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Financing the Future of Legal Education: "Not What It Used to Be"

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FINANCING THE FUTURE OF LEGAL EDUCATION: “NOT WHAT IT USED TO BE”¹

*Steven R. Smith**

2012 MICH. ST. L. REV. 579

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INTRODUCTION

These have been “the good old days” for legal education.² The financing of legal education has had an uneven, but significant, improvement for

* Dean Emeritus and Professor of Law, California Western School of Law. The Author thanks Hannah Arterian, William Aceves, David Barnhizer, Chris Chapman, Pam Duffy, Marilyn Jordan, Bill Kahler, Lera Smith, Don Smythe, James White, and Peter Winograd. This Article is dedicated to our students and their future clients—this ultimately is about them.

1. “The trouble with our times is that the future is not what it used to be.” THE PORTABLE CURMUDGEON 105 (Jon Winokur ed. 1987) (quoting the French poet and philosopher, Paul Valery).

2. “The good old days” generally refers to the last twenty-five to forty years in legal education. Both are somewhat arbitrary dates. The forty-year period, beginning in 1971 to 1972, was just following the initial law school baby boom and reflected the sustained growth in legal education following that initial influx of baby boomers.

much of the last forty years, remarkably so for much of the last twenty years.³

Fueled primarily by tuition increases, the rising level of revenues in law schools has underwritten advances in legal education.⁴ It is possible that this may be coming to an end, however, as the days may be numbered for tuition increases well above the rate of inflation. If that is so, it will produce a substantial disconnect between expectations of what legal education can do and become, and financial reality.

This Article will first review the substantial improvements in legal education and track the sources of the funding for these improvements. It will look at whether law school is, and continues to be, a good economic investment for most students. It will then consider the current economic circumstances of legal education and the possible coming disconnect between expectations and reality. It will conclude by considering what could improve the lot of legal education in the future and, to the contrary, what could make matters much worse.

I. IMPROVEMENTS IN LAW SCHOOLS

Past financial good times allowed law schools to make some wonderful improvements in their programs.⁵ Instructional programs have changed significantly during the last forty years. The improvement in the teaching and research efforts of law schools has been possible largely as a result of the decrease in the student-faculty ratios of law schools. The ratio at one time was 50:1 for some schools and commonly above 30:1.⁶ Now the stu-

3. See generally PETER DEL. SWORDS & FRANK K. WALWER, *THE COSTS AND RESOURCES OF LEGAL EDUCATION: A STUDY IN THE MANAGEMENT OF EDUCATIONAL RESOURCES* (1974) (providing an outstanding source of information about legal education going back more than forty years).

4. Throughout this Article, there are references to specific law schools. In some instances, those schools are noted as specific law schools, either by name or by reference without a name. Where the data regarding a school is reliably available from a single source, the school is usually named.

5. See Roger C. Cramton, *Change and Continuity in Legal Education*, 79 MICH. L. REV. 460, 473-75 (1981) (providing information regarding the early boom in U.S. law schools).

6. Telephone Interview with James P. White, Professor Emeritus, Ind. Univ. Robert H. McKinney Sch. of Law (Nov. 2, 2011). Dean White was the long-serving ABA Consultant on Legal Education. As Consultant, he presided over the ABA accreditation process beginning in 1975 and was closely involved with the effort of the ABA to reduce student-faculty ratios in law schools. ABA data note that the ratio at most law schools dropped (on average) from academic years 1979 to 2010 from 27:1 to 14:1 (schools of 500-699 students) and from 30:1 to 15:1 (schools of 700-1099 students). AM. BAR ASS'N, *STUDENT FACULTY RATIO, SEMESTER SYSTEM SCHOOLS 1978-2011* (2011), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admission

dent-faculty ratio is typically between 15:1 and 20:1, with many schools under 15:1.⁷ Some of this resulted from a redefinition of the ratio, but the ratio is still much reduced from earlier days.⁸

This ratio has permitted a very substantial change in the teaching and research efforts of law schools.⁹ It allows students to be in smaller second and third year classes and seminars, have meaningful internship supervision, and receive good quality legal writing instruction. At the same time it allows faculty members to pursue their own interests in small classes and research. In any event, it is expensive. This increased the size of the law school professoriate significantly, both through general increases in tenured and tenure-track faculty, and through new categories of faculty—particularly clinicians and legal writing faculty.

Clinical programs were once rare, but they are now a standard part of law schools. As a result of internships and other clinical programs, there is a large number of faculty members with clinical expertise. Internships in the old days were frequently unsupervised, even when substantial credit was offered for them. Now internships, especially high credit internships, must be carefully supervised by the faculty, and as a result they are often a bridge from law school to practice.¹⁰

Legal writing was generally either neglected or taught by senior students and adjunct faculty, with little or no coordination or supervision. Now most schools have a formal legal writing program in the first year staffed by

s_to_the_bar/statistics/student_faculty_ratio.authcheckdam.pdf. Dean White indicates that prior to 1979, some schools had student-faculty ratios approaching 100:1.

7. The student-faculty ratios for law schools are published on the Law School Admission Council (LSAC) website. See *Official Guide to ABA-Approved Law Schools*, LSAC (2011), https://officialguide.lsac.org/release/OfficialGuide_Default.aspx [hereinafter *Official Guide to ABA-Approved Law Schools*]. Other recent student-faculty data can be found at *2009 Raw Data Law School Rankings: Student-to-Faculty Ratio (Ascending)*, INTERNET LEGAL RESEARCH GRP., http://www.ilrg.com/rankings/law/index.php/1/asc/SF_Ratio/2009 (last visited May 26, 2012).

8. At one time, the faculty count did not commonly include any part-time faculty, adjuncts and faculty without some permanent appointment. The Standards now permit the counting (up to twenty percent of the permanent full-time faculty) of administrators, adjuncts, and non-tenure/tenure-track legal writing instructors and clinicians. AMERICAN BAR ASSOCIATION, STANDARDS & RULES OF PROC. FOR APPROVAL OF LAW SCHOOLS, Interpretation 402-1 (2011), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf [hereinafter ABA STANDARDS]; see also James P. White, *Improved Student/Faculty Ratio Affects Teaching*, 15 SYLLABUS 2 (Mar. 1984).

9. The changes in teaching and research in law schools are recounted in ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (providing a review of the history of legal education and the initial part of the boom).

10. The requirements for field placement supervision are set out in the ABA Standards. See ABA STANDARDS, *supra* note 8, Standard 305(c) and related Interpretations.

a group of full-time legal writing faculty, plus advanced legal writing in the second and third years.

Seminars were certainly found forty years ago in law schools, but not to the extent that small classes, writing seminars, and very specialized courses now dominate much of the third year. As a result, the range of specialty areas and concentrations has proliferated in law schools. As part of that, interdisciplinary classes, sometimes taught in the law school by those with graduate degrees in other disciplines and sometimes team taught by faculty from other disciplines, have also become sufficiently common to no longer be referred to as “Law and Bananas” courses.¹¹

The academic quality of law schools during the past four decades has also been enhanced by the aggressive commitment to research missions. In many universities forty years ago, Thorstein Veblen’s claim that “the law school belongs in the modern university no more than a school of . . . dancing”¹² was not a joke. Scholarly publications have increased dramatically and law schools take publication seriously. Indeed, “admission” to the law teaching profession in terms of publication now resembles what was required forty years ago to get tenure. Today there may still be problems with university committees and administrators looking at law professors as overpaid and underworked in teaching, but at least they are increasingly viewed as legitimate academics.

This has been possible, in part, because law schools insisted on it—for example for granting tenure, promotion, and salary increases. It has also come because of dramatic increases in the resources for research. Released teaching loads, travel and conference funds, research assistants, and research stipends, for example, have made sophisticated research missions possible.

At the same time that the size of faculties increased, faculty salaries were increasing substantially. Although precise data are not available, on average faculty salaries probably bested the rate of inflation most years. Averages of faculty salaries became more complicated to calculate because some faculty positions have lower pay scales than standard tenure-track positions. The most notable example is that of legal writing faculty who typically receive lower salary with renewable contracts (and at the same time relatively heavy teaching loads and limited or no obligations for publication). Thus, simple faculty salary averages now may be difficult to compare with those of twenty years ago.

Other areas of the law school have also changed dramatically, generally for the better, in the last forty years. The student services of today bear

11. Steven R. Smith, *From Law and Bananas to Real Law: A Celebration of Scholarship in Mental Health Law*, 34 CAL. W. L. REV. 1, 1 (1997).

12. THORSTEIN VEBLLEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 211 (1st ed.1918).

little resemblance to those earlier times. “Placement” became “Career Services,” going from one staffer (sometimes part-time) to highly professional staffs. Academic support, diversity offices, services for students with disabilities, and bar exam preparation have been developed as formal structures, with professional staff, support, and offices.

Admissions offices have expanded, as have many law school financial aid offices. These offices are the front lines for revenue generation in most law schools. Although the primacy of Juris Doctor (J.D.) tuition revenue is not new for law schools, the competition for students, the place of recruiting scholarships, and student loans have changed significantly. And many public schools are as dependent on the admissions and financial aid offices as their private counterparts.

This competition has created another major area of cost increases—merit, or recruiting, scholarships. Part of the cost of this has been covered by converting need-based financial aid to recruitment scholarships, but a substantial portion of it in many schools has been new costs so that the “discount rate” (total scholarships, grants-in-aid, or remissions given by the institution, regardless of the source of it) has increased.¹³ In private schools, it was approximately 12% in 1990-1991 and 17% in 2000-2001.¹⁴ In 2009-2010 it was approximately 20%.¹⁵

Other sources of revenue have also led to law school staff increases. This is particularly true in the areas of alumni relations and development. Although private fundraising still does not represent a significant (ten percent or more) percentage of revenue at most law schools, in absolute terms this funding has increased and covers the cost of these offices several times over.¹⁶

Law libraries have changed their character during the last forty years, adding electronic information services. The demand for new equipment and

13. In an accounting sense, these are not really expenditures, but offset against gross tuition to create “net tuition.” For all practical purposes, these scholarships are like expenditures, and I include them as such in this Article.

14. John A. Sebert reported these figures from the ABA in John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, 518 (2002).

15. Information extrapolated from a number of sources, including *Average Amount Borrowed for Law School 2001-2010*, AM. BAR ASS’N (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf. See also William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last If Law Grads Can’t Pay Bills?*, ABA J. (Jan. 1, 2012), available at http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/.

16. Fundraising has become a standard part of the job of a dean. See, e.g., Kenneth C. Randall, *The Dean as Fundraiser*, 33 U. TOL. L. REV. 149, 149 (2001); John A. Miller, *The Modern Law Dean*, 50 J. LEGAL EDUC. 398, 398 (2000). While it is clear that the dollar amount raised by most law schools has increased substantially, private fundraising still represents a relatively small proportion of the total budgets of most law schools.

access to new electronic information sources has put pressure on library budgets. Libraries have supplied great support for the increased research mission of law schools. Although the cost of libraries has not decreased, in dollar terms, libraries generally have consumed a constant or declining percentage of the law school budget in the electronic age.¹⁷

As a general matter, and contrary to expectations, electronic data systems have generally added to the cost of law school. Some of these costs—central backbone and data management systems, for example—have been run through universities (usually as overhead), while others have been represented by direct-cost increases in equipment, software, and personnel costs for law schools.

Facility costs are generally a hidden cost of law school operations because they do not appear as direct expenditures. But in reality both the capital costs (construction) and operating costs (utilities, repairs, and maintenance) have increased the costs of law schools.

Not all increases in expenditures have been as productive in increasing quality. Public relations and reputation or ranking-related expenditures¹⁸ are other expenses that have increased a great deal over the last twenty years. This is particularly related to *U.S. News & World Report* rankings¹⁹—public relations campaigns, consultants, and the like can be expensive, even when they are not effective.²⁰

Overhead charges include the cost of university services, general charges by universities of various sorts (which may or may not reflect actual costs to the university), the cost of operating law school facilities, and law school-related debt service. But they may also include costs not fairly allocated to the law school (the “rip off” factor). Law schools have always had overhead charges, and those charges exist regardless of whether the law school is part of a university. Overhead or indirect costs have increased in dollar terms in part because of facility size increases. In addition, general university costs have increased, and these are commonly allocated as part of mandated cost sharing to the units of the university, including the law school.

There have been periodic claims that law school accreditation—particularly American Bar Association (ABA) accreditation—has also ac-

17. The classic article on law school expenditures that debunked the feeling that law libraries were driving law schools to the poor house was Jane L. Hammond, *Library Costs as a Percentage of Law School Budgets*, 80 *LAW LIBR. J.* 439 (1988).

18. Jay Conison, *Financial Management of the Law School: Costs, Resources, and Competition*, 34 *U. TOL. L. REV.* 37, 44 (2002).

19. See *Best Law Schools: Ranked in 2012*, *U.S. NEWS & WORLD REPORT*, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 26, 2012) [hereinafter *U.S. NEWS & WORLD REPORT*].

20. Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 *IOWA L. REV.* 1579, 1611 (2011).

counted for a significant portion of the increase in the cost of legal education.²¹ The claim is that the costs necessitated by accreditation requirements, not the actual cost of the accreditation process (which is relatively small), increase expenses by requiring large and expensive libraries, full-time faculties, state-of-the-art facilities, and the like. To a major degree, however, the question is not as simple as whether the cost of legal education is higher than it would be without the requirements imposed by ABA accreditation. For example, the ABA has not played any role in the issue of faculty salaries for more than fifteen years.²² Yet it appears that faculty salaries have increased substantially during that time.²³

Effective accreditation of law schools should lead to better legal services to the public through better-educated lawyers. If the increase in costs of meeting accreditation standards leads to better attorneys, the public has benefitted from the accreditation despite the resulting higher costs. On the other hand, if a reduction in cost would harm the public by resulting in inadequately trained attorneys, an accrediting agency should be reluctant to embrace it.²⁴

Suppose, for example, that it would be possible to design a system that could produce lawyers in half the time. The first six intense months would be of Socratic and introductory “thinking like a lawyer” education. Then a year of skills and some substantive courses would complete the education.²⁵ In my experience, for some students this might work, but for many current

21. The costs of accreditation have long been discussed and have become a current favorite topic among some bloggers. Stuart L. Pardau, *The ABA Accreditation Process, the Cost of Legal Education and its Impact on the Delivery of Legal Services*, ON THE 50 YARD LINE (Dec. 18, 2011, 9:36 AM), <http://www.onthe50yardline.com/2011/12/aba-accreditation-process-cost-of-legal.html>. But, it has not been limited to bloggers. See Ken Myers, *Citing Costs, 14 Deans Protest ABA's Accreditation Procedure*, NAT'L L.J., May 30, 1994, at A16.

22. David Barnhizer suggests that the “system” was set in place during the period where the ABA was involved in salary matters. E-mail from David Barnhizer, Professor Emeritus, Cleveland-Marshall Coll. of Law, to author (Jan. 15, 2012) (on file with author). It created a way of working and expectations that became the “ghost in the machine” so that its direct involvement no longer was required because it created a pattern of operation and expectation that carried forward in part because it served the interests of law faculty. *Id.* This is an interesting theory, but my sense is that pressure for salary increases in the last twenty years may be more related to faculty governance than the shadow of past ABA accreditation. That is, with funds available, most deans have found it politic to increase faculty salaries as a part of maintaining a happy (or at least non-mutinuous) faculty.

23. As part of the antitrust consent decree with the Justice Department, the ABA agreed to stop collecting law faculty salary data. *United States v. Am. Bar Ass'n; Proposed Final Judgment and Competitive Impact Statement*, 60 Fed. Reg. 39421 (Aug. 2, 1995). There currently are not reliable national data available from all law schools. In my experience, however, more limited, private data suggest that law faculty salaries have gone up substantially in the last fifteen years.

24. This assumes that the benefits to the public are greater than the costs, of course.

25. E-mail from David Barnhizer, Professor Emeritus, Cleveland-Marshall Coll. of Law, to author (Jan. 15, 2012) (on file with author).

law students this reduction in the time studying law would likely reduce their readiness for the profession. The fact that such a system would cost less would not in and of itself justify an accrediting agency to do it if it would harm the public. (This approach is different from a few two-year J.D. programs that currently exist, at, for example, California Western²⁶ and Dayton.²⁷ In those programs summers are essentially used to help cover the approximately ninety semester credit hours needed to graduate.)

The ABA has been responsible for requiring improvements in law schools that have led to better legal education. Accreditation by its very nature must prevent institutions from cutting corners where educational quality is harmed, and to push schools to improve. For about twenty years, beginning in the mid-1970s, the ABA applied considerable pressure on law schools to improve instructional programs by reducing student-faculty ratios,²⁸ enhancing facilities and libraries, and increasing student support services.

The Government Accountability Office (GAO) report largely discredited the claim that accreditation has played a substantial role in modern times.²⁹ Rather, pressure related to *U.S. News & World Report*³⁰ rankings and university expectations were identified as more important factors in increased costs.³¹

26. See *Part-Time and Two-Year Options*, CALIFORNIA WESTERN SCHOOL OF LAW, http://cwsl.edu/main/default.asp?nav=academic_programs.asp&body=academic_programs/part_time.asp (last visited May 26, 2012).

27. See *Earn Your J.D. in 2 Years*, UNIVERSITY OF DAYTON SCHOOL OF LAW, http://www.udayton.edu/law/academics/jd_program/two_year_option.php (last visited May 26, 2012).

28. This is based on the assumption that the ratio leads to smaller classes, a fuller curriculum, and generally better teaching and learning. Not everyone would agree with the assumption. For example, if the time freed up for law faculty is devoted more to research and writing rather than invested in teaching, the lower ratio may at best marginally improve education. Indeed, if the lower ratio leads to law faculty failing to develop themselves as teachers and resenting added teaching expectations as intrusions on their research and writing activities, the lower ratio could conceivably lead to a decline in classroom teaching.

29. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009).

30. U.S. NEWS & WORLD REPORT, *supra* note 19.

31. David Barnhizer suggests that it is possible that the ABA system was already set and operated in the interests of the law professoriate and deanship, and it has continued to do so without direct intervention of the ABA. E-mail from David Barnhizer, Professor Emeritus, Cleveland-Marshall Coll. of Law, to author (Jan. 15, 2012) (on file with author). His idea is similar to religious deism where God was the clockwork master who created the "machine" and then left it to its own devices. The "creator's" (ABA) power and influence don't simply disappear. *Id.*

II. BENEFITS TO STUDENTS?

Much of the increase in expenditures has likely benefitted the law students who pay most of the freight. It has led to including smaller classes, seminars, writing programs, clinical instruction, career services offices, and improved facilities. Some of the increase in law school resources that occurred has been used to support functions of less clear benefit to students, most notably university overhead charges. *U.S. News & World Report*³²-related expenditures arguably inure to the benefit of students if they work by increasing the perception of the value of their education among potential employers.³³

Another example of an area where it is not clear whether the increase in the cost of law school has helped students is the increase in faculty salaries. These increases help students if the better compensation attracts and retains “better” faculty to legal education. Here there is some analytical difficulty because of the need to define what is meant by “better” in the sense of teaching capability, reputation of faculty quality that works to the perception of the quality of the law school, and the productivity of law faculty as scholars. These are not identical and in some situations may even represent conflicting aims since it is not inevitable or automatic that the best teacher is the most productive or insightful scholar or that there is a strong connection between a law teacher’s credentials as seen by other faculty and the scholarly or teaching ability of that individual.

The increase in recruitment scholarships has, of course, helped the students who received the scholarships.³⁴ Whether the other students who generally pay for most of these scholarships (through tuition and fees) have benefitted economically is more doubtful, although they have presumably

32. U.S. NEWS & WORLD REPORT, *supra* note 19.

33. Some expenditures are essential because of regulatory obligations, the Americans with Disabilities Act (ADA) being one example. Beyond complying with the law, these increases in costs have benefitted some students directly by opening greater access to law school and the legal profession.

34. A change that has been significant (if hidden) but has not increased the costs of legal education is the change law schools have made in the nature of the financial aid that is awarded. At many law schools, the vast majority of aid awarded is “merit” based rather than “need-based.” Interview with Peter Winograd, Professor Emeritus, Univ. of N.M. Sch. of Law, in San Diego, Cal. (Nov. 11, 2011). The major exception to this trend is the small handful of very elite schools that offer scholarships based solely on need, perhaps in part because the applicant pool is so rich that merit-based aid is essentially unnecessary. The need-based scholarships become a way to diversify the student body. See Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL’Y 67, 80-90, 127 (2010). The change from need-based scholarships to merit-based scholarships can be a kind of reverse “Robin Hood” because needier students are often less likely than wealthy student to qualify for merit grants.

benefitted by association with the students attracted to the law school with the scholarships and by the presumed enhancement of the particular law school's reputation due to its ability to attract highly qualified students.

The increase in the part of tuition funds that go to support faculty research represents another area in which the direct value to students is unclear. In the elite or near-elite law schools, the reputation of the school may be influenced considerably by faculty research. In many other schools, however, the degree to which students benefit from the faculty research expenditures is less clear. One way of looking at it is that there is an indirect reputational benefit to students due to the fact that their law school is part of a university. Tuition revenue allocated to faculty research is the price of being a part of a university. Therefore, to the extent that students benefit from the university name, they benefit from the research expenditures that the university would expect from faculty. In addition, some faculty at other schools produce more "local" research product in areas that are recognized by potential employers of their students. At some law schools, however, the direct benefits from the increase in expenditures on research are probably hard to identify.

III. WHERE HAS THE MONEY COME FROM?

Although many factors contributed to the financial status of law schools over the last several decades, no factor has been as important as the rate of increase in law school tuition. Most law school funding comes from a handful of sources—tuition and fees, state subvention (primarily in public schools), private fundraising (including interest on endowments), and limited amounts of net income from ancillary programs (net "profits" from Continuing Legal Education (CLE), auxiliary enterprises, and some federal grants). In some instances universities directly subsidize the law school from general university endowment or other sources of funds, but this is no longer common—at least on a "net" basis where the university provides more funding than it charges in overhead. Of these potential sources, tuition and fees generally account for ninety to ninety-five percent of private law school revenues.³⁵

Private fundraising has been an area of financial success for many law schools in the last twenty years. It has increased in nominal dollars in most every law school. Nonetheless, it still provides a relatively small portion of the overall funding, except at some elite law schools and a few others with very large endowments.

35. See Matasar, *supra* note 20, at 1604.

State support for public higher education, including law schools, increased unevenly during the early part of the last four decades.³⁶ That has been reversed in the last decade or two.³⁷ State subvention is declining almost universally and, as of a result of the economic problems of states in recent years, is practically disappearing in some places.³⁸ This loss of state revenue has often been replaced by increasing tuition, sometimes to market rates (the rates charged by private universities). Rather than reduce budgets because of declining state support, they have often sought to increase tuition to cover the loss. While private law schools in some states have received a form of subvention or subsidy to pay a small portion of the cost of state residents attending those schools, budget pressures have put such programs at risk of being reduced or eliminated.

Many law schools now have some tuition from non-J.D. programs, most commonly LL.M. programs. LL.M.s for foreign lawyers have been particularly popular, but “domestic” programs are now common.³⁹ Online LL.M. programs are offered by some law schools, while several schools now have graduate programs for non-lawyers.⁴⁰ For most schools such programs now produce some net revenues (tuition less expenses attributed to the program), but the J.D. programs have been, and continue to be, where the big money is.

Law schools may also increase revenue by increasing the size of the J.D. class, either by establishing a new program (e.g., a part-time division), by reducing attrition, or by simply expanding the size of the entering class. More recently, some law schools have increased enrollment by accepting substantial numbers of transfers into the second year class. This allows those schools to increase upper division enrollment without having to report the LSAT Scores and undergraduate GPAs (LSAT/UGPAs) of these trans-

36. See Caralee Adams, *State Funding for Higher Ed. Drops by 7.6 Percent in a Year*, EDUC. WEEK (Jan. 24, 2012, 7:16 AM), http://blogs.edweek.org/edweek/college_bound/2012/01_in_a_commentary_by.html; Kevin Kiley, *NSF Report Notes Decline in State Support for Research Universities*, INSIDE HIGHER EDUC. (Jan. 18, 2012 3:00 AM), <http://www.insidehighered.com/news/2012/01/18/nsf-report-notes-decline-state-support-research-universities> (reporting state support for research universities declined by twenty percent between 2002 and 2010); Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735 (2011).

37. *Id.*

38. See *supra* note 36 and accompanying text. Public law schools, faced with the decline in state support have often responded by increasing tuition to make up for the lost state subvention. A form of “privatization” has occurred in legal education where public law schools are charging “market rate” for tuition—that is, rates similar to, or greater than, private law schools. The University of Michigan, University of Virginia, and University of California law schools are notable examples.

39. See *infra* notes 132-35 and accompanying text.

40. See *infra* notes 134-35 and accompanying text.

fers in the data collected by *U.S. News & World Report*.⁴¹ A few schools have accepted upwards of 100 transfers in a single year.⁴² In 2008–2009, Georgetown took 81 transfers and Columbia 79.⁴³ In 2009–2010, George Washington took 97; Columbia 78; Florida State 74; and Georgetown 61.⁴⁴

Although enrollment in American law schools has increased significantly, much of that increase has reflected the opening of new law schools, not substantial permanent expansion of existing law schools. In 1950, there were 117 approved law schools; in 1970, 148 schools.⁴⁵ By 1990, there were 175, and now there are 200.⁴⁶

Small increases in enrollment in a law school are often effective in producing net revenue. The marginal cost in adding five or ten students to an entering class can be close to zero. In a law school where tuition is \$35,000 per year, the ten students can increase net revenues by \$350,000. If a law school adds ten students per year during a single three-year cycle, then at the end of that period it may have increased annual revenues by approximately one million dollars per year.

The expansion in enrollment in legal education has been because of the increase in women and minority students. Between 1971 and 2009, the J.D. enrollment in accredited law schools increased from 91,225 to 145,239, or by 54,013 students. During the same time, the number of men enrolled actually declined by approximately 6,000 students.⁴⁷ The number of women increased by approximately 60,000 students.⁴⁸ The number of minority students increased by approximately 27,000 students during this time.⁴⁹ The

41. See generally U.S. NEWS & WORLD REPORT, *supra* note 19; see also Jeffrey L. Rensberger, *Tragedy of the Student Commons: Law Student Transfers and Legal Education*, 60 J. LEGAL EDUC. 616, 616 (2011).

42. See *Official Guide to ABA-Approved Law Schools*, *supra* note 7. This guide now publishes the number of transfer students that schools accept. *Id.*

43. *Id.*

44. *Id.* See generally Rensberger, *supra* note 41.

45. E-mail from Cathy A. Schrage, Executive Assistant, Accreditation, Section of Legal Educ. & Admissions to the Bar (Feb. 9, 2011) (on file with author).

46. *Id.*

47. The number of men in law school declined from 82,658 to 76,737 between 1971 and 2011. AM. BAR ASS'N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER (2011), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf.

48. According to the ABA data, in 1969–1970, women represented six percent of the law students in ABA-approved law schools. AM. BAR ASS'N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER, *supra* note 47. In 2009–2010, women were forty-seven percent of the law students in ABA law schools. *Id.*

49. The total minority J.D. enrollment in 1971–1972 was 5,568, and in 2009–2010 it was 32,505. FIRST YEAR J.D. AND TOTAL J.D. MINORITY ENROLLMENT FOR 1971–2011, AM. BAR ASS'N, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_minority.authcheckdam.pdf. The LSAC reports that from 1989–1990 to 2010–2011, the number of minority

enrollment increases in legal education for forty years is thus the story of finding new pools of applicants. That pool has, in effect, doubled over the four decades,⁵⁰ but is, of course, not likely to continue into the future.

J.D. tuition is the real driver of the improvements in legal education. Although it has not done so every year, J.D. tuition over the last forty years or so generally has increased more rapidly than the Consumer Price Index (CPI), often twice the rate.⁵¹ These increases have been found in almost all law schools—including public law schools where some of the substantial increases in recent years were replacing declining state subsidies.

Except during times of substantial inflation, tuition increases averaging six percent have been common. The compounding effect of this is substantial over even a relatively short period of time. Take as an example a law school with 600 students with tuition in 1987 of \$10,000 and assume it increased tuition six percent each year and that it did not change enrollments or increase revenue in any other way. By the fall of 2012, its tuition would be \$43,000. Its tuition revenue will have gone from \$6 million in 1987 to \$25.8 million.⁵² This must give legal educators pause—the very real improvements in our professional lives and in the quality of what law schools do has come at a great price to our students.

This “magic” of tuition increases being able to improve legal education may not be sustainable. Rapidly increasing tuition at some point simply exceeds what potential applicants are willing to pay. In 2010, law school tuition has increased at (in modern terms) a near record low, with a median increase of three percent.⁵³ Some law schools did not increase tuition at all. The median increase in 2011 for private schools was five percent, and many deans estimate that the 2012 increase will be around the rate of inflation. Because the discount rate (scholarships) is increasing, the real rate of increase in net tuition is even lower.

The reason for a reversal of the long-term trend, if it is happening, is not clear. As we will discuss below, in the past there has not been very much price sensitivity from students. Nevertheless, there was a sense among law schools—particularly deans and admissions professionals—that this has

students in ABA law schools more than doubled, from 15,720 to 35,045 (total enrollment in J.D. programs). *Total Minority Enrollment: 1989-2010*, LSAC, available at <http://www.lsac.org/jd/pdfs/TotalMinorityEnrollment.pdf>.

50. The effective pool of potential applicants for law school is essentially determined by the number of graduates from baccalaureate graduates. Women represent more than half of the baccalaureate graduates. Women are, therefore, more than half of the pool for potential law school applicants.

51. See discussion *infra* Part VII.

52. The actual increases in tuition are considered in detail *infra* Part VII.

53. See discussion *infra* Part VIII; see also *Law School Tuition*, AM. BAR ASS'N (2011), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf.

changed. The job market and the public disdain for lawyers and law schools created an atmosphere in which prospective law students may be sensitive to price or decide not to attend law school. An added factor is that once a number of schools shied away from the usual increases, their competitors were afraid of being seen as pricy or even gougers. If this represents the end of the era of great improvements, it will have a profound impact on law schools.

IV. STUDENT LOANS

Federal student loan programs have enabled this increase in law school funding. In most law schools, federal student loans to the law students near or exceed the total revenue from tuition.⁵⁴ It is hard to imagine that law schools, or much of the rest of American higher education, could have sustained the improvements of the last twenty-five years without the easy availability of credit to students.⁵⁵ Over the years, changes in loan programs have made borrowing substantial amounts for law school easier and more available.⁵⁶

Commercial loans once played a significant role in this lending to law students. Some, but not all, were federally guaranteed student loans.⁵⁷ Commercial entities began to worry about default rates, and for a while it appeared that law schools, not just law students, would be ranked according to the ability of their graduates to repay the loans (employment prospects following graduation).⁵⁸ Under such a system, students at different schools would be expected to pay different rates of interest. A student at an elite law school might have a five percent loan, while one at a school whose graduates are not attractive to the market might have eight percent loans. The

54. For 2009-2010, total tuition for all ABA approved law schools averaged \$21.2 million. During the same year, the average student loan per law school was \$22.5 million.

55. See generally Marilyn Yarbrough, *Financing Legal Education*, 51 J. LEGAL EDUC., 457, 458-60 (2001) (recounting the early history of student loans).

56. PLUS loans for graduate and professional students, commonly known as GradPLUS, first appeared at Federal Student Aid Programs, 71 Fed. Reg. 45709 (Aug. 9, 2006) (to be codified at 34 C.F.R. pt. 685).

57. For a review of the history of law student debt issues, see James P. White, *The Impact of Law Student Debt Upon the Legal Profession*, 39 J. LEGAL EDUC., 725, 729 (1989).

58. The fear of default, particularly in the early years of repayment, would naturally be higher where new graduate unemployment is high or where starting salaries are low. So, a law graduate of Yale would be expected to have a lower default risk than a graduate of a law school where the employment prospects of the recent graduate were not bright. Because the risk of default is greater, the interest rate charged in a commercial setting would be higher, and there would be greater limits on the loans in terms of credit-worthiness, cosigners, and the like. This possibility presented several problems to law schools. The risk of a rating system based on loans and freezing needy students out of the educational loan programs was a significant threat. See generally John R. Kramer, *Will Legal Education Remain Affordable, By Whom, and How?*, 1987 Duke L.J. 240 (1987).

emergence of the Access Group and its competition to commercial lenders, as well as some changes in federal programs, averted that problem, although more students were required to prove credit worthiness or have cosigners.⁵⁹

Law graduate federal loan defaults generally stayed very low, in part because of the narrow federal definition of default and the changes in federal bankruptcy law that imposed a very narrow definition of default entitlement for federal loans.⁶⁰ Commercial loans to law students resulted in somewhat higher default rates, but they were still low compared with many other higher education programs.

Over time the federal loan programs became more advantageous to law students. The availability of the GradPLUS loans is a notable example.⁶¹ The total borrowed by law students and the average loan amount allowed per law school borrower for educational loans expanded.⁶²

The Income Based Repayment (IBR) program continues this trend.⁶³ These programs cap the amount a borrower will have to repay, based on adjusted gross income and the poverty rate based on family size.⁶⁴ For recent federal loans, the maximum repayment amount in any given year was 15% less 150% of the poverty rate (given family size). For example, assume a loan of \$100,000, in a family of two and a salary of \$50,000, where only one spouse has loans with an adjusted gross taxable income of \$45,000 (this assumes \$5000 of various adjustments to income). Then 150% of the poverty rate, or \$22,000 approximately, is deducted from the adjusted gross income.⁶⁵ The maximum IBR annual repayment rate under these assumptions was: $(15\%)(\$45,000 - \$22,000) = \$3,450$. Of course, the rate in this example would be the same whether the federal loan was \$100,000,

59. See Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733 (2001).

60. Kyle L. Grant, *Student Loans in Bankruptcy and the "Undue Hardship" Exception: Who Should Foot the Bill?*, 2011 BYU L. REV. 819, 846 (2011).

61. A good source of information about the broad outline of Grad PLUS loans is Federal Student Aid, *Questions and Answers about Direct PLUS Loans for Graduate and Professional Students*, DEPT. OF EDUC., available at <http://studentaid.ed.gov/students/attachments/funding/PlusLoansQA.pdf>.

62. *Id.*

63. Income-Based Repayment Plan, 34 C.F.R. § 685.221 (2008), as amended at 74 Fed. Reg. 56006 (Oct. 29, 2009). For a review of the complexities of the IBR system, see Philip G. Schrag & Charles W. Pruett, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583 (2011).

64. If the borrower is single, it is simple—it is the AGI of the one person. If married, and if only one spouse has a student loan in IBR, and the spouses file taxes jointly, then their incomes are both considered when calculating the payment. If both spouses' loans are in IBR, or if the spouses file separately, then they are treated separately.

65. The Federal Poverty Rate Tables for 2012, based on family size, may be found online. See *2012 Annual Federal Poverty Guidelines*, FAMILIESUSA, <http://www.familiesusa.org/resources/tools-for-advocates/guides/federal-poverty-guidelines.html> (last visited May 26, 2012).

\$150,000, or \$200,000. In general, the interest accrued in excess of the IBR payment is added to the outstanding balance.⁶⁶ At the end of twenty-five years, any remaining amount is forgiven. For those in certain specified public service positions,⁶⁷ the amount remaining after ten years is forgiven.⁶⁸

In 2011, President Obama accelerated changes in the federal rules to make IBR even more attractive.⁶⁹ The repayment plan for newer borrowers will be as follows: 10% of adjusted gross income less 150% of the poverty rate, with any unpaid balance forgiven after twenty years.⁷⁰ Using the same example as above, the maximum repayment for someone with a \$100,000 loan (or more) with an annual adjusted gross income of \$45,000 (based on a \$50,000 salary less deductions) would be approximately \$2,300, or approximately \$200 per month. That is (10%) (\$45,000-\$22,000)=\$2,300.

One way of thinking of the IBR program is that it removes some of the risk of not doing well following graduation from law school. A student with a poorly paying job following graduation should not go bankrupt because of educational loans or because she or he decides to go into low-paying public service. It also reduces the incentive for students to borrow as little as possible while in law school.

V. DOES GOING TO LAW SCHOOL PAY?

Even with the availability of cash to pay for legal education, why are students willing to pay so much tuition and take on such debt to receive it?⁷¹

66. For the first three years of IBR repayment, if the borrower's reduced IBR payments do not cover the accrued interest, the government will pay the interest on the borrower's subsidized loans only. After three years, and for unsubsidized loans, the interest not covered will be added to the outstanding balance.

67. Actually, the claim that debt levels substantially influence graduates' decisions to go into public service appears, from the *After the J.D.* study, to be overblown. See Gita Z. Wilder, *Law School Debt and Urban Law Schools*, 36 SW. U. L. REV. 509, 509 (2007).

68. Public Service Loan Forgiveness Program, 34 C.F.R. § 685.219 (2008), as amended at 74 FR 56006 (Oct. 29, 2009).

69. President Obama's Pay as You Earn regulations are still only in the proposal stage, because they need to complete negotiated rulemaking first. *Negotiated Rulemaking Committee, Negotiator Nominations and Schedule of Committee Meetings—Student Loan Programs*, OFFICE OF FED. REG., <https://www.federalregister.gov/articles/2011/10/28/2011-27982/negotiated-rulemaking-committee-negotiator-nominations-and-schedule-of-committee-meetings-student> (last visited May 26, 2012); see also *Negotiated Rulemaking Committee, Negotiator Nominations and Schedule of Committee Meetings—Student Loan Programs*, 76 Fed. Reg. 66880 (Oct. 28, 2011).

70. See *id.*

71. For a discussion of the reasons for the increase in lawyers, see Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers?: Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431 (1989). Other accounts include B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. &

Is law school worth it? The answer to that question is not purely financial, of course—there are social, status, and other psychological benefits to having a law degree and being a lawyer. But focusing on the financial benefits only, why do students invest in law school?

The media's discussion of the value of law school is seriously muddled. The first problem is that anecdotes about law graduates with \$150,000 of debt who drive taxis may make for interesting copy, but these outliers hardly answer the good investment question any more than does the hypothetical graduate who made \$160,000 plus a \$200,000 bonus the first year. Another problem is that focusing on the first year or two out of law school is not a very good way of calculating the value of law school. David Van Zandt estimated that a new lawyer had to make \$65,000 to justify the cost of law school, for example.⁷² Whatever the basis for the \$65,000 figure, it makes little sense that a starting salary defines the break-even amount. That, of course, is particularly true with the IBR program. The proper comparison is between the present value of the total future income with the law degree and without it. We will come back to that "benefits" calculation.

At the same time, simply calculating the cost of "list price" law school tuition is not a complete way of calculating the cost of a legal education. A better statement of the real cost is the opportunity cost of going to law school. The opportunity cost would be the present value of the net tuition paid, plus the present value of lost income for the three years attending law school (less any money earned while a law student). Living costs for the time in school are not included because those costs exist whether or not someone is in law school and, therefore, do not represent a cost of attending law school.

For any person considering going to law school, it may be possible to do a reasonable calculation of the likely costs. It would be very difficult to make this calculation of benefits with precision for a specific person, however, because the kinds of jobs someone would have without the law degree or with it are impossible to know. But on average we can make some reasonable estimates based on average annual income of those with undergraduate degrees only versus lawyers. These data would wring out the problems

ECON. 53, 70-76 (1977); Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215, 218-25, 234-38 (1992).

72. David Lat, *Changes in Legal Education: Some Thoughts from Dean David Van Zandt*, ABOVE THE LAW (Feb. 3, 2010, 8:23 PM), <http://abovethelaw.com/2010/02/changes-in-legal-education-some-thoughts-from-dean-david-van-zandt>. In reaching this conclusion, then-Dean Van Zandt apparently "assum[es] that students would make \$60,000 per year without going to law school, that law school tuition is \$30,000 per year, that the student works for thirty years as a lawyer, and that the discount rate is 5%." ABA COMM'N ON THE IMPACT OF THE ECON. CRISIS ON THE PROFESSION AND LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL 22 n.12 (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/lstd/legaled/value.authcheckdam.pdf>.

of looking only at starting salaries and would be based on the range of professionals instead of a few anecdotes.

According to the Bureau of Labor Statistics (BLS), the median annual salary of someone with a baccalaureate degree is approximately \$54,000,⁷³ for someone with a generic professional degree the median is calculated at approximately \$84,000,⁷⁴ and for lawyers a median of approximately \$113,000 (and a mean of \$129,000).⁷⁵ Using the median salaries over forty-year careers,⁷⁶ the value of the baccalaureate degree holder's income is \$2.16 million, \$3.36 million for the generic professional degree holder, and \$4.52 million for the lawyer. (For simplicity I assume here that the increases in salaries for baccalaureate degree holders, professional degree holders and lawyers, over time, just offset the discounting to present value.) This career-long earning difference between the baccalaureate degree holder and someone with a professional degree is \$1.20 million. Between the baccalaureate degree holder and the lawyer the career-long difference is \$2.36 million. (All figures are before income, FICA, and other taxes.)

On the cost side, I estimated the net tuition, which is gross tuition less discounts or scholarships, to be \$31,000 for each of the three years, or a total of \$93,000.⁷⁷ The cost of lost wages for the three years in law school is generously estimated at \$54,000 for each of three years, or \$162,000.⁷⁸ The total present value cost would be \$255,000.

The lawyer (based on median incomes), over a career, will net an increase over the baccalaureate degree holder of \$2.105 million (\$4.52 million for the lawyer compared with \$2.16 million for the baccalaureate degree holder, less \$255,000 for the cost of law school).⁷⁹ Assuming a much more expensive education—no scholarship, tuition of \$50,000 per year, no earnings while in law school, and books and other fees of \$10,000 per year—the cost of going to law school would be \$342,000 for this student. This would still leave, at the median, the lawyer more than \$2 million ahead of the baccalaureate degree holder.

73. *2010 Median Weekly Earnings for Persons Age 25 and Over*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/emp/ep_chart_001.txt (last visited May 26, 2012).

74. *Id.*

75. *Occupational Employment and Wages, May 2010*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/current/oes231011.htm#top> (last visited May 26, 2012).

76. This assumes that the lawyer will retire slightly later, so that both work for forty years.

77. This is based on \$40,000 tuition with a twenty percent discount rate.

78. The estimate of lost salary income is based on the average salary of someone with a baccalaureate degree, which probably is overstated on average for someone just entering the workforce. See *2010 Median Weekly Earnings*, *supra* note 73.

79. See *Occupational Employment and Wages*, *supra* note 75; *2010 Median Weekly Earnings*, *supra* note 73.

These data have significant limitations in terms of precision, both overstating and understating the benefits of the law degree. The under and overstatement of the benefits of being a lawyer may tend to offset each other, but these calculations are not precise by any means. For example, they may tend to overstate the value of the legal education because the BLS data report the income of lawyers (not everyone with law degrees).⁸⁰ It is likely that on average those with baccalaureate degrees who go to law school are more accomplished than those who do not, and would have had higher incomes whether or not they went to law school.⁸¹ Furthermore, the differential between those with baccalaureate degrees and lawyers (based in the calculation on median incomes) does not apply evenly over the forty years of their careers—it probably occurs somewhat unevenly, but perhaps more toward the end of careers; and in that case, the differential in lifetime incomes should be time-value discounted. None of the income figures has income taxes, FICA, or the like removed. These, over time, would be at a higher rate for the higher incomes, thereby reducing the after-tax difference between the baccalaureate and lawyer. In addition, the rate of tuition discounting (through scholarships) was assumed at 20%—which is conservative given the national average for law schools, but, of course, some students will receive no scholarships, thereby increasing the cost of law school. And these data are based on medians. Even at the tenth percentile of lawyers, however, the annual income is slightly higher than the median for baccalaureate degree holders (\$54,130 for the tenth percentile of lawyers⁸² v. \$53,976 for the median for baccalaureate degrees).⁸³ The figures do not take into account those students who drop out of law school having paid for the first year. And, there is the rare person who would have created the new Widget App and made a zillion dollars had she just stopped with a baccalaureate degree instead of going to law school. It takes real outliers, however, to have a convincing story that law school cost them in net financial terms.

The calculations, based on medians, that lawyers will net \$2 million before-taxes dollars more over a career may also somewhat understate the financial advantage of being a lawyer. For example, they do not take into account the possibility of unemployment. That rate is higher among those with undergraduate degrees than professional degrees (it is twice as high for the baccalaureate degree holder),⁸⁴ probably resulting in an understatement of net value of the law degree. The calculations assume that the three years

80. See *Occupational Employment and Wages*, *supra* note 75.

81. Herwig Schlunk, *Mamas 2011: Is A Law Degree A Good Investment Today?* (2011), available at <http://ssrn.com/abstract=1957139>. This paper calculates the benefits of a law degree at a considerably higher level, in part due to much higher discount rates. See *id.*

82. *Occupational Employment and Wages*, *supra* note 75.

83. *2010 Median Weekly Earnings*, *supra* note 73.

84. *Id.*

of salary (instead of law school) are at the median of baccalaureate degree holders, which probably overstates the salary for those three years and ignores the possibility of un- or under-employment during that time. The Income Based Repayment program probably has the effect of reducing the risk of going to law school by eliminating some of the debt of law school for those with relatively low paying jobs. The calculations also assume that the student makes no money working during law school.

In addition, errors in the calculation could result from the informal discount rate (equal to the rate of salary increases), problems gathering accurate salary information, and the assumption of forty-year working lives. Nonetheless, as a general matter the value of going to law school seems clear for most of the people who choose to attend, even though they do not win the “starting salary lottery” of \$160,000. Indeed, based on the median salaries, it is not even close. For example, assuming a total tuition cost of \$150,000 and that the lawyer was paid only at the 25th percentile (\$75,200) rather than the median (for a career income of \$3.008 million), going to law school (compared with the median for baccalaureate degree holders) would have an economic advantage of \$591,000 (\$3.008 million less \$2.16 baccalaureate income, less \$150,000 tuition and \$162,000 lost wages during law school).⁸⁵

Based on these data, for the vast majority of lawyers, the economic decision to go to law school has been a sensible one when looked at over the long term. In fact, the long-term substantial economic benefits of becoming a lawyer may be one reason to think that any current downturn in the rate of increase of tuition could be a temporary phenomenon. The argument may be that lawyers are going to suffer a substantial decline in income over the coming years that would change this calculation. But the question is and will remain, “As compared with what?” That is, for a non-scientist undergraduate, what are the career options that are available and more economically attractive than law school?

VI. PRICE DIFFERENTIATION

An interesting feature of law school tuition rates is that tuition rates generally seem unrelated to the value of the degree the student will receive.⁸⁶ The value of a law degree, based on future earning capacity, can vary substantially from law school to law school. Yet, tuition charged in

85. Assuming that salary increases for lawyers and non-lawyers both approximate the discount rate.

86. For a study from the 1980s finding correlations between starting graduate salaries, law school rating, tuition rates, and faculty salaries, see generally Ronald G. Ehrenberg, *An Economic Analysis of the Market for Law School Students*, 39 J. LEGAL EDUC. 627 (1989).

recent years often does not reflect this economic value of the degree. Two law schools in Manhattan a few blocks away from one another are examples. Both charge about the same in tuition and fees (School A charges approximately \$48,000⁸⁷ while School B charges \$50,000⁸⁸). Yet their students have dramatically different financial prospects, based on starting salaries of their graduates. School A reports median starting salaries (private firm) at \$60,000⁸⁹ and School B at \$160,000.⁹⁰ This phenomenon may not be surprising in light of the fact that over a career being a lawyer (compared to having just a baccalaureate degree) creates considerable economic advantage—from both law schools.

In addition, part of this similarity of tuition is illusory. The same student applying to both schools might receive a substantial merit scholarship from School A, but little or nothing from School B. Thus, a prospective law student who applies to both School A and School B may receive no scholarship offer from School B, but a substantial scholarship offer (say, one half tuition) from School A. For this student, the effective tuition rate for School B is twice what it would be at School A.

Beyond the tuition discount, the failure of tuition rates to reflect future income potential also reflects the fact that for the most part, law schools are selecting their “customers” as much as the applicants are selecting the law school. That distorts ordinary ideas of markets. There is not really a single market for law students. Each law school seeks to admit the best LSAT/UGPA students it can.⁹¹ And, many, probably most, students seek the school with the greatest prestige (reputation) possible. Once the elite schools are filled, the admissions market open to the remaining students is such that they will pay whatever is asked by the next best law schools. So, the law schools in that lower tier are not under pressure to reduce prices because they are the only market available to the applicants who cannot get into the higher tier, and so on.

87. *Tuition and Financial Aid*, N.Y. LAW SCH., http://www.nyls.edu/prospective_students/tuition_and_financial_aid/ (last visited May 26, 2012).

88. *Student Expense Budget*, N.Y. UNIV. SCH. OF LAW, <http://www.law.nyu.edu/depts/financialaid/budget/entering.html> (last visited May 26, 2012).

89. N.Y. LAW SCH., NEW YORK LAW SCHOOL 2010 EMPLOYMENT STATISTICS (2011), available at http://www.nyls.edu/user_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf. The median starting salary has to be extrapolated from the website. The law schools are identified as A and B in the text (and can be discerned from the websites). Although the information is publicly available, because it is not clear that the data are comparable, I have not specifically identified the schools in the example.

90. *Employment Data for Recent Graduates*, N.Y. UNIV. SCH. OF LAW, <http://www.law.nyu.edu/careerservices/employmentstatistics/index.htm> (last visited May 26, 2012).

91. That may not be technically true for most law schools. They do pay close attention to LSAT and UGPA, but other factors are considered in admissions decisions too.

It is possible, perhaps likely, that this will not continue forever. It is possible that students admitted to schools with lower-income potential will balk at paying the same, or nearly the same, as students going to high-income potential law schools, thereby putting even greater economic pressure on the lower prestige schools.

VII. HOW THE MAGIC WORKS

Now we are going to see how the apparent magic happens that has allowed so much progress in legal education. The real driver of the expansion and improvements in law schools in the last forty years or so has been the rate of increase in tuition. During most of that time, law schools have increased tuition well above the cost of living as measured by the Consumer Price Index (CPI).⁹² This has produced, year after year, a very substantial pool of money available to start new programs, expand the faculty, increase faculty salaries, and otherwise improve programs.

During the last twenty-five years, 1985 to 2010, tuition and fees at private law schools have increased from \$7,385 to \$37,330.⁹³ (This is the median of private schools. The averages were \$7,385 and \$37,447 respectively.)⁹⁴ If law school tuition had increased at the rate of inflation, the CPI for the same period, from the 1985 base of \$7,385 the increase would have been to only \$14,966 rather than \$37,330.⁹⁵

From 1985 to 2010, the increase in law school tuition has been approximately \$30,000, or an increase of 405% for the period.⁹⁶ During the same period, the CPI increased \$7,480, which was a 102.6% increase.⁹⁷ Thus, over this period, law school tuition over this time increased at nearly four times the rate of inflation (increase in the CPI).

In dollar terms, this has been very substantial. Consider a medium-size hypothetical law school that maintained J.D. enrollment at 600 from 1985 to 2010 and charged the median rate for private law schools. During that time the hypothetical school had an increase in gross tuition revenue from \$4.4 million in 1985 to \$22.4 million in 2010. Had law school tuition increased only at the rate of inflation, tuition in 2010 would have produced total gross tuition of \$9 million.

92. The BLS maintains a handy year-to-year CPI calculator. *Consumer Price Index Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited May 26, 2012) [hereinafter *Inflation Calculator*].

93. *Law School Tuition 1985-2011*, AM. BAR ASS'N (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admission_s_to_the_bar/statistics/ls_tuition.authcheckdam.pdf.

94. *Id.*

95. See *Inflation Calculator*, *supra* note 92.

96. *Id.*

97. *Id.*

The increase in total tuition at this hypothetical school that stayed at median tuition (from 1985-2010) was therefore \$18 million (\$22.4 million in 2010 v. \$4.4 million in 1985). This is as compared with what total tuition increases would have produced at the CPI rate—\$4.6 million in increases (\$9 million in 2010 v. \$4.4 million in 1985). The law school's "excess" total tuition revenue was \$13.4 million. ("Excess" here means the amount of total tuition revenue produced by the actual median law school tuition less the revenue that the CPI increases would have produced had that been the rate at which tuition increased.)

This is the "magic"—the money that has "fallen through" to law schools and parent universities above the rate of inflation. These are the funds that have been used for all of the progress (and perhaps a few other things not of such value) over the last twenty-five to forty years.

Another way of increasing tuition revenue is to increase the number of students, at least modestly. For example, had the hypothetical law school added a modest increase, say ten students per year, to its entering class (for a total J.D. enrollment of 630), its gross tuition revenue would have been \$1.1 million more (30 extra students x \$37,300), for a total gross revenue of \$23.5 million (\$22.4 million + \$1.1 million).

The CPI should account for "normal" increases in compensation, supplies, and the like, although in some instances (library acquisitions and health insurance being examples) costs to maintain a constant state are considerably above the CPI. Therefore, in the hypothetical school most of the extra \$13.4 million (or \$14.5 million with the extra students) would have been available for extra salary increases, new programs, reduced teaching loads, and additional faculty and staff.

In comparing tuition rates, private and public law schools need to be considered separately because of the fact that in public law schools a significant part of the increase in tuition has substituted for reductions in state subvention. The effect on public law school resident tuition is, nonetheless, interesting. In 1985 the median *resident* tuition was \$1,792; in 2010, it was \$18,077.⁹⁸ This was a 909% increase (compared with the 102% increase in the CPI).⁹⁹ The median *nonresident* public law school tuition went up from \$4,786 in 1985 to \$37,596 in 2010, an increase of 686%.¹⁰⁰ In some places, including California, this change has been even more dramatic. At University of California-Berkeley, for example, law school has gone from what were

98. *Id.*

99. The average figures were somewhat higher for public school resident tuition—\$2,006 in 1985 and \$20,238 in 2010. *Id.*

100. *Id.*

traditionally a few small fees, to (in 2011-2012) \$50,164 tuition and fees for residents, and \$54,372 for non-residents.¹⁰¹

Law schools are not alone in having increased tuition significantly over the last few decades. The College Board tracks the increases in the costs of college.¹⁰² It indicates that the increase in undergraduate tuition and fees over the last decade at private colleges has been seventy percent.¹⁰³

In one sense these figures can be misleading. They are all stated as gross tuition and do not account for discounting—mostly merit or “recruiting” scholarships. It is difficult to compare the percentage increase in scholarships with the increase in tuition using publicly available information. The ABA data allow a comparison of the median tuition increase with the total (nationally) of scholarships, although these data somewhat overstate the increase in scholarships.¹⁰⁴ Using these data from the ABA for 1991-1992 to 2008-2009, the dollar amount awarded for grants and scholarships increased from \$139 million to \$816 million, or an increase of approximately 485%.¹⁰⁵ This compares with an increase in median private school tuition for the same years of approximately 160%.¹⁰⁶ These data are not entirely comparable.¹⁰⁷ To adjust for the number of schools reporting, a rough estimate of the scholarships in 2008-2009 would be \$717.2 million,¹⁰⁸ or an increase of approximately 416% from 1991 to 1992.

101. *Fees & Cost of Attendance*, UNIV. OF CAL. BERKELEY SCH. OF LAW, <http://www.law.berkeley.edu/6943.htm> (last visited May 26, 2012).

102. *Overview*, COLLEGEBOARD ADVOC. AND POL’Y CTR., http://trends.collegeboard.org/college_pricing (last visited May 26, 2012).

103. *Tuition and Fee and Room Board Charges Over Time—Unweighted*, COLLEGEBOARD ADVOC. AND POL’Y CTR., http://trends.collegeboard.org/college_pricing/report_findings/indicator/911#f9005 (last visited May 26, 2012).

104. There are two problems with these data. First, they tend to overstate the increase in the percentage of financial aid because they report total dollar amounts for all law schools and the addition of new schools exaggerates the average. The second problem is that the tuition data used include only private law schools, while the scholarship data use all law schools.

105. *Internal Grants and Scholarships: Total Amount Awarded 1991-2010*, AM. BAR ASS’N, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/internal_grants_scholarships_awarded.authcheckdam.pdf.

106. *Law School Tuition 1985-2011*, *supra* note 93. For 1991-1992 that median tuition was \$12,999. In 2008-2009 it was \$33,985, an increase of \$20,986, or an increase of 161% for the period. *Id.*

107. The data are not entirely comparable because rate of tuition increases is for private schools only, but the increase in the amount of scholarship awarded is for all schools. In addition, the number of schools reporting scholarships was 176 in 1991, but it was 200 in 2008. See *Internal Grants and Scholarships: Total Amount Awarded 1991-2010*, *supra* note 105.

108. This calculation was made by reducing the number of reporting law schools from 200 to 176 in 2008-2009. This process assumes that the schools not included in 1991

These data, whichever figures are used, suggest a significant increase in tuition discounting in law schools over the seventeen years examined. These figures may also have been eclipsed by more recent events. Following 2008–2009, the competition for students resulting from a decline in applications has, by all accounts, resulted in schools substantially increasing financial aid. Those data, however, are not yet available.

The sobering realization is that this really is not magic at all. Funding the sorcerer's success are the checkbooks and credit of people who come to us for their legal education. Our students have paid the price of the steep increases in tuition that have permitted it all to happen.

VIII. THE CURRENT ECONOMIC CIRCUMSTANCES OF LEGAL EDUCATION

Legal education is going through what is sometimes described as a “crisis” related to the number of applications, public confidence, and uncertain direction.¹⁰⁹ Applications are down, many law schools are not meeting enrollment projections, there are budget cuts and budget shortfalls in both public and private schools, the accreditation process is going through a messy and seemingly unproductive tug of war over many standards, legal education is roundly criticized in the public press and legal news, graduates are finding it hard to find good jobs, and lawsuits against law schools have become a kind of “blood sport.”

For those who have spent many years in the academy, this has a familiar ring—we have seen much of this play before. There have periodically in legal education been dire predictions that there is economic disaster ahead. The 1980s, for example, produced great handwringing that the good times could no longer roll, and that tuition could not keep on its substantial upward trends much longer. I have been a member of panels discussing the future of legal education, usually as the optimist that any difficult times were temporary. A couple of years ago I was able to claim that my friends had collectively “predicted five of the last zero disasters in American legal education.”¹¹⁰ I cannot be so optimistic this time.

that were included in 2008 were the same as the average of those that did report. That assumption is only for the convenience of the calculation, not based on any data. *Id.*

109. Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 *IND. L. REV.* 735, 737 (2011).

110. See A. Kenneth Pye & John R. Kramer, *Solvency and Survival after the Boom—A Different Perspective*, 34 *J. LEGAL EDUC.* 462, 462-63 (1984); Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 *CLINICAL L. REV.*, 457, 467 (1994); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 *N.Y.L. SCH. L. REV.*, 465, 474-75 (2004).

Keeping in mind John Templeton's admonition that "[t]he four most dangerous words in investing are: '[T]his time it's different,'"¹¹¹ the question is: Could it be different *this* time? There are short-term cycles at work, as usual. But there may also be some longer-term changes that will not reverse themselves as cycles do.

Experienced legal educators will recognize elements of the typical law school cycle. Applications may go up for four or five years, followed by four or five years of reductions in applications. The beginning of a recession is generally good for applications. The opportunity cost of law school is lowest during economic downturns (good jobs are hard to find), and easy availability of federal loans allows borrowing even during these times. Then after the initial increase in applications, the downward cycle begins. The reduction in applications results in some law schools under-enrolling, and the downturn appears to be the beginning of a disaster, not the normal part of the cycle. Despite increased recruitment efforts, it is hard to attract students and a substantial number of schools are faced with lowering acceptance criteria or reducing enrollment. Concern with rankings creates a special problem with showing a reduction in LSAT scores, so there has been a tendency to turn to transfers to make up some of the loss of revenue from first-year students.¹¹² This time it appears that a significant number of schools may be increasing the discount rate (i.e., increasing the number of scholarships) to attract students.

The reduction in enrollment, or increase in discounting, means that there are fewer funds available for operating the law school. Surpluses and plans for new programs disappear first, followed by freezes on salaries and open positions. Reductions in library expenditures, travel funds, general operating funds, and facilities expenses are generally next. Real reductions in staff, through attrition, retirement incentives, and layoffs may occur. But these are temporary and budgets rebound as the cycle moves into the upward phase.

The downward turn is commonly accompanied by bad press for law schools and the profession. This time it seems to be led by the *New York Times* and some level of disdain for the practice of law and the judiciary.¹¹³ Jobs for graduates are harder to find. Salaries are often depressed. A general sense of despair about the future for lawyers feeds the decline in applica-

111. Bob Parkman, *Consider These 'Words of Wisdom' About Investing*, SIR JOHN TEMPLETON (Sept. 20, 2006), http://www.sirjohn templeton.org/articles_details.asp?a=16.

112. Rensberger, *supra* note 41, at 637 (2011).

113. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=1. For a compilation of Segal's complaints about law schools, and the responses to those complaints, see postings at MONEYLAW, <http://money-law.blogspot.com/2011/11/david-segals-critiques-of-legal.html> (last visited July 12, 2012).

tions. This time it seems more intense, perhaps because Internet “scam bloggers” can whip up both emotion and attention.

All this is temporary. A cycle changes direction, no matter how unlikely that feels during the downward fall. Much of what we are seeing is exactly that. Perhaps the turn from record numbers of applications to reductions was more abrupt this time, perhaps the fall a little faster, perhaps the bad press a little more vivid, but most of what we are seeing is the cycle and this “part” is not different this time.

There are, however, several things going on that may not be part of the normal cycle of law schools. This time there may also be longer-term problems for legal education. These are not crises of the moment, but the possibilities of chronic problems in the financing of legal education. This threat relates to the increases in the rate of tuition and the level of indebtedness of new law graduates. Perhaps less threatening are the related problems of the stability of current loan programs for law students and the economic (and social) status of lawyers and the law that are resulting in a permanent decline in the number of applicants to law school.

Over the years legal education has become addicted to the “excess” (beyond the CPI) increases—as demonstrated by the hypothetical school above—and therein lies the rub. The present financial model of American legal education has come to assume that the primary financial driver of law school expansion can continue: i.e., that tuition increases can rise more rapidly than inflation. Most of the proposals to improve legal education in the U.S. seem to assume additional resources for the reforms, or at least appear to require additional resources to implement them effectively. The expectation, based on the history of two or three generations of law professors, is that new programs can almost magically be funded without having to reduce other programs. Indeed, few in legal education have lived through more than short periods of time where that was not possible.

At conferences, symposia, accreditation discussions, and almost anywhere else legal educators gather, there are many suggestions for reforms and changes. Here is a sampling, but certainly not a complete list:

- Outcomes assessments should be done carefully and that will require additional faculty and staff with expertise dedicated to the assessment.
- Legal writing programs should be expanded in a number of ways to give students both more kinds of writing and better supervision and feedback.
- Clinics, or at least well-supervised internships, should be required for all students.
- All students should have first-year small sections of substantive material.
- A variety of new specialized seminars should be offered both to broaden the curriculum and to allow faculty to teach more in the areas in which they are doing research.

- Interdisciplinary programs should be expanded substantially and for most or all students so that they are acquainted with the challenges they will face in practice in working with other professions and disciplines.
- International programs should be expanded in recognition that the legal profession is becoming global and that lawyers will spend much of their careers advising clients with international contacts and interests.
- Faculty should have three-course, or even only two-course, loads per year to encourage serious research efforts.
- Sabbaticals should be expanded to more groups of faculty and perhaps granted more frequently for the most productive scholars.
- Summer research grants should be similarly expanded.
- Travel funds should be increased to promote scholarship and to get the name of the school out there.
- Faculty salaries need to be increased to retain the best faculty and to compete with practice or at least to compete with other law schools.
- Salaries for legal writing instructors and others should be increased to be more in line with tenure-track and other faculty.
- More released time should be provided for younger faculty for research purposes because universities are increasing the expectations for research.
- Tenure and faculty status should be expanded to more groups (e.g., legal writing faculty and clinical staff attorneys) along with governance rights, sabbaticals, and other prerequisites.
- Computer services must be expanded to meet student demand and to help support new faculty educational initiatives.
- International exchange programs should be enhanced.
- The student-faculty ratio should be reduced.
- The number of students assigned to each legal writing instructor should be reduced in light of the intensive personal instruction outside of class that is required.
- Student academic support programs should be enhanced for all students or at least for students who exhibit some academic difficulty.
- Career services offices need to be enhanced given the extraordinarily difficult job markets.
- Merit-based scholarships should be expanded to compete for students in a down market for admissions.
- Need-based scholarships should be restored, especially to attract minority students.
- The website should be enhanced considerably.
- The facilities need to be expanded to accommodate the new faculty, international programs, LL.M.s, legal writing and clinical programs that have developed.
- The law school needs additional support staff for student advising and for financial aid.

- Library funding is in need of an increase to take account of the extraordinary increase in prices from publishers and to make use of electronic information.
- The law school needs to be realistic and undertake a campaign to increase its ranking in *U.S. News & World Report*.¹¹⁴
- The law school needs a public relations campaign to emphasize the good work that the faculty is doing and all of the innovative programs at the law school.
- Coming from the university, the law school should be willing to help shoulder a part of the burden of increased costs and losses in other parts of the university.

Those promoting these ideas seldom suggest realistic ways they can be funded for the long run. Perhaps there is really no reason they should expect to have to explain, in part because they have never been required to do so. Throughout their time in legal education it was possible to do new and good things with the excess tuition that seemed to fall like manna each year. An interesting article by John Sonsteng and colleagues notably did describe how to reallocate resources within the law school to provide a much-enhanced practical education.¹¹⁵ The core idea was to swap out half the current tenured faculty with contract teachers making approximately half the salary of the tenured faculty they were replacing.¹¹⁶ Although the authors were describing how to increase the skills training in a law school without increasing the costs, the same techniques might be applied for other reallocations or to reducing costs.

In the meantime, back at the business office, there is gnashing of teeth over current enrollments and increased recruiting scholarships. That could mean simply that the hope of implementing these reforms would have to be delayed a bit. Such was the circumstance in the past when enrollment dips or endowment declines broke up the flow of new money. For much of the last forty years, it would be realistic to expect that a number of these good ideas could be implemented in some way with the increased resources resulting from the tuition increases that exceeded inflation.

The difference this time focuses on tuition increases. When the immediate problem of the cyclical decline in applications ends, will the longer-term problem of tuition growth disappear? If so, it may produce a disconnect within the legal academy because financial reality at many law schools cannot be aligned with the expectations of additional resources to expand all sorts of good things.

114. See U.S. NEWS & WORLD REPORT, *supra* note 19.

115. See generally John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007).

116. The article assumed a law school of 1000 students with forty full-time regular faculty paid \$139,000 each. *Id.* at 464-71. Twenty of the forty faculty would be replaced by forty new long-term contract faculty making \$62,500 each (these were 2007 dollars). *Id.*

As a matter of the mathematics it is impossible for tuition to increase at multiples of the rate of inflation forever. If law school tuition increased at the rate of inflation for the next twenty-five years (2010-2035), and the rate of inflation were to average three percent, CPI-based tuition would be \$78,000, an increase of \$40,700. But if tuition continued to increase at four times the CPI, that would be a tuition increase of \$162,680, resulting in a median law school tuition of approximately \$200,000 per year (\$162,680 increase plus the 2010 tuition of \$37,300). If the trend were to continue fifty or more years...well, the problem becomes clear.

Apart from the mathematics, there is some evidence that the rate of increase in tuition may have hit the point where it is not likely to continue routinely to beat inflation by a considerable margin. The possibility of this reality is commonly discussed among deans, some of whom are considering zero tuition increases for the near future, or even reducing tuition. In truth, net tuition (total tuition less discounting through scholarships) is already declining in some law schools. The increase in private law school tuition (three percent) for Fall 2010 was the lowest percentage in the last twenty-five years.¹¹⁷ For public law schools, it was a different story. The median of resident tuition in public law schools increased nine percent—approximately the percentage increase of the last twenty-five years.¹¹⁸ Non-resident tuition, however, increased only three percent (following thirty-eight percent the previous year and zero percent the year before that)—the second lowest increase in the twenty-five year period.¹¹⁹

Law school tuition increases have not followed a smooth path in the past several decades and they are unlikely to do so. There will be years when tuition increases will exceed the rate of inflation. But it now seems possible that unlike the past there will also be years (perhaps most years) in which the rate of tuition increases is no more than, or even less than, inflation. Predictions of future tuition increases are not particularly reliable, but law schools need to face the possibility that they will not be able to rely on tuition increases well above the rate of inflation.

The second change that will probably not be cyclical is the level of student borrowing. This issue is closely related to tuition increases. Indeed, federal loan programs are in one sense the enabler of the tuition increases that have occurred. For 2009-2010, student loans for law school were an estimated \$4.5 billion, approximately the same as the total tuition paid by law students.¹²⁰ Students, of course, borrow educational loans for living expenses as well as tuition, but this figure suggests the degree to which law students, and in turn law schools, rely on these loans to pay for law school.

117. See *Law School Tuition 1985-2011*, *supra* note 93.

118. *Id.*

119. *Id.*

120. See *Average Amount Borrowed for Law School 2001-2010*, *supra* note 15.

For graduates in 2009–2010, the average borrowed (among law students who had educational loans) was approximately \$106,000 among private law school graduates and \$70,000 among public law school graduates.¹²¹ These amounts are increasing significantly, as they almost surely must be given the increases in tuition. With public law school tuition increasing rapidly, the debt load among public law school students can also be expected to increase rapidly.

Despite the high and rapidly increasing debt loads of law students, law graduate loan defaults have remained quite low. This is true for several reasons. First, the definition of “default” under federal rules is quite restrictive and does not capture the true level of those not paying off their debts. Second, student loans are generally not dischargeable in bankruptcy¹²² and state bars tend to take a dim view of attorneys or applicants for federal loans defaulting on federal loans—so there is every incentive to avoid defaulting. More recently the Income Based Repayment system makes it unusual for defaults on new federal loans to occur in good faith.¹²³

Beyond the default rate, the increasing size of law graduate federal debt may be a concern because it makes law schools especially vulnerable to changes, even fairly small changes, in federal loan policy. This is because the high levels of debt make it difficult for students to pay the loans in the early years of practice and this may cause them to fail to make the full payments under the IBR program. It is also because the debt may scare potential applicants away from law schools. Some admissions offices and deans are already reporting such concerns on the part of applicants.

The greatest risk regarding these loans is that changes in federal policy would make law students ineligible for some of the loans now commonly used by law students. Elimination of IBR would, of course, present a significant problem. Interest rate increases will increase the effective cost of the loans, or the terms (maximum limit on individual loans, for example) would reduce the amount that students can borrow.

We have already seen some changes. The “in-school interest subsidy” for federal loans was eliminated, effective July 2012.¹²⁴ It is possible that law schools could be almost accidentally caught in regulations that are aimed at proprietary for-profit schools. The Department of Education and some members of Congress have been endeavoring to reduce abuses by

121. *Id.* The reported amounts were \$124,950 for private and \$75,728 for public.

122. *See generally* Grant, *supra* note 60.

123. *See infra* Part IV.

124. Jennifer Liberto, *Students to Feel Pinch in Debt Deal*, CNNMONEY (Aug. 2, 2011), http://money.cnn.com/2011/08/01/news/economy/debt_ceiling_students/index.htm. *See* Mark Kantrowitz, *Answers to Your Questions on Student Loans and Scholarships*, N. Y. TIMES: THE CHOICE (Nov. 14, 2011) <http://thechoice.blogs.nytimes.com/2011/11/14/kantrowitz-part-one/>.

proprietary schools in using federal loans.¹²⁵ In any event, federal loans have become the lifeblood of legal education, and there have been very large increases in the level of law student loans. The reliance on very high levels of federal loans is not something that can easily be undone without significantly disrupting the financial stability of many law schools.

IX. THE DISCONNECT IN LEGAL EDUCATION

As a result of the combination of short-term changes in the number of applicants for law school, state budget cuts and endowment losses, and the possibility of longer-term changes in tuition rates and possibly student loans, it is entirely possible that the happy days of the last forty years will not continue for many schools. In that case there would not be the funds that we in legal education have come to expect that will allow many of the fine programs and strategies now being discussed and as listed previously to be added on top of the current programs. That portends a disconnect between the expectations of faculty and the likely financial reality that is now being faced in an increasing number of law schools.

A legal education “disconnect” would not affect all law schools equally. Some law schools may do reasonably well in the short run. Law schools that can continue to attract relatively large numbers of well-qualified applicants and can sustain non-tuition funding will probably not have short-term problems. Elite law schools are examples, of course. They generally have access both to excellent students and to substantial endowments. From their perspective, however, times may not seem as good as they have been. There will temporarily be fewer outstanding students in the overall applicant pool, so the competition for the elite students (important to keep the *U.S. News & World Report* ranking, of course) will likely be increasingly intense.

Some public law schools that have so far maintained substantial state subvention will have dips in state aid, some of which can be made up with significant tuition increases. The state subvention is forgiving of downturns in applicant pools, however, because those schools are less tuition dependent. The number of law schools that can depend on substantial state support is rapidly decreasing. This is another way in which this downturn is probably different. When state revenues return, it is unlikely that public funding for legal education will return.

Some public law schools have another admission advantage unrelated to funding and that is the special status associated with being *the* “state” law

125. See generally Gayland O. Hethcoat, II, *For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector*, 24 LOY. CONSUMER L. REV. 1 (2011); Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done to Reduce Them*, 40 J.L. & EDUC. 225 (2011).

school. In some instances it is because it is the only law school in the state (the University of New Mexico¹²⁶ and University of Nevada Las Vegas¹²⁷ being examples). In other instances it is because of the traditional place of the law school, and generally the university, within the state (the University of South Carolina¹²⁸ and University of Minnesota¹²⁹ being examples). These schools have an admissions advantage because they have a loyal following within the state and therefore have a special access to potential applicants.

Very efficient, low-cost law schools with the ability to reduce expenses and be agile probably have an advantage. They may have some room to increase tuition beyond that of other law schools and, to the extent that a real price sensitivity develops among applicants, their advantage could be significant.

At the other extreme, some law schools could be at particular risk. These are non-elite law schools with high tuition, without special access to students, that are not particularly efficient (cost per student), that have limited reserves or endowment, with high fixed costs (e.g., debt service), with little budget flexibility, in crowded or otherwise competitive markets and whose graduates have low starting salaries. Those with at-risk universities, large overhead, complex and ineffective governance structures, or limited agility in changing programs or reducing staff would be especially troubled. These schools could find themselves scrambling (at least for a while unsuccessfully) for students. They would probably be unable to increase tuition and be boxed in by high costs that will be difficult to reduce. Should that happen, they will struggle financially, and for law schools without significant reserves or the ability to develop significant new sources of revenue, the outlook would be bleak.

As we shall see shortly, this process could result in a form of bifurcation of legal education: “the haves” and “the have-nots.”¹³⁰ The haves would probably continue with strong research missions (and substantial expenditures on research), and full-time faculty who are very well paid, with relatively lower teaching loads. The have-nots, with less (perhaps substantially less) revenue per student, would then have to find ways of providing quality legal education at a lower price. This would require reducing instructional expenses without harming the quality of the education (at least not in a way

126. See generally *Welcome*, UNIV. OF N.M. SCH. OF LAW, <http://lawschool.unm.edu/admissions/> (last visited May 26, 2012) (“You will join a distinctively diverse community at New Mexico’s only law school and you will live in one of the most unique states in the nation where cultures have blended for centuries.”).

127. See *About*, UNIV. OF NEV. LAS VEGAS WILLIAM S. BOYD SCH. OF LAW, <http://law.unlv.edu/about.html> (last visited Apr. 5, 2012).

128. See UNIV. OF S.C. SCH. OF LAW, <http://law.sc.edu/> (last visited May 26, 2012).

129. UNIV. OF MINN. LAW SCH., <http://www.law.umn.edu/> (last visited June 10, 2012).

130. See *infra* Part X.

that is apparent on the bar exam or to initial employers), eliminating many research expenses and becoming more efficient.

The proprietary law schools are another interesting group.¹³¹ These schools have, as economic objectives, paying taxes that most nonprofit schools do not have, and returning profits to investors. A basic model for these law schools is to keep enrollment up (in part by locating in areas underserved by traditional legal education), maintain tuition as high as the market will bear, keep bar passage at least reasonable, and control costs while sharing, or at least appearing to share, the goals of mainline law schools—solid education, participation in the community, and some level of visible faculty research. These law schools have the added financial disadvantage that they do not have as much opportunity for private fundraising as traditional law schools. Enrollment in these law schools likely reflects the good choice of location, plus the fact that there has been excess demand—students who were not admitted to other more desirable schools in the region. As applications decline, these law schools may find it particularly difficult to continue to grow enrollment, which appears to be a part of the business plan. If the ability to increase tuition is reduced, their profitability may also be expected to suffer. At the same time, these law schools have lessons regarding efficiency that may be of considerable value to nonprofit law schools for which efficiency has not been a central goal.

The majority of law schools are between the elite law schools and the at-risk law schools. They are law schools that are highly tuition dependent—with tuition being 90–95% of total revenue, with the clear majority of that from J.D. tuition. They have seen a reduction in applications, but have been able to come close to filling their class this year, as they will the next, by slightly reducing the quality of the entering class and nudging the discount rate above 20%, toward 25%. They may have had a budget deficit for 2012–2013 that is manageable in the short run by not filling positions, but if it continues, it will mean additional staff reductions. They have some endowment and private giving that is being used to support scholarships, research, and a variety of specialty programs. They find their students being “raided” by other schools that are accepting transfers. They are struggling to find employment for their graduates, as are their competitors.

131. Proprietary law schools have had an interesting history in American legal education. Many law schools began as proprietary schools, later to become nonprofit. The ABA and AALS have traditionally had an aversion to them because of some of the abuses associated with their early history. *See generally* STEVENS, *supra* note 9. More recently, with the assistance of the Justice Department, the accreditation standards have permitted proprietary law schools and several are now accredited. *United States v. Am. Bar Ass’n*, 934 F. Supp. 435, 437 (D.D.C. 1996); *see* Mark E. Steiner, *The Secret History of Proprietary Legal Education: The Case of the Houston Law School, 1919-1945*, 47 J. LEGAL EDUC. 341, 342 (1997).

So far, this more or less describes the typical law school in the typical downturn—although perhaps it is a little steeper downturn this time. The real change for these law schools could come when the decline in law school enrollment ends and the cyclical upturn begins. In the past that has meant that filling the class is relatively easy, the budgeted enrollment (or even over-enrollment) becomes the norm, and the six percent tuition increases are reinstated. Those increases allow repair of the damage during the downturn, expansion of faculty salaries and faculty size, new programs, and new student services.

If, instead, the tuition increase is roughly the rate of inflation, the usual form of recovery would not happen. With an increased discount rate, and increases in insurance and other fringe benefits and utilities, there would be very limited funds for more than minimal salary increases. Faculty and staff expansion would be difficult, as will new programs that are not self-supporting. Over a few years, efforts to make standard the three-course annual teaching load for law faculty along with generous summer grants would become more and more difficult.

For some law schools, this could feel something like “Back to the Future.”¹³² It is undoing many of the reforms of the recent past—perhaps more reducing those reforms than eliminating them. If distance learning is both acceptable to students and done efficiently (at a significantly lower cost than in-person instruction) then law schools might be able to replace some in-person instruction with distance learning. To the extent that the choice is between adjunct instruction (which is very inexpensive and in-person) and distance learning, however, distance learning would have to be done very cheaply to compete on cost.¹³³

This would hardly be a disaster for most law schools. It would be, however, a substantial departure from the expectations of schools, especially the perception by law school faculties about how the enterprise should operate. In legal education we have not yet had to consider what we will not do that we are currently doing in order to start new programs. We are not accustomed to having to make a program self-sustaining—not just optimistically project it as self-sufficient, but really, really do it. We are used to having priorities in self-studies and strategic plans to indicate where the new funds will go, or, more accurately, where *some* of the new funds will go—not to identify where existing programs will be eliminated. But, if tuition starts increasing at about the rate of inflation, such planning would be required and would be a dramatic departure from the expectations of continuing expansion.

132. BACK TO THE FUTURE (UNIVERSAL PICTURES 1985).

133. This should not be confused with starting non-J.D. programs done entirely with distance learning where the law school may achieve significant revenues at a relatively low cost and where the entire program may be done with distance learning.

Deans would likely be where reality meets expectations at these law schools. The reduction in the growth of the faculty, great difficulty in starting new non-revenue programs, trimming of outreach efforts, and having to raise money for the current basics could give rise to “do nothing” claims aimed at administrative heads, even if a dean is being extraordinarily creative and hardworking in the newly emergent competitive context of legal education.

The alternatives to a steady-state system unable to sustain itself over time essentially would be to reduce existing expenses and reallocate those resources to another program, or increase revenue—either by increasing enrollments or seeking more non-J.D. revenue. Reallocation (which means reducing something that is being done currently) is at best a difficult process in higher education.

The nature of academic programs and existing law school governance structures make program reduction difficult. The “oxen” who are being gored are not likely to take the goring quietly. Self-interest, lack of understanding of markets or financial matters, ambiguity about faculty fiduciary obligations and some accreditation requirements make law school governance “in extremis” difficult. Among other things, such reallocation of taking from one program to give to another threatens the “mutual nonaggression pacts” among law school faculty that allows them to operate quietly. It is one thing to decide who will get new money (from tuition increases), but it would be quite another to decide whose program will be cut in order to give the money to someone else. In some, perhaps many, schools, faculty governance cannot be expected to do that successfully. Deans would have to take responsibility for that, undoubtedly prodded by university administrators.

One lucky break in the reallocation process for the next few years, should budgets need to be reduced on a long-term basis, is that there is a large group of senior faculty who will retire. For a few years that would permit schools to reduce the size of the faculty and reduce the resources devoted to faculty by not replacing all of the retirees or by developing personnel models that allow the retiring faculty to be replaced with lower priced faculty. Neither is without difficulty, but it would certainly be easier than many other forms of reallocation. Of course, not replacing faculty would reverse the trend of the last thirty years of declining student-faculty ratios and would have some impact on the ability of the law school to offer reduced teaching loads, very small classes and seminars taught by full-time faculty, and the like. Adjuncts might be used to fill in some of the teaching.

The issue of faculty salaries may become of greater concern. Existing faculty might see a reduction in the rate of increase of salaries, but are not likely to see substantial reductions in nominal pay. Schools in financial difficulty would have to consider, however, whether new faculty can be paid at the same rates or on the same scale as existing faculty. There is some evi-

dence that teaching faculty who do not have research obligations might receive lower salaries than the visibly excellent research faculty. Looking at the compensation for legal writing instructors, who certainly seem to work as hard as traditional doctrinal faculty, presents evidence for this possibility. There is usually a lower salary for legal writing faculty because the market for the positions is different than for research faculty (i.e., those with the expectation of substantial scholarly publication). One reason is visibility. Excellent teaching is hard to see from the outside, at least compared with publications.

Despite the lower salaries for legal writing faculty, there are many well-qualified candidates anxious to join the ranks of legal writing faculty. Similarly, there are many very qualified candidates seeking regular teaching positions each year. Some law schools may decide that they can attract fully acceptable candidates by offering lower entry-level salaries than is currently the norm, and perhaps reducing scholarly research and publication expectations.

In terms of cutting expenses in order to reallocate resources, the areas in which there has been the greatest increase in expenditures during the last twenty-five years are likely to be candidates. In addition to faculty size and compensation, some student services, general administrative costs, some practice skills, and fringe benefits would be likely targets of cuts.

The prospect of increasing revenues would be a much more popular option. Increasing enrollment at most schools currently does not look promising. An alternative is to open one or more branches. This is a technique used by several law schools. For example, Widener did it for some years with the Harrisburg campus,¹³⁴ Cooley opened several branches around Michigan and more recently a branch in Florida,¹³⁵ and John Marshall (Atlanta) is opening a branch in Savannah.¹³⁶

Beyond the J.D. revenue, the trick is increasing *net* revenues, not just revenues. It is not unusual for a proposal for a new program to identify new revenues, but also to incur costs that offset most of the revenues. By way of illustration, consider two programs, each of which enrolls ten students paying tuition of \$35,000 each, or \$350,000 gross tuition revenue for the program. Program X provides one scholarship (\$35,000) and requires a pro-

134. Widener Law has locations in both Harrisburg, Pennsylvania and Wilmington, Delaware. WIDENER LAW, <http://law.widener.edu/About.aspx> (last visited June 10, 2012).

135. The Thomas M. Cooley School of Law has branches in Lansing, Auburn Hills, Grand Rapids, Ann Arbor, and Tampa Bay. *Thomas M. Cooley Law School to Open New Campus in Tampa Bay*, THOMAS M. COOLEY SCH. OF LAW (Aug. 8, 2011), http://www.cooley.edu/news/2011/080811_cooley_opens_tampa_campus.html.

136. JOHN MARSHALL L. SCH., *Atlanta's John Marshall Law School to Open Branch in Savannah—New 'Savannah Law School' Set to Begin Classes in August 2012* (2011), available at <http://www.johnmarshall.edu/students/img/SLS%20Release%20Final%2012-8-11.pdf>.

gram director (\$75,000+\$30,000 of support, fringes, and other similar expenses), one faculty member (\$100,000+\$50,000 of support, etc.), a student assistant (\$20,000), and general expenses (\$25,000), or a total cost of \$335,000.¹³⁷ Program Y relies on existing resources (e.g., students go into regular classes) and requires only one program director (\$75,000+\$30,000 of support, fringes, etc.). On the revenue side, these two programs look alike—\$350,000 of new revenue. But they are very different. Program X essentially breaks even (\$350,000 revenue less \$335,000 of direct expenses) and, in fact, is probably costing the school money because of the overhead costs. Program Y is making \$245,000 for the law school (\$350,000 revenue less \$105,000 of direct expenses), although this calculation does not include overhead costs.

Law schools seeking increases in revenue will likely turn to some tried, and sometimes true, sources. Most law schools now have some form of Master of Laws (LL.M.) or other advanced degree.¹³⁸ One advantage of these programs is that they are, for most purposes, unregulated by the accrediting agencies and can usually be operated at a low cost.¹³⁹ The most popular is an advanced degree for foreign lawyers. These programs typically require one or two years of study, with limited discounting, and usually a fairly low cost (compared with the cost of the J.D. program). Students are often included in existing J.D. courses, with very little cost for the extra students.

Other non-J.D. programs include a variety of specialty LL.M. programs including, for example, tax law, criminal law, intellectual property, and health law.¹⁴⁰ In addition to courses designed for law graduates, these courses may welcome non-lawyers. A notch lower on the degree ladder are non-degree or certificate programs for non-lawyers. Most law schools have not yet offered such programs, in part because of concerns about whether there is a continuing demand for them. Offering undergraduate programs

137. The plus figures include a range of support and incidental expenses, including fringe benefits, research assistants, value of support released time, sabbaticals and the like.

138. The ABA Section of Legal Education lists the programs at its website. *Post J.D. Program by School*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school.html (last visited Mar. 18, 2012).

139. The ABA does not approve or accredit these programs. The ABA does require that approved law schools obtain “acquiescence” to LL.M. and similar programs. In essence, the review is primarily to determine that the non-J.D. program is not detracting from the J.D. program. ABA STANDARDS, *supra* note 8, Standard 308. As a result, law schools are free to offer very low-cost instruction (nearly all adjuncts, for example, without risking accreditation problems).

140. A list of the non-J.D. programs in American law schools is provided by the ABA on its website. *See Post J.D. by Category*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html (last visited Mar. 18, 2012).

(e.g., paralegal programs or Law and Justice undergraduate majors) would usually not produce substantial net revenue unless the law school can employ teachers at salaries much below full-time law faculty compensation.

Online education is another area with which some law schools are experimenting. For the most part these are LL.M.-type programs.¹⁴¹ It is very difficult to estimate the genuine net revenues that these programs are generating.¹⁴²

Private fundraising has, in absolute (nominal dollar) terms, been a successful source of funds for law school. Although these funds at most schools have not increased dramatically as a percentage of the total budget, they are now a meaningful source of revenue. There is reason to hope that the trend can at least continue for private fundraising revenue, although how far it can be pushed is an open question. In addition, much of the money from fundraising is dedicated to a specific purpose, and this may not contribute much to the areas in which the law school needs the funds.

Any number of other ideas for improving net revenues have been floated from time to time—for example, starting a law school law firm to charge fees to paying clients, renting space in the law school facilities, and undertaking extensive CLE programs. Some of these have been successful in producing reasonably significant revenue.¹⁴³ Those, however, seem to be the exception and it is doubtful that they hold much promise of producing substantial revenue for most schools.

The pressure of declining J.D. tuition is likely to be the mother of invention for law schools. Presently unknown revenue sources would likely be invented in the face of adverse conditions.

X. THE HAVES AND THE HAVE-NOTS

To return to the potential of the divide within legal education, the current trends suggest that for a limited number of law schools the near future will probably see relatively insignificant changes in the direction of revenue of the last twenty-five to forty years. Even if a reduction in the rate of

141. E.g., JOHN MARSHALL LAW SCH. CHI., <http://ecourses.jmls.edu/> (last visited Mar. 18, 2012); VERMONT LAW SCH., <http://www.vermontlaw.edu/distancelearning/x12502.xml> (last visited Mar. 18, 2012); FLA. COASTAL SCH. OF LAW, <http://www.fcsl.edu/llm/> (last visited Mar. 18, 2012).

142. Debra Cassens Weiss, *More Law Schools Offer Online LL.M. Programs*, ABAJOURNAL.COM (May 4, 2010), http://www.abajournal.com/news/article/more_law_schools_offer_online_ll.m_programs/.

143. Making these programs a reliable and significant source of funds has been difficult. A number of law schools have had significant CLE programs, but more schools have found that competition from bar associations and commercial vendors have prevented them from cashing in on CLE. A few law schools have facilities that are in demand for a variety of events, even movie making, but this also is generally not a reliable source of funds.

growth of net tuition (total tuition less scholarships) occurs, small increases in enrollment, reduction in scholarships, and income from other sources would likely offset these changes.

For another group of law schools, there is some risk that the increase in tuition (much more rapid than inflation) that has sustained their operations the last forty years may not continue consistently in the future. Other sources of revenue might be insufficient to avoid stagnation in real operating costs over time. These schools would struggle in some years to fill a class even as the discount rate (recruiting scholarships) has increased. They could also suffer a significant loss of students through transfers after the first year to a degree that will undermine schools' economic stability and expectations as some of their "top" students suddenly disappear. This would mean that funds will not be readily available for new programs.

A few law schools might not survive in their present forms. They would face the limitation on tuition increases and periodic downturns in applications along with an increase in the discount rate among competitors. At the same time, applicants (and students considering transferring) could become more attuned to the different economic value that degrees have from one school contrasted with another. In this event, tuition in the middle group of schools could be under particular pressure. That is, if the market (applicants and students) begin to believe that tuition at a law school will in some way reflect the value of the degree, with the result that only law schools with very high student salary prospects can charge the top tuition, then many law schools will have to reduce (at least in real net terms) their tuition in order to attract and retain students.

This tuition differential would in some ways seem natural—the predicted economic value to the graduate of the degree varies by the school and it would not be strange for a market to recognize that. It would, however, change legal education by creating a form of "have" and "have-nots." Of course a form of that exists already in the hierarchical structure of U.S. law schools. Law schools that have (or have access to) very large endowments and private gifts are more "haves" than the others. But there is not a substantial differential in the tuition schools can get by with based on salaries of graduates—we noted, for example, two law schools in New York with very similar tuition, but whose graduates have very different financial prospects.¹⁴⁴

Should there become substantial differences in tuition based on likely salaries of graduates, the funds available to support programs would diverge as well. Because those law schools with large endowments and substantial fundraising tend also to be the schools that would be able to charge the higher tuition rates, the divergence could become substantial over time.

144. See *supra* notes 87-90 and accompanying text.

This is another way of saying that price competition could begin to affect law schools in a meaningful way. That would place greater pressure to emphasize the financial value of the law school's education, keep costs down, and provide value for every dollar charged. The emphasis on reputation and rankings, as well as on the reports of graduate economic success, would increase the pressure in these areas.

It is difficult to project what expenditures the "have-not" schools would be most likely to give up in these circumstances. Universities will be reluctant to give up the indirect costs they charge law schools, but at some point there may be no choice but to reduce them somewhat. It is, however, reasonable to expect that law schools would have to give up those things that mean the least to prospective students.

Among the options for the have-not schools under such circumstances:

- paying full-time faculty less,
- increasing teaching loads,
- relying more heavily on adjunct faculty,
- reducing the commitment to a research mission,
- wringing out high overhead and other nonproductive costs,
- reducing the discount rate (scholarships),
- increasing the student-faculty ratio,
- providing clinical education in a more cost-efficient manner,
- finding new sources of non-J.D. tuition revenue,
- remaining flexible to offer new programs (jettisoning ineffective programs and replacing unproductive faculty) quickly, and
- reducing staff outside the student services area.

Should this come to pass, some of these schools might not survive, at least in their current form.

The most likely to go are those things that students do not see adding to their education and the research mission. For example, at some non-elite law schools, the students are probably hard-pressed to determine what the value to them is of the faculty research mission of the school. This can be an expensive mission—I estimate that the research mission in some law schools could account for a quarter to a third of the expenses of the school. The faculty and applicants/students may have different priorities, and for schools that have to keep tuition as low as possible in the struggle to maintain enrollment and reduce transfers, the student perspective would be important.

This is not to say that the affected law schools would, or could, give up research missions entirely. Universities expect a scholarly mission, and whatever the ABA Standards may do with research requirements, the Asso-

ciation of American Law Schools (AALS) Membership Review Standards¹⁴⁵ are not likely to drop scholarly research as a core value. Law schools would, therefore, have to find ways of maintaining a reasonable research mission (or at least the appearance of one) at a lower cost or convince applicants and students that they are receiving value from that mission.

Price competition and cost reduction have been foreign to legal education, so responding to them would be both new and difficult. The flexibility needed to deal effectively with this kind of competition is not a hallmark of higher education generally. The flexibility in law schools is limited by such factors as the percentage of tenured faculty, expansion of the groups with tenure or long-term contracts, the expectations regarding teaching loads (sometimes set in policy as well as practice), relatively high salaries for faculty and some administrative positions, limits on the use of adjuncts (primarily related to AALS membership, but also in ABA Standards), large facilities (and related large loans for some institutions), and libraries that require resources. For reasons noted earlier, the governance mechanisms in many law schools are not structured to allow reasonably timely and aggressive reactions to these difficult conditions.

XI. WHAT COULD GO RIGHT?

Projections are projections. And I noted earlier that two of my friends have repeatedly claimed that they have “seen the future and it doesn’t work.”¹⁴⁶ They have been predicting economic disaster for law schools.¹⁴⁷ So, what could happen to make the concern this time too pessimistic? Perhaps the good old days can continue. After all, most of what we currently see is likely to be cyclical problems that will go away. But what of the longer term?

Good news could occur several ways. Student price sensitivity and the reluctance of law schools to increase tuition significantly might be temporary. It is possible that tuition could continue to increase above the CPI for years to come. If the downturn in applications is a temporary phenomenon (as I believe it probably is), those tuition increases would allow law schools to continue to expand programs, reduce teaching loads, increase student services and the like. It would also mean that the further split of law schools

145. See generally *What Is the AALS?*, ASS’N OF AM. LAW SCHS., <http://www.aals.org/about.php> (last visited Mar. 18, 2012).

146. *Quotation Details*, THE QUOTATIONS PAGE, <http://www.quotationspage.com/quote/26251.html> (last visited Mar. 18, 2012).

147. For some of the dire predictions concerning the long-standing “consensus that law schools face a troubled financial future,” see Bradley Forst, *Financing Legal Education: The Challenge of the 1980’s*, 7 S. ILL. U. L.J. 137, 137 (1982); see also *supra* notes 109-110 and accompanying text.

into a kind of “haves” and “have-nots” would not likely be any more pronounced than it currently is.

It is plausible to hope for this to happen. The strong long-term economic advantage of becoming a lawyer, the limited professional alternatives for those with strong undergraduate records and the easy access to loans through the federal government could combine to allow tuition increases to return to the historic rates of much of the last forty years.

Other good news might occur if states reverse course and increase funding for higher education, particularly legal education. This could occur in several ways. The student loan program, or the repayment of loans, is at best a remote possibility. Expanding the amount that can be borrowed, subsidizing interest, providing greater loan forgiveness, or reducing the proportion of income that must be used to repay federal loans would all reduce the true cost and risk of attending law school. Loan programs could be modified, with law schools the incidental beneficiaries of broader changes. Such an eventuality also seems unlikely, however, because the current programs have already become so advantageous. Of course, for public schools reversing the trend, more state subsidy for legal education would be good news too. Federal funds for grants to support law-related research or new educational approaches would help offset losses in tuition. These possibilities unfortunately fall in the category of pipedreams. Private fundraising could increase significantly for law schools. Law firms might become more involved financially with law schools, individual donors could continue to increase their generosity, or bar associations might support legal education—e.g., through a dues assessment to assist law schools. Private fundraising is likely to continue to be an important part of the revenue of law schools, but it is highly unlikely that law firms or bar associations will be the source of major increases and there might even be declines as lawyers come under increasing financial pressure.

It is possible that a new group of applicants wanting to go to law school could develop. We noted that in the past forty years women and minority applicants have driven the increase in law school applications. It is entirely possible that the number of women (and percentage of applicants) could continue to increase, although this is far from a sure bet. The number of men applying to law school has declined from three decades ago, so women are more likely to replace men in the applicant pool incrementally than to expand the pool very much. Perhaps fifty percent, approximately the current ratio of women applicants, is not the place where this trend will stop—perhaps it could be seventy percent, although the data do not suggest that this is about to happen. It is hard to imagine any other large groups that are untapped for law school, but it is possible they are out there somewhere.

There may be significant sources of tuition revenue through new non-J.D. programs, including graduate degrees, LL.M.s, and certificate programs. These may be in person or via distance learning online. Law schools

are likely to expand such programs, but it is less likely that there will be dramatic increases in net revenue from them.

These are not, of course, mutually exclusive or exhaustive of the ways law schools will search for new revenues. Almost all law schools are likely to try a mix of three or four of these areas whether or not they are facing a financial crisis. Collectively, these possibilities do not, in my mind, add up to a high probability of producing sufficient net revenues to sustain the past growth in legal education. “I may be surprised. But I don’t think I will be.”¹⁴⁸

XII. WHAT COULD GO WRONG?

Matters could also become much worse than they are now, or than would be expected if the rate of increase in tuition was limited to approximately the rate of inflation. Because it is the lifeblood of legal education, changes in the federal student loan policies regarding law schools could pose a grave problem for law schools. Policies, for example, that limited the total borrowing permitted for law school, increased the interest charged, added credit worthiness requirements, or increased default rates could have a devastating impact on the willingness of applicants and students to assume the debt that pays much of the tuition at most law schools. Even changes in the Income Based Repayment program could create future problems for law schools. Such changes are not beyond the realm of possibility either. Congressional dissatisfaction with legal education, the ABA, and other parts of higher education has been clear.¹⁴⁹ This attention could result in changes in the loan programs or other federal legislation directed to legal education. It certainly contributes, at least temporarily, to the public’s suspicion of law schools.

Another possible disaster for law schools would be if this time it is different—if the downturn in applicants is not a temporary, cyclical phenomenon, but a sustained shift in interest in law school. In that case, there would likely be a long-lasting double whammy of reduced rates of increase in tuition and a reduction in class size or entering credentials at many law schools. Additional whammies would await schools with high fixed costs (including debt), with calcified structures that make it difficult to change operations reasonably quickly, or that are at the bottom of the “food chain” in admissions. In such a case, change would not be the issue for some law

148. *Andrew Strauss*, GOOD READS, <http://www.goodreads.com/quotes/show/262772> (last visited Mar. 18, 2012).

149. *See, e.g.*, Mark Hansen, *Senators Seek Decade of Detailed Law School Placement, Bar Passage and Student Debt Data*, ABAJOURNAL.COM (Oct. 14, 2011), http://www.abajournal.com/news/article/senators_seek_detailed_stats_on_law_school_placement_bar_passage_and_studen/.

schools. It would be a question of survival. I do not believe it is different this time and, therefore, applications will slowly bounce back. This optimism is not universally shared by knowledgeable observers.¹⁵⁰

It is possible that potential applicants to law school would not only be unwilling to pay increases in tuition above the rate of inflation, but would demand decreases in existing tuition rates. The high cost of loans, fears related to their economic future or a general sense of dissatisfaction associated with trashing of law schools in the blogs and press could conceivably create a pushback on tuition. A different form of this seems like a greater possibility. Students may increasingly demand some form of scholarship assistance, which would drive the discount rate up and net tuition down. While I would be surprised if there were a general tuition revolt, the possibility that the discount rate will increase is more likely.

There are, of course, any number of other farfetched calamities that could befall legal education—dramatic reductions in charitable giving, efforts by the organized bar to reduce competition by limiting the number of people admitted to the bar, the ABA's loss of accrediting recognition for law schools, asteroids hitting law schools, and the list goes on.

CONCLUSION

Change is likely. Some of the change for legal education is cyclical—most notably the drop in applications,¹⁵¹ but, part of the change may be different this time. The progress of the last forty years has been fueled primarily by “excess” tuition—tuition that exceeds the rate of inflation. It is possible that the rate of tuition increase will slow substantially. While such a change seems of the sort that only a budget officer could care about, if it happens, in the long run it would have a profound impact on legal education. Circumstances are now such that prudent law schools must consider how they will fulfill their missions if the rates of increases in tuition are at or below the CPI.

Should this happen, the resulting long-term changes represent a threat to legal education because we have come to expect that new programs, improvements, and increases could be funded substantially by the excess tui-

150. At a recent deans' meeting, several ABA deans were willing to wager that my optimism is not well placed.

151. The reduction in applicants for the Fall of 2011, down more than ten percent from the prior year, was noticed not just by deans and law professors. See Nathan Koppel, *Law School Loses Its Allure as Jobs at Firms Are Scarce*, WALL ST J., Mar. 17, 2011, <http://online.wsj.com/article/SB10001424052748704396504576204692878631986.html>. The decline appears likely to continue for the Fall 2012 class—perhaps down fifteen percent from the prior year. See Debra Cassens Weiss, *Law School Applications for Fall 2012 Drop More Than 15 Percent*, ABAJOURNAL.COM (Jan. 20, 2012), http://www.abajournal.com/news/article/law_school_applications_for_fall_2012_drop_more_than_15_percent/.

tion. But the possibility of these changes also presents an opportunity. It invites us to pay more attention to doing things efficiently, to identifying true priorities, to be better at what we choose to do. It will, however, disrupt our professional lives. Neither our psyches nor our governance structures are equipped to deal well with long-term reductions in law school programs.

Legal educators should have, and when they think about it do have, ambivalence about the tuition increases that have characterized the last forty years. On the one hand, it is what has allowed law schools the chance to improve the quality of the legal education, enhance student services and expand scholarly efforts. On the other hand, it has quite literally come at a significant price to our students. As we consider a future with the possibility of smaller increases in tuition, there is more ambivalence. There is a sense that this may be good for our students. But there is also a sense that improving what we do will require much more work and care, and probably sacrifice, than it has in the past.

This is not about us, however. In the end it really is not about our students. Despite the focus of the Article, this ultimately is about the legal profession's ability to provide high quality legal services to our society. Educating well a sufficient number of lawyers to provide efficient legal services at a reasonable cost is the purpose of all of this. Thus, the ultimate goal as we face change is how can we improve the quality of our education and do so in a way that is as efficient as possible. Succeeding in that mission, perhaps with fewer resources than we have come to expect, will not be easy. The innovative capacity of those who are in legal education is certainly up to the task. It will require the best in us in creativity, strong leadership, cooperation, and selflessness.