indebtedness	43%	31%
I do not know what jobs or income I will have over a long period of time, so it has been difficult to decide what repayment plan would be best for me in the long run	14%	28%
I would use this plan if it covered all my loans, but I need a high income because I have large loans that cannot be consolidated into the plan because they are not government-guaranteed	19%	11%
The total payments would be too high, even if some of the money were eventually forgiven	5%	13%
I have been putting off until a later year my planning of how I will repay my loans	14%	11%
I have not heard of anyone using this program, so I have been suspicious of it	5%	4%
LRAP is sufficient to help me pay off my loans	0%	0%
Other	0%	2%

238. Only four Catholic students had made a deliberate decision not to use income-contingent repayment.

Table 19 considers the first-ranked reasons and the top three reasons. It shows that the most important reasons, by far, are students' unwillingness to commit to a long repayment plan, the difficulty of long-term planning under conditions of uncertainty, and the fact that they had high private debts that would not be covered by income-contingent repayment.²³⁹

Because the number of students who had enough information to decide about income-contingent repayment was so low, further questions were addressed to respondents who already claimed to know about how income-contingency worked and had decided not to use it,²⁴⁰ and to the larger group of respondents who did not have enough information about it.²⁴¹ They were provided with a description of the program, comprising approximately one single-spaced page with the information about the regulations summarized earlier in this Article.²⁴² After they read a description of the program, they were asked whether they would probably want to use this option. For the most part, this better informed group still did not want to use income-contingent repayment, although the percentage who were interested at Catholic (which has no LRAP) was twice as high as at Georgetown and is the most significant difference in the data supplied by students at the two schools.

TABLE 20: PROBABLE USE OF INCOME-CONTINGENT REPAYMENT BY STUDENTS DESIRING TO WORK IN PUBLIC INTEREST LAW AND INFORMED ABOUT THE TERMS OF THE OPTION

Will you probably use this option?	Georgetown (N=238)	Catholic (N=91)
Yes	20%	39%
No	80%	61%

239. This conclusion equally applies to the subgroup of those with very high debt. Their top three reasons (aggregating their three top-ranked reasons) for not wanting to use income-contingency were avoiding long-term debt (30%), lack of information about their futures (27%), and lack of coverage of commercial loans (15%).

240. Students who thought that they knew about the program might have been misinformed about it, particularly since most of them knew about it through word of mouth. Therefore, the summary of the program was directed to these students as well as to those who admitted not knowing enough about it.

241. Thus, the only respondents not asked the remaining questions were the small number who had already decided to use income-contingent repayment.

242. See discussion *supra* Part III.B.

This negative opinion of income-contingent repayment did not vary greatly among subgroups with larger debts. Among the Georgetown respondents, 17% of those with low and high debt said that they would use the option, while 21% of those with very high debt said that they would do so.

The students who had just been informed about the parameters of the program and had decided not to use it were then asked their reasons, just as those who had already known about the program had been asked earlier. The possible responses were similar to those offered in connection with the earlier question, but because these students had just been given detailed information about the option, more specific explanatory wording for the reasons was provided. The choices were:

- I don't want to be indebted for 25 years, even if the annual payments could be low and I might eventually get some forgiveness.
- I don't know what jobs or income I will have over a long period of time, so it is difficult to decide what repayment plan would be best for me in the long run.
- I'd use this plan if it covered all my loans, but I need a high income because I have large loans that can't be consolidated into the plan (they are not government-guaranteed).
- The total payments would be too high because I expect my income to rise, and as my income rises, my payments will also rise, so little if any of my debt would be forgiven after 25 years.
- The total payments would be too high, even if some of the money were forgiven after 25 years.
- I would be worried about having to pay income tax on the amount forgiven in the 25th year.
- I am putting off until a later year my planning of how I will repay my loans.
- I haven't heard of anyone using this program, so I am suspicious of it.
- LRAP is sufficient to help me pay off my loans (Georgetown questionnaire only).
- Other.

Table 21 reveals that the main reasons for reasonably well-informed public-interest-oriented students' avoidance of the option are the same as those given by students who had not been so recently

educated: the twenty-five year commitment before forgiveness occurred;²⁴³ the difficulty of deciding in favor of the option without knowing more about the student's future employment or income; and the plan's exclusion of commercial debt.

TABLE 21: TOP-RANKED AND THREE TOP REASONS OF STUDENTS WHO HAD JUST BEEN INFORMED ABOUT INCOME-CONTINGENT REPAYMENT BUT DECIDED NOT TO USE THIS OPTION

	Georgetown (N=188), top choice	Georgetown, top three choices	Catholic (N=56), top choice	Catholic, top three choices
Do not want twenty-five year indebtedness even with low payments and possible forgiveness	50%	30%	45%	31%
Difficult to plan long in advance	17%	27%	9%	21%
Plan does not cover commercial debt	19%	16%	20%	17%
Expect income to rise	5%	10%	13%	12%
Total payments would be too high, even with forgiveness	2%	5%	5%	5%
Concerned about tax in twenty-fifth year	1%	1%	—	3%
Putting off planning	2%	5%	2%	3%
Have not heard of anyone using this program	1%	2%	—	1%
LRAP is sufficient	2%	1%	(No LRAP)	(No LRAP)
Other	3%	2%	12%	7%

Unwillingness to sign up for a twenty-five year repayment plan was, by far, the most important negative factor attributed to the income-contingent repayment plan. It should be noted, however, that as debt rose, the aversion to twenty-five year repayment gave way, a bit, to non-coverage of commercial debt as a major factor against using income-contingent repayment. This result tends to suggest that as the percentage of students with very significant commercial debt rises (as it will each year that the annual ceiling on Stafford loans remains \$18,500 despite

243. The questionnaire made clear that the repayment plan could be switched to a different option, so that respondents would not necessarily lock themselves into twenty-five years of repayment. But they were also made aware of the fact that forgiveness was not made available unless one remained in the plan for twenty-five years.

increases in tuition and the cost of living), non-coverage of commercial debt will become a more important reason why students avoid the income-contingent repayment option. The Georgetown numbers are shown in Table 22.²⁴⁴

TABLE 22: TWENTY-FIVE YEAR REPAYMENT AND NON-COVERAGE OF COMMERCIAL DEBT AS FACTORS IN GEORGETOWN RESPONDENTS' DECISIONS NOT TO USE INCOME-CONTINGENT REPAYMENT²⁴⁵

Debt level	Percent who listed twenty-five year term as first factor	Percent who listed commercial debt as first factor
All respondents	50%	19%
Low (N=13)	61%	8%
High (N=62)	52%	18%
Very high (N=113)	48%	20%

Finally, because it was acknowledged while designing the questionnaire that aversion to twenty-five year repayment would loom large as a reason for not considering an income-contingent plan,²⁴⁶ those students who had objected for this reason were asked to clarify their objection.²⁴⁷ Did they dislike twenty-five year repayment because the term was simply too long in some absolute sense, or because the norm was ten-year repayment?²⁴⁸ At both schools, a strong majority was averse simply because they could not bring themselves to sign up for a twenty-five-year term, but a significant minority (17% at Georgetown, 19% at

244. The number of Catholic respondents was too low to be meaningful.

245. Respondents who listed other than these are not counted, causing the total of percentages to be lower than 100%.

246. During the preparation stage of this Article, the income-contingent repayment plan was explained to perhaps a dozen students, not all of whom were at Catholic or Georgetown. They were visibly interested, until it was made known that the repayment term was twenty-five years. At that point their eyes almost always became distant and their interest became academic rather than personal. Several said that people in their mid-twenties could not be expected to sign any agreement that would affect their lives until they were in their fifties (as if their choices of law school, first jobs, and spouses did not do so).

247. This question was directed to students who listed objection to a twenty-five-year term as one of their reasons, regardless of ranking.

248. The choices were: "I wouldn't want to repay my student loans over such a long period even if 25-year repayment becomes the norm for all law graduates, those going into the private and public sectors," or "I could accept repaying my student loans over such a long period if that were the norm for everyone, especially if that saved me some money. But I don't want to be making payments on my loans for fifteen years after most people I know have finished paying for school."

Catholic) objected primarily because they did not want to deviate from the norm.

B. Financial Aid Advisors

These surveys of students tend to show that there is relatively little interest in the income-contingent repayment option among students with high debts and low salary prospects, whether or not they are well-informed about its details. But what about the professionals who advise these students about their financial obligations and opportunities? To learn something about their views on income-contingent repayment, the Author surveyed the law school financial aid advisors, sending a questionnaire via e-mail to all 153 law school financial aid advisors who listed an e-mail address either in their professional directory²⁴⁹ or on their law school's Web site.²⁵⁰ The advisors were able to complete the questionnaire without revealing their identities or law schools, and to those who did reveal their school names were promised anonymity. Officials at ninety-eight law schools responded.²⁵¹

According to the survey results, fifty-seven of the responding schools are private law schools. Twenty-five of those (as well as eight public law schools) have LRAPs. Thirty of the schools (including seven of the fifty-seven private schools) participate in direct lending, making it possible for graduates to elect income-contingent repayment without first consolidating²⁵² (and presumably making information about this option more readily available to them than at schools like Georgetown and Catholic). At about one-half of the responding law schools (52%), a majority of graduating students take their first jobs in large law firms

249. See LAW SCHOOL ADMISSION COUNCIL, DIRECTORY 1998-99 (1999).

250. The ABA accredits 181 law schools, see ABA APPROVED LAW SCHOOLS, *supra* note 209, at 8, but not all have financial aid advisors, and not all financial aid officers list e-mail addresses. Some of those who do list addresses and were included in my survey are not technically law school advisors and do not actually have offices in their law school. These officials work in a central university administration office and are the primary persons designated to answer questions from law students, but they do not see law students on a daily basis as the financial aid advisors situated in law schools inevitably do. In a few instances, the officials who received the inquiries did not respond, and a follow up was conducted by asking Georgetown's financial aid advisor to give them additional copies of the questionnaire at their annual convention.

251. This absolute number of responses is, of course, small, but the data might be fairly representative because it represents more than half of all United States law schools.

252. Unfortunately, some columnists who inform students about repayment options do not mention that FFELP borrowers may consolidate their student loans into a direct federal loan so that they can elect income-contingent repayment. See Tony Munroe, *If You Can't Pay, Talk to Loan Arranger*, BOSTON HERALD, Sept. 27, 1998, at 35.

(with more than 250 lawyers). At one-third of the law schools, at least 10% of graduates start at salaries of \$33,000 or less.

The actual cost of attending two-thirds of the responding schools exceeds the \$18,500 annual Stafford loan limit; these schools are referred to as "high tuition" schools for purposes of analyzing the questionnaire responses. Of the sixty-six schools in that category, twenty-nine have LRAPs. Thirty-one percent of the schools reported that the average debt of their graduating students was \$55,500 (three Stafford loans) or less; 59% between \$55,500 and \$75,000; and 10% more than \$75,000. These categories are referred to for purposes of analysis as low debt, high debt, and very high debt schools. Among the private schools, however, only 4% were low debt schools; 78% were high debt, and 18% were very high debt schools.

First, financial aid advisors were asked how much they knew about the federal income-contingent repayment option. Three percent had never heard of it. Twenty percent had heard of it but were not familiar with it. Sixty-two percent said that they understood "the basic outline of the option but [were] not familiar with it in detail." Advisors who checked this option might know enough about it to refer high debt, low-income students to the government's Web site for further information. Only 14% said that they were familiar with its details.²⁵³ To elect this option, they had to say that they understood "its repayment formulas, its limitation on capitalization of unpaid interest, the opportunities for entry into and exit from the option, and the forgiveness feature." In other words, they had to know enough about it (in the opinion of the Author) to be able to offer expert advice to law students, including those who inquired about the option and those who might benefit from the option but had not previously heard about it.

253. This percentage rose to 19% among financial aid advisors at private law schools, the schools whose students have more substantial debt. But it was only 15% among financial aid advisors at schools at which more than 10% of the graduates start at salaries of \$33,000 or less. It fell to 10% among advisors at the twenty-nine schools where the average debt of graduates was less than \$55,500.

TABLE 23: FINANCIAL AID ADVISORS' KNOWLEDGE
OF THE OPTION (N=98)

Understood the option well	14%
Understood basic outline but not familiar with details	62%
Had heard of it	20%
Had never heard of it	3%

Additional questions were not asked of the twenty-three financial aid advisors who had never heard of the income-contingent repayment option or who had heard of it but were not familiar with it. All of the remaining data was collected from the seventy-five advisors who at least understood the basic outlines of income-contingent repayment.

To find out what advice these advisors proffered, they were asked what information about the income-contingent repayment option they or others in their offices gave to students who expected to have low-income jobs but would graduate with high debt. Respondents had three choices:

- We do the income-contingent arithmetic with them (or at least with those who request us to do that), to help them decide whether this option would be helpful for them, either as a short-term option or over a 25-year period.
- We tell them about the federal income-contingent option and give them printed information that is specifically about income-contingent repayment (or instructions about how to get specific information about this repayment plan), but we do not do the arithmetic with them as part of our counseling.
- We give them general information about loan repayment options (such as printed information about loan repayment choices, or the Access Advisor diskette), but we do not usually discuss this specific option.

Consistent with the low degree of familiarity with the program's formulas, very few advisors or their offices assisted students with the quite complex arithmetic that is necessary to understand the comparative advantages and disadvantages of this repayment option. Table 24 displays the advice dispensed by all financial aid advisors who knew at least the basic outline of the program, and by the fourteen who reported that they understood the option well.

TABLE 24: TYPES OF ADVICE GIVEN BY THE FINANCIAL AID ADVISORS MOST FAMILIAR WITH INCOME-CONTINGENT REPAYMENT²⁵⁴

	All of these advisors (N=75)	Those who understood the basic outline (N=61)	Those who knew the details (N=14)
Help with arithmetic, at least by request	4%	0%	21%
Provide printed information or explain how to get it	51%	49%	57%
Do not discuss income-contingent repayment	45%	51%	21%

Thus, nearly one-half of the advisors who knew at least the outlines of the income-contingent program do not inform students about it, and only 4% of them (all at private law schools) help with the math necessary to compare this method with other methods of repayment.

Cross-tabulations were performed in an attempt to identify factors that might make it more likely that these advisors would discuss income-contingent repayment with law students. Because so few of them do the arithmetic with students, the advisors were divided into only two groups. Those in the first group either do the arithmetic, provide information, or inform students about how to get information. Members of the second group do not discuss income-contingent repayment at all.

254. It could reasonably be assumed that the financial aid advisors who did not know even the general outlines of the program did not help students with the complex arithmetic. Therefore, of the ninety-eight advisors who responded to the survey, only three helped students to do the comparative computations.

TABLE 25: INFLUENCE OF POSSIBLE FACTORS ON DEGREE OF INFORMATION OFFERED BY THE MOST KNOWLEDGEABLE LAW SCHOOL FINANCIAL AID ADVISORS

	Help with arithmetic, provide printed data, or advise how to get information	Do not discuss income-contingent repayment
All knowledgeable advisors	55%	45%
Advisors who believe that at least 5% of their graduates could benefit in the short or long-term from the option (N=35)	66%	34%
Advisors who believe that less than 5% could benefit (N=33)	45%	55%
Private school (N=46)	61%	39%
Public school (N=29)	45%	55%
More than 10% of students take low-paying jobs (\$33,000 or less) (N=23)	56%	44%
Less than 10% take low-paying jobs (N=52)	54%	46%
School participates in federal direct lending (N=26)	54%	46%
School does not participate in federal direct lending (N=49)	55%	45%
High-cost school ²⁵⁵ (N=51)	61%	39%
Low-cost school (N=24)	42%	58%

The results suggest that neither a school's participation in direct lending nor the percentage of students who take very low-paying jobs has much influence on how much advice financial aid advisors provide

255. The cost of attendance exceeds the annual Stafford limit.

about income-contingent repayment,²⁵⁶ but that the likelihood of providing at least minimal advice was increased if the advisor believed that a more substantial number of graduates could benefit from the program, the school was a private school, or the school was a high-cost school.

To learn these advisors' opinions of the utility of income-contingent repayment, they were asked to state their view of its use by their high-debt graduates "who want to work, at least for several years, in jobs that do not have high compensation—for example, public interest, local government jobs, and very small firms." They were given three options for response:

- Many of these graduates might benefit by using it as a long-term repayment plan, and many others might benefit by using it for a few years and then switching to a more conventional repayment option.
- It would not be helpful as a long-term repayment plan for many of them, but a considerable number of them might benefit by using it for a few years and then switching to a more conventional repayment option.
- Very few, if any, of our graduates would benefit from either long-term or short-term use of this plan.

The overall responses are displayed in Table 26. They show that despite the advisors' lack of familiarity with the details of the program or their disinclination to help students to compute whether it would be advantageous, the vast majority believe that the option would be useful for this segment of law graduates.

TABLE 26: OPINIONS OF THE MOST KNOWLEDGEABLE FINANCIAL AID ADVISORS ABOUT THE UTILITY OF THE INCOME-CONTINGENT OPTION FOR HIGH-DEBT, LOW INCOME GRADUATES (N=75)

Many might benefit as a long-term plan and many for a few years	39%
Benefit for a few years only	52%
Few if any would benefit	9%

256. It should be noted, however, that these results are displayed only for advisors who knew at least the basic outlines of income-contingent repayment, and that direct lending participants were somewhat more likely (87% compared to 72%) to fall into that category.

Interestingly, the better the advisors knew the program, the less useful they thought it was, as indicated in Table 27.

TABLE 27: OPINIONS ABOUT UTILITY AS A FUNCTION OF GREATER FAMILIARITY WITH IT

	Percent of those who understood details very well (N=14)	Percent of those who understood the basic outline (N=61)
Many might benefit as a long-term plan and many for a few years	14%	44%
Benefit for a few years only	64%	49%
Few if any would benefit	21%	7%

Table 28 examines factors about their law schools that might influence the opinions of financial aid advisors about income-contingent repayment.

TABLE 28: CROSS-TABULATION OF ADVISORS' OPINIONS AND LAW SCHOOL CHARACTERISTICS

	Percent who think it could help high-debt, low-income graduates both as a long-term and as a short-term plan	Percent who think it is useful only as a short-term plan	Percent who think few if any would benefit
All respondents	39%	52%	9%
School has LRAP (N=33)	29%	61%	11%
School does not have LRAP (N=42)	45%	47%	9%
More than 10% of graduates start at \$33,000 or less (N=23)	52%	39%	9%
Fewer than 10% of graduates start at \$33,000 or less (N=52)	32%	58%	10%
High-cost school (N=51)	41%	49%	10%
Low-cost school (N=24)	33%	58%	8%

Not surprisingly, advisors were more likely to think income-contingent repayment useful (especially for both long-term or short-term users) if their schools lacked an LRAP, had more low-income graduates, and cost more to attend.

The eight advisors who did not think that income-contingent repayment would be useful either for long-term or short-term use were asked to explain their reasoning. One did not respond. Table 29 summarizes the thinking of the other seven, though it should be noted that the number of respondents here is very low because so few thought the program useless.

TABLE 29: REASONS OF THE SEVEN MOST SKEPTICAL ADVISORS ABOUT WHY INCOME-CONTINGENT REPAYMENT WOULD NOT BE USEFUL EVEN IN THE SHORT TERM

	Top ranked reason	All reasons
Other, less complex repayment plans would be better for those who cannot afford ten-year repayment	43% (3 of 7)	33%
Short-term users do not remain in the program long enough to qualify for forgiveness and will end up paying more than on ten-year plan	14% (1 of 7)	28%
School's LRAP is sufficient	29% (2 of 7)	17%
Students are better off working for law firms or corporations to reduce debt before taking low-paying jobs	—	11%
Department of Education administration is unreliable	—	6%
Other	14% (1 of 7)	6%

A much larger group of forty respondents (including the eight who thought it not useful in either time frame) thought that income-contingent repayment would not help as a long-term repayment method. They were asked the reasons for their views about lack of long term utility. They were offered eight possible explanations, as well as the opportunity to list an "other" reason. The eight options were as follows:

- It only covers governmentally extended and government-guaranteed debt.
- It requires 25-year amortization to qualify for forgiveness, and such a long repayment period is too long for our graduates, even if the

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financial terms (including eventual forgiveness) were advantageous.

- Few graduates will remain in the program long enough to qualify for forgiveness, and they will end up paying more money than if they elected a more traditional repayment plan.
- The program is useful only to those high-debt students who can predict what their career paths will be and know that they will have low incomes for a long time, but few if any of our graduates will fit that profile.
- The forgiveness eventually offered by the program is taxable as income.
- I have not yet heard of law graduates benefiting by using this program.
- This school has a Loan Repayment Assistance Program, and it is sufficient to meet the needs of most of our high-debt, low-income graduates.
- Administration by the Department of Education, either of direct lending generally or of this option, is unreliable.

As Table 30 shows, a plurality of them believed that few graduates would remain in the program long enough to qualify for forgiveness and would end up paying too much money.

TABLE 30: REASONS WHY INCOME-CONTINGENT REPAYMENT WOULD NOT BE A USEFUL LONG-TERM (TWENTY-FIVE YEAR) OPTION (N=40)

	Top ranked reason	All reasons
Does not cover commercial debt	5%	14%
Twenty-five years is too long, even if forgiveness would be advantageous	13%	14%
Few graduates will remain in the program long enough to obtain forgiveness, and they will pay too much compared to standard repayment	40%	26%
Long-term career paths are too unpredictable	15%	16%
Forgiveness is taxable	7%	8%
I have not heard of others using it	7%	9%

LRAP is sufficient	10%	9%
Department of Education administration is unreliable	0%	3%
Other	3%	1%

Finally, the financial aid advisors who had been familiar with income-contingent repayment were asked to estimate the percentage of their students who would benefit by using it, and the percentage who actually did use it. Apparently, schools do not usually ask their graduates to report back to them on the repayment method they elect; 80% of the advisors stated that they would have no way of making even a rough estimate of the percentage who actually used the option.²⁵⁷ But Table 31 shows that an overwhelming majority of the advisors (86%) believe that at least 1% of their schools' graduates would benefit, and a majority (52%) believes that the percentage is more than 5%. Contrast these percentages with the mere 4% of advisors who help their students, even when requested, with the arithmetic needed to evaluate the utility of income-contingent repayment.

TABLE 31: ESTIMATES, BY FINANCIAL AID ADVISORS FAMILIAR WITH INCOME-CONTINGENT REPAYMENT, OF THE PERCENTAGE OF THEIR SCHOOLS' GRADUATES WHO WOULD BENEFIT (N=68)

Percent Who Would Benefit	Estimate
More than 10%	25%
5% to 10%	27%
1% to 4.9%	34%
Some but fewer than 1%	11%
None	3%

Not surprisingly, the percentage of advisors who thought that at least 5% of students would benefit was higher at private schools (60%) than at public schools (37%); at schools lacking an LRAP (55%) than at those that had such programs (46%); at schools where at least 10% of graduates took low-paying jobs (70%) than at those where fewer took

257. Of the fifteen who were able to estimate, two said none; four said fewer than 1%; seven said 1 to 4%; one said 5 to 10%; and one said more than 10%.

such jobs (43%); and at high-cost schools (54%) than at low-cost schools (45%). But the data also showed that the advisors who reported understanding the details of the income-contingent plan were less likely to believe that at least 5% would benefit (36%), compared to those advisors who only knew its general outlines (55%). This finding seems consistent, however, with the earlier conclusion that the advisors who best understood the plan were less likely to think that it was beneficial to students.²⁵⁸

V. IS INCOME-CONTINGENT REPAYMENT GOOD FOR YOU?

Part III of this Article reported the high hopes of Congress and President Clinton that income-contingent repayment would help to enable idealistic students, including law students, to enter public service. But the survey data in Part IV suggest a dismal image of the utility of income-contingent repayment for idealistic law graduates. One-half of the students who want to spend at least one-third of their careers in public service do not expect to do so,²⁵⁹ and 90% of those students cite their student debt as a significant reason for foregoing the opportunity.²⁶⁰ Approximately two-thirds of these students have never heard of the income-contingent repayment option,²⁶¹ and only 9% even know generally what it provides.²⁶² Among the very few who know about it, only about one-fifth plan to use it.²⁶³ When informed about the details of the option, only one-fifth to two-fifths of the students wanted to use it.²⁶⁴ Professional financial aid advisors are slightly better informed but at least as skeptical. Only 14% of them understand the option well.²⁶⁵ One-half of the advisors who know of the program at least generally think that it would benefit at least 5% of their students, and one-quarter think that it would help more than 10% of their students.²⁶⁶ But only 4% of the advisors go over the complex arithmetic with the students whom it could help, even on request, and nearly one-half do not discuss it with students at all.²⁶⁷

258. *See supra* tbl.27.

259. *See supra* tbl.10.

260. *See supra* tbl.11.

261. *See supra* tbl.14.

262. *See supra* tbl.14.

263. *See supra* tbl.18.

264. *See supra* tbl.19.

265. *See supra* tbl.23.

266. *See supra* tbl.31.

267. *See supra* tbl.24.

This skepticism and lack of knowledge on the part of both students and advisors would be justified or at least harmless if the income-contingent repayment option is so poor that in fact, only an infinitesimal fraction of high-debt, low-income students would be advantaged by using it. To evaluate its utility generally, and to enable law students to compare how their own debts would fare under income-contingent repayment and other repayment plans, the Author and his research assistant, Tai-yeu Hsia, constructed an interactive income-contingent loan repayment calculator. FinAid, a public interest Web site for information on student loans, has made the calculator available without charge in HTML form.²⁶⁸

A person using this Web site calculator enters, in specified fields, his or her government-guaranteed debts that are eligible for consolidation in the direct lending program,²⁶⁹ the applicable interest rate or rates, his or her starting income (including any spousal income), and his or her anticipated rate of income growth.²⁷⁰ Guessing future income growth is one of the more difficult aspects of using the calculator, but one can ask prospective employers about their historical rate of salary increases, and one can also make alternative assumptions about future income growth and test them. The user of the calculator may also assume a sudden increase in his or her future income level—for example, a change from public interest to law firm employment. Finally, the user may enter the current thirty-year government bond rate (or a different discount rate, if preferred) to reflect the financial advantage of repaying money later rather than sooner.²⁷¹

The calculator will then provide the user with the monthly payment for the first month and every month until the debt is paid off or forgiven; the time at which the debt will be paid off or forgiven; the total of payments that the student will pay over time; the amount of the debt that the government will forgive as a result of the subsidies built into the option; and the projected principal balance at the end of every month (which will help the user to decide whether to prepay the debt or switch,

268. To use the FinAid income-contingent repayment calculator, access Mark Kantrowitz, *Income Contingent Repayment Calculator*, FinAid: The SmartStudent Guide to Financial Aid, at <http://www.finaid.org/calculators/icr.phtml> (last visited Feb. 13, 2001).

269. If her debts were direct federal loans to begin with, rather than FFELP loans, consolidation is not necessary.

270. The user also enters whether he or she lives in Alaska or Hawaii, since the federal poverty level is set higher in those states, and the size of the user's family. The latter entry is necessary because the poverty level varies with the number of dependents.

271. For an explanation of why the thirty-year bond rate is recommended, see the Appendix to this Article.

at any given point, to ten-year or some other form of repayment).²⁷² The calculator will also show the present value of the stream of future repayments, and of any amount of subsidy that the government will eventually provide. Because the value of a dollar paid twenty-five years from now is less than the value of a dollar paid ten years from now, only present value calculations can enable a borrower to compare the cost of repayment using two or more repayment plans with different terms.²⁷³

The FinAid Web site also allows a borrower to compare income-contingent repayment with ten-year repayment, thirty-year “extended” repayment, or repayment over any other term of years.²⁷⁴ Similar calculators are available on other sites, but this one uniquely computes present value so that the cost of a loan paid under one of these methods can more accurately be compared to the cost of income-contingent repayment.²⁷⁵

272. No calculator, including the one utilized in this Article, can predict precisely a borrower’s actual schedule of repayments under the income-contingent repayment option, because a borrower cannot predict in advance certain relevant events that will occur in the future, such as the rate of change in the federal poverty level (an aspect of the repayment formula) or the precise year-to-year income fluctuations of the borrower. Even if the borrower had an entirely flat rate of income increases, calculators (which assume even increases) will be imperfect predictors of the payment bills that the government’s computer will send out in future years, because increases in the consumer price index and the poverty level are not the same from year to year. Even the Department’s own Web site calculator, posted to the public so that would-be borrowers can determine how much they would pay under various repayment plans, bears the following legend in bold, red, capital letters: “Calculations are estimates. Values may not reflect the actual amount computed by the direct loan servicing center.” *Income Contingent Repayment Data Entry*, U.S. Dep’t of Educ., at <http://www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlentry2.html> (last visited February 15, 2001) (capitalization omitted). The tables in this Article are subject to the same caveat. We were able to check our calculator against the government’s Web site calculator only for hypothetical borrowers whose income increased by 5% per annum, because that assumption is rigidly built into the government’s Web site calculator. In that range, our calculator produces payment totals (over twenty-five years) which, measured in current dollars, are generally within one-tenth of 1% of the amounts reported on the government’s Web site calculator.

273. See the Appendix to this Article. The government’s calculator, *Income Contingent Repayment Data Entry*, U.S. Dep’t of Educ., at <http://www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlentry2.html> (last visited February 15, 2001), does not calculate present values.

274. See Mark Kantrowitz, *Income Contingent Repayment Calculator*, FinAid: The SmartStudent Guide to Financial Aid, at <http://www.finaid.org/calculators/icr.phtml> (last visited Feb. 13, 2001). A steady repayment calculator also appears on the FinAid Web site. See Mark Kantrowitz, *Loan Payment Calculator*, FinAid: The SmartStudent Guide to Financial Aid, at <http://www.finaid.org/calculators/loanpayments.phtml> (last visited Feb. 13, 2001).

275. Compare Mark Kantrowitz, *Income Contingent Repayment Calculator*, FinAid: The SmartStudent Guide to Financial Aid, at <http://www.finaid.org/calculators/icr.phtml> (last visited Feb. 13, 2001) with *Income Contingent Repayment Data Entry*, U.S. Dep’t of Educ., at <http://www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlentry2.html> (last visited February 15, 2001).

A. *Larry and Lisa Lifer, Public Interest Careerists*

With the calculator in hand, consider the situation of Larry Lifer, a law student graduating in June 2000,²⁷⁶ with \$15,000 in government-guaranteed undergraduate debt, \$55,500 in additional debt as a result of law school Stafford loans, and \$5000 in accrued interest from the law school loans.²⁷⁷ If he consolidates his loans into a federal direct loan now, the loan will bear an annual interest rate of 8.25%.²⁷⁸ Mr. Lifer has been offered a position as a staff attorney in a neighborhood legal services office in the continental United States at the typical starting salary of \$32,000. He plans to spend his entire career in legal services work. He is not married. Because legal services' budgets depend on an annual funding process and his office does not have a fixed or unionized salary scale, he and his future employer are a little uncertain about the rate of salary increase that he can expect. It might be 2%, 3%, or 4%. Let us say that the thirty-year bond rate is currently 5.8%.

Table 32 shows the important characteristics of repayment for the three assumptions about the rate of salary increase. It shows that in all of these cases, payments in the first year and the sixth year are much lower than the \$926 required by ten-year repayment. Thus, the main goal of income-contingent repayment, keeping payments affordable, is met. In addition, the government provides additional loan subsidies for borrowers at all of these levels of increasing income, but the degree of subsidy is highly sensitive to the rate of increase. If Mr. Lifer's income increases at 2% per year, the government will write off about 24% of the total debt repayment (measured in terms of present value). But if his income increases by 4% annually, the government will write off only about 7% of the debt.

276. The tables in this Article display costs of repayment based on consolidation in late Summer 2000. The FinAid Web site is updated annually to include in its calculations the most recently released federal poverty level values and other adjustments required by federal law. Using the FinAid calculator in 2001 will produce slightly different results than those reported here, but that calculator permits historical research by allowing the user to assume that he or she was consolidating in an earlier year. Thus, these results can be replicated by selecting "2000" as the "table year" on the FinAid calculator. *See id.*

277. This is approximately the amount that would accrue during three years of law school and a six-month grace period. See Memorandum from Jeff Hanson, Access Group, Average Debt at Repayment, Law School Class of 1998—Revised, to Interested Parties 2 (Jan. 26, 2000) (on file with author).

278. For 2000-01, the Stafford loan repayment rate is the ninety-one-day treasury bill rate in May 2000 (5.89%) plus 2.3%, or 8.19%. *See* 34 C.F.R. § 685.202(a)(1)(iii)(B) (2001). This is rounded up in a federal consolidation loan to the next higher one-eighth of a percentage point, or 8.25%. *See id.* § 685.202(a)(3)(i)(E).

TABLE 32: CHARACTERISTICS OF INCOME-CONTINGENT REPAYMENT
FOR LARRY LIFER: \$75,500 DEBT,
\$32,000 STARTING SALARY

	Income increases at 2%	Income increases at 3%	Income increases at 4%
Monthly payments, year one ²⁷⁹	\$394	\$394	\$394
Monthly payments, year six	\$428	\$457	\$488
Total of payments, current dollars	\$144,107	\$171,440	\$194,477
Present value of total of future payments	\$73,677	\$84,444	\$94,272
Amount the government forgives, current dollars	\$100,845	\$71,427	\$29,543
Present value of government forgiveness	\$24,633	\$17,447	\$7216

Income-contingent repayment could be attractive to Larry Lifer at all three of these rates of salary increases, because it is a way to keep payments low in relation to income. Indeed, recalling the very highest percentage of income (20%, twice as high as the government's own recommendation) that professionals have recommended as a ceiling for student debt,²⁸⁰ income-contingent repayment is the only way to make repayment affordable, particularly in the early years. Table 33 shows that among repayment plans that reduce payments (compared to standard ten-year repayment), it may even be a good way to keep down the total amount paid, because it most greatly reduces payment right away, while keeping total payments over the life of the loan comparable to other payment-reduction plans. But as noted, Mr. Lifer's federal subsidy is not very great if he will experience income increases as large as 4% annually.

279. Because the income-contingent repayment option only permits consolidation of government-guaranteed debt, repayment of any commercial debt must be added to the monthly figures.

280. See *supra* text accompanying note 91.

TABLE 33: COMPARISON OF REPAYMENT PLANS FOR LARRY LIFER
WITH 4% INCREASES²⁸¹

	Standard repayment	Graduated repayment, debt repaid in thirty years		Extended thirty-year repayment	Extended twenty- five-year repayment	Income- contingent repayment with 4% income increases
Monthly payments year one, and percentage of after-tax income ²⁸²	\$926 (41%)	\$519 (23%)	\$567 (25%)	\$595 (26%)		\$394 (17%)
Monthly payments, year six, and percentage of after-tax income, based on gross income of \$40,500 ²⁸³	\$926 (34%)	\$540 (20%)	\$567 (21%)	\$595 (22%)		\$488 (22%)
Total of payments, current dollars	\$111,123	\$216,364	\$204,195	\$178,584		\$194,477
Present value of total of future payments	\$84,738	\$98,175	\$94,605	\$94,170		\$94,272
Amount the government forgives, current dollars	0	0	0	0		\$29,543
Present value of government forgiveness	0	0	0	0		\$7216

281. Under the federal government's graduated repayment plan, the period within which the debt is scheduled for repayment increases as the amount of the debt goes up. For a \$75,500 debt, the period is up to thirty years. Unlike thirty-year extended payment, however, the amount of monthly repayment is not steady. It starts at a smaller level in the early years, and increases over the period of repayment, on the assumption that the borrower's income will rise. A borrower can choose a period of repayment shorter than the maximum. Although a comparison between twenty-five-year graduated repayment and twenty-five year income-contingent repayment was preferred, neither the government's Web site calculator nor, apparently, any other online calculator permit the user to assume a repayment period shorter than the maximum. The data on graduated repayment in this chart were calculated on the government's Web site. See *Income Contingent Repayment Data Entry*, U.S. Dep't of Educ., at <http://www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlentry2.html> (last visited Feb. 15, 2001). The present value calculation for the graduated repayment data was performed on a spreadsheet created by Lewis Walton on the basis of an algorithm supplied by the Department.

282. This assumes a personal exemption of \$4300, a standard deduction of \$2750, federal income tax of \$3746, and state and local income taxes of \$1124 (30% of federal tax). The personal exemptions, standard deductions, and tax rates in this Article are based on 1999 rules. See I.R.S., *supra* note 194, available at <http://ftp.fedworld.gov/pub/irs-pdf/p17.pdf> (last visited Feb. 14, 2001) (providing the 2000 rules).

283. This assumes \$6026 in federal tax and \$1807 in state and local tax.

What if Mr. Lifer is unduly pessimistic, and actually achieves 5% or 7% salary increases after electing the income-contingent repayment option? He will obtain no subsidy, because he will pay off his loan before he gets to the twenty-five-year mark. But that does not necessarily spell disaster. He can switch to ten-year repayment when he can afford it. Or he can keep paying through the income-contingent plan, taking note of the comparisons in Table 34. Note that even under the most expensive version of income-contingent repayment (5% income increases), Mr. Lifer will pay only about \$16,000 more, in terms of present value, than his fellow graduate who pays down the loan over ten years.

TABLE 34: COMPARISON OF SIX REPAYMENT PLANS, INCLUDING THREE ASSUMPTIONS ABOUT INCOME INCREASES UNDER AN INCOME-CONTINGENT REPAYMENT PLAN

	Standard repayment	Graduated repayment, debt paid in thirty years ²⁸⁴	Extended thirty-year repayment	Income-contingent repayment, 3% increases	Income-contingent repayment, 5% increases, debt paid in 24.4 years	Income-contingent repayment, 7% increases, debt paid in 19.4 years
Monthly payments, year one	\$926	\$519	\$567	\$394	\$394	\$394
Monthly payments, year six	\$926	\$540	\$567	\$457	\$519	\$586
Total of payments, current dollars	\$111,123	\$216,364	\$204,195	\$171,440	\$200,439	\$170,711
Present value of total of future payments	\$84,738	\$98,175	\$94,605	\$84,444	\$99,109	\$95,429
Amount the government forgives, current dollars	0	0	0	\$71,427	0	0
Present value of government forgiveness	0	0	0	\$17,477	0	0

Of course, as he is electing how to pay his debts, Mr. Lifer will be very eager to know what his rate of income increase is likely to be, because although he will on the whole be better off if it is higher, he will be more heavily subsidized if the rate is lower. It may not be easy for

284. See *supra* note 281.

him to get this information, but he could start by asking his future employer for projections or at least historical figures on the rate of increase. For a very rough estimate, he could consult Table 35, the results of an unscientific survey of civil legal aid offices.

Table 35 was constructed because although all law school career services offices know the starting salaries at a large range of legal aid and other public interest employers, there seems to be no published compilation of the rates of projected or historical salary increase at such institutions. For purposes of assessing the utility to law graduates of income-contingent repayment, the national average or median for such programs is not necessary, but the range of possibilities is worth knowing. Therefore, a true random sample was unnecessary, and was in any event beyond the means of this project. The data was collected by asking Don Saunders, an official of the National Legal Aid and Defenders Association, to suggest individual legal aid office directors who would be most likely respond to a survey regarding their salary practices. Questionnaires were sent to the ninety-five individuals he suggested and fifty-one replies were received.

The first question asked for the organization's starting salary. The responses indicate that although \$32,000 may be the national average starting salary for these jobs,²⁸⁵ many legal services offices start at a lower level, some of them as low as \$25,000 to \$25,500 (reported by six offices). Table 35 reflects this range.

TABLE 35: STARTING SALARIES AT CIVIL LEGAL AID OFFICES (N=51)

Starting salary	Percentage and number of programs
\$25,000 to \$27,000	25% (13)
\$27,001 to \$29,000	10% (5)
\$29,001 to \$31,000	33% (17)
\$31,001 to \$33,000	10% (5)
More than \$33,000	22% (11)

These directors were also asked to provide historical or estimated data on the rate of salary increases for the first ten years of an attorney's

285. The mean salary for 1999 graduates starting in full-time legal services jobs was \$31,795. See EMPLOYMENT AND SALARIES 1999, *supra* note 71, at 41.

career with the office, and for the following ten years. Some of them wrote letters to the Author about the difficulty of providing this data:

The percentage of salary increase was difficult to estimate because of our continuing uncertainty regarding federal funding. Our Board, for several years, was simply giving end of the year bonuses to deal with the funding uncertainty.²⁸⁶

Since our salary figures vary each year, and in some years when funding has been particularly tight, our staff have not received salary increases at all, it is difficult to estimate the increases in a % fashion. Normally our attorney staff receive less than a thousand dollars in salary increase each year²⁸⁷

[T]here is . . . little predictability in our salaries. . . . When funding declines, as it often does, we sometimes freeze salaries. Then we may give a relatively large increase to catch up. . . . [O]ur increases tend to be in dollar amounts rather than percentages[;] i.e., attorneys will get a \$1,500 increase rather than a 3% increase. This practice . . . means that as a percentage, increases are often *less* each year.²⁸⁸

The reported rates of increase during the first ten years fell into the pattern shown in Table 36.

TABLE 36: REPORTED RATES OF ANNUAL SALARY INCREASES FOR LAWYERS DURING THE FIRST DECADE (N=50)

Rate of increase	Percentage and number of programs
2%	4% (2)
3%	18% (9)
4%	22% (11)
5%	32% (16)
6% or more	24% (12)

286. Letter from Juan A. Gonzalez, Executive Director, Legal Aid Society of Albuquerque, to the Author (June 14, 2000) (on file with author).

287. Letter from an anonymous source to the Author (undated) (on file with author).

288. Letter from Bob Sable, Director, Greater Boston Legal Services, to the Author (June 22, 2000) (on file with author).

Because so many programs had starting salaries substantially below the national median, the rates of increase during the first ten years for the group of programs that started lawyers at \$27,000 or less were particularly focused upon. These rates varied from 2% (one program) through 3% (three programs)²⁸⁹ up to 10% (one program). A set of income-contingent repayment calculations was therefore run assuming a lower-than-average starting salary of \$27,000, at various rates of increase.

TABLE 37: CHARACTERISTICS OF INCOME-CONTINGENT REPAYMENT FOR LARRY LIFER'S SISTER LISA: \$75,500 DEBT, \$27,000 STARTING SALARY

	Income increases at 2%	Income increases at 4%	Income increases at 7%, debt repaid in 24.9 years	Income increases at 10%, debt repaid in 19.2 years
Monthly payments, year one	\$311	\$311	\$311	\$311
Monthly payments, year six	\$336	\$386	\$470	\$563
Total of payments, current dollars	\$112,076	\$161,635	\$211,050	\$175,525
Present value of total of future payments	\$57,492	\$76,879	\$99,333	\$96,139
Amount the government forgives, current dollars	\$133,476	\$83,908	0	0
Present value of government forgiveness	\$32,603	\$20,496	0	0

As this table indicates, for a person starting at the low end of the salary scale, even a 4% annual rate of increased income results in a very substantial federal subsidy, which in terms of present value is almost 20% of the debt repayment. But high rates of salary increase do require larger total repayment, and a borrower experiencing rapid income increases might at some point convert to a different repayment plan. For example, if Ms. Lifer's actual increases were 7%, her debt would have

289. One of these programs gave some attorneys larger increases.

grown to \$86,272, including the accrued but uncapitalized interest that she owed the government, by the beginning of the sixth year. If she calculated the consequences of shifting at that point to standard ten-year repayment, she would discover that such a conversion would require her to repay only \$126,978 (in current dollars) over the remaining loan period, rather than \$167,790 if she remained in income-contingent repayment. In terms of present value, she would have to expend only about \$97,000, rather than \$110,000 through income-contingent repayment. But her monthly payments in the sixth year would suddenly increase from \$492 (18% based on one-twelfth of her after-tax income of \$32,687)²⁹⁰ to \$1058 (37%). This much more rapid payment may simply not be affordable.

It should be noted that the calculator, and the tables, are premised on a constant rate of salary increase, set by the borrower to estimate the value of income-contingent repayment. Similarly, the government's calculator assumes a constant rate of income increase, though the rate on that calculator is set inflexibly at 5%. However, as one legal services director noted in his letter, the rate of increase may actually drop, so the tables and the calculator may understate the value of income-contingent repayment. In fact, eighteen of the fifty-one programs reported decreasing percentages of salary raises, and none reported accelerating percentages of increases. The programs with the lowest rate of initial increase (under 5%) reported the smallest drop (to 4% after ten years). Those with rates of increase of 5% to 7% tended to drop them by 2%, while those with the largest initial increases, in the range of 8% to 10%, tended to drop the rate by as much as 5% after a decade, unless the attorney was promoted to a managerial position.

B. Ralph Reformer, Test Case Litigator

Suppose Larry Lifer's classmate Ralph Reformer undertakes a career, not in a legal services office starting at \$27,000 or \$32,000 with 3% increases, but in a public interest law firm devoted to test case litigation, public policy education, or public interest lobbying. In order to learn about starting salaries and rates of increases at the much smaller number of these organizations, a survey was sent out to fifteen of their directors.²⁹¹ Six replies were received, which are displayed in Table 38.

290. This assumes \$6026 in federal income tax and \$1807 in state and local income tax.

291. These directors were also identified by NLADA's Don Saunders as representative and likely to reply.

TABLE 38: STARTING SALARIES AND RATES OF SALARY
INCREASE IN PUBLIC INTEREST LAW FIRMS

Firm number	Years of experience required of starting lawyers	Starting salary	Rate of increase, first ten years	Rate of increase, second ten years	Number of lawyers employed
1	0	\$31,300	3%	3%	More than 15
2	at least 3	\$35,000	6%	4%	6 to 15
3	4	\$36,750	8.5%	4%	5 or fewer
4	1	\$38,000	4.5%	4%	more than 15
5	4	\$41,000	5%	2%	6 to 15
6	5	\$50,000	at least as much as inflation	same	6 to 15

Suppose that Mr. Reformer spends his career at firm number four, about half way through this list. In that case, his repayment options are summarized in Table 39.

Table 39 suggests a surprising conclusion. One might think that income-contingent repayment would have few attractions for someone starting with income as high as \$38,000. Yet the early-year payments on this plan are far more affordable than those under ten-year repayment, for even in the sixth year, standard repayment would consume nearly one-third of after-tax income. And although all non-standard repayment plans are more costly in the long run than ten-year repayment, the thirty-year graduated and twenty-five year extended repayment plans will cost the borrower more over time than will income-contingent repayment.

TABLE 39: REPAYMENT OPTIONS FOR RALPH REFORMER: \$75,500 DEBT, AT PUBLIC INTEREST LAW FIRM NUMBER FOUR, STARTING SALARY \$38,000, WITH 4.5% INCREASES

	Income-contingent repayment, debt repaid in 18.6 years	Standard repayment	Graduated repayment, debt repaid in thirty years ²⁹²	Extended twenty-five-year repayment
Monthly payments, year one, and payment as a percentage of taxable income ²⁹³	\$494 (19%)	\$926 (36%)	\$519 (20%)	\$596 (23%)
Monthly payments, year six and payment as a percentage of taxable income ²⁹⁴	\$628 (20%)	\$926 (29%)	\$541 (17%)	\$596 (19%)
Total of payments, current dollars	\$159,095	\$111,123	\$216,364	\$178,584
Present value of total of future payments	\$93,554	\$84,738	\$98,175	\$95,526

C. Cindy Civic, Serving the Poor First and Getting Rich Later

Unlike Larry and Lisa Lifer, Cindy Civic does not think of herself as committed to a life of public interest law. She expects that eventually, she will follow many of her classmates into a fairly large law firm, where her income will be well above \$100,000 per year. For four or five years, however, she wants to work in a public interest job, either because she considers it her public duty to serve people who are less fortunate than herself, or because she thinks that public service work will be more fun than law firm work, and she wants to undertake it before she has children to support.

Ms. Civic therefore plans four years of work with Lisa Lifer in her legal services office. At the beginning of her fifth year, she imagines that she will have a dramatic career shift, going to work for a corporate law firm at a salary of \$150,000, not nearly as high as she would be making if she had started at the firm immediately after law school, but a conservative estimate, and worth settling for in order to have the

292. See *supra* note 281.

293. The assumptions as to after-tax income are that this single taxpayer will pay \$5354 in federal income tax (as provided by the 1999 tax table) and another \$1606 in state and local income tax.

294. The borrower's gross income will have risen to \$49,486, and taxable income to \$42,436, assuming a standard deduction. Federal tax is assumed to be \$8532, and state and local tax \$2560, keeping it in the same ratio to federal tax as in the previous calculation.

privilege of doing for four years the full-time service work that she always wanted to undertake.

Like Lisa Lifer, Ms. Civic has \$75,500 of government-guaranteed debt and will start her professional life with a salary of \$27,000, and she will obtain raises of 4% annually before she changes jobs. After her change, her new \$150,000 salary will continue to rise by 4% per year.

But how will Ms. Civic manage those first four years? She cannot elect standard repayment at the outset, because the \$926 monthly payments would amount to 46% of her after-tax income.²⁹⁵ Income-contingent repayment would reduce those payments to \$311, only 18% of her income. But what would happen if she remained in the income-contingent repayment plan until the debt were repaid? Table 40 provides the answer.

TABLE 40: REPAYMENT OPTIONS FOR CINDY CIVIC: DEBT \$75,000, INITIAL SALARY \$27,000, RAISES AT 4%, NEW JOB AT \$150,000 AFTER FOUR YEARS, WITH FURTHER RAISES AT 4%

	Standard repayment (shown for comparison, but impossible because Ms. Civic cannot afford the initial payment)	Remain in income-contingent repayment until debt is paid (12.5 years in all)	Five years of income-contingent repayment, followed by conversion of the remaining debt to ten more years, standard repayment	Five years of income-contingent repayment, followed by level payment of the remaining debt in five more years
Monthly payments, year one, and percentage of after-tax income	\$926 (46%)	\$311 (16%)	\$311 (16%)	\$311 (16%)
Monthly payments, year six, ²⁹⁶ and percentage of after-tax income ²⁹⁷	\$ 926 (12%)	\$1304 (16%)	\$1077 (14%)	\$1791 (23%)
Total of payments, current dollars	\$111,123	\$138,258	\$149,948	\$128,161
Present value of total of future payments	\$84,738	\$90,184		

295. This assumes federal income tax of \$2996 and state and local tax of \$899.

296. If Ms. Civic were to remain in income-contingent repayment, she would not make higher payments on her fifth-year much-increased salary until the beginning of the sixth year.

297. This assumes (somewhat unrealistically) that Ms. Civic is still taking the standard deduction. She will have gross income of \$150,000, federal tax of \$42,356, and state and local tax of \$13,068.

This table shows that if Ms. Civic's primary debt repayment goal is to keep monthly payments at the lowest possible percentage (14%) of her monthly after-tax income after she takes her law firm job, her best strategy would be to convert to standard ten-year repayment shortly after her career change makes it possible to make higher payments. She would pay off the debt in a total of fifteen years. However, at her new, high salary, she may be able to afford paying 16% of her after-tax income toward her student debt. If so, she would actually be better off remaining in income-contingent repayment until the debt is paid off in a total of twelve and one-half years rather than fifteen. On the other hand, she might prefer to pay off the remaining debt quite rapidly, over a five-year period, after she changes jobs. If so, she will have to pay 23% of her after-tax income toward her debt repayment in the sixth year to pay off the debt in a total of ten years.²⁹⁸

D. *Fay Federal, Justice Department Lawyer*

Suppose that Fay Federal enters the United States Department of Justice in its Honors Program, and works at the Department's headquarters in Washington, D.C. She will enter at the GS-11 level, which in the year 2000 started at \$42,724 with 3% annual raises.²⁹⁹ Her options are shown in Table 41, and any repayment program other than standard repayment is plausible.

298. With an annual income of \$150,000, Ms. Civic might well begin investing in stock, mutual funds, or other investments that historically have had long-run returns well over 10%. If so, her best strategy might be to elect a repayment plan through which she would pay off her student loans over the longest, not the shortest, period of time, a period of at least twenty-five additional years. Thus, for a long time she would have the benefit of funds for which she was paying interest of 8.25% but earning interest of more than 10%. For just this reason, many people with mortgages elect to invest discretionary funds rather than use them to pay off their debt. On the other hand, unlike mortgage interest, only a small part of student loan interest is deductible from income tax. *Compare Frequently Asked Tax Questions and Answers*, IRS, at http://www.irs.ustreas.gov/prod/tax_edu/faq/faq-kw217.html (last visited Feb. 22, 2001), with IRS, *Interest Expense: Topic 505*, at http://www.irs.ustreas.gov/prod/tax_edu/teletax/tc505.html (last visited Feb. 22, 2001). Thus, the relevant figure for purposes of comparison is the after-tax return on investments, requiring a higher pre-tax return to justify this strategy of profiting on the spread.

299. See 2000 *General Schedule Locality Rates of Pay for Washington-Baltimore, DC-MD-VA-WV (including St. Mary's County, MD)*, U.S. Office of Pers. Mgmt., at <http://www.opm.gov/oca/2000tbls/GSannual/html/GSDCB.HTM> (last visited Feb. 14, 2001). This table incorporates a locality adjustment, raising the General Schedule level to account for the higher-than-average cost of living in the Washington, D.C. area. See *id.*

TABLE 41: COMPARISON OF REPAYMENT PLANS FOR FAY FEDERAL, A JUSTICE DEPARTMENT LAWYER: DEBT OF \$75,500, STARTING INCOME OF \$42,724, WITH 3% INCREASES

	Standard repayment	Graduated repayment, debt repaid in thirty years ³⁰⁰	Extended twenty-five-year repayment	Income-contingent repayment, debt repaid in 17.3 years
Monthly payments, year one, and percentage of after-tax income ³⁰¹	\$926 (33%)	\$519 (18%)	\$595 (22%)	\$573 (20%)
Monthly payments, year six, and percentage of after-tax income, based on gross income of \$49,845 ³⁰²	\$926 (29%)	\$540 (17%)	\$595 (18%)	\$664 (21%)
Total of payments, current dollars	\$111,123	\$216,364	\$178,584	\$148,552
Present value of total of future payments	\$84,738	\$98,175	\$88,006	\$91,785

E. Max Merger, Corporate Lawyer

Finally, a reader of this Article might be curious about the utility of income-contingent repayment for graduates with high debts who are planning to work for corporate law firms with high starting salaries and rapid rates of advancement. Table 42 shows that Max Merger, a typical corporate lawyer, starting at \$75,000 and expecting 10% raises, would actually repay a little less using the income-contingent repayment option than using a standard ten year level repayment schedule. The reason for this is that the government's income-contingent repayment formula would require a graduate with such a high income to repay a larger percentage of that income (as well as a larger amount), and as a result, the graduate using this plan would pay off the debt in seven and one-half years, rather than ten. Mr. Merger, on the other hand, might prefer to pay

300. See *supra* note 281.

301. This assumes federal income tax of \$6642 and state and local income tax of \$1993.

302. This assumes federal tax of \$8630 and state and local tax of \$2589.

off his student loan over a very long term, using his high income for investments rather than loan repayments.³⁰³

TABLE 42: COMPARISON OF REPAYMENT PLANS FOR MAX MERGER, A LAW FIRM LAWYER: DEBT OF \$75,500, STARTING INCOME OF \$75,000, WITH 10% INCREASES

	Standard repayment	Graduated repayment, debt repaid in thirty years ³⁰⁴	Extended twenty-five-year repayment	Income-contingent repayment, debt repaid in 7.7 years
Monthly payments, year one, and percentage of after-tax income ³⁰⁵	\$926 (22%)	\$519 (12%)	\$595 (13%)	\$1040 (25%)
Monthly payments, year six, and percentage of after-tax income, based on gross income of \$132,867 ³⁰⁶	\$926 (12%)	\$540 (7%)	\$595 (8%)	\$1184 (16%)
Total of payments, current dollars	\$111,123	\$216,364	\$178,583	\$102,732
Present value of total of future payments	\$84,738	\$98,175	\$95,526	\$82,886

It should be clear from these tables that neither the income-contingent repayment calculator nor a table comparing income-contingent repayment with other repayment options can dictate which system a borrower should use. Each individual must decide, based on the individual's own circumstances, whether income-contingent repayment is desirable. For a high-debt, low-income borrower, the income-contingent repayment plan is a strong tool for lowering debt repayment. In addition, lawyers who start at very low salaries, or who expect very low rates of salary increase, and particularly those lawyers who start at a

303. See *supra* note 298.

304. See *supra* note 281.

305. This assumes federal income tax of \$15,851 and state and local income tax of \$4755.

306. This assumes federal tax of \$33,783 and state and local tax of \$10,134.

low rate and expect a low rate of increase, will benefit not only by lowering their payments, but by obtaining substantial federal subsidies. In addition, although the current-dollar cost of using income-contingent repayment appears much higher than the current-dollar cost of ten-year repayment, the present values of the future streams of payments are sometimes remarkably similar. High-debt, high-income borrowers might also consider income-contingent repayment as a method for paying off their debts even more quickly than through straight repayment, with the built-in buffer that if they accept low-paying work for a while, their payments will go down. But for a high-income borrower, a decision to pay off debts rapidly involves balancing the psychological stress of being in debt against the value of having more money to invest.

Thus, the financial advisors who responded to the Author's survey may be correct in thinking that a small but significant fraction of law graduates might benefit from income-contingent repayment. But the assessment of whether income-contingent repayment is useful for a particular borrower requires both careful analysis of the borrower's plans and circumstances and thoughtful comparisons of the results of complex mathematical calculations. Income-contingent repayment is not the best solution for every borrower, but it is of sufficient interest to warrant sophisticated understanding by more than 4% of the nation's law school financial aid advisors.

F. *The Effects of LRAP*

Up to now, we have assumed that our prototypical borrowers are at schools that have no LRAPs. What happens if they go to a school that provides its own loan repayment assistance for their legal services work? Of course the effects will depend on the exact rules of the particular LRAP. Let us consider what would happen if Larry Lifer were an alumnus of Georgetown.³⁰⁷

Georgetown expects LRAP beneficiaries to schedule repayment "using a 15 year or more" schedule.³⁰⁸ Thus, a graduate who elected twenty-five-year income-contingent repayment would qualify, but the

307. Georgetown has two loan repayment assistance programs ("LRAPs"). See *Loan Repayment Assistance Programs*, Georgetown University Law Center, at <http://www.law.georgetown.edu/finaid/lrap.html> (last modified Aug. 18, 2000) (describing both). By virtue of working in a legal services office, Larry Lifer would qualify for the more generous LRAP-I program, which is considered here.

308. *Id.* If a student does not want to consolidate with at least a fifteen-year repayment schedule, Georgetown awards benefits based on a calculation that nevertheless assumes a fifteen-year level repayment amount.

graduate can also qualify by electing straight fifteen-year repayment. If a recent graduate's gross earnings are below a specified, inflation-adjusted "standard maintenance allowance" (\$32,200 for the year 2000, and higher if the graduate lives in certain high-cost cities), Georgetown will not expect the graduate to contribute toward loan repayment, but the school's subsidy is phased out as income rises.³⁰⁹ The graduate is expected to contribute to loan repayment 50% of the difference between salary and the standard maintenance allowance, and the student becomes ineligible for LRAP benefits when the difference between salary and the standard maintenance allowance is equal to or more than twice the annual loan repayment.³¹⁰ Loan payments due on undergraduate debt are deducted from salary for purposes of determining benefits, but undergraduate loans are not eligible for LRAP payment or forgiveness, and commercial loans are only covered to the extent that "funds [are] available."³¹¹ Georgetown will "lend" the graduate the money necessary to make the monthly loan payments, and it will forgive these loans according to a specified schedule, with the total amount forgiven after five years in qualifying public interest employment.³¹² After five years, all further funds are loaned to the graduate for six months at a time, and then forgiven if the borrower remained in qualifying employment for that period.³¹³

It should be noted, for purposes of analyzing the interaction between LRAPs and income-contingent repayment, that LRAP forgiveness is not considered "income" for purposes of the income tax law.³¹⁴ It therefore does not enter the adjusted gross income calculation of the income-contingent repayment formula.

So if Larry Lifer attends Georgetown, he has three plausible choices. When he graduates, he could choose an LRAP and fifteen-year repayment, sticking with fifteen-year repayment even after the benefits of the LRAP phase out as his income rises. His second option would be to choose an LRAP and twenty-five-year income-contingent repayment at the time of graduation. His third option would be to start with an LRAP and fifteen-year repayment, but switch to income-contingent

309. *See id.*

310. *See id.*

311. *See id.* Because commercial debt coverage is not guaranteed, this analysis assumes that it is not eligible for LRAP subsidy. This assumption also facilitates comparisons between this analysis and other analyses in this Article, because income-contingent repayment does not cover commercial debt, either.

312. *See id.*

313. *See id.*

314. *See* 26 U.S.C. § 108(f)(2)(D)(ii) (Supp. IV 1999).

repayment after about five years, as the benefits of the LRAP phase out. Under all of these plans, he will pay only a small amount out of his own pocket for his first five years of legal services work. If he chooses income-contingent repayment from the beginning, his payments during the first five years will be smallest, and Georgetown will therefore lend him less money, and will therefore forgive a smaller amount. Table 43 summarizes the consequences of these choices. A fourth column was added to Table 43, showing the effects of income-contingent repayment alone, without an LRAP. This column simulates Mr. Lifer's situation if he were to graduate from a school with no LRAP, or if his employment—for example, hanging out a shingle to serve working-class families—produced the same income but did not qualify for LRAP benefits.

This table shows that by electing income-contingent repayment from the beginning, Mr. Lifer will pay less out of his pocket in the early years. But if Mr. Lifer elects fifteen-year level repayment and makes somewhat larger out-of-pocket payments, the law school will pay a greater subsidy over time, and Mr. Lifer's payments will be lower in later years. Furthermore, he will have less remaining debt at the end of five years. Thus Mr. Lifer might reasonably elect either type of repayment, depending on his particular circumstances. Starting with fifteen-year repayment and converting to income-contingent repayment is a kind of middle option. It would keep repayment minimal when the LRAP subsidy is beginning to phase out. But under this plan, Mr. Lifer's debt repayments will gradually rise to \$777 per month just before the debt is repaid, though at that time repayments will still be a relatively affordable 18% of his rising after-tax income, which will then be \$53,160.³¹⁵ Under this hybrid plan, the debt will take a total of twenty-one years to repay, rather than fifteen years as in the case of level fifteen-year repayment or twenty-five years under straight income-contingent repayment.

315. This assumes gross income in the twenty-first year, based on the 4% annual increases of \$72,920, federal income tax of \$15,200, and state and local income tax of \$4560.

TABLE 43: ELECTING INCOME-CONTINGENT REPAYMENT ALONG WITH GEORGETOWN LRAP: ELIGIBLE LRAP DEBT IS \$60,500, BUT TOTAL FEDERAL DEBT IS \$75,500; STARTING SALARY IS \$32,000 WITH 4% ANNUAL RAISES

	Straight LRAP (fifteen-year level debt repayment)	LRAP with income-contingent repayment (twenty-five-year income-contingent repayment)	LRAP with fifteen-year level repayment for five years, then converted to twenty-five-year income-contingent repayment for sixteen years ³¹⁶	Income-contingent repayment alone (no LRAP)
Monthly amount due, year one	\$732 (constant for fifteen years)	\$394 (rising to \$467 by year five)	\$732 (constant for fifteen years)	\$394 (rising to \$467 by year five)
LRAP payment, monthly, during first year (loaned and later forgiven by law school)	\$587 (law school debt repayment only)	\$317 (rises with income over the five years) ³¹⁷	\$587 (law school debt repayment only)	0
Monthly payments which borrower has to pay out-of-pocket, year one (amount due less LRAP payment), and percentage of after-tax income ³¹⁸	\$145 (6%)	\$79 (3%)	\$145 (6%)	\$394 (16%) (rising to \$467 by year five)
Total subsidy paid by LRAP, years one through five	\$35,220	\$20,638 ³¹⁹	\$35,220	0
Debt remaining after five years	\$70,432	\$82,007	\$70,432	\$82,007
Monthly out-of-pocket payments, year six, and percentage of after-tax income ³²⁰	\$260 (10%) ³²¹	\$375 (14%) ³²²	\$390 (14%) ³²³	\$488 (19%)

316. This option would nominally require up to thirty years of total repayment, since switching into income-contingent repayment requires starting a new repayment period unless the borrower had been paying under a plan anticipating more than twelve years of repayment. See 34 C.F.R. § 685.209(c)(4)(ii) (2001). However, under the facts assumed here, Mr. Lifer's income would rise rapidly enough for him to repay the debt in full, through income-contingent repayment, in a total of twenty-one years (five of straight repayment and sixteen of income-contingent repayment). He would receive no forgiveness at the end of that period.

317. Because Georgetown does not cover undergraduate debt, it will prorate the portion of income-contingent repayment attributable to that debt, even though the full payment would be lower than payment of law school debt alone under fifteen-year repayment.

318. This assumes federal income tax of \$3746 and state and local income tax of \$1124.

319. This is an estimate, based on 80% (the fraction of debt attributable to law school loans) of the \$25,798 in income-contingent repayment to this point.

320. This assumes gross income of \$40,500, federal income tax of \$6062, and state and local tax of \$1808. This also assumes that Georgetown's standard maintenance allowance has risen by 2% per year and is \$36,000 in the sixth year.

Borrowers in other circumstances, or who graduate from law schools with different LRAPs, might find that the balance tips more heavily for or against a particular repayment strategy. For example, after graduating from Georgetown, Cindy Civic (who plans to jump to the world of corporate law after four years in legal services) could well elect an LRAP with a straight fifteen-year repayment plan, rather than income-contingent repayment, because after the first four years she would easily be able to afford the monthly payments of \$732 (less than 10% of her after-tax income), and she would face a smaller long-term debt.

Similarly, let us change the assumption that Mr. Lifer attended Georgetown. Suppose that he attended Northwestern University Law School. Northwestern has a LRAP, but because the program has an income ceiling of \$29,000,³²⁴ lower than Mr. Lifer's income of \$32,000, Mr. Lifer could not use the LRAP, and income-contingent repayment would look more attractive than if he had graduated from Georgetown. Or suppose that he attended American University Law School, which has a Public Interest Loan Repayment Assistance Program ("PILRAP").³²⁵ PILRAP is in some ways more generous than the LRAP at Georgetown: it covers undergraduate debt, and it pays subsidies as if the graduate were paying the debt over ten years, even if the graduate elects slower repayment. But in other ways, it is less generous; in particular, graduates receive no subsidy after their income reaches \$35,000,³²⁶ while Georgetown's subsidy is phased out pursuant to a complex formula that could result in some benefits for high-debt graduates earning up to \$60,000. Table 44 shows Mr. Lifer's choices as an American University graduate.

321. The calculation is as follows: \$40,500 income less undergraduate debt repayment of \$1740 is \$38,760, from which the standard maintenance allowance, which by now has become \$36,000, is deducted. This yields \$2760, or \$230 per month. The graduate is expected to contribute half of this, or \$115 per month, toward law school loan repayment. To this must be added the \$145 of undergraduate loan repayment.

322. Because the graduate's earnings now exceed the standard maintenance allowance, the law school will pay a maximum of \$115 per month toward the graduate's loan repayment, which by now has grown to \$490 per month in income-contingent repayment. *See supra* note 320.

323. This constitutes income-contingent payment of \$535 per month in the first year of such payment, minus a law school subsidy of \$145.

324. *See* NAT'L ASS'N FOR PUB. INTEREST LAW, *supra* note 110, at 148.

325. *See* FINANCING THE FUTURE, *supra* note 97, at 25.

326. *See Office of Career Services: Frequently Asked Questions at OCS*, American University Washington College of Law, at <http://www.wcl.american.edu/ocs/faq.html> (last visited Feb. 23, 2001).

TABLE 44: THE CONSEQUENCES OF ELECTING INCOME-CONTINGENT REPAYMENT WHEN AMERICAN UNIVERSITY LAW SCHOOL PILRAP (LRAP) SUBSIDIES ARE ALSO AVAILABLE; ELIGIBLE PILRAP DEBT IS 75,500;³²⁷ STARTING SALARY IS \$32,000 WITH 4% ANNUAL RAISES

	Straight PILRAP (ten-year level debt repayment)	PILRAP with income-contingent repayment (twenty-five-year income-contingent repayment)	PILRAP with ten-year level repayment for five years, then converted to twenty-five-year income-contingent repayment for twelve years ³²⁸	Income-contingent repayment alone (no PILRAP)
Monthly amount due, year one	\$926 (constant for ten years)	\$394 (rising to \$467 by year five)	\$926 (constant for ten years)	\$394 (rising to \$467 by year five)
PILRAP payment, monthly, during first year (loaned and later forgiven by law school)	\$426	\$394 ³²⁹	\$426	0
Monthly payments, year one (amount due less PILRAP payment), and percentage of net income ³³⁰	\$500 (22%)	\$0 (0%)	\$500 (22%)	\$394 (16%) (rising to \$467 by year five)
Total subsidy paid by PILRAP, years one through five ³³¹	\$11,445	\$10,775	\$11,445	0

327. American University's Public Interest Law Repayment Assistance Program ("PILRAP") covers repayment of federally guaranteed undergraduate as well as law school debt. *See* Telephone Interview with Ingrid Valentine, Assistant Director of Financial Aid, American University Law School (Sept. 21, 2000).

328. This option would nominally require up to thirty years of total repayment, since switching into income-contingent repayment requires starting a new repayment period unless the borrower had been paying under a plan anticipating more than twelve years of repayment. *See* 34 C.F.R. § 685.209(c)(4)(ii) (2001). However, under the facts assumed here, Mr. Lifer's income would rise rapidly enough for him to repay the debt in full, through income-contingent repayment, in a total of seventeen years (five of straight repayment and twelve of income-contingent repayment). He would receive no forgiveness at the end of that period.

329. If a graduate were to elect a payment plan providing for slower repayment than standard ten-year repayment, American University's PILRAP would nevertheless make the same loan repayment that it would make based on standard ten-year repayment. *See* Telephone Interview with Ingrid Valentine, *supra* note 327.

330. This assumes federal income tax of \$3746 and state and local income tax of \$1124.

331. PILRAP subsidies end when the graduate earns more than \$35,000. *See supra* text accompanying note 326. This graduate will earn more than \$35,000 in his fourth year, and PILRAP subsidies will end at that time unless American University increases the standard maintenance allowance. In an interview with the Author, American University's financial aid office suggested that the author should not assume that PILRAP would raise its standard maintenance allowance (increasing the salary that the graduate could earn without losing subsidies), as such raises are not automatic, are not necessarily reviewed periodically, and had not occurred in more than two years. *See* Telephone Interview with Ingrid Valentine, *supra* note 327. A small raise in the allowance would affect the figures in this table only marginally, because the \$35,000 is so low, compared to

Debt remaining after five years	\$45,402	\$82,007	\$45,402	\$82,007
Monthly out-of-pocket payments, year six, and percentage of after-tax income. ³³²	\$926 (35%)	\$488 (19%) ³³³	\$453 (18%)	\$488 (19%)

This table shows that with standard repayment, PILRAP alone will not meet Mr. Lifer's needs. He will soon become ineligible for PILRAP subsidies, so in his sixth year of work Mr. Lifer would have to pay more than one-third of his after-tax income to repay his loans. But Mr. Lifer has other choices. He could use a combination of income-contingent repayment and PILRAP subsidies to make no loan payments whatsoever during the first year of repayment. Indeed, he would pay virtually nothing for the first three years, during which he will remain eligible for PILRAP subsidies, and he would pay only \$488 per month for his loans even in the sixth year, after PILRAP subsidies end. However, because he will owe more at the end of five years than he did when he graduated, his monthly payments will gradually rise to \$925 in the final year of income-contingent repayment (19% of his net income, which will have risen to \$58,598 annually). Or he could pay off the debt more quickly by using standard repayment for a few years³³⁴ and then converting to income-contingent repayment. If he converted after five years, he would pay off the debt in seventeen years, and after converting to income-contingent repayment, his highest monthly payment would be \$498 (in the final year of repayment).

In any event, for a student planning to use a LRAP, creating a table modeled on Table 43 or Table 44 seems like a desirable step in financial planning. Creating tables like these could also help prospective students who plan low-income careers to choose among law schools. For example, a comparison between the two tables shows that during the first five years, Georgetown's subsidy for Mr. Lifer (based on ten-year standard repayment) would be more than three times greater than

starting salaries of average public interest lawyers like Larry Lifer, that such lawyers salaries soon exceed this level or one that would be somewhat higher than this level.

332. The calculation is as follows: \$40,500 gross income minus federal tax of \$6062 and state and local tax assumed to be \$1808 yields an after-tax income of \$32,630.

333. Because the graduate earns more than \$35,000, he or she is no longer eligible for PILRAP subsidies. See *supra* text accompanying note 326.

334. Conversion was assumed after five years in Table 44 so as to facilitate comparison with Table 43. Mr. Lifer would be more likely to convert after three years, when the school's subsidies end.

American's, and Georgetown's subsidies will continue long after the first five years, whereas American's subsidies will end.³³⁵

One feature of these tables should be of particular interest to law school deans at schools that lack LRAPs. Such deans might see the federal government's income-contingent repayment plan as obviating the need for them to create such programs. However, the last column of Table 43 shows that in the critical early years, even using income-contingent repayment, a graduate from a school without such a LRAP would have to pay, out-of-pocket, about three times as much in loan payments as a graduate from a school that has a strong LRAP.

G. *The Effects of Marriage*

Return to the original Larry Lifer, graduating from a school with no LRAP, and going to work for \$32,000 with 3% annual increases. He recently graduated from law school and began thinking about loan repayment options. He is single, but he and his girlfriend, Penny Lane, are thinking about getting married. What are the consequences of marriage for their loan repayments?

First, let us consider what happens if Mr. Lifer and Ms. Lane are in roughly the same circumstances. She plans to work in legal services, with the same income. She also has the same amount of debt. Federal regulations allow the happy couple to combine their debts into a single income-contingent loan, and they require them to combine their incomes for purposes of the repayment calculation, because the government assumes that the couple's combined income most accurately reflects one member's ability to repay debt. But doubling both the debt and the income does not result in the same repayment schedule that the couple would have had if they had remained single, because the federal poverty guidelines, which are part of the income-contingency formula, assume that two can live nearly as cheaply as one.³³⁶ Table 45 shows a comparison between the couple's situation before and after marriage; a standard repayment column is included in the table for purposes of additional comparison, though it would require them to repay an exceedingly high fraction of their income in the early years.

335. This conclusion is not surprising in view of the relative magnitudes of the two programs. Georgetown's LRAP currently dispenses approximately \$630,000 annually, whereas American University's PILRAP program has dispensed \$356,000 since it began in 1988. See NAT'L ASS'N FOR PUB. INTEREST LAW, *supra* note 110, at 30, 102. Based on the size of the third-year class, Georgetown (690) is about twice as large as American (350). See ABA APPROVED LAW SCHOOLS, *supra* note 209, at 90, 182.

336. See *supra* text accompanying note 196.

TABLE 45: EFFECT OF MARRIAGE, SIMILARLY SITUATED PARTNERS, \$32,000 INCOMES, 8.25% INTEREST, 3% RAISES, \$151,000 COMBINED DEBT SUBJECT TO INCOME-CONTINGENT REPAYMENT

	Larry Lifer and Penny Lane, unmarried borrowers, consolidated numbers	Larry Lifer and Penny Lane, married couple	Larry Lifer and Penny Lane, married couple, debt paid in ten years through ten-year standard repayment
Monthly payments, year one, and percentage of after-tax income (joint return in the case of the married couple), based on gross income of \$64,000	\$788 (18%) ³³⁷	\$879 (21%) ³³⁸	\$1852 (42%)
Monthly payments, year six, and percentage of after-tax income (joint return in the case of the married couple), based on gross income of \$76,420	\$914 (18%) ³³⁹	\$1019 (21%) ³⁴⁰	\$1852 (36%)
Total of payments, current dollars	\$342,879	\$384,645	\$222,247
Present value of total of future payments	\$168,886	\$188,929	\$169,482
Amount the government forgives, current dollars	\$141,854	\$52,387	0
Present value of government forgiveness	\$34,894	\$12,796	0

By marrying after choosing income-contingent repayment, Mr. Lifer and Ms. Lane will pay approximately 11% more in each first-year loan payment than if they had remained single, and they will pay approximately \$20,000 more, over the life of the loan (measured in terms of present value), than they would if unmarried. This might be a price that they would happily pay for a combination of connubial bliss and affordable repayment.

But now consider the possibility that although Ms. Lane is, like Larry Lifer, a \$32,000 legal services lawyer, she is free of debt because she paid for her legal education out of money she saved before attending law school. If they marry, the Department will attribute her income to

337. This assumes federal income tax of \$3746 and state and local tax of \$1124 on each taxpayer.

338. This assumes federal income tax of \$8725 and state and local tax of \$2632 on the joint income.

339. This is based on federal tax of \$5382 and state and local tax of \$1615 on each taxpayer.

340. This assumes federal income tax of \$12,247 and state and local tax of \$3674 on the joint income.

the couple, even though she has no debt to combine with his. Compare their pre-marriage and post-marriage prospects in Table 46.

TABLE 46: EFFECT OF MARRIAGE, DIFFERENTLY SITUATED PARTNERS, \$32,000 INCOMES, 3% RAISES, A SINGLE \$75,500 DEBT SUBJECT TO INCOME-CONTINGENT REPAYMENT

	Larry Lifer and Penny Lane, unmarried borrowers, the debtor using income-contingent repayment, consolidated numbers	Larry Lifer and Penny Lane, married couple, debt paid through income-contingent repayment (debt will be paid off in ten years)	Larry Lifer and Penny Lane, married couple, debt paid in ten years through ten-year standard repayment
Monthly payments, year one, and percentage of after-tax income (joint return in the case of the married couple)	\$394 (9%) ³⁴¹	\$879 (20%) ³⁴²	\$926 (21%)
Monthly payments, year six, and percentage of after-tax income (joint return in the case of the married couple), based on joint gross income of \$76,420	\$459 (9%) ³⁴³	\$945 (19%) ³⁴⁴	\$926 (18%)
Total of payments, current dollars	\$171,439	\$111,415	\$111,123
Present value of total of future payments	\$84,443	\$84,821	\$84,738
Amount the government forgives, current dollars	\$70,927	\$0	\$0
Present value of government forgiveness	\$17,447	\$0	\$0

In this situation, the impact of marriage is far more dramatic in the early years of repayment. Mr. Lifer and Ms. Lane will be tempted to elect income-contingent loan repayment over standard repayment, because choosing income-contingent repayment without actually marrying could lower first-year loan repayments from 21% of their combined income to 9% of their combined income. However, by exchanging vows rather than merely cohabiting (or by remaining married rather than divorcing and living together if they have married before they notice the consequences for their loan repayments), they will (in the early years) more than double what they have to pay each month

341. This assumes federal income tax of \$3746 and state and local tax of \$1124 on each taxpayer.

342. This assumes federal income tax of \$8775 and state and local tax of \$2632.

343. This is based on federal income tax of \$5382 and state and local tax of \$1615 on each taxpayer.

344. This assumes federal income tax of \$12,247 and state and local tax of \$3674.

toward Mr. Lifer's student loans.³⁴⁵ The "marriage penalty" of the federal student loan repayment program is thus far more severe in the early years than the "marriage penalty" imposed by the income tax law.³⁴⁶ The clear message from the Department to the happy couple: avoid the benefit of clergy.³⁴⁷ The Article returns to this marriage penalty issue in Part VII.

VI. WHY INCOME-CONTINGENT REPAYMENT IS SO UNPOPULAR

When income-contingent repayment was a gleam in the eye of policy makers, they anticipated that this option would be used by 15% to 30% of borrowers.³⁴⁸ Two years later, the Secretary of Education projected that between 1996 and 2000, 17% of all direct loans, including consolidations from FFELP loans, would be repaid under the income-

345. Despite the striking differences in payment schedules in the early years, the present value of their future payments is about the same for this couple under all three plans. Note that the increased repayment obligation in the early years would be even greater if Mr. Lifer marries Ms. Lane whose income is much greater than his—for example, if she worked in a law firm for a salary of \$150,000. If Mr. Lifer had elected income-contingent repayment a year before meeting Ms. Lane, his options, realistically, would be either to abandon income-contingent repayment and ask his wife to make large payments on his loans (which she might or might not be willing to do), or to refrain from marrying so that he could continue to pay a small fraction of the couple's after-tax income toward his loan obligations.

346. In 1999, the federal income tax on two \$32,000 incomes, filed by single taxpayers (whether or not cohabiting) would have been \$7492. If those two taxpayers had married and filed a joint return, they would have paid a federal income tax of \$8725, paying a "marriage penalty" of about 16% of the tax due from them as single taxpayers. By contrast, the additional student loan repayment caused by the marriage of Mr. Lifer and Ms. Lane would be \$10,584 in the first year of repayment, an increase of 122% above the \$4752 payment required if the couple had remained unwed. It may be worth noting that if Ms. Lane had not married Mr. Lifer, but had instead lived with Mr. Lifer's sister Lisa under Vermont's civil union law, the couple would have avoided the additional payments required of married couples. This seems to be a rare instance in which federal law advantages homosexual couples compared with people who are married.

347. A Department spokesperson would undoubtedly disavow this message and suggest that this couple elect standard or graduated repayment over a shorter repayment period, since together they have \$64,000 in gross income and are not impoverished. Nevertheless, the Department's regulations would permit the couple to obtain significant benefits from income-contingent repayment, provided that the borrowers remain unmarried. *See* 34 C.F.R. § 685.209(b) (2001).

348. *See* OFFICE OF POST-SECONDARY EDUC., DEP'T OF EDUC., DISCUSSION PAPER ON ISSUES RELATING TO THE REPAYMENT OF FEDERAL DIRECT STUDENT LOANS app. at 3 (Mar. 1, 1994) [hereinafter *REPAYMENT OF FEDERAL DIRECT STUDENT LOANS*] ("[I]t seems most reasonable to assume that the probability of choosing income-contingent repayment would increase as the savings in initial payments from doing so increased but that the probability would not be zero or one for any group. [On the assumption that the probability of choosing income-contingent repayment would gradually increase to 75% as the difference in initial monthly payments approached \$50] between 15 and 30 percent of borrowers would choose income-contingent repayment.").

contingent plan.³⁴⁹ In fact, fewer than 1% of new borrowers at schools that offer direct federal loans chooses income-contingent repayment.³⁵⁰ Rather than being used, as President Clinton hoped, to encourage public service, income-contingent repayment is used mostly “as a last resort[]’ [option] to the most desperate borrowers” (those who have defaulted or are close to defaulting).³⁵¹ Indeed, 40% of its users are borrowers who were placed there involuntarily, by the Department, after they defaulted.³⁵² There are no separate statistics on law student use of the program, and financial aid advisors do not know how many of their students elect this option.³⁵³ Law students planning public interest careers might be the most likely candidates for income-contingent repayment, because legal education is among the most expensive types of graduate education and many public interest salaries are so low. But the results of my surveys suggest that the law students who might have the greatest interest in income-contingent repayment are wary of it, and there is little reason to think that any substantial number of them use it, or even know about it.³⁵⁴

Why is there such a large gap between expectations and reality? The first answer must be that the Department should probably not have thought of the program as one that would attract as many as 15 to 30%

349. See *Federal Student Loan Programs: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Econ. & Educ. Opportunities*, 104th Cong. 327 (1995).

350. See U.S. GEN. ACCOUNTING OFFICE, *DIRECT STUDENT LOANS: ANALYSES OF BORROWERS’ USE OF THE INCOME CONTINGENT REPAYMENT OPTION* app. II at 30 tbl.II.2 (GAO/HEHS-97-155, 1997) Forty-five percent of borrowers consolidating their loans also chose income-contingent repayment, but there were only about 60,000 consolidation loans, as of the time of the study, compared with 554,000 nonconsolidated loans. See *id.* app. II at 30 tbls.II.2-3. The percentage choosing income-contingent repayment reported by the General Accounting Office may have been understated because the program was relatively new at the time of its study. However, as of May 31, 2000, only 1.46% of unsubsidized, unconsolidated Stafford loan balances were being repaid through income-contingent repayment. See OFFICE OF ELEMENTARY AND SECONDARY EDUC., DEP’T OF EDUC., *BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2001*, at 373 (2001), available at <http://w3.access.gpo.gov/usbudget/fy2001/pdf/edu.pdf> (last visited Feb. 15, 2001) [hereinafter BUDGET]. Of all federal direct loans in repayment (including involuntary consolidations), 6% by volume were loans in which, as a result of the benefits of the income-contingent repayment option, the borrower was paying less than the interest due on the loan. See *Utilization of Loan Repayment Plans in the Federal Direct Student Loan Program*, U.S. Dep’t of Educ., at <http://www.gao.gov/mmsl/icsdata.pdf> (last visited Sept. 7, 2000).

351. Stephen Burd, *Few Borrowers Repay Student Loans Through ‘Income-Contingent’ System*, CHRON. HIGHER EDUC., Sept. 25, 1998, at A40 (quoting an advisor).

352. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 350, at 2.

353. See *supra* text accompanying note 257.

354. Recall that only 9% of the students at Catholic and Georgetown who wanted to spend substantial segments of their careers in public interest law knew much about the plan’s provisions, even generally. This figure may overstate knowledge, because half of those in the 9% had received their information through word of mouth, which may have been inaccurate. See *supra* tbl.14.

of borrowers; the percentage of high-debt graduates who think that they will have many years of low-paid work is probably far below those percentages.³⁵⁵ Furthermore, Congress and the Department designed a program that is simply too weak to attract even 5% of borrowers. The existing income-contingent repayment plan certainly succeeds in keeping loan payments affordable. But the twenty-five-year repayment schedule frightens off most of the potential customers³⁵⁶ and their counselors.³⁵⁷ It affects borrowers in several ways: by making forgiveness seem on the other side of a lifetime, by making financial planning difficult because so many events affecting income and expenses will intervene over such a long period, by increasing the total amount that must be paid so greatly, and by setting up so great a divergence with the norm of “standard” repayment.³⁵⁸

A second part of the answer is that financial aid advisors are the critical link between the Department and student borrowers, and at least some of them have concluded that income-contingent repayment is advantageous for virtually no law students.³⁵⁹ Recall that financial aid advisors tended to think that very few students would remain in the plan long enough to obtain partial forgiveness, and that of those who thought that even short-term use of the plan was not useful, the most common reason offered was that other, less complex repayment options were preferable.³⁶⁰ The Author’s survey of these advisors also included an open-ended question on which they could provide comments on the income-contingent repayment option. Some commented that they just did not understand the program very well,³⁶¹ but a few comments shed further light on the view that income-contingent repayment is simply a poor way to deal with student debt:

- We discourage the use of income-contingent [sic] because negative amortization is not to anyone’s benefit. . . . [and] if they are still paying on their own student loan when their children go to college

355. One-third of the Georgetown and Catholic law students said that but for debt, they would like to spend two-thirds of their careers in full-time public service work. But even before law schools became so expensive, the proportion of graduates who followed such a career path was much lower. And aside from those who seek public service careers, it is doubtful that many high-debt borrowers *expect* to have low-income jobs for a long period of time. *See supra* tbl.7.

356. *See supra* text accompanying note 243.

357. As one financial aid advisor put it bluntly on a questionnaire, “25 years is too long into the future for students to see a benefit.”

358. *See supra* tbl.21.

359. *See supra* tbls.26-27.

360. *See supra* tbl.29.

361. *See supra* tbl.23.

it will reduce their ability to assist the children with college expenses.

- Financial aid counselors would encourage use of any other option since this one might result in negative amortization.
- A 25 or 30 year consolidation lowers the monthly [sic] nearly as low as an income-contingent repayment, but can save the borrower significant interest expense as compared to a graduated or income-contingent plan.
- Most . . . will choose the graduated repayment option . . . as the monthly payment is similar for the first few years.
- Our law graduates are [not interested in] long payment periods. Two other options are the graduated payment plan [with increasing payments over ten years] or [increasing payments over] 12-15 years.
- Other options are less costly and more attractive in the long haul. I have confidence in the FFELP repayment options.
- It is my understanding that by using this program they give up a lot of deferment and forbearance options that would otherwise be available to them in time of need or hardship.
- To rely on an income that is going nowhere is like stating you will never be successful. . . . [M]ost law alums want to be successful, and cannot be, if they make payments contingent on their income. A few may take advantage of this, but I bet they are doing jobs under the table and not reporting them.

These survey respondents are wise to encourage consideration of other options, but their comments may also reflect misunderstandings of the income-contingent option in relation to its alternatives. Negative amortization (increasing the principal of a loan) may indeed be to the benefit of some borrowers, if it is coupled with eventual forgiveness of the principal; also, the Department's regulations limit negative amortization, so that capitalization of unpaid interest stops when the principal balance has grown by 10%, and compounding of interest does not resume even after the debt is worked down.³⁶² For some borrowers, simple extended repayment over thirty years may well cost about the same, over time, as income-contingent repayment. But for high-debt, low-income borrowers, it will not lower the first several years' payments as much as income-contingent repayment, and for some of those

362. See 34 C.F.R. § 685.209(c)(5) (2001).

borrowers, it will cost more in the long run.³⁶³ Payments under the graduated repayment plan are not necessarily similar, in the early years, to those under income-contingent repayment, and graduated repayment over a long term can be the most expensive method of repayment,³⁶⁴ especially compared to income-contingent repayment that includes some degree of forgiveness. The repayment options offered by FFELP lenders may be less attractive for high-debt, low-income borrowers, because while the “income-sensitive” repayment option offered by FFELP lenders may lower payments for a few years, it does not lower them as much as the income-contingent repayment option does, and it does not offer any forgiveness.³⁶⁵ Deferments³⁶⁶ and forbearances³⁶⁷ are available under all federal repayment options, including income-contingent repayment,³⁶⁸ although the reduced payments under income-contingent repayment may make them less necessary. And not all law graduates measure their “success” by the amount of money they make in their careers.³⁶⁹

In addition, these comments may represent isolated overstatements, since a majority of the financial aid advisors reported in the survey that income-contingent repayment would be useful for at least 5% of their

363. See *supra* tbl.34.

364. See *supra* text accompanying notes 280-81.

365. Sallie Mae provides a Web-based calculator. See *Repayment Calculator*, Sallie Mae, Calculators, at <http://www.salliemae.com/calculators/repayment.html> (last visited Feb. 14, 2001). On this Web site, a borrower may obtain information about income-sensitive (and other) repayment of Sallie Mae loans. See *id.* It shows two income-sensitive plans. Under the first, Larry Lifer’s \$75,500 debt would be repaid over eleven years. His monthly payments during the first year would be \$533 (more than the \$396 under income-contingent repayment), but in the second year, his payments would balloon to \$924 per month and remain there for the next ten years. Under the second plan, he would repay the debt over thirty-one years (compared with twenty-five years under income-contingent repayment). In the first year the payment would be \$533 monthly, increasing to \$566 in the second and subsequent years. Payments in the early years under this plan would still be larger than under income-contingent repayment, and the total payment over thirty-one years would be \$210,116, larger than under income-contingent repayment using any assumption about Larry Lifer’s salary increases. See *supra* tbl.34.

366. 34 C.F.R. § 685.204. A deferment is a period of up to three years during which payments need not be made, though interest usually continues to accrue and is capitalized. See *id.* § 685.204(a)(1), (c). They are granted for various reasons specified in regulations—for example, while the borrower is unemployed, experiencing “economic hardship,” has a graduate fellowship, or is pursuing a rehabilitation training program for individuals with disabilities. See *id.* § 685.204(b).

367. 34 C.F.R. § 685.205. A forbearance is a temporary cessation or reduction of payments approved by the Secretary of Education based on poor health, public service under the National and Community Service Trust Act, and various other reasons. See *id.* § 685.205(a).

368. Nothing in 34 C.F.R. § 685.204 (deferment), § 685.205 (forbearance), or § 685.209 (income-contingent repayment) prohibits this combination.

369. See *supra* text accompanying note 3.

students.³⁷⁰ Nevertheless, one reason for the program's low use rate by law graduates may be that many financial aid advisors do not know very much about the option, and even those who think that it would be useful for 5% of those they advise may be so leery of the program that they actually commend it to fewer than that 5%.

The inherent unattractiveness of the option, the financial aid advisors' poor familiarity with the program, and the advisors' wariness of it, may all result from the desire of Department officials to give the option a low political profile throughout the Clinton Administration, despite the President's personal enthusiasm for it. FFELP lenders, eager to preserve billions of dollars of virtually risk-free federally-guaranteed profit, bitterly fought against the creation of the federal direct lending program.³⁷¹ After 1993, FFELP and direct lending co-existed as competitors, and by 1998, the federal government had persuaded 20% of the nation's colleges to grant direct federal loans.³⁷² But the lenders and their congressional allies spent years trying to repeal federal direct lending, or at least to prevent it from being used by borrowers at more than a statutorily fixed percentage of schools.³⁷³ Because the "foremost" advantage of the direct lending program over the FFELP program was the availability of income-contingent repayment in the direct lending program,³⁷⁴ and the lending industry feared that this repayment option "would give the direct-loan program a competitive edge,"³⁷⁵ the industry targeted that plan for ridicule and attack. In 1996, three industry groups issued a report attacking the plan as too costly for students.³⁷⁶ It purported to show that income-contingent repayment was "[a]n expensive option," compared to other repayment plans, and that the Department's literature gulled students into choosing this option without warning them sufficiently of the costs.³⁷⁷ Somewhat misleadingly, the report prominently featured a chart showing that for a student with a

370. See *supra* tbl.31.

371. See generally WALDMAN, *supra* note 11, at 56-57, 63.

372. See Burd, *supra* note 351. By volume, the direct loan program's share was even higher: 31% of unsubsidized Stafford loan originations (\$3.4 billion of \$11.2 billion) were federal direct loans. See BUDGET, *supra* note 350, at 372, available at <http://w3.access.gpo.gov/usbudget/fy2001/pdf/edu.pdf> (last visited Feb. 15, 2001).

373. See, e.g., Student Loan Privatization Act of 1995, H.R. 1501, 104th Cong. § 201 (1995) (potentially phasing out the direct lending program).

374. See Stephen Burd, *Despite an Apparent Cease-Fire, the Battle Over Student Loans Rages On*, CHRON. HIGHER EDUC., Jan. 24, 1997, at A19.

375. Burd, *supra* note 351.

376. See EDUC. FIN. COUNCIL, NAT'L COUNCIL OF HIGHER EDUC. LOAN PROGRAMS, AN EXAMINATION OF THE LONG-TERM COSTS TO STUDENT BORROWERS OF INCOME CONTINGENT REPAYMENT UNDER THE FEDERAL DIRECT LOAN PROGRAM (1996).

377. See *id.* at 1, 5.

\$15,000 loan and a \$15,000 starting salary, all other repayment methods would be less expensive.³⁷⁸ The study was circulated widely among lawmakers and financial aid advisors. It failed to persuade Congress to kill direct lending, but some observers thought that it was “‘remarkably effective’ at discrediting income contingency” and that “‘aid administrators became much more wary of recommending that option to their students.’”³⁷⁹ The industry’s animosity toward the federal direct lending program continues to this day. In October 2000, the Bank of America, Sallie Mae, and other industry leaders sued the Department to restrain it from reducing by 1% the loan origination fee that students are charged when they accept a direct loan. Success in the litigation would make direct loans less attractive to student borrowers.³⁸⁰

Fear of industry and congressional counter-attacks may have caused the Department to shy away from trying to make the program more attractive by forgiving loans sooner, and even from more effectively informing the public about this repayment method. Most Department officials spoken with agreed to talk to the Author only on condition that their remarks were not attributed to them by name or position, but one stated that when the Department was developing its regulations in 1994, it never considered whether it could amortize income-contingent loans over a period shorter than the statutory maximum of twenty-five years, because “the whole program was

378. *See id.* at 3. The report was fair in some ways. It acknowledged that income-contingent repayment “can be a help to some” borrowers, and it sensibly recommended that “[s]tudent loan borrowers need to be counseled thoroughly.” *Id.* at 1. Its critique of the Department for not providing information about the amount of forgiveness and the full repayment tables as part of its calculator was well-founded. But the report was misleading in three ways. First, it highlighted only a single example (\$15,000 debt/\$15,000 income), and in this example, income-contingent repayment was the most expensive option. *See id.* at 1, 3. If the authors had *either* doubled the assumed debt to \$30,000, or doubled both income and debt, income-contingent repayment would have been less expensive, rather than more expensive, than graduated repayment. Second, the authors counted dollars expended in twenty-five years as equally valuable as dollars expended in fifteen years, rather than discounting any of their results to present value. *See id.* Third, the authors (like the government) assumed an annual income growth of 5%, rather than displaying the fact that income-contingent repayment becomes more valuable to the borrower as income growth rates fall below 5%. *See id.* at 5.

379. Burd, *supra* note 351 (quoting John Dean, counsel to the Consumer Bankers Ass’n). One advisor concluded that income-contingent repayment could “‘double or even triple the cost of a loan’” and recommends it “‘only as a last resort’ to the most desperate borrowers.” *Id.* (quoting an advisor). If advisors erroneously believed that the option was a good one for a large fraction of students and became more realistic, the report served a useful function. But if they concluded that only “the most desperate borrowers,” should use it, they may have misinterpreted the authors’ stated conclusions. *Id.*

380. *See* Kenneth J. Cooper, *Lawsuit May Affect Student Loan Costs*, WASH. POST, Nov. 27, 2000, at A19; *Corrections*, WASH. POST, Nov. 28, 2000, at A2.

controversial at the time, so we had no inclination to do so. And it remains controversial today, as direct lending is still under attack.”³⁸¹ A former official told a reporter that “[t]he Department has just been gunshy [about promoting the income-contingent repayment plan] because it doesn’t want to rankle any feathers with the Republicans who oppose direct lending.”³⁸²

Politics may not deserve the entire blame for poor public relations, however. At least as presently structured, the income-contingent repayment plan would benefit only a small percentage of students, and the Department might reasonably place a higher priority on educating the public about programs affecting larger numbers of students. For whatever reason, however, the effort to make students and their advisors aware of the option has certainly diminished over the years. Shortly after the pertinent regulations were issued at the end of 1994,³⁸³ Department officials launched a national outreach effort to explain federal loan consolidation and its sub-options. It sent teams to universities, produced a handbook, and created a videotape. The handbook is now out of print, though its essentials are on the Department’s Web site. The video is no longer used. The systematic visits to financial aid advisors have stopped, though they may never have reached law school advisors in any event, because the Department officials visited only the main university advisors, expecting them to pass the word to individual components of their universities.³⁸⁴

Even if the information from those briefings was passed to the law school advisors in 1995, it may not have been perpetuated to the current advisors, as there is rapid turnover and lateral movement among professionals in that field.³⁸⁵ In addition, though the Web seems to be the Department’s main method for propagating information about income-contingent repayment to students, using the Web to learn about the fine print of this program, or even fairly basic information, can be challenging. In July 2000, starting with the Department’s home page,³⁸⁶

381. Telephone Interview with an anonymous Department of Education Official (July 5, 2000).

382. Alexandra Starr, *Styron’s Chance: There Have Been Promising Innovations to Help Pay for College, but None Match the GI Bill*, WASH. MONTHLY, May 1999, at 30, 33 (quoting a former Department employee).

383. See Kathy Kristof, *Loan Consolidation Plan Would Expand Direct Lending Program for Students*, DENV. POST, Dec. 26, 1994, at C-03.

384. See Interview with Department of Education Official (June 11, 1999).

385. Collection of the data from the survey of financial aid advisors took six months, in part because so many of the advisors listed in the *1998-99 Law School Admission Council Directory (1999)* were no longer in those positions in May 1999, and others left their positions at the end of the spring semester, 1999, and were not replaced until later in the summer.

386. U.S. Dep’t of Educ., <http://www.ed.gov/> (last modified Feb. 12, 2001).

and knowing what to look for, it took six levels and thirteen hyperlinks before finding a description of income-contingent loans.³⁸⁷ Searching a different way, the Department's calculator³⁸⁸ was eventually found, but it was not very helpful in computing the repayment information for Larry Lifer, Cindy Civic, or the other characters in this Article. The calculator does not permit the borrower to assume an income growth rate of other than 5%, and does not permit him or her to assume a sudden increase in income (as in the case of Cindy Civic). The Department's Web site also is not updated promptly, causing its calculations to be inaccurate. For example, federal poverty level figures for the year 2000 were published by the federal government in February 2000, but as of late August of that year, the Department's Web site was still basing its calculations on 1999 poverty levels.³⁸⁹ Most seriously, both the Department's calculator and its Web-based chart of representative income-contingent repayments³⁹⁰ display the current-dollar costs of repaying a loan under four different repayment options, but none of them discounts the stream of payments to present value. The result is that the apparent difference between the costs of ten-year repayment and income-contingent repayment seems much greater than it really is, because the user is lulled into comparing apples and oranges while thinking that she is comparing apples and apples.³⁹¹

Besides the inherent weakness of the program, the possible disinclination of Department officials to trumpet it even to those

387. From the Department's homepage, the following hyperlinks led to a description of income-contingent loans: a click on *Student Financial Assistance*, then on *Financial Aid for Students*, then on *Finding Out About Financial Aid*, then on *Direct Loans* (knowing that the income-contingent option was part of the direct loan program), then on *Publications and Guides for Students*, and then on *Direct Loans: A Better Way to Borrow* (as opposed to *All About Direct Loans*). Seven more clicks on the "next" hyperlink at the bottom of the page led to a one-page description of income-contingent repayment. Even then, the Department's calculator that would compute repayment schedules could not be found, though backing up and clicking other options would eventually locate it. The process could have been shortened by clicking *Search* on the home page and entering the words *Income-Contingent*; this would have led to a list of documents from which the top selection would have led to a page about income-contingent repayment from the *Exit Counseling Guide for Borrowers*. One more hyperlink would have led to a chart with some sample income-contingent repayments, but because the incomes on the chart are only \$15,000, \$25,000, and \$45,000, Larry Lifer's repayments could not be computed. Still one would not have come to the calculator.

388. See *supra* note 272.

389. Mark Kantrowitz discovered this anomaly while creating the more up-to-date FinAid income-contingent loan repayment calculator.

390. See *Exit Counseling Guide for Borrowers*, U.S. Dep't of Educ., at <http://www.ed.gov/DirectLoan/pubs/exitborr/exb8.html> (last visited Feb. 20, 2001).

391. For example, compare the current-dollar and present value numbers in Table 33 of this Article.

students whom it would significantly help, and the poor quality of the Department's public information, three additional factors may contribute to disaffection by advisors and students.³⁹² First, the program includes the horrendous marriage penalty noted earlier in this Article.³⁹³ Many students are single when they graduate but expect that they might marry within a few years. They do not know whether they will marry a person with debts or without debts, but if they elect income-contingent repayment and consider marrying someone without debts, they will have to consider changing payment plans in mid-stream or cohabiting without marrying. This factor complicates financial planning. Second, forgiveness at the end of the twenty-five-year repayment period is presently taxable, though that could change during the two decades before anyone pays this tax. The tax is small for most borrowers, its present value is much smaller, and financial aid advisors responding to the Author's survey did not rate this factor strongly in their reasons for skepticism about income contingency. But some of them did mention it in comments on their questionnaires.³⁹⁴ The third factor is one that the students surveyed ranked second in their view of why they would not want to use income-contingent repayment, and which could loom even larger over the next few years. Only debts subject to federal consolidation can be scheduled for income-contingent repayment, and commercial debt cannot be so consolidated. But commercial debt is already a significant factor for law graduates. None of the examples involving Mr. Lifer and his colleagues assumed that they had commercial debt, but many law graduates have \$30,000 or more of commercial debt in addition to their Stafford loan debt. This number will grow higher as the cost of legal education increases, and with it will rise the percentage of debt not subject to income-contingent repayment. The standard monthly payment on \$30,000 of debt is \$368, nearly as much as Larry Lifer has to pay each month during the first year of income-contingent repayment on his \$75,500 in Stafford loans. He could work with his commercial lender to try to schedule the payments over a longer period (escalating the total to be paid, without forgiveness), but if he

392. A third potential negative, the requirement that borrowers permit disclosure of their tax returns to verify adjusted gross income, is not apparently a serious deterrent, at least for law students. The government already has this information, and lawyers are not likely to think that information they share with the Department of Treasury should be concealed from the Department.

393. See discussion *supra* Part V.G.

394. For example, one said: "Primarily the taxation. Students who really need this benefit . . . will have a larger amount at the end of 25 years to be forgiven. The taxation . . . can be significant enough that the student can't pay it." Another said: "I think one of the main concerns is the taxation of the amount forgiven."

does not do so, the percentage of his after-tax income that he will have to pay toward his student debts will rise from 20% to 38%, probably not a manageable amount. Even if he arranges for twenty-five-year repayment of both loans, he will have to pay 32% of his first-year income toward his loans. This significantly reduces the utility of the income-contingent repayment option. Larry Lifer might well decide to throw in the towel, giving up his hope of serving the poor in order to pay off the debt that he incurred so that he could serve the poor.

VII. RECOMMENDATIONS

Congress and President Clinton tried to develop a program that would facilitate or even encourage public service by students who felt that their debts prevented them from undertaking it. But the income-contingent repayment option that the Department currently administers primarily serves graduates who are on the brink of default under a different repayment plan,³⁹⁵ as opposed to high-debt students who want to do public service work. The recommendations begin with suggestions for students and financial aid advisors who must take the plan as they find it. But suggestions are also provided for Congress and the Department about how they could make this option more effectively achieve the desired result.

A. *High-Debt Law Students Considering Low-Income Jobs*

If you are thinking about spending several years in a low-income job, the income-contingent repayment option may be worth considering. But before even thinking about that particular plan, it is essential to come to grips with the more basic issue of the term of years within which you will repay your loan. Your classmates who are headed for highly-paid law firm jobs will pay off their loans in ten years or less. Ten-year repayment may not be possible on the income that you will earn. Paying off your student debt over a period of fifteen to twenty-five years may be necessary if you want to follow the career plan you have set for yourself. There is nothing magical about a ten-year repayment period; it became conventional before debts were typically as high as they are now, and it is not suitable for high-debt, low-income graduates.

The surveys reported in this Article show that law graduates who want to do public interest work have a hard time accepting long repayment periods, and that the twenty-five-year amortization schedule

395. See *supra* text accompanying notes 348-52.

for income-contingent loans is the single greatest barrier to use of this option, far outdistancing the larger total cost of repayment.³⁹⁶ The thought of repaying student loans so long after graduation is a daunting psychological barrier, even if a twenty-five-year plan is economically advantageous.³⁹⁷ As noted below, policy makers should shorten this period. But if you must consider a long-term repayment plan, keep in mind two factors that may make it easier to accept:

1) Your education is a major asset, like a house. In fact, after a house, if you buy one, it will probably be the most expensive asset you ever purchase. Since the 1930s, Americans have become quite used to purchasing valuable assets with long-term mortgages, and it makes sense for you to think of your student loan debt as the mortgage with which you purchased your education, which you have already used or will begin to use before you make your first payment. Few home buyers spend thirty years griping about having had to take out thirty-year mortgages. They are too busy enjoying their homes.³⁹⁸

396. See *supra* tbl.21. As one student put it in a response on a Georgetown questionnaire: "A 25 year repayment is alarming when faced with the reality that this repayment will extend through the years when I may choose to have a family (possibly not working) and up to the point of retirement." The twenty-five-year period may have been so "alarming" that it diverted this student from realizing that in years in which income was zero, the repayment obligation would also be zero. On the other hand, since the plan currently imputes a spouse's income to the borrower, this respondent may have understood that he or she would have to rely on such a spouse to make debt repayments during years of child-rearing, and may have found that prospect too confining compared with giving up a first choice of career in favor of more rapid repayment.

397. The failure of Yale's Tuition Payment Option, an early, privately financed forerunner of income-contingent repayment, provides additional evidence that very long repayment terms for educational loans do not work well. From 1971 to 1978, Yale allowed students to borrow from the University with income-contingent repayment: for every \$1000 borrowed, they would have to pay 0.4% of their incomes until one of two events occurred: either the debt for their entire class was paid off, or thirty-five years passed. See William M. Bulkeley, *Old Blues: Some Alumni of Yale Realize That They Owe College a Lasting Debt*, WALL ST. J., Feb. 23, 1999, at A1 (describing the program and quoting users). The group-based nature of the plan was designed so that wealthy graduates would subsidize those with low lifetime incomes. See *id.* As a student, President Clinton himself borrowed from the plan. See *id.* Yale predicted that the debts of each class would be retired within twenty to twenty-five years, but none were. See *id.* Tying debt retirement to the fortunes of the group probably killed the plan; students who planned lives of public service borrowed under the plan, while those aiming to make a lot of money avoided it, and so there was not enough repayment to pay off the class debts. See *id.* Also, as many years went by, many graduates decided that they had paid enough, and when they defaulted, Yale was reluctant to sue its alumni. See *id.* The long-term nature of the obligation bred resentment, with one alumnus, the founder of the Idaho Yale Club, reporting: "'As much as I love Yale, this is tainting my overall feelings.'" *Id.* (quoting Dr. Bettis); see also WALDMAN, *supra* note 11, at 10 (describing Clinton's use of the program). After adverse publicity, Yale announced that it would forgive remaining debts after 2001, though it would pursue defaulters. See William M. Bulkeley, *Yale to Forgive Debt, Take Loss on Old Loans*, WALL ST. J., Apr. 12, 1999, at A6.

398. Of course the asset of a legal education is less tangible than a house, and it cannot be passed along to your children. But a house cannot free an innocent prisoner from death row, help

2) As John Kramer noted long ago, when you make debt repayments twenty years from now, you will be using dollars worth far less than the ones you hold in your hand today.³⁹⁹ Long-term repayment plans cost more, in that long term, than short-term plans. But the charts showing how much more they cost, including those published by the United States government, are in a sense illusory, because they compare long and short-term plans in current dollars, as if a dollar paid ten years from now and a dollar paid twenty-five years from now were equally valuable. A table in this Article shows that discounting the streams of payments to their present value, to more appropriately compare them, significantly reduces the difference in their actual cost.⁴⁰⁰ You can generate a similar table of current dollar and discounted comparisons to reflect your own circumstances.

If you are willing to consider repayment over a term longer than ten years, income-contingent repayment may be worth thinking about, but you have other options as well, and different plans will be better for different individuals. For example, you might choose graduated repayment, through which (as in income-contingent repayment), the monthly payments rise over time. On debts of at least \$60,000, the graduated payments may be extended over a period as long as thirty years, but you can elect a shorter period if you can afford the monthly payments. On the other hand, for some borrowers, income-contingent repayment may be superior to graduated repayment. For example, for Larry Lifer, our career legal services lawyer, even with 7% annual raises, income-contingent repayment both more greatly reduces the initial payments (when he can least afford them) and costs less over time than thirty-year graduated repayment (which keeps initial payments lower than any other alternative payment plan).⁴⁰¹

No simple formula can tell you which of the many available repayment options is best for you, but you really do have alternatives to ten-year repayment. Spending a few hours with Web-based calculators could save you tens of thousands of dollars and make it possible for you to have the career you want. Unofficial calculators⁴⁰² may be better than

protect a crusading journalist from reprisals by a dictatorial government, restore disability benefits to an elderly person who was wrongfully denied them, or stop racial discrimination in employment. Also, a law degree could enable borrowers to make the money needed to more rapidly repay their debt, if they ever choose to do so.

399. See Kramer, *supra* note 14, at 267.

400. See *supra* tbl.3.

401. See *supra* tbls.33-34.

402. See Tai-yeu Hsia & Philip G. Schrag, *Income-contingent Loan Repayment and Steady Repayment Calculators*, Georgetown University Law Center, at

the government's calculator, because they may permit you to make more flexible assumptions about your future income, and because the government does not compute present value, which is an important aspect of comparing plans of different durations. But do not neglect to use the government's calculator as well, because it is the most authoritative, and if the discrepancies between the unofficial calculators and the government's calculator are significant, you should do further research to try to understand the cause of the discrepancy.⁴⁰³ If the calculators show that you will benefit from forgiveness at the end of twenty-five years, do not forget to take into account the effect of possible income taxation on the amount forgiven, though Congress could eliminate the tax before then. Assume a reasonable tax rate, compute the one-time tax, and then discount the amount to its present value to see how much it would cost you in today's currency. Finally, keep in mind that only government-guaranteed debts (and direct federal loans) are subject to consolidation.⁴⁰⁴ To determine your full repayment obligation, analyze the repayment plans available for your commercial debt (which may include extended repayment options, but are unlikely to involve forgiveness), and add those monthly obligations to those resulting from the new federal obligation that you will assume.

If you are at a school with a good LRAP for which the work you plan to do will qualify, it will almost always pay to use the LRAP and then, taking that program's subsidy formula into account, figure out which repayment formula would be best for you.⁴⁰⁵ If your school has no LRAP, or only a poor program that will not provide a significant subsidy, it is more likely that you will want to give the federal income-contingent repayment option serious consideration as a debt management device.

Keep in mind that a decision to consolidate your loan with the federal direct loan program and to choose the income-contingent

<http://data.law.georgetown.edu/faculty/schrag/loanrepayment.html> (last modified July 20, 2000); Mark Kantrowitz, *Income Contingent Repayment Calculator*, FinAid: The SmartStudent Guide to Financial Aid, at <http://www.finaid.org/calculators/icr.phtml> (last visited Feb. 13, 2001) (providing the FinAid income-contingent repayment calculator).

403. Small discrepancies are to be expected, because people who construct different calculators may use somewhat different conventions for rounding numbers, different assumptions about what happens during the first month of repayment, or different projections about the rate of increase of the federal poverty level. But differences in outcome of more than 1% are worth investigating.

404. See *supra* text accompanying note 269.

405. Some employers also have LRAPs for their employees, and students could inquire about this when they interview for jobs. The National Association for Public Interest Law ("NAPIL") collects information on LRAPs, and periodic consultation of its Web site is useful. See Nat'l Ass'n for Pub. Interest Law (NAPIL), at <http://www.napil.org/> (last visited Feb. 14, 2001).

repayment option is not permanent. You can switch out of income-contingent repayment, accelerate your payments within the option, or prepay your loan. Only borrowers who remain in the program for twenty-five years can obtain forgiveness, but borrowers who plan to do public interest work for a few years may benefit from the plan by using it temporarily to minimize loan repayments, and then switching to much more rapid repayment.⁴⁰⁶ Other borrowers may have special circumstances warranting temporary use of income-contingent repayment. For example, a recent law graduate who is not necessarily going to have a very low income may need to sign a mortgage to buy a house. But the mortgage company, looking at her student loan repayment obligations if she elects ten-year repayment, may decide that she does not qualify for its credit. She might elect income-contingent repayment to reduce her student loan repayment obligations to a minimum level, obtain her mortgage, and convert to a different repayment plan when it is convenient to do so.

Finally, unless the Department accepts the recommendation of this Article to change its policy of imputing all of a spouse's income to the borrower, be aware of the income-contingent repayment option's potential "marriage penalty" trap. If you elect this option and become married, your marriage will affect your loan repayment obligations. The magnitude of the effect will be greatest if your spouse has significant income and low student debt. Your repayment obligation will be affected even if your spouse keeps his or her own money separate from yours and you have no right to spend it.

B. Law School Financial Aid Advisors

Financial aid advisors are incredibly important resources for law students generally, and they are indispensable in helping students who want public interest careers to figure out how to afford them.⁴⁰⁷ At schools with good LRAPs, the financial aid advisors usually administer the programs, and in some cases, that may be sufficient to meet the needs of students who do not plan to go to well-paying law firms. But some jobs that would qualify in many people's minds as "public service," such as hanging out a shingle and serving the needs of ordinary

406. See *supra* Part V.C (providing the example of Cindy Civic). As noted earlier, borrowers who believe that they can invest money to achieve an after-tax return better than their student loan rate might want to elect a much *less* rapid repayment plan. See *supra* note 298.

407. See generally *supra* Part IV.B. and tbls.23-26, 31.

working families, will not qualify under most LRAPs.⁴⁰⁸ And most schools do not have well-financed LRAPs. Therefore, financial aid advisors need to be fully conversant with alternatives to standard repayment.

Unfortunately, most of them do not understand the details of income-contingent repayment very well,⁴⁰⁹ at least in significant part because the Department has not helped them very much to do so.⁴¹⁰ The best advice is to play with the income-contingent repayment calculators and the hypothetical career plans of students for whom it might be beneficial. Financial aid advisors may be correct in thinking that most students will not remain in income-contingent repayment long enough to earn forgiveness. But advisors should note that some subsidization can occur relatively early, when unpaid interest ceases to be capitalized, and that some students would benefit by using income-contingent repayment for a few years, even if they were to obtain no subsidy at all.

Recognizing that because of its present terms, the income-contingent repayment option is helpful only for a fraction of graduates who seek low-income careers, financial aid advisors also have a significant role to play in reforming the program. Better than anyone else, they understand its value and limitations, and because of their hands-on familiarity with students' needs and this repayment option, they have credibility with Congress and with the Department. Financial aid advisors (and career services advisors) should therefore be active in urging improvements in the program, both on Capitol Hill and with the Secretary of Education and other Department officials.

C. Congress and the Department

Congress and the Department must make the income-contingent loan repayment option more generous in order to achieve the goals they set in 1993 and 1994. Above all else, they must shorten the period, currently twenty-five years, during which a borrower must repay the loan before forgiveness of the remaining debt occurs.⁴¹¹ This period

408. See generally NAT'L ASS'N FOR PUB. INTEREST LAW, *supra* note 110, at 97 (providing the eligibility criteria). A few law schools with very large LRAPs, notably Harvard, Yale, and New York University, cover graduates earning low incomes in private practice. See *id.*

409. See *supra* tbl.23.

410. See *supra* text accompanying notes 371-91.

411. The statistics reported in the Georgetown and Catholic student surveys do not do justice to the disbelief and disgust expressed in comments that respondents wrote at the end of their questionnaires—for example, “I can’t believe that anyone would sign up to the terms for the 25 years. Everything is weighted in the government’s favor and doesn’t seem a good deal for the student”; “Twenty-five years is a very long time”; “Two to three years at a good firm is better than

could be abbreviated either for all users of the program or, if that is too costly, at least for borrowers who in fact have spent a long time doing public service. The period should not be so far beyond the standard ten-year repayment period that it becomes unthinkable for students who are not already at the brink of default. A fifteen to seventeen-year period seems plausible.⁴¹²

Consider what forgiving the loan after fifteen years would do for some of the borrowers that we have considered. It would essentially double or more than double their subsidies, while freeing them from the psychological burdens of twenty-five-year repayment schedules. Table 47 compares forgiveness after fifteen years with the current plan, for several of the hypothetical borrowers featured in this Article.

25 years of living under debt"; "The federal program seems to be a band-aid"; "I don't want to be paying student loans at retirement"; "Frankly, I'm a little insulted by the tone of a 'forgiveness' program that requires 25 years. People should be rewarded for doing public interest when it is hardest—straight out of law school," and "I will be 31 when I graduate, and would be VERY UNHAPPY to be paying off law school until I am 56 years old, no matter how low the payments are. My own children would be OUT of law school by that point."

412. Even forgiving student loans after ten years of income-contingent repayment is not unthinkable, and it was recently suggested by experts on educational financing from the University of Missouri:

Since the income-contingent plan was conceptually developed to promote employment in low-paying public service jobs, we wonder if the current program, when the full economic impact is known, will help meet its objective. We think not. . . . We propose [that] . . . after a maximum of ten years, the loan is closed, and no additional payments are required. . . . [A]n individual would not be saddled with a lifetime of debt and would, we think, be more likely to select public service employment.

PATRICIA SOMERS & JAMES COFER, COMM. ON GOVERNMENTAL AFFAIRS, MORTGAGING THEIR FUTURE: STUDENT DEBTLOAD IN THE U.S.: TESTIMONY PRESENTED TO THE U.S. SENATE GOVERNMENTAL AFFAIRS COMMITTEE FEB. 10, 2000, at http://www.senate.gov/~gov_affairs/021000_somers.htm (last visited Feb. 14, 2001) (underscoring omitted). Under the Somers and Cofer proposal, some high-income borrowers might choose standard ten-year repayment because it would lead to slower repayment than income-contingent repayment, but most borrowers would probably choose income-contingent repayment because of its built-in subsidy. *See id.* Thus, income-contingent repayment would become the new standard norm. In their testimony, Somers and Cofer did not estimate the cost of implementing their suggestion. *See id.*

TABLE 47: BORROWER REPAYMENTS AND SUBSIDIES ON \$75,500 DEBT, COMPARING INCOME-CONTINGENT REPAYMENT PLANS OFFERING FORGIVENESS AFTER TWENTY-FIVE YEARS AND AFTER FIFTEEN YEARS (THOUSANDS OF DOLLARS)

	Larry Lifer, \$32,000, 4% raises, with forgiveness after		Larry Lifer, \$32,000, 3% raises, with forgiveness after		Lisa Lifer, \$27,000, 4% raises, with forgiveness after	
Years	25	15	25	15	25	15
Payments (current dollars)	194	97	171	88	162	77
Payments (present value)	94	63	84	57	77	50
Cost or value of forgiveness (current dollars)	30	79	71	88	83	100
Cost or value of forgiveness (present value)	7	34	17	38	20	43

Shortening the period may not require new legislation, though paying for it would require the Secretary of Education to reprogram other funds or to obtain additional appropriations for the years in which the cost would be incurred. The statute provides that the period of income-contingent repayment is “not to exceed 25 years.”⁴¹³ This is a statutory maximum, not necessarily also a minimum. As noted earlier, the Department did not even consider whether it had authority to provide for income-contingent loans for shorter durations.⁴¹⁴ The time for such consideration is at hand. At the very least, the Department should make a careful estimate of the cost to the taxpayers of shortening the period. Because the percentage of users of this option is far smaller than the percentage estimated when the Department established a twenty-five-year repayment plan in 1994,⁴¹⁵ the costs of forgiving loans must be much lower than those estimated at the time, and at least some liberality might be permitted within the original budget. In fact, there is some evidence that the program the Department created costs only 4% to 12%

413. 20 U.S.C. § 1087e(d)(1)(D) (1994).

414. See *supra* text accompanying notes 381-82.

415. See *supra* text accompanying note 383.

as much as the Department's original projection.⁴¹⁶ In addition, the program was created in times of budget deficit, whereas by the year 2000, legislators were having trouble deciding how to spend huge federal budget surpluses.⁴¹⁷ The cost to the taxpayers of reducing the period for repayment for law graduates is shown in the following table, which assumes that 5% of all law school graduates would use an improved income-contingent repayment option. At present, virtually no law graduates use income-contingent repayment, but 2.8% of all law students take initial jobs as public interest lawyers.⁴¹⁸ In addition, some state government and private jobs offer salaries so low that income-contingent repayment might be attractive. Not all of these graduates would elect any variant of income-contingent repayment, because not all students borrow, not all public service jobs are low-paying, and some lawyers who start at very low salaries will quickly advance in salary (some of them joining high-paying law firms after a year or two of public service). So 5% usage is intended to be a conservative guess.

416. The Department predicted that "if interest is not capitalized at all, [the program] would cost the Federal government \$300 million over the cost of . . . 10 year fixed loan repayment." REPAYMENT OF FEDERAL DIRECT STUDENT LOANS, *supra* note 348, at 13. But three years later, after the program was operating, the projected cost of forgiveness was only 13.8 million dollars for the year 2021 (the first year of forgiveness), rising to 36.1 million dollars by 2030. *See Fed. Student Loan Programs: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Econ. and Educ. Opportunities H.R.*, 104th Cong. 324, 328 (1995) ("Department of Education Responses to Congressman Gordon's Questionnaire"). In both cases, these projections appear to be in future dollars, so in terms of current purchasing power, they are much smaller, in fact, than they might appear.

417. In 2000, the Congressional Budget Office estimated that the federal budget surplus would reach 2.17 trillion dollars during the following decade. *See CBO Projecting a Whopping \$2.17 Trillion in Surpluses*, SEATTLE TIMES, July 18, 2000, at A4. The Social Security Administration was projected to have an additional 2.39 trillion dollar surplus over the same period. *See id.*

418. *See* EMPLOYMENT AND SALARIES 1999, *supra* note 71, at 13.

TABLE 48: COST OF REDUCING THE PERIOD AFTER WHICH
OUTSTANDING BALANCES WOULD BE FORGIVEN FOR LAW GRADUATE
BORROWERS IN INCOME-CONTINGENT REPAYMENT⁴¹⁹

Number of years after which debt would be forgiven	Additional annual per cohort cost to taxpayers (\$ in millions) ⁴²⁰
19	3
17	5
15	8

To put in context the eight million dollar annual per cohort cost of reducing the forgiveness period to fifteen years, the annual per cohort cost of the entire Stafford loan program for graduate students is about one billion dollars,⁴²¹ lowered default rates on student loans have saved the taxpayers eighteen billion dollars since 1993,⁴²² and the projected budget surplus for fiscal year 2001 is \$102 billion.⁴²³

419. See E-mail from the U.S. Department of Education to the Author (Aug. 28, 2000, 12:42 EST) (on file with author). Reducing the period to fifteen years for all graduate student borrowers (not only law students) would increase the annual per cohort cost to \$44 million (assuming 5% usage). E-mail from the U.S. Department of Education to the Author (Jan. 23, 2001, 10:47 EST) (on file with author). The messages included the following caveat: "Estimates are provided as technical assistance only. Numbers do not reflect the policy positions or official cost estimates of the Department of Education or the Administration." E-mail from the U.S. Department of Education to the Author (Aug. 31, 2000, 16:45 EST) (on file with author).

420. The Department computes costs of subsidizing loan repayment in terms of annual per cohort costs. A cohort is the set of all students who borrow in a particular year.

421. See E-mail from the U.S. Department of Education to the Author (Aug. 31, 2000, 16:45 EST) (on file with author). The annual federal appropriation for all federal student financial assistance is currently 9.4 billion dollars. See H.R. 3424, 106th Cong. (1999) (enacted). Thus, shortening the forgiveness period for law students to fifteen years would probably increase the cost of financial aid for graduate students by less than 1%, and would increase the cost of federal financial aid by less than one-tenth of 1%. The Secretary of Education might want to offer forgiveness after fewer years to all borrowers who had completed graduate and professional degrees and used income-contingent repayment, not just to law graduates. Of course this will be more expensive, but it may only be two or three times as costly as the numbers in this chart show, and therefore still an infinitesimal increase in the cost of the national student loan program.

422. See Ellen Nakashima, *Record Low Default Rate in Student Loan Program: Strong Economy and Increased Enforcement Are Cited*, WASH. POST, Oct. 2, 2000, at A2. Thus, in 1993 and 1994, when Department officials computed how much money they could afford to allocate for subsidies through the income-contingent option, they were unaware of billions of dollars that would be saved as a result of fewer defaults.

423. See *CBO's Current Budget Projections*, Congressional Budget Office, U.S. Congress, at <http://www.cbo.gov/showdoc.cfm?index=1944&sequence=0&from7> (last visited Feb. 14, 2001).

If reducing the loan period for all users is nevertheless deemed too expensive,⁴²⁴ policy makers could consider offering forgiveness at the end of a shorter period only to those who had fulfilled a public service requirement, such as having spent at least ten of the previous fifteen years in full-time public service work. To avoid controversy about what constitutes “public service” work, the term should be defined broadly—for example, full-time work for any tax-exempt organization, any agency of any level of government, any international organization (such as an agency of the United Nations, or an international war crimes tribunal), or any combination of these entities.⁴²⁵ If necessary to prevent abuse, an income ceiling could also be imposed—for example, forgiveness could be phased out for borrowers whose adjusted gross income, averaged over the years of the loan, exceeded specified levels.

For lawyers, the next most important reform would be to raise the annual ceiling on borrowing under the unsubsidized Stafford loan program. Students studying medicine and other health-related subjects (including public health and health administration) can already borrow \$30,000 a year in unsubsidized Stafford loans (and \$8500 in subsidized Stafford loans),⁴²⁶ but law students (as well as Ph.D. candidates and other

424. The cost could be deemed too expensive because eight million dollars is deemed an unacceptably large number. Alternatively, policy makers could determine that the author's estimate of 5% usage is too low, or that use of more generous income-contingent repayment by borrowers other than law graduates would excessively raise the price. It should be noted, however, that few types of graduates have debt-to-income ratios higher than those of public interest lawyers.

425. Congress has drawn a similar line in recent legislation to encourage students to perform public service. In making LRAP loan forgiveness non-taxable, Congress applied the benefit to loans forgiven

pursuant to a program of such educational organization which is designed to encourage its students to serve in occupations with unmet needs or in areas with unmet needs and under which the services provided by the students (or former students) are for or under the direction of a governmental unit or an organization described in section 501(c)(3) of the tax law.

26 U.S.C. § 108(f)(2)(D)(ii) (Supp. IV 1999).

426. In 1998, when Congress phased out the Health Education Assistance Loan Program for students in medical and related professions, unsubsidized Stafford loan eligibility was expanded from \$18,500 per year to \$38,500 per year for students at schools that had disbursed loans through the phased out program. See *Dear Partner, Colleague Letters*, U.S. Dep't of Educ., GEN-98-18, Aug. 1999, at http://ifap.ed.gov/dev_csb/new/home (last visited Feb. 14, 2001) (following hyperlinks to Dear Partner, Colleague Letters). This authority was expanded a year later to all students in the health professions, regardless of whether their schools had participated in the program that had been phased out. See *Dear Partner, Colleague Letters*, U.S. Dep't of Educ., GEN-99-21, July 1999, at http://ifap.ed.gov/dev_csb/new/home (last visited Feb. 14, 2001) (following hyperlinks to Dear Partner, Colleague Letters). Students eligible for these larger Stafford loans were those studying allopathic medicine, osteopathy, dentistry, veterinary medicine, optometry, podiatry, pharmacy, public health, chiropractic medicine, and clinical psychology, as well as those in graduate programs in health administration. See *id.*

graduate students) can borrow only \$10,000 per year (plus \$8500 in subsidized loans).⁴²⁷

Increasing the amount of annual Stafford loan eligibility⁴²⁸ would benefit all law students, because it would substitute lower-interest federally-guaranteed debt, with a statutory ceiling of 8.25% on the interest rate, for commercial debt at interest rates that can exceed the federally guaranteed loan rate by a percentage point or more.⁴²⁹ But in addition, raising the annual loan eligibility limit would particularly assist high-debt, low-income borrowers who might use the income-contingent repayment option, because a larger fraction of such students' debt would be eligible for consolidation and payment through the option. Compare Larry Lifer's situation under two scenarios. Assume that he attends Catholic,⁴³⁰ borrows \$75,500 in Stafford loans for undergraduate and law school study, and borrows an additional \$24,500 commercially over three years, at the rates prevailing in September, 2000. Assume that his commercial debt is payable over twenty years, and that, as in some earlier examples, he goes to work at a starting salary of \$32,000 and has annual 3% raises.

427. See 34 C.F.R. § 682.204(a)(5), (b)(5) (2001).

428. Regulations also provide for a lifetime Stafford loan borrowing limit of \$138,500. See *id.* § 682.204(e). This limit would not have to be changed, because three \$38,500 loans would equal only \$115,500, and few students borrow as much as another \$23,000 as undergraduates.

429. As of July 2000, the Access Group, a major lender to law students, charged Georgetown and George Washington students 8.594% on its commercial loans. The interest rate for students at the Howard Law School, or the D.C. School of Law, each a few miles away, was 9.562%. These rates understate the interest rate, however, because students are also charged a one-time "guarantee fee" just before repayment. In the case of a Georgetown or George Washington borrower, the fee was at least 6.9% (and up to 12.9%); in the case of Howard or D.C. School of Law students, it was at least 7.5%. The interest rates vary because the Access Group starts with a rate based on the bond market and then adds a percentage that "var[ies] by loan program and institution." *Federal & Private Loan Terms*, Access Group, at <http://www.accessgroup.org> (last visited Feb. 23, 2001) (following hyperlinks to Federal & Private Loan Terms); see also *Federal Stafford Loan*, Access Group, School Selection, at <http://www.accessgroup.org> (last visited Feb. 21, 2001) (following hyperlinks to Federal & Private Loan Terms: School Selection) (providing the instructions as to how to access the percentages for the above schools).

430. For such a student, the commercial loan rate is assumed to be 9.562% plus a one-time fee of 7.5%.

TABLE 49: INCOME-CONTINGENT REPAYMENT FOR LARRY LIFER'S \$100,000 AGGREGATE LOAN, COMPARING (A) THE CURRENT \$18,500 ANNUAL LIMIT ON STAFFORD BORROWING, AND (B) HIS SITUATION IF THE LIMIT WERE RAISED SO THAT HE COULD BORROW ENTIRELY THROUGH FFELP OR A FEDERAL DIRECT LOAN

	\$75,500 debt subject to income-contingent repayment, plus \$24,500 commercial borrowing, payable over twenty years: federal repayment, commercial repayment (in parenthesis) and total repayment	\$100,000 debt subject to income-contingent repayment
Monthly payments, year one	\$394 (+ \$230) = \$624 (26% of after-tax income) ⁴³¹	\$394 (16% of after-tax income)
Monthly payments, year six	\$457 (+ \$230) = \$687 (25% of after-tax income) ⁴³²	\$457 (17% of after-tax income)
Total of payments, current dollars	\$171,440 (+ \$55,288) = \$226,988 ⁴³³	\$172,452
Present value of total of future payments	\$84,443 (+ \$33,077) = \$117,520	\$84,705
Amount the government forgives, current dollars	\$71,427	\$152,831
Present value of government forgiveness	\$17,447	\$37,331

This table shows that if we factor in a reasonable amount of commercial debt,⁴³⁴ would-be legal services lawyers graduating today from private, non-LRAP law schools with an average amount of indebtedness will have to pay, in their first year on the job, about 26% of their after-tax income toward their student loans, in excess of even the most forgiving estimates of what is affordable. But simply by sweeping more of the debt into the unsubsidized Stafford loan program, the federal

431. This assumes federal income tax of \$3746 and state and local income tax of \$1124.

432. This assumes gross income of \$40,500, federal tax of \$6062, and state and local tax of \$1808.

433. To this, the commercial lender would add a guarantee fee of \$2625 in the twentieth year.

434. Recall that the *average* total debt anticipated by Georgetown and Catholic public-interest oriented students in 1999 was \$95,000. *See supra* tbl.6.

government could make it possible for these public servants to afford the burdens of their debt, lowering repayment, through the income-contingent option, to 16% of after-tax income. Furthermore, if such graduates' incomes remained low for twenty-five years, they would qualify for more than twice as much forgiveness as under the present law.

This reform also would not require new authorizing legislation but would require the Secretary of Education to reprogram funds or seek an increased appropriation.⁴³⁵ Congress established a presumptive \$10,000 annual limit on the amount of the unsubsidized Stafford loan extended to a graduate or professional student.⁴³⁶ But it also authorized the Secretary of Education to raise the amount where he or she determines "that a higher amount is warranted in order to carry out the purpose" of the Higher Education Act "with respect to students engaged in specialized training requiring exceptionally high costs of education."⁴³⁷ It can hardly be doubted that legal education involves "specialized training" or that it now involves "exceptionally high costs."⁴³⁸ The Secretary should raise the unsubsidized Stafford loan limit for law school students to the lower of \$30,000 (as it is for students in the medical professions) or the actual cost of attendance at the student's school.⁴³⁹ If the limit were raised for all law students, and every law student in the United States borrowed \$38,500 per year in subsidized and unsubsidized Stafford loans,⁴⁴⁰ the annual additional per cohort cost would be sixty-nine million dollars, compared to the one billion dollar annual per cohort cost of the Stafford loan program for all graduate students. However, "[i]f the combined volume was transferred exclusively into d[irect] l[ending] [i.e., if the federal government rather than banks extended all Stafford loans to law students,] the savings related to the increased loan volume would more than offset the costs of increasing . . . the annual maximum Stafford unsubsidized amount."⁴⁴¹ Another option would be for the Department to

435. Of course Congress could direct this reform itself, but Congress is not scheduled to begin to review the Higher Education Act until 2002-03.

436. See 20 U.S.C. § 1078-8(d)(2)(C) (Supp. IV. 1999).

437. *Id.* § 1078-8(d)(2)(D).

438. *Id.*; see also *supra* text accompanying notes 29-30.

439. Raising it to a flat \$30,000 could risk encouraging over-borrowing at some state-subsidized law schools where the annual cost of attendance is less than \$38,500.

440. This is an unrealistic and very conservative assumption because \$38,500 exceeds the actual cost of attendance for in-state students at many public law schools.

441. E-mail from the U.S. Department of Education to the Author (Aug. 31, 2000, 16:45 EST) (on file with author). In the e-mail, estimates were provided as technical assistance only. See *id.* This estimate was based on the assumption that all 40,000 law students in the United States would borrow the entire \$20,000 of additional Stafford funds, for an additional 800 million dollars of

raise the annual limit on Stafford loans not only for law students but also for all graduate students. This would cost taxpayers still more money if the loans were extended through FFELP, or reap greater profit for taxpayers if accomplished through direct lending.

It might be objected that making larger loans available to law students (or to graduate students generally) would simply enable universities to raise tuition. If valid, this objection applies with equal force to all government subsidies for education, including the existing loan programs, grant programs, and education tax credits and deductions. Nobody is proposing to end those subsidies, and leading politicians often suggest expanding them.⁴⁴² In addition, the link between loan availability and tuition levels is a "hotly contested" issue, but there are apparently no studies proving that the availability of loan funds is the only factor or even a major factor in tuition increases.⁴⁴³ Other factors strongly affecting tuition, particularly at law schools, include the effects of rapidly rising salaries in the private sector (which make it more difficult for law schools to retain their faculties without raising salaries), the rising costs of books and technology, the level of alumni contributions, and competition from other schools for talented students.⁴⁴⁴

The Department should also consider simplifying the income-contingent repayment formula. The complexity of the mathematical computations is itself a deterrent to using this program. As one Georgetown student respondent to my questionnaire put it,

loans. A sixty-nine million dollar annual per cohort federal cost for making those loans works out to an 8.6% subsidy rate, and the estimated subsidy rate on all FFEL Stafford loans to graduate students, which was 5.9% in Fiscal Year ("FY") 1999, is expected to be 6.5% in FY 2000, and 3.8% in FY 2001. See BUDGET, *supra* note 350, at 374, available at <http://w3.access.gpo.gov/usbudget/fy2001/pdf/edu.pdf> (last visited Feb. 15, 2001). The reason why the government could turn a loss into a profit by lending the money directly to law students rather than by paying subsidies to banks under FFELP, is that, although the default rate in unsubsidized FFEL and direct lending to graduate students is virtually the same (8.75% for FFEL and 8.83% for direct loans), the subsidy rate for FFEL unsubsidized Stafford loans to graduate students was 5.9% in FY 1999, whereas the *profit* rate on federal direct unsubsidized Stafford loans to graduate students was 13.4%. See *id.* Presumably the direct loan advantage lies in not having to pay commercial lending institutions to make risk-free loans.

442. See *The 2000 Campaign: A Presidential Debate: Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A30 (describing a Gore proposal for a federal tax deduction of up to \$10,000 for college education).

443. See STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 106TH CONG., RISING COST OF COLLEGE TUITION AND THE EFFECTIVENESS OF GOVERNMENT FINANCIAL AID 28-29 (Comm. Print 2000) (providing the testimony of David W. Breneman, University Professor and Dean of the Curry School of Education, University of Virginia).

444. See *supra* notes 16-37.

Too complicated! It's easier for me to just get a firm job, pay the money, and be done with it than try to figure out how this will work over 25 years. . . . If the government really wished to assist me they would make it easier. After all, it's a piece of cake to take out the loan, why is the payback plan so complex?

Three other reforms should also be undertaken. First, the Department should significantly improve the quantity and quality of information about income-contingent repayment that it offers to students and to financial aid advisors. Recognizing that new financial aid advisors enter the profession regularly, and that central university officials may not communicate the full details of all federal programs to all of the advisors in particular graduate schools, the Department should develop effective materials for explaining the income-contingent option, including its advantages and disadvantages for various types of students, and make them available directly to the financial aid advisors in all of the nation's law schools, and probably other types of graduate schools as well. If the repayment formula remains complex, a video, distributed either as a tape or over the Web, might be desirable. In addition, the Department should significantly upgrade its Web-based calculators. It should allow students considering various repayment plans to make flexible assumptions about the rate of income growth, including the assumption that they will change careers at some point during the life of their loan. All of the Department's calculators should show present value calculations for the total cost of loan repayment, so that repayment plans of different durations can be more accurately compared.

Better information about the program should be made available not only to advisors in graduate schools, but also to advisors in college financial aid and career planning offices. Some students who aspire to public service careers may be refraining from applying to graduate and professional schools, assuming that the cost of attending those institutions would frustrate their service goals. Better information about government loan repayment assistance could enable college students to make better choices about their higher education.

Second, Congress should make federal forgiveness of income-contingent loans tax-exempt. The fact that forgiveness is not tax-exempt seems to be only a minor factor, to date, in students' distrust of the program, accounting for about 1% of student concerns and 8% of financial aid advisors' concerns.⁴⁴⁵ But this may reflect only the fact that any taxation is still twenty years off, or that other aspects of the program

445. See *supra* tbls.21, 30.

are more disagreeable to those polled for this Article. As the program is improved, concerns about taxation could grow. It makes no sense for the federal government to give with one hand, because it has determined the beneficiaries to be needy, and take back with the other. The Department and the Department of the Treasury made a joint commitment to seek congressional repeal of the tax on forgiveness.⁴⁴⁶ In addition, Congress has already made law school LRAP forgiveness non-taxable;⁴⁴⁷ it should do the same for its own forgiveness program.

Finally, the Department should repeal its marriage penalty on borrowers using income-contingent repayment. Ideally, it should allow married borrowers to elect to have assets and debts treated either on an individual or a joint basis.⁴⁴⁸ Alternatively, it should regard a borrower's income as the higher of (a) the borrower's own income or (b) one-half of the combined income of the borrower and the borrower's spouse.⁴⁴⁹ Though the Department's motive in attributing the income of both spouses to a borrower was apparently to more accurately reflect ability to pay,⁴⁵⁰ not all spouses share their incomes, spouses generally have expenses as well as income, and the amount of the penalty under the Department's formula can be so great that it may encourage cohabitation without wedlock, or even divorce. As Martin D. Ginsburg has shown, Sweden's tax law once did what the Department has now done, simply requiring married couples to add their incomes together.⁴⁵¹ The result was a rash of divorces.⁴⁵² When the law was amended so that divorce

446. See William D. Ford Federal Direct Loan Program, 60 Fed. Reg. 61820, 61823 (Dec. 1, 1995) (codified at 34 C.F.R. § 685.209(c)(4)(iv) (2001)).

447. See 26 U.S.C. § 108(f) (1994 & Supp. IV 1999).

448. Repeal would be consistent with the recent drive by members of Congress and the President to repeal the marriage penalty in the income tax. In the summer of 2000, Congress passed legislation to amend the Internal Revenue Code so that married couples would no longer pay more tax than if they were single. See R.G. Ratcliffe, *Spouse Tax Relief Bill Gets Vetoed: Bush Seizes Opportunity to Link Gore to Decision*, HOUS. CHRON., Aug. 6, 2000, at A1. President Clinton vetoed the bill because it would have cost nearly 300 billion dollars over ten years, and more than half of the relief would have gone to families earning over 100,000 dollars. See *id.* George Bush, the Republican presidential candidate, supported the bill; Al Gore, the Democratic presidential candidate, supported the veto but said that he favored the right kind of repeal of the marriage tax. See *id.*

449. This alternative, less favorable to borrowers, is how the major LRAP programs treat marriage for the purpose of computing the borrower's eligibility for subsidies. See NAT'L ASS'N FOR PUB. INTEREST LAW, *supra* note 110, at 107, 136, 297 (Harvard, New York University, Yale). Georgetown simply averages the incomes (after deducting the spouse's loan repayments from his or her gross income). See *id.* at 100.

450. See *supra* notes 345-47 (describing the "marriage penalty").

451. See Martin D. Ginsburg, *Taxing the Components of Income: A U.S. Perspective*, 86 GEO. L.J. 123, 134-35 (1997).

452. See *id.* at 134.

could not free the couple from higher taxation, hundreds of thousands of Swedes began living together without the formalities of marriage, and the rate of children born out of wedlock in stable, two-parent homes, soared.⁴⁵³ “It was not immorality,” notes Ginsburg.⁴⁵⁴ “It was the idiotic tax law.”⁴⁵⁵

The income-contingent repayment option represents a fine idea, but as a government program, it has not yet come into its own. It could be an important component of how the United States supports its young people who want to commit years, or even their whole lives, to public service. Specialized training for public service is very expensive,⁴⁵⁶ so a good and generous income-contingent loan repayment plan can help new law graduates to follow their hearts. But the plan we now have benefits too few, too little. American policy makers, and especially the Secretary of Education, should make the improvements necessary to bring into force the farsighted program that President Clinton and Congress envisioned in 1993.

453. *See id.* at 134-35.

454. *Id.* at 135.

455. *Id.*

456. *See supra* Part II.

VIII. AFTERWORD

This Article recommends several ways in which the income-contingent repayment option could be improved by making it slightly more generous and therefore more attractive to students who desire public service careers.⁴⁵⁷ Unfortunately, as this Article goes to press, some political winds may be blowing in the opposite direction. While neither the new Administration of President George W. Bush nor Congressional leaders have made definitive statements on the subject, it is possible that the entire federal direct lending program could come under attack during 2001 or 2002. If the federal direct lending program is terminated, the income-contingent repayment option, which exists only within the direct lending program, will probably be ended rather than reformed.

Two straws in the wind suggest that the direct lending program may come under new attack. First, when the Republican leadership organized the House of Representatives in January, 2001, it had to select a new chair for the Committee on Education and the Workforce. Thomas E. Petri, the Wisconsin Republican who had been an early and enthusiastic supporter of direct lending,⁴⁵⁸ was next in line in seniority and was expected to become the committee's chair. However, the leaders passed over him in favor of John A. Boehner, reportedly because Representative Petri had "long supported the direct-lending program that . . . many Republican lawmakers—and the bankers and student-loan-guarantee agencies that contribute to them—have sought to eliminate."⁴⁵⁹ "Lenders believe him [Boehner] to be more sympathetic to their views," a former committee staffer explained.⁴⁶⁰

Second, President George W. Bush appointed William D. Hansen as Deputy Secretary of Education.⁴⁶¹ Prior to his appointment, Hansen was the executive director of the Education Finance Council, the trade association that lobbied for non-profit lenders in the FFEL Program.⁴⁶² The Council co-authored the 1996 Report criticizing the income-contingent repayment option,⁴⁶³ and it had sued the Department to

457. See generally *supra* Part VII.C.

458. See *supra* text accompanying note 146.

459. Stephen Burd & Jeffrey Brainard, *House GOP Shuns Seniority Rules in Choosing Boehner to Head Education Panel*, CHRON. HIGHER EDUC., Jan. 12, 2001, at A22.

460. *Id.*

461. See Piper Fogg, *People*, 33 NAT'L J. 821, 821 (2001).

462. See Stephen Burd et al., *Cautiously Watching the President-Elect: Colleges Hope for the Best, but Some Programs May Be Vulnerable*, CHRON. HIGHER EDUC., Jan. 5, 2001, at A34.

463. See *supra* note 376 and accompanying text.

prevent it from lowering the fees charged to students for federal direct loans.⁴⁶⁴

These signs do not necessarily mean that direct lending will be attacked or that any such attack will succeed.⁴⁶⁵ Furthermore, private lenders could try to build into FFELP an income-contingent repayment option that is more forgiving than the one that is part of the direct lending program (and, by definition, more forgiving than the income-sensitive repayment options that private lenders now offer, which provide no debt forgiveness).⁴⁶⁶ They could, in other words, build into private lending plans a cross-subsidy feature through which the vast majority of graduates who earn more substantial incomes, or those who enter the private sector, provide funds that could be used for partial forgiveness of loans to graduates who have low incomes, or who do public service. But private lenders generally regard their missions as providing lending services and profit-maximization, and they do not have the explicit mandate to support public service that Congress gave the Department in 1993. Therefore, if the direct lending program is demolished, the income-contingent repayment option may disappear into the rubble.⁴⁶⁷

464. See Burd et al., *supra* note 462 (listing Education Finance Council is a participant in the lawsuit); see also *supra* note 380 and accompanying text (describing the lawsuit).

465. One Republican staff member believed that it would be “foolish” for the Bush administration to try to eliminate the direct lending program, because that program is “withering on the vine on its own” after some prominent Universities left it. Burd et al., *supra* note 462.

466. See *supra* note 365.

467. Another possibility would be that direct lending would end, but that proponents of the income-contingent repayment option might extract, as a price of its termination, the continuation of a small federal direct lending program for the sole purpose of extending income-contingent loans, on terms such as those advocated in this article, to high-debt, low-income graduates, or to the subset of those graduates in public service. The subsidy funds would then be appropriated by Congress rather than emerging from the profits of a large federal direct lending program.

APPENDIX

DISCOUNTING TO PRESENT VALUE WITH THE LONG BOND RATE

A rational person would rather repay one thousand dollars after ten years than repay this sum tomorrow, because inflation will reduce the value of the dollar and because money that is not expended at a given moment could be earning interest or could enable the borrower to buy and enjoy the use of goods and services until it is expended. Therefore, the cost of future repayments must be discounted to their present value, particularly when a borrower is considering competing repayment plans of different durations and different payment schedules.

The present value of a stream of future repayments is quite sensitive to the discount rate selected. This is evident from Table 50, which compares the present values of repaying \$75,500 in steady monthly installments over ten and twenty-five years, using four different discount rates. The rates chosen for this table are 2.5% (roughly the annual rate of inflation from 1995 to 1999); 5.8% (the thirty year treasury bond or "long bond" rate in late summer, 2000), 8.25% (the maximum interest rate on federal consolidated student loans), and 12% (the typical rate at which a recent graduate with heavy student debt can borrow additional money—for example, on a credit card).

TABLE 50: NET PRESENT VALUE OF REPAYING \$75,500 AT 8.25%
INTEREST OVER TWENTY-FIVE YEARS, WITH
VARIOUS DISCOUNT RATES

Discount rate	Ten-year repayment (\$111,123 in current dollars)	Twenty-five-year repayment (\$178,584 in current dollars)
2.5%	\$98,363	\$133,122
5.8%	\$84,738	\$95,526
8.25%	\$76,476	\$77,435
12%	\$66,167	\$59,044

These large variations suggest the importance of selecting the most appropriate rate. A higher assumed rate will make the long-term

repayment plan more attractive. For rates lower than the annual percentage rate on the loan, the higher the assumed rate, the smaller will be the reported additional cost of repaying a long-term (e.g., twenty-five-year) loan, compared to repaying the same amount of money over a short term (e.g., ten years) loan. And if the assumed rate is greater than the annual percentage rate on the loan, the net present value of the long-term repayment plan will actually be lower than that of the short-term repayment plan. Thus, lower discount rates are “conservative” in the sense that they are less likely to make long-term loan repayment look attractive. But the lowest rate in the table, the rate reflecting only recent increases in the consumer price index, is unrealistically low, both because the inflation rate has been unusually low in recent years and because this rate does not take into account the fact that money that is not immediately repaid can be invested—for example, in liquid assets or in consumer goods—to produce value.

Unfortunately, there is not a single “correct” answer to the question of what discount rate a student borrower should use for the purpose of considering loan repayment. Each individual’s discount rate will be different, depending on the individual’s expected circumstances. In fact, each individual’s discount rate will change annually, depending on changes in those circumstances.

Mark Kantrowitz, who created the FinAid Web site to help students to analyze loan repayment, made it possible for each student using the income-contingent loan repayment calculator to insert an individual discount rate for use in present value calculations. But he also offers this advice on selecting a rate:

The discount rate should be the APR [annual percentage rate] of the highest risk-adjusted rate of the return th[at] you can obtain by investing your money, or the lowest rate at which you can borrow money, whichever is higher. The reason is [that] your decision of whether to pay off your student loan depends on whether you can earn more by investing the payoff funds in a different vehicle or spend less by refinancing the loan with a lower cost source of funds. If you have both a lower borrowing cost with a different loan and a higher investment return, the higher rate wins, because you could use the other loan to borrow money to invest, and therefore be financially better off than you would be by paying off the student loan.

....

Clearly, no student would rationally accept a loan with a higher NPV [net present value] than the amount borrowed, so perhaps the

discount rate should also be at least as much as the APR of the student loan interest rate. On the other hand, if the student has access to no other loans, and their highest [risk-adjusted] investment rate of return is the [risk-free] long bond (30-year Treasury), then the long bond is the correct discount rate to use. The difference between the amount borrowed and the NPV could be considere[d] a premium the student is paying for cash flow assistance.⁴⁶⁸

Kantrowitz uses the current thirty-year bond rate as the default value for net present value in the FinAid calculator.⁴⁶⁹ In this Article, the thirty year bond rate has also been selected as the discount rate because it represents a conservative point between the extremes of a low recent inflation rate⁴⁷⁰ and the high rate at which most high-debt, low-income students could borrow additional funds. It could be objected that the thirty-year bond rate is much too low of a rate to use, and is excessively conservative, because no ordinary civilian (such as the graduate of a law school) could borrow money at the thirty-year bond rate. But a student using the FinAid calculator may select a higher (or lower) discount rate.

On September 14, 2000, as this Article was being completed, the thirty-year bond rate was 5.8%, and that is the rate used in tables in this Article. The FinAid Web site permits the user to find the current thirty-year bond rate. Alternatively, the CNN Financial Network Web site,⁴⁷¹ or any other convenient online financial report, contains this current rate.

It seems likely that the federal government will cease issuing thirty-year bonds in the year 2001.⁴⁷² If so, the next-best measure might be the longest-term federal bonds available in the market, or whatever other indicator Wall Street adopts to measure the present cost of long-term revenue streams.

468. Mark Kantrowitz, *Net Present Value*, FinAid: The SmartStudent Guide to Financial Aid, at <http://www.finaid.org/loans/npv.phtml> (last visited Feb. 12, 2001).

469. Another possible choice would be the historical thirty-year bond rate—for example, for the last ten years or the last twenty-five years. But these measures would produce higher and therefore less conservative rates: 7% for the last ten years, and about 9% to 10% for the last twenty-five years. See *Historical 30 Year Bond Chart 1977 to 1999*, StockMotions.com, at http://www.stockmotions.com/charts/historic30yearbond_77_to_99.htm (last visited Feb. 9, 2001). Using a 7% or 9% rate might make long-term income-contingent and extended repayment plans seem very attractive compared to ten-year repayment.

470. Recent inflation has been unusually low. However, the low rate has been sustained for only a short time, and it may already be increasing. Over a longer term, inflation has exceeded the current thirty-year bond rate. The average inflation rate between 1977 and 1999 was 8% annually. For the period from 1969 to 1999, it was about 12%.

471. CNNfn, *The Financial Network, Markets: Bonds & Rates*, at <http://cnnfn.cnn.com/markets/bondcenter/rates.html> (last visited Feb. 28, 2001).

472. See Jonathan Fuerbringer, *Treasury Gives 30-Year Bond a Reprieve, and Price Falls*, N.Y. TIMES, Aug. 3, 2000, at C8.