
NOTE

Undoing Hardship: Applying the Principles of Dodd-Frank to the Law Student Debt Crisis

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“The difference between this and subprime is in subprime, the loans went bad no matter what the government did . . . this scheme is going to go on until the government stops it.” — Steve Eisman.¹

INTRODUCTION

In 2008, a global financial crisis occurred as millions of borrowers defaulted on their mortgages.² Many of those borrowers lost their homes while lenders endured catastrophic losses.³ Millions owed more than their homes were worth.⁴ The precise causes of the mortgage crisis are numerous and contested.⁵ But one undisputed cause was the implosion of a subprime housing market based on unsafe loans.⁶ Mortgage originators sold too many loans that borrowers could not repay.⁷ Borrowers, with easy access to these unsafe loans, defaulted

¹ Gennine Kelly, *The New Short: What Steve Eisman's Betting Against Now*, CNBC (Sept. 15, 2010, 2:18 PM ET), http://www.cnbc.com/id/39194343/The_New_Short_What_Steve_Eisman039s_Betting_Against_Now.

² See FIN. CRISIS INQUIRY COMM'N, *THE FINANCIAL CRISIS INQUIRY REPORT 402* (2011) [hereinafter *FINANCIAL CRISIS REPORT*], available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> (“Since the housing bubble burst, about four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments.”); John Schoen, *Study: 1.2 Million Households Lost to Recession*, MSNBC (Apr. 8, 2010, 9:53:08 AM ET), http://www.msnbc.msn.com/id/36231884/ns/business-eye_on_the_economy/t/study-million-households-lost-recession/#.UOc6P3f-t8E.

³ See sources cited *supra* note 2 and accompanying text.

⁴ See *FINANCIAL CRISIS REPORT*, *supra* note 2, at 403-04; Gregory Scott Crespi, *The Trillion Dollar Problem of Underwater Homeowners: Avoiding a New Surge of Foreclosures by Encouraging Principal-Reducing Loan Modifications*, 51 *SANTA CLARA L. REV.* 153, 153-54 (2011).

⁵ See *FINANCIAL CRISIS REPORT*, *supra* note 2, at xvii-xxv (citing failures of corporate governance and risk management, excessive lending and borrowing, collapsing lending standards, mortgage securitization, failures of credit rating agencies, and more as partial causes of the crisis). Other commentators placed much more emphasis on government expansion of cheap loans. See *id.* at 444 (Peter J. Wallison, dissenting) (“[T]he sine qua non of the financial crisis was U.S. government housing policy, which led to the creation of 27 million subprime and other risky loans — half of all mortgages in the United States — which were ready to default as soon as the massive 1997–2007 housing bubble began to deflate.”).

⁶ See MICHAEL LEWIS, *THE BIG SHORT* 142 (2011) (explaining how financial managers creating mortgage-backed securities often had no stake in the mortgages within them); *This American Life: The Giant Pool of Money* (WBEZ Chicago radio broadcast May 9, 2008) [hereinafter *The Giant Pool of Money*], available at <http://www.thisamericanlife.org/radioarchives/episode/355/transcript> (telling the story of one administrator who continued selling “liar[] loans” he knew were bad because repayment was “someone else’s problem”).

⁷ See sources cited *supra* notes 2, 6, and accompanying text.

under the weight of adjustable rate mortgages with ballooning payments.⁸ These loans were dangerous for lender and borrower alike, but originators often sold them anyway because they bore no risk of default.⁹ Instead, originators sold them to banks who packaged them into securities.¹⁰ When the bubble popped, millions lost their homes and many large banks held toxic securities with little market value.¹¹

Congress responded to the 2008 financial crisis by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).¹² The sweeping law attempted to protect consumers and lenders alike from dangerous consumer debts.¹³ For example, Dodd-Frank sought to tighten lending standards, increase loan transparency, and require most mortgage originators to retain some risk of default.¹⁴ Consequently, the Act outlawed the most dangerous subprime mortgage loans.¹⁵

Federal student loans share many characteristics with subprime mortgages.¹⁶ Subprime loans are loans issued to borrowers with a

⁸ See FINANCIAL CRISIS REPORT, *supra* note 2, at 402-03; Schoen, *supra* note 2.

⁹ See FINANCIAL CRISIS REPORT, *supra* note 2, at 444 (Peter J. Wallison, dissenting); LEWIS, *supra* note 6, at 142; THOMAS SOWELL, THE HOUSING BOOM AND BUST 30-56 (2009); *The Giant Pool of Money*, *supra* note 6.

¹⁰ See sources cited *supra* note 9 and accompanying text.

¹¹ See generally FINANCIAL CRISIS REPORT, *supra* note 2, at xvii-xxv (describing the reasons for the financial crisis that led to millions of people losing their homes); ANDREW ROSS SORKIN, TOO BIG TO FAIL 428-490 (2010) (discussing the mortgage crisis and consequences).

¹² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5301 (2012)), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

¹³ See *id.*

¹⁴ See generally *id.* (discussing the intent of Dodd-Frank); DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 99-116 (2010) (discussing the intent of Dodd-Frank and its consequences); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008) (arguing that consumer credit products can be just as dangerous as tangible products); Charles K. Whitehead, *The Volcker Rule and Evolving Financial Markets*, 1 HARV. BUS. L. REV. 39 (2011), available at http://www.hblr.org/download/HBLR_1_1/Whitehead-Volcker_Rule.pdf (discussing the impact of Dodd-Frank on institutional risk assessment).

¹⁵ See Dodd-Frank Act § 1411 (banning all “liar” loans); Truth in Lending, 76 Fed. Reg. 27,390 (May 11, 2011) (to be codified at 12 C.F.R. pt. 226) (requiring lenders to investigate a borrower’s ability to pay); John Pottow, *Ability to Pay*, 8 BERKELEY BUS. L.J. 175, 176 (2011) (discussing § 1411 and its implementation); Linda Singer, Zachary Best & Nina Simon, *Breaking Down Financial Reform*, 14 J. CONSUMER & COM. L. 2, 6-9 (2010) (discussing Dodd-Frank’s elimination of deceptive loans with ballooning monthly payments).

¹⁶ See generally April A. Wimberg, *Comparing the Education Bubble to the Housing*

weakened ability to repay as measured by debt-to-income ratios, or by an incomplete or checkered credit history.¹⁷ Conventional wisdom has often argued that legal education, like home ownership, is a “can’t lose” investment.¹⁸ As with the housing bubble, tuitions at law schools have risen dramatically along with availability of very large loans.¹⁹ And as with the worst subprime loans, the federal government issues Direct Loans to law schools without considering the borrower’s ability to pay.²⁰ Thus many law graduates, like so many post-crash homeowners, have found themselves underwater.²¹

This Note argues that the Department of Education (“DOE”) should apply the principles of Dodd-Frank to the Direct Loan program for law schools. Specifically, the DOE should gradually refuse to issue Direct Loans to law schools whose graduates face unacceptably high debt-to-income (“DTI”) ratios. Part I will outline the structure and intent of the Higher Education Act (“HEA”), describe federal approaches to

Bubble: Will Universities Be Too Big to Fail?, 51 U. LOUISVILLE L. REV. 177, 196-97 (2012) (comparing student loan crisis and housing bubble); Antony Davies & James R. Harrigan, *Why the Education Bubble Will Be Worse Than the Housing Bubble*, U.S. NEWS & WORLD REP. (June 12, 2012), <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/12/the-government-shouldnt-subsidize-higher-education>; Jeff Gelles & Inquirer Staff Writer, *Private Student Loan Market Mirrored Housing Bubble*, PHILLY.COM (July 21, 2012), http://articles.philly.com/2012-07-21/business/32765198_1_private-student-loans-private-student-loan-market-stafford-loans; Andrew Martin & Andrew W. Lehen, *A Generation Hobbled by the Soaring Cost of College*, N.Y. TIMES (May 12, 2012), <http://www.nytimes.com/2012/05/13/business/student-loans-weighing-down-a-generation-with-heavy-debt.html> (comparing rising costs of tuitions to rising costs of homes during housing bubble).

¹⁷ Press Release, Federal Deposit Insurance Corporation et al., Subprime Lending: Expanded Guidance for Subprime Lending Programs, *available at* <http://www.fdic.gov/news/news/press/2001/pr0901a.html> (last updated Jan. 31, 2001).

¹⁸ See *Hedlund v. Educ. Res. Inst., Inc.*, 468 B.R. 901, 907 (D. Or. 2012), *rev'd*, 718 F.3d 848 (9th Cir. 2013) (“Attending law school was a guaranteed way to ensure financial stability.”); BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS*, at ix-x (John M. Conley & Lynn Mather eds., 2012); David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html?> [hereinafter *Losing Game?*].

¹⁹ See discussion *infra* Part II.A (comparing law student loan crisis to the subprime mortgage crisis). See generally Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 407 (2005) [hereinafter *Undue Hardship*] (discussing the proliferation of tuitions and loans to cover them).

²⁰ See Fed. Student Aid, *Federal Student Loan Program*, STUDENTAID (June 2013), <http://studentaid.ed.gov/sites/default/files/federal-loan-programs.pdf> (explaining that most loans are given without consideration for current income). *But see id.* (detailing that students may *not* borrow Direct PLUS Loans if they have an adverse credit history).

²¹ See Segal, *Losing Game?*, *supra* note 18.

student loan default, and define the law student debt crisis.²² Part II will argue that many federal loans issued to attend law school, viewed through the lens of Dodd-Frank, are unsafe.²³ Part III will directly apply the principles of Dodd-Frank to the law student debt crisis, outline the proposal, and discuss its merits.²⁴

I. THE HEA AND THE LAW SCHOOL DEBT CRISIS

A. *The HEA as a Means to Prosperity*

Congress passed the Higher Education Act of 1965 to ensure that more people could afford to attend colleges and universities.²⁵ President Johnson proposed and later signed the HEA as part of his Great Society policy agenda.²⁶ Johnson's vision of prosperity for all people depended on the upward mobility of poor people through education.²⁷ Johnson's vision was as pragmatic as it was ideological; he feared that without the HEA the United States would lack a sufficiently trained workforce.²⁸ Thus, the HEA provided federal money to state educational institutions and authorized direct student aid to students who wished to attend college.²⁹ Congress has since reauthorized the HEA eight times, most recently in 2008.³⁰

²² See discussion *infra* Part I (discussing federal approaches to student debt and the law student debt crisis).

²³ See discussion *infra* Part II (arguing that federal loans to attend law school often feature unsafe DTI ratios).

²⁴ See discussion *infra* Part III (proposing that the DOE refuse to issue Direct Loans to attend law schools whose graduates carry unsafe debt levels).

²⁵ See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219; Matthew A. McGuire, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 119-20 (2012); Joseph Siple, *For-Profit Education and Federal Funding: Bad Outcomes for Students and Taxpayers*, 64 RUTGERS L. REV. 267, 270 (2011).

²⁶ See ANGELICA CERVANTES ET AL., TG RESEARCH AND ANALYTICAL SERVS., OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER 17 (2005), available at http://www.tgslc.org/pdf/hea_history.pdf (noting that President Johnson fervently believed in higher education and made the HEA a legislative priority); Siple, *supra* note 25, at 270.

²⁷ See Lyndon B. Johnson, Remarks at the University of Michigan (May 22, 1964), in 1 PUB. PAPERS OF THE PRESIDENTS OF THE U.S.: LYNDON B. JOHNSON, 1963-1964, at 704-07 (Gov't Printing Office ed., 1965), available at <http://quod.lib.umich.edu/p/ppotpus/4730949.1964.001/786?rgn=full+text;view=image>.

²⁸ See Siple, *supra* note 25, at 270.

²⁹ See 20 U.S.C. § 1070 (2012); see also sources cited *supra* note 25 and accompanying text.

³⁰ See generally CERVANTES ET AL., *supra* note 26, at 31-42 (discussing the history

Title IV of the HEA specifically authorizes direct aid to students seeking to attend post-secondary institutions.³¹ Congress found that, in terms of total family investment, the costs of higher education were second only to mortgage payments.³² Many young people, they noted, chose to forgo college due to its excessive costs.³³ These problems were particularly concentrated among the nation's poor who were the least likely to attend college, regardless of aptitude.³⁴ To receive adequate training, the next generation of American workers needed direct access to scholarships and low-interest loans.³⁵

Congress originally viewed Title IV student loans as a last line of defense for prospective students.³⁶ They designed the loans to be a safety valve for middle-income families facing economic crises, or work-study students who found themselves unable to work.³⁷ Congress felt that Title IV loans were critical to poor families because they would not have access to this credit from private lenders.³⁸ Thus, they made Title IV loans available to all students without consideration of their ability to pay.³⁹

Almost all law students finance their legal education using Title IV loans — specifically through the William D. Ford Direct Loan (“Direct Loan”) program.⁴⁰ Direct Loans consist of Stafford loans and PLUS

of HEA reauthorizations).

³¹ See 20 U.S.C. Ch. 28, Subch. IV. Pt. A (2012).

³² See S. REP. NO. 673-89, at 36 (1965) (“[T]he total investment in education is second in size only to the family investment in a home. Unlike home mortgage costs, which can be spread over two or more decades, the cost of higher education is heavily concentrated in a short span of years.”).

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.* at 5-8.

³⁶ See *id.*; CERVANTES ET AL., *supra* note 26, at 47 (explaining that Congress felt the grant program would diminish the need for the loan program). See generally S. REP. NO. 673-89 (detailing the rising cost of tuition and the growing burden on students).

³⁷ See S. REP. NO. 673-89, at 44-46.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See 20 U.S.C. § 1087b (2012); William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, A.B.A. J. (Jan. 1, 2012, 5:20 AM CST), available at http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/ (noting that 85% of law students take loans and owe almost \$100,000 on average). See generally New Amer. Found., *Federal Student Loan Programs — History*, FED. EDUC. BUDGET PROJECT (Mar. 28, 2012, 7:47 PM), <http://febp.newamerica.net/background-analysis/federal-student-loan-programs-history> (giving an overview of the transition from FFELP loans to Direct Loans).

loans.⁴¹ Stafford loans are lower cost loans, but a student may only take out up to \$20,500 in Stafford loans per year.⁴² Federal PLUS loans bridge the gap between other financial aid sources and the cost of attendance at participating schools.⁴³ Law students may finance the entire cost of their education via the Direct Loan program.⁴⁴ The DOE delivers these loans directly to law schools.⁴⁵

The DOE will issue Direct Loans to attend any law school accredited by the American Bar Association (“ABA”).⁴⁶ The DOE itself does not accredit any postsecondary institution.⁴⁷ Rather, it entrusts various accrediting agencies to determine which schools are eligible to receive Title IV funds.⁴⁸ Nevertheless, the DOE may deny Title IV funds to any institution to protect the financial interests of the United States or the intent of the HEA.⁴⁹

B. Congress’ Two-Pronged Approach to Increasing Tuition Levels: More Loans, More Risk

As Congress expected, college tuitions continued to rise beyond the rate of inflation after they passed the HEA.⁵⁰ Since 1965, Congress has

⁴¹ See Fed. Student Aid, *supra* note 20.

⁴² *Subsidized and Unsubsidized Loans*, FED. STUDENT AID, <http://studentaid.ed.gov/types/loans/subsidized-unsubsidized> (last visited Mar. 15, 2014).

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See § 1087b(c).

⁴⁶ See *Thomas M. Cooley Law Sch. v. Am. Bar Ass’n*, 459 F.3d 705, 707 (6th Cir. 2006) (noting that ABA accreditation is critical to receiving federally-backed aid). See generally 20 U.S.C. § 1099b (2012) (explaining the recognition process of the accrediting agencies).

⁴⁷ See U.S. Dep’t of Educ., *Overview of Accreditation*, ED.GOV, <http://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview> (last modified Jan. 16, 2014).

⁴⁸ See *id.*; see also U.S. Dep’t of Educ., *Accrediting Agencies Recognized for Title IV Purposes*, ED.GOV, http://www2.ed.gov/admins/finaid/accred/accreditation_pg9.html#law (last modified Jan. 16, 2014).

⁴⁹ See 20 U.S.C. § 1087d(a)(1)(6) (2012) (requiring an institution to comply with any provisions the “Secretary determines are necessary to protect the interests of the United States and to promote the purposes of this part”).

⁵⁰ See GLENN HARLAND REYNOLDS, *THE HIGHER EDUCATION BUBBLE 12-14* (2012) (noting that college tuitions rose to account for federal subsidies); Mark J. Perry, *Chart of the Day: The Higher Education Bubble*, AEI IDEAS (July 25, 2011, 8:56 AM), <http://www.aei-ideas.org/2011/07/chart-of-the-day-the-higher-education-bubble/> (commenting that the higher education “bubble” mirrors the 1990s tech bubble); Mark J. Perry, *Higher Education Bubble: College Tuition Doubled Over the Last 10 Years vs. +52% for Medical Care*, CARPE DIEM (July 26, 2011, 1:11 PM), <http://mjperry.blogspot.com/2011/07/higher-education-bubble-college-tuition.html> (demonstrating that college tuitions have risen at a rate double the consumer price index).

responded to the rising costs of higher education in two ways. First, it has increased access to federal loans via revisions to the HEA.⁵¹ Second, it has restricted the ability of student debtors to discharge student loan debt via revisions to the bankruptcy code.⁵²

In 1976, Congress dramatically limited the ability of student debtors to obtain bankruptcy relief.⁵³ Congress feared that extending broad bankruptcy protections would reward students for refusing to honor a legal obligation to taxpayers.⁵⁴ Congressional testimony included accounts — often exaggerated — of professional students taking federal loans with no intent to repay.⁵⁵ Thus, Congress added a new requirement that student debtors could not seek discharge until five years after their first student loan payment.⁵⁶ Even more importantly, bankruptcy courts could only discharge federal student loans that placed an “undue hardship” on the debtor.⁵⁷ Many members of Congress opposed this provision because it placed students in the same debt category as criminals, tax cheats, and deadbeat dads.⁵⁸

Congress did not define undue hardship in the Bankruptcy Code.⁵⁹ In most circuits, courts have adopted the *Brunner* test to determine

⁵¹ See, e.g., CERVANTES ET AL., *supra* note 26, at 41 (illustrating how revisions to the HEA sought to increase access to loans by middle class families).

⁵² See 11 U.S.C. § 523(a)(8) (2012) (prohibiting discharge of students’ loans except in cases of “undue hardship”); Brendan Baker, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1218 (2012) (explaining how Congress revised the bankruptcy code five times in 1976 to make discharge of student loans more difficult); Pardo & Lacey, *Undue Hardship*, *supra* note 19, at 419-28 (giving history of the genesis and evolution of § 523(a)(8)).

⁵³ See Baker, *supra* note 52, at 1218; Pardo & Lacey, *Undue Hardship*, *supra* note 19, at 419-20.

⁵⁴ See Baker, *supra* note 52, at 1217-18; Pardo & Lacey, *Undue Hardship*, *supra* note 19, at 425-28.

⁵⁵ See Pardo & Lacey, *Undue Hardship*, *supra* note 19, at 420 (explaining that Congress feared fraud even after being presented with evidence that less than 1% of federally insured loans were discharged in bankruptcy).

⁵⁶ See Baker, *supra* note 52, at 1218.

⁵⁷ See Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (codified at 20 U.S.C. § 1087-3 (1976)).

⁵⁸ See H.R. REP. NO. 95-595, at 149 (1976) (statement of Representative O’Hara) (arguing that the bankruptcy changes “treats educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony-dodging”); Pardo & Lacey, *Undue Hardship*, *supra* note 19, at 422 (analogizing educational loans to loans obtained by crimes).

⁵⁹ See 11 U.S.C. § 523(a)(8) (2012); *In re Brunner*, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff’d sub nom.* *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (“‘Undue hardship’ is undefined in the Bankruptcy Code.”); B.J. Huey, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to*

whether a student has demonstrated undue hardship.⁶⁰ In *In re Brunner*, the debtor filed for bankruptcy within seven months of graduating with a master's degree in Social Work.⁶¹ She sought discharge of all her debts except \$9,000 in student debt, which had not yet entered repayment.⁶² Two months later, after the grace period expired on her student loans, the debtor amended her complaint to include her \$9,000 in student debt.⁶³ At the time, she had not made a single student loan payment.⁶⁴ At a hearing, Brunner explained her shaky finances and difficulty finding a job.⁶⁵ The bankruptcy judge discharged all of her debt.⁶⁶

The district court reversed the discharge on appeal and held that Brunner had not established undue hardship.⁶⁷ The court reasoned that the debtor has a burden to meet three prongs in order to demonstrate undue hardship.⁶⁸ First, the debtors must establish that they cannot maintain a minimal standard of living if forced to repay the loan.⁶⁹ Second, they must prove that their financial condition is unlikely to improve for a significant portion of the repayment period of the loan.⁷⁰ Finally, debtors must demonstrate a good faith effort to repay the loan.⁷¹

The court found that Brunner failed on the second and third prongs.⁷² Specifically, she did not prove that her inability to pay would last for a significant portion of the repayment period because she was

Discharge Section 523(a)(8) of the Bankruptcy Code?, 34 TEX. TECH L. REV. 89, 92 (2002).

⁶⁰ See *In re Frushour*, 433 F.3d 393, 400 (4th Cir. 2005); *In re Oyler*, 397 F.3d 382, 385 (6th Cir. 2005); *In re Polleys*, 356 F.3d 1302, 1309-10 (10th Cir. 2004); *In re Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003); *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003); *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998); *In re Faish*, 72 F.3d 298, 305-06 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132, 1136-37 (7th Cir. 1993); Julie Swedback & Kelly Prettner, *Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases*, 36 WM. MITCHELL L. REV. 1679, 1682 (2010).

⁶¹ See *In re Brunner*, 46 B.R. at 753.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 758.

⁶⁸ See *id.* at 756.

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ *Id.*

⁷² See *id.* at 758.

skilled and capable of paying off her debt in the future.⁷³ Additionally, Brunner failed to demonstrate a good faith effort to repay her debt because she did not make a single payment and requested discharge before exploring deferment options.⁷⁴

Courts have applied the *Brunner* test harshly.⁷⁵ A debtor must usually demonstrate substantial hardship; chronic debilitating health issues are typically a decisive factor.⁷⁶ Even if hardship exists, debtors must still demonstrate a good faith effort to pay the loan.⁷⁷ In many cases, student debtors are advised that winning an undue hardship discharge is impossible.⁷⁸

After revising the bankruptcy code, Congress dramatically expanded access to federally guaranteed student loans in 1978 and has since continued to expand the program.⁷⁹ Until then, many middle class

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See generally Robert C. Cloud, Ed.D., *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783, 797-98 (2004) (“Student debtors must establish a certainty of hopelessness to achieve discharge, a very difficult legal hurdle to surmount.”); Swedback & Prettner, *supra* note 60, at 1679-80 (discussing cases where sympathetic debtors have failed to win undue hardship discharge).

⁷⁶ See Pardo & Lacey, *Undue Hardship*, *supra* note 19, at 485 (explaining that the discharge rate for unhealthy debtors was far higher than for healthy debtors regardless of income).

⁷⁷ See, e.g., *In re Mason*, 464 F.3d 878, 885 (9th Cir. 2006) (reinstating students loans of a debtor found to show insufficient repayment effort despite finding that debtor was unable to repay the loan); *In re Frushour*, 433 F.3d 393, 401 (4th Cir. 2005) (holding a debtor may not voluntarily take a low-paying job as preferred field and claim undue hardship); *In re Gerhardt*, 348 F.3d 89, 93 (5th Cir. 2003) (finding that an orchestra musician must work outside field if necessary to pay student debt); *In re Faish*, 72 F.3d 298, 305-06 (3d Cir. 1995) (adopting the *Brunner* test); *In re Roberson*, 999 F.2d 1132, 1136-37 (7th Cir. 1993) (refusing to discharge the loans of a debtor because he failed to prove a good faith effort to maximize future income).

⁷⁸ See Ron Lieber, *Last Plea on Student Loans: Proving a Hopeless Future*, N.Y. TIMES (Aug. 31, 2012), http://www.nytimes.com/2012/09/01/business/shedding-student-loans-in-bankruptcy-is-an-uphill-battle.html?_r=2&pagewanted=all&; Martha Neil, *In ‘Perfect Storm’ of Hard-to-Find Jobs and Stagnant Pay, Law Grads Can’t Escape Hefty Student Loans*, A.B.A. J. (Feb. 6, 2012), http://www.abajournal.com/news/article/more_recent_law_grads_likely_are_filing_for_bankruptcy/ (noting that it’s notoriously difficult to prove undue hardship); Katy Stech, *Grads Skirt Student Loans*, WALL ST. J. (Dec. 7, 2012), <http://online.wsj.com/article/SB10001424127887323316804578161223639540916.html?user=welcomed&mg=id-wsj>. But see Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 184-85 (2009) [hereinafter *The Real Student-Loan Scandal*] (arguing that more discharges are permitted than popularly thought but contending that the real problem is inconsistent application of the standard).

⁷⁹ See Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978) (codified as amended in 20 U.S.C. § 1001 (2012)); C. Aaron LeMay & Robert

families were unable to meet the strict income requirements of the HEA, yet were still priced out of higher education.⁸⁰ After the revision, federal student loans tripled, and the amount of borrowing has increased ever since.⁸¹ One year later, Congress again expanded undue hardship protection to include any federally guaranteed loans issued by non-profit institutions.⁸²

Currently, all student loans — including loans issued by private banks — fall under undue hardship protection.⁸³ Senator Elizabeth Warren commented that student debt collectors enjoy collection powers that would make mobsters jealous.⁸⁴ Indeed, student loans can follow debtors for their entire life.⁸⁵

C. *The Law School Debt Crisis: High Debt, Low Pay*

Law students overwhelmingly depend on Title IV funds to finance their education.⁸⁶ A greater percentage of law students take federal

C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 80-81 (2007) (noting that Congress responded to pressure from middle class families to expand loan opportunities).

⁸⁰ LeMay & Cloud, *supra* note 79, at 80-81.

⁸¹ *See id.*; *see also* CERVANTES ET AL., *supra* note 26, at 47 (showing steady increase in student borrowing each year since 1977).

⁸² *See* Baker, *supra* note 52, at 1218.

⁸³ *See id.* at 1218-19; Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 78, at 181.

⁸⁴ John Hechinger, *Obama Relies on Debt Collectors Profiting from Student Loan Woe*, BLOOMBERG (Mar. 25, 2012), <http://www.bloomberg.com/news/2012-03-26/obama-relies-on-debt-collectors-profiting-from-student-loan-woe.html> (“Student-loan debt collectors have power that would make a mobster envious.”); *see also* Peter Reilly, *Should Student Loans be Dischargeable in Bankruptcy?*, FORBES (Dec. 29, 2011), <http://www.forbes.com/sites/peterjreilly/2011/12/29/should-student-loans-be-dischargeable-in-bankruptcy/> (acknowledging that student loans are “structurally predatory” because they lack bankruptcy protection, statutes of limitations, refinancing rights, and other consumer protections).

⁸⁵ *See* Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,622 (proposed July 26, 2010) (to be codified at 34. C.F.R. pt. 668), *available at* <https://www.federalregister.gov/articles/2010/07/26/2010-17845/program-integrity-gainful-employment> (explaining how former students who default on their student loans face difficulty finding housing and purchasing a car); Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 471-72 (2012) (detailing the consequences of student loan default); Peter Coy, *Student Loans: Debt for Life*, BUS. WK. (Sept. 18, 2012), <http://www.businessweek.com/articles/2012-09-06/student-loans-debt-for-life>; Jonathan D. Glater, *Finding Debt a Bigger Hurdle Than Bar Exam*, N.Y. TIMES (July 1, 2009), http://www.nytimes.com/2009/07/02/business/02lawyer.html?_r=1&hp (detailing how debt can prevent debtors from getting a law license).

⁸⁶ *See* TAMANAHA, *supra* note 18, at 109-12 (demonstrating that the vast majority

loans than any other type of student.⁸⁷ In 2011, more than 85% of law students graduated with student loan debt; the average graduate carried more than \$92,000 in total debt.⁸⁸ Only medical students — whose education requires an additional year of study — take on more cumulative debt.⁸⁹

Law school tuitions have risen dramatically in recent decades.⁹⁰ From 1985 through 2009, resident tuition at public law schools skyrocketed by 820%.⁹¹ In the same span, non-resident tuition increased by 543%, and tuition at private schools increased by 343%.⁹² These prices have far outstripped inflation; if public law school tuition rose only with inflation, then public law schools would cost over 25% less than they do now.⁹³ Law school tuitions have risen faster and steadier than the price of undergraduate education.⁹⁴ Recent tuition increases outpaced even the rise in housing prices seen during the frenzy of the subprime mortgage bubble.⁹⁵

Despite historic debt levels, law graduates currently face the worst employment environment in decades.⁹⁶ Though society has traditionally viewed law school as a safe investment,⁹⁷ many law

of law students take on considerable debt); Julie Margetta Morgan, *What Can We Learn from Law School? Legal Education Reflects Issues Found in All of Higher Education*, CTR. FOR AM. PROGRESS 8 (Dec. 2011), http://www.americanprogress.org/wpcontent/uploads/issues/2011/12/pdf/legal_education.pdf; *Student Loans*, FINAID, <http://www.finaid.org/loans/> (last visited Feb. 13, 2014) (noting that in 2010, 88.6% of law students financed their education with loans and the average debtor owed a total of \$92,937).

⁸⁷ See *Student Loans*, *supra* note 86.

⁸⁸ See sources cited *supra* note 85 and accompanying text.

⁸⁹ See *Student Loans*, *supra* note 86.

⁹⁰ See TAMANAHA, *supra* note 18, at 107.

⁹¹ *Id.* at 108; see also Segal, *Losing Game?*, *supra* note 18 (stating that law school tuition has outpaced the rate of inflation).

⁹² See TAMANAHA, *supra* note 18, at 108.

⁹³ See *id.* at 107; see also Segal, *Losing Game?*, *supra* note 18.

⁹⁴ See REYNOLDS, *supra* note 50, at 12; TAMANAHA, *supra* note 18, at 128-29.

⁹⁵ REYNOLDS, *supra* note 50, at 12.

⁹⁶ *Law School Grads Face Worst Job Market Yet — Less Than Half Find Jobs in Private Practice*, N.A.L.P. (June 7, 2012) [hereinafter *Law School Grads*], <http://www.nalp.org/2011selectedfindingsrelease>.

⁹⁷ See *Hedlund v. Educ. Res. Inst., Inc.*, 468 B.R. 901, 907 (D. Or. 2012), *rev'd*, 718 F.3d 848 (9th Cir. 2013) (“Attending law school was a guaranteed way to ensure financial stability.”); Jennifer Cheeseman Day & Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, U.S. CENSUS BUREAU 1-4 (July 2012), <http://www.census.gov/prod/2002pubs/p23-210.pdf> (noting that people generally believe education will lead to greater income).

students graduate without a legal job.⁹⁸ Only 8% of legal graduates will earn positions at large law firms and command the large salaries they offer.⁹⁹ Thus, some have recently declared law school the worst investment an individual can make.¹⁰⁰

Law schools often argue that the debt load of the average law student is comparable to the salary of the average lawyer.¹⁰¹ But this characterization is misleading because the salaries of recent legal graduates fall on a disparate bimodal distribution curve.¹⁰² The bimodal distribution curve describes the disparate salaries of law school graduates. It demonstrates how very few new lawyers actually earn the average salary of a law school graduate. Most earn far less, yet a small minority of graduates earn very high salaries that skew the average.¹⁰³

The bimodal distribution curve ensures that most law graduates earn far less than the “average” graduate. In 2012, NALP reported that the unadjusted *mean* graduate salary for graduates was \$80,798.¹⁰⁴ Yet the *median* salary was much lower: \$61,245.¹⁰⁵ NALP further stated that these unadjusted numbers were inflated because many employers

⁹⁸ See TAMANAHA, *supra* note 18, at 114-18; *Law School Grads*, *supra* note 96.

⁹⁹ See J. Maureen Henderson, *Why Attending Law School Is the Worst Career Decision You'll Ever Make*, FORBES (June 26, 2012), <http://www.forbes.com/sites/jmaureenhenderson/2012/06/26/why-attending-law-school-is-the-worst-career-decision-youll-ever-make/>.

¹⁰⁰ *Id.*

¹⁰¹ See Lawrence E. Mitchell, *Law School Is Worth the Money*, N.Y. TIMES (Nov. 28, 2012), <http://www.nytimes.com/2012/11/29/opinion/law-school-is-worth-the-money.html?partner=rssnyt&emc=rss>.

¹⁰² See TAMANAHA, *supra* note 18, at 112-14 (giving a detailed analysis of the bimodal distribution curve for law school graduates); Judith N. Collins, *NALP Research: Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, N.A.L.P. 3 (Aug. 2012), <http://www.nalp.org/uploads/0812Research.pdf> (explaining the evolution of the bimodal distribution curve); Elie Mystal, *Law Dean Takes to the N.Y. Times Op-Ed Page to Blame Media for Declining Law School Applications*, ABOVE L. (Nov. 29, 2012), <http://abovethelaw.com/2012/11/law-dean-takes-to-the-new-york-times-op-ed-page-to-blame-media-for-declining-law-school-applications/> (attacking the myth of the “average salary” being a useful number given the bimodal distribution curve of law graduate salaries); Elie Mystal & Staci Zaretsky, *Starting Salaries Are Swirling Down the Drain*, ABOVE L. (July 12, 2012), <http://abovethelaw.com/2012/07/starting-salaries-are-swirling-down-the-drain/> (discussing the significance of the bimodal curve).

¹⁰³ See sources cited *supra* note 102 and accompanying text.

¹⁰⁴ See *Law School Class of 2012 Finds More Jobs, Starting Salaries Rise — But Large Class Size Hurts Overall Employment Rate*, N.A.L.P. (June 20, 2013) [hereinafter *2012 Starting Salaries Rise*], http://www.nalp.org/classof2012_selected_pr.

¹⁰⁵ See *id.*

did not report their salaries.¹⁰⁶ Large law firms, who employ between 12–16% of law graduates, cause these disparities.¹⁰⁷ Their starting salaries, usually \$160,000 or more, eclipse the salaries of other graduates.¹⁰⁸ In addition, large firms are far more likely to report their salaries.¹⁰⁹ Accordingly, when it comes to starting salaries for law school graduates, averages are exceptionally misleading.¹¹⁰

These conditions — rising tuitions coupled with relatively low salaries — suggest that tuitions are somewhat insensitive to graduate earning power.¹¹¹ Students have demonstrated that they will borrow enormous amounts of money to attend any law school.¹¹² For example, a graduate of Yale Law School (“YLS”), the top law school in *US News & World Report’s* ranking,¹¹³ paid \$54,650 in tuition and fees this year.¹¹⁴ A student at Thomas Jefferson School of Law (“TJSL”), which is unranked by *US News* and the defendant in a lawsuit over falsified employment statistics,¹¹⁵ paid \$44,000 this year.¹¹⁶ Yet Yale students enjoyed a much more substantial return on their investment: in 2011, 83% of Yale graduates found full-time positions requiring bar passage.¹¹⁷ By contrast, only 33% of Thomas Jefferson graduates

¹⁰⁶ See *Starting Salaries — Class of 2012*, N.A.L.P. (Sept. 2013), http://www.nalp.org/starting_salaries_class_of_2012.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.* (“[W]hether considering the adjusted mean, the unadjusted mean, or the median, it remains the case that few jobs pay the mean or median salary.”).

¹¹¹ See TAMAHANA, *supra* note 18, at 131-32 (explaining that even non-elite law schools could increase tuitions because demand has been sufficiently high). See generally David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1 [hereinafter *Ka-Ching!*], available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?ref=davidsegal&r=0> (noting that the business of law school isn’t subject to the rules of a market economy).

¹¹² See sources cited *supra* note 86 and accompanying text.

¹¹³ *Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Mar. 15, 2014) [hereinafter *USN Rankings*].

¹¹⁴ *Id.*

¹¹⁵ See *id.*; Mark Hansen, *Saying ‘Labels Matter,’ Judge Permits Law School Alumni Suit Over Job Stats*, A.B.A. J. (Dec. 4, 2012), http://www.abajournal.com/news/article/judge_denies_thomas_jefferson_sols_motion_for_summary_judgment_of_alumni/ (discussing the court’s rejection of TJSL’s motion for summary judgment).

¹¹⁶ See *USN Rankings*, *supra* note 113.

¹¹⁷ These numbers are compiled from the 2011 Employment Summary report for all member schools prepared by the American Bar Association. See *Section of Legal Education — Employment Summary Report*, A.B.A., <http://employmentsummary.abaquestionnaire.org/> (last visited Feb. 13, 2014) [hereinafter *A.B.A. Employment*].

earned these positions.¹¹⁸ Further, approximately 32% of Yale students found employment at law firms employing more than one hundred lawyers.¹¹⁹ These positions carry, by far, the highest salaries of any positions for new legal graduates.¹²⁰ Only 1% of Thomas Jefferson graduates earned these positions.¹²¹

Law schools in the same geographic market, with relatively close *US News* rankings, also demonstrate this disparity. For example, an in-state law student at the University of California, Berkeley — ranked ninth — only pays about \$750 more in tuition than a law student at the University of California, Davis — ranked thirty-sixth.¹²² But a Berkeley graduate is more than four times as likely to find a position at a law firm employing more than 100 attorneys than a Davis graduate.¹²³

Tuition rates only partially illustrate the problem because law schools allocate different amounts of money towards financial aid. For example, the average YLS student-debtor graduates with \$111,961 in debt, but the average TJSJL student-debtor graduates with \$180,665 in debt.¹²⁴ These numbers strongly suggest that, in many cases, the student-debtors who borrow the most will earn the least.

II. THE DOE ISSUES MANY UNSAFE DIRECT LOANS

This Part argues that some law school loans — like some pre-Dodd-Frank mortgages — are too dangerous. First, it compares the

Report] (select “Yale University” under “Select School”; then select “2012” under “Select Class”; then select “Generate Report”).

¹¹⁸ *Id.* (select “Thomas Jefferson School of Law” under “Select School”; then select “2012” under “Select Class”; then select “Generate Report”).

¹¹⁹ *See id.* (select “Yale University” under “Select School”; then select “2012” under “Select Class”; then select “Generate Report”).

¹²⁰ *See TAMANAHA, supra* note 18, at 112-14; *Employment for the Class of 2012 — Selected Findings*, N.A.L.P. 3 (2013), <http://www.nalp.org/uploads/Classof2012SelectedFindings.pdf>.

¹²¹ *See A.B.A. Employment Report, supra* note 117 (select “Thomas Jefferson School of Law” under “Select School”; then select “2012” under “Select Class”; then select “Generate Report”); *USN Rankings, supra* note 113.

¹²² *See USN Rankings, supra* note 113 (demonstrating that a UC Berkeley student pays \$48,058 for in-state tuition and a UC Davis student pays \$47,286 for in-state tuition).

¹²³ *See A.B.A. Employment Report, supra* note 117 (select “2012” under “Select Class”; then select “Download Complete Employment Data” — reports that 54% of Berkeley graduates join firms employing more than 100 lawyers compared to 12% of Davis graduates).

¹²⁴ *See Whose Graduates Have the Most Debt?*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/> (last visited Mar. 15, 2014) [hereinafter *USN Debt Rankings*].

subprime mortgage bubble to the student debt crisis, and argues that Dodd-Frank offers an effective rubric for evaluating the “safety” of loans. Next, it contends that many law school student loans — viewed from the lens of Dodd-Frank — are unsafe despite recent federal efforts to assist debtors in repayment.

A. *Unsafe Conditions: Comparing Law Student Loans and the Subprime Mortgage Bubble*

Congress massively reformed consumer finance by passing Dodd-Frank.¹²⁵ In doing so, the federal government effectively declared that some loans were too dangerous to tolerate.¹²⁶ During the housing bubble, many homebuyers over-borrowed because unique features of the subprime mortgage market permitted and encouraged dangerous loans.¹²⁷ Through Dodd-Frank, Congress sought to reverse those features and prevent those conditions from occurring again.¹²⁸

The student loan market shares many of the same features as the pre-Dodd-Frank subprime mortgage market. For example, both markets feature perverse incentives for debt brokers. During the mortgage crisis, unscrupulous mortgage brokers fueled the bubble by selling mortgages to people they knew could not afford them.¹²⁹

¹²⁵ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5301 (2012)), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>; Ben Protess, *Deconstructing Dodd-Frank*, N.Y. TIMES: DEALBOOK (Dec. 11, 2012), <http://dealbook.nytimes.com/2012/12/11/deconstructing-dodd-frank/> (calling Dodd-Frank “the most significant regulatory overhaul since the Great Depression”).

¹²⁶ See Bar-Gill & Warren, *supra* note 14, at 2, 7, 95 (arguing for a provision in Dodd-Frank to regulate consumer credit); Pottow, *supra* note 15, at 176-77 (discussing Dodd-Frank prohibition on mortgage loans without considering the borrower’s ability to pay); Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY 8, 16-17 (2007) (calling for a Financial Product Safety Commission to ban unsafe loans).

¹²⁷ See FINANCIAL CRISIS REPORT, *supra* note 2, at 402, 418; Erik F. Gerding, *The Subprime Crisis and the Link Between Consumer Financial Protection and Systemic Risk*, 4 FIULR 435, 448-50 (2009) (discussing the effect of securitization of mortgages reducing lender risks and dramatically lowering underwriting standards); Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 50-51 (2009) (discussing the role of information-asymmetry leading up to the subprime mortgage crisis); Frederic S. Mishkin, Governor, Bd. of Governors of the Fed. Reserve Sys., Remarks at the U.S. Monetary Policy Forum: On “Leveraged Losses: Lessons from the Mortgage Meltdown” (Feb. 29, 2008), available at <http://www.federalreserve.gov/newsevents/speech/mishkin20080229a.htm> (discussing incentive problems created by “originate-to-distribute” model).

¹²⁸ See Dodd-Frank Act § 1411 (discussing the components of a safe mortgage).

¹²⁹ See Bar-Gill & Warren, *supra* note 14, at 38-39 (discussing how mortgage originators pushed borrowers into loans they would not have purchased otherwise);

Brokers profited by immediately flipping the debt to other institutions and thus did not suffer a loss in the case of default.¹³⁰ Thus, the chief point of contact between borrowers and lenders was a gatekeeper with no incentive to protect either party in the transaction.¹³¹ Rather, the pre-Dodd-Frank mortgage brokers only had a financial stake in increasing the size, and number, of mortgage loans.¹³² Their misaligned interests, combined with an information asymmetry between sophisticated brokers and unsophisticated first-time buyers, resulted in many loans that borrowers could never repay.¹³³

Law schools broker law student debt and, like mortgage brokers in the subprime mortgage crisis, do so risk-free. Law schools certify student applications for student loans and directly receive the money from the DOE.¹³⁴ If a student never makes a payment, the federal government must bear the full cost of the transaction.¹³⁵ The law school need not refund any portion of the loan proceeds. Thus, federal policy incentivizes schools to charge as much as students are willing to borrow, but presents no financial incentive to decrease student debt loads.

The mortgage crisis demonstrated that incentives to increase consumer borrowing are particularly dangerous when debt transactions feature an information asymmetry.¹³⁶ Mortgage loans

Gerding, *supra* note 127, at 448-50; Charles W. Murdock, *Why Not Tell the Truth? Deceptive Practices and the Economic Meltdown*, 41 LOY. U. CHI. L.J. 801, 857-63 (2010) (discussing how the incentives of mortgage originators worked against borrowers).

¹³⁰ See sources cited *supra* note 127 and accompanying text; see also Murdock, *supra* note 129, at 857-63; *The Giant Pool of Money*, *supra* note 6.

¹³¹ See sources cited *supra* note 127 and accompanying text; see also FINANCIAL CRISIS REPORT, *supra* note 2, at 165 (noting that originators earned a commission, which gave them an incentive to make more loans).

¹³² See sources cited *supra* note 127 and accompanying text; see also FINANCIAL CRISIS REPORT, *supra* note 2, at 165 (noting that originators earned a commission, which gave them an incentive to make more loans).

¹³³ See sources cited *supra* note 127 and accompanying text; see also FINANCIAL CRISIS REPORT, *supra* note 2, at 165 (noting that originators earned a commission, which gave them an incentive to make more loans).

¹³⁴ See *While You're in School*, FED. STUDENT AID, <http://www.direct.ed.gov/inschool.html> (last updated Jan. 3, 2014) [hereinafter *Direct Loans*]; see also *Applying for Direct Loans*, FED. STUDENT AID, <http://www.direct.ed.gov/applying.html> (last updated Jan. 3, 2014).

¹³⁵ See generally *Federal Student Loan Programs — History*, *supra* note 40 (discussing transition to Direct Loan program following the financial crisis).

¹³⁶ See Bar-Gill & Warren, *supra* note 14, at 38-39 (discussing how many mortgage borrowers took more expensive loans than they needed because they did not know better); Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 7 (2011) (discussing how homebuyers are at an information disadvantage when working with mortgage lenders); Moran, *supra* note 127, at 50-51.

usually feature transactions between a sophisticated party, like a bank, and an unsophisticated one-time buyer.¹³⁷ The perverse incentives for brokers, coupled with information asymmetry, caused many homebuyers to borrow dangerously.¹³⁸ They borrowed more money than they needed, and did so on less favorable terms than they could have negotiated.¹³⁹ The borrowers simply did not know enough to demand a better deal.¹⁴⁰ Much worse, in many instances, these conditions encouraged outright fraud by mortgage brokers to encourage borrowers to borrow excessive amounts on dangerous terms.¹⁴¹ Thus, in many cases, homebuyers agreed to loans featuring monthly payments that soon ballooned far beyond what their monthly incomes could bear.¹⁴²

The law school loan process features a similar information asymmetry.¹⁴³ Law schools are sophisticated parties and law students are one-time buyers. Student loan borrowers must undergo entrance counseling to learn the terms of their debt.¹⁴⁴ Unfortunately, this information is only partially helpful to students evaluating whether they can repay their loan. Unlike homebuyers, prospective student borrowers must assess their ability to repay based solely on their assessment of their *future* monthly income. Students are essentially speculating the quality of their law school using their future income as collateral. But a prospective law student must speculate facing a hopeless information disadvantage.¹⁴⁵ No student can match a particular law school's knowledge about the income of its graduates.¹⁴⁶

¹³⁷ See sources cited *supra* note 136 and accompanying text.

¹³⁸ See Bar-Gill & Warren, *supra* note 14, at 39-40.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 8-9 (2009); Christopher J. Miller, "Don't Blame Me, Blame The Financial Crisis": A Survey of Dismissal Rulings in 10b-5 Suits for Subprime Securities Losses, 80 FORDHAM L. REV. 273, 278 (2011); David Heath, *At Top Subprime Mortgage Lender, Policies Were an Invitation to Fraud*, HUFF. POST (Mar. 18, 2010), http://www.huffingtonpost.com/2009/12/21/at-long-beach-mortgage-a_n_399295.html.

¹⁴² See FINANCIAL CRISIS REPORT, *supra* note 2, at 403; Schoen, *supra* note 2.

¹⁴³ 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, 110-13 (2010) (describing the information asymmetries inherent in the law school application process).

¹⁴⁴ See *Entrance Counseling*, FED. STUDENT AID, <https://studentloans.gov/myDirectLoan/whatYouNeed.action?page=counseling> (last visited Feb. 14, 2014).

¹⁴⁵ See, e.g., TAMANAHA, *supra* note 18, at 146-54 (detailing how law school employment numbers are often misleading); Kyle P. McEntee & Patrick J. Lynch, A

Unsurprisingly, law schools have a poor record of providing accurate future income information to prospective students.¹⁴⁷ Law schools routinely report the average salaries of graduates without including the nuances of the bimodal salary distribution.¹⁴⁸ Law schools often hire their own graduates for temporary employment right before releasing their employment numbers.¹⁴⁹ Even worse, law graduates have accused several law schools of outright fraud, including falsifying graduate employment data.¹⁵⁰

Of course, there are important differences between the mortgage crisis and student loans. On a global credit level, student loans may carry less danger because they are unlikely to cause a financial crisis. Unlike many mortgage loans, the federal government explicitly assumes the full risk of student default.¹⁵¹ But on a borrower level, student debt is much riskier than mortgage debt because it has no resale value and the debt cannot be discharged.¹⁵² A student cannot sell their education for a loss. Unlike an underwater homeowner, student debtors may not walk away from their degree nor seek a fresh start in bankruptcy. A student debtor must pay their student loan until the debt is repaid, forgiven, or a bankruptcy court finds them nearly destitute.¹⁵³

Way Forward: Transparency at American Law Schools, 32 PACE L. REV. 1 (2012) (providing an extensive discussion on the challenges facing potential law students to make an informed decision about attending law school).

¹⁴⁶ See sources cited *supra* note 145 and accompanying text.

¹⁴⁷ See Paul Campos, *Top 30 Law School Continues to Tout Phony Employment Stats to Prospective Students*, INSIDE L. SCH. SCAM (Dec. 6, 2012, 6:57 AM), <http://insidethelawschoolscam.blogspot.com/2012/12/top-30-law-school-continues-to-tout.html>; Segal, *Losing Game?*, *supra* note 18 (noting that “Enron-type accounting standards have become the norm” for law school employment reporting); Staci Zaretsky, *Former Thomas Jefferson School of Law Employee Alleges Falsification of Employment Statistics*, ABOVE L. (Oct. 23, 2012), <http://abovethelaw.com/2012/10/former-thomas-jefferson-school-of-law-employee-alleges-falsification-of-employment-statistics/>. Some law schools, on the other hand, have gone out of their way to tell prospective students about declining employment numbers. See, e.g., Elie Mystal, *Washington & Lee Law School Makes Lengthy Employment Disclosure to Prospective Students*, ABOVE L. (Feb. 1, 2011), <http://abovethelaw.com/2011/02/washington-lee-law-school-makes-lengthy-employment-disclosure-to-prospective-students/> (discussing Washington & Lee Law School’s exceptional employment disclosures to prospective students).

¹⁴⁸ See Segal, *Losing Game?*, *supra* note 18.

¹⁴⁹ See *id.*

¹⁵⁰ See Zaretsky, *supra* note 147.

¹⁵¹ See *Federal Student Loan Programs*, *supra* note 40.

¹⁵² See sources cited *supra* note 78 and accompanying text.

¹⁵³ See sources cited *supra* note 78 and accompanying text.

B. *Current Federal Efforts to Assist Law Student Loan Borrowers Are Inadequate to Solve the Debt Crisis*

The federal government has addressed the problem of rising student debt almost exclusively by offering a wider variety of repayment plans.¹⁵⁴ In 1994, Congress authorized the Income-Contingent Repayment Program (“ICRP”) for direct federal loans.¹⁵⁵ The program permits federal student loan borrowers to limit their monthly payments to 20% of their discretionary income.¹⁵⁶ However, if a borrower’s monthly payments do not fully pay any interest due, then the unpaid interest is capitalized.¹⁵⁷ After twenty-five years of successful payments, the federal government forgives the remaining balance.¹⁵⁸

In 2007, President George W. Bush and Congress significantly improved the ICRP by passing the College Cost Reduction and Access Act (“CCRAA”).¹⁵⁹ The Act introduced the Income-Based Repayment plan (“IBR”).¹⁶⁰ Borrowers enrolled in IBR are not required to make monthly payments that exceed 15% of their discretionary income.¹⁶¹ Further, the government will pay any portion of a borrower’s capitalized interest not covered by that payment for three years.¹⁶²

¹⁵⁴ See, e.g., *Repayment Plans*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/plans> (last visited Feb. 13, 2014) (listing seven different repayment plans for federal student loans).

¹⁵⁵ Student Loan Reform Act of 1993, Pub. L. No. 103-66, 107 Stat. 341 (codified as amended at 20 U.S.C. § 1087(a)-(h) (2012)); see also Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 770-74 (2001) (outlining the ICRP option); Thomas J. Yerbich, *Student Loan Income Contingent Repayment Plans: An Alternative?*, AM. BANKR. INST. J., Feb. 24, 2005, at 8, 44 (explaining ICRP); *Income Contingent Repayment*, FINAID, <http://www.finaid.org/loans/icr.phtml> (last visited Feb. 13, 2014).

¹⁵⁶ See sources cited *supra* note 155.

¹⁵⁷ See sources cited *supra* note 155.

¹⁵⁸ See sources cited *supra* note 155.

¹⁵⁹ See 20 U.S.C. § 1098e (2012) (establishing IBR); College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784; James Audette, *Defining “Gainful Employment” and Other Reforms in Federal Educational Lending*, 38 J.C. & U.L. 167, 171-78 (2011) (defining IBR as created by CCRAA); *Income-Based Repayment*, FINAID, <http://www.finaid.org/loans/ibr.phtml> (last visited Feb. 13, 2014).

¹⁶⁰ College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 12 Stat. 784; see also 20 U.S.C. § 1098e.

¹⁶¹ See *Income-Based Plan*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/plans/income-based> (last visited Feb. 13, 2014).

¹⁶² See *id.* (describing interest payment benefit).

The CCRAA dramatically improved the situation for legal graduates who work in government or for public interest organizations.¹⁶³ These debtors may utilize reduced payments under IBR, or any other federal payment plan.¹⁶⁴ After 120 payments, which need not be consecutive, the debtors may have their entire balance forgiven.¹⁶⁵ Unlike other debtors, those who receive public service forgiveness will not have to recognize the discharged amount as income for tax purposes.¹⁶⁶

Congressional payment reforms, however, are insufficient to address the law student loan crisis because they do not reduce principal balances. Both plans feature negatively amortizing interest payments over the course of the loan.¹⁶⁷ In other words, students unable to pay all of their interest payments each month have that interest added to their principal balance.¹⁶⁸ Debtors have lower monthly payments but must pay more over the life of the loan.¹⁶⁹ Thus, enrollment in ICRP or IBR is akin to making minimum payments on credit card debt: debtors pay interest on interest.¹⁷⁰ Further, the debtor must recognize income on the entire balance of the forgiven loan, which may be higher than the amount they originally borrowed, and therefore face an unpayable tax bill.¹⁷¹

The First Circuit wisely applied this reasoning in *In re Bronsdon*.¹⁷² In *Bronsdon*, a sixty-four-year-old woman sought to discharge over \$80,000 in student loans she incurred to attend Southern New England Law School.¹⁷³ After graduation, the woman failed the bar

¹⁶³ See *Public Service Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/publicservice.phtml> (last visited Feb. 13, 2014).

¹⁶⁴ *Id.*

¹⁶⁵ See *Public Service Loan Forgiveness*, *supra* note 163.

¹⁶⁶ See *Taxability of Student Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/forgivenessstaxability.phtml> (last visited Feb. 14, 2014); see also Letter from Eric Solomon, Asst. Sec'y for Tax Pol'y, to Rep. Levin (Sept. 19, 2008), available at <http://www.finaid.org/loans/20080919treasurylevinforforgiveness.pdf> (explaining that teachers and public service workers are not required to recognize a taxable gain when their debts are forgiven, but all others must recognize the amount forgiven as taxable income).

¹⁶⁷ See *Direct Loans*, *supra* note 134.

¹⁶⁸ See Christina Couch, *What to Know About Income-Based Repayment Plans*, BANKRATE (Feb. 20, 2013), <http://www.bankrate.com/finance/student-loans/income-based-repayment-plans.aspx>.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See sources cited *supra* note 166.

¹⁷² See *In re Bronsdon (Bronsdon II)*, 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010).

¹⁷³ *In re Bronsdon (Bronsdon I)*, No. 07-14215-JR, 2009 WL 95038, *1 (Bankr. D. Mass. Jan. 13, 2009), *vacated and remanded sub nom.* Educ. Credit Mgmt. Corp. v.

exam three times by significant margins. After working briefly, she was unable to find employment and her only monthly income was a Social Security check for \$946.¹⁷⁴ The bankruptcy court discharged the debt, and the DOE appealed.¹⁷⁵ The DOE argued that the debtor did not face an undue hardship because she qualified for ICRP, and her payments under that plan would be \$0.¹⁷⁶ By failing to enroll, they argued, she failed to show a good faith effort to repay her loan.¹⁷⁷

On appeal, the First Circuit upheld the discharge. The court reasoned that forcing the debtor to enter ICRP was a pointless exercise.¹⁷⁸ They noted that ICRP did nothing to relieve the debtor of the burden.¹⁷⁹ Further, they noted that because ICRP forgiveness is a taxable event, a debtor who participates in ICRP merely exchanges student loans for tax debt.¹⁸⁰ Because both debts are nondischargeable, the debtor received no relief.¹⁸¹ Thus, the court upheld the discharge.¹⁸²

Despite the First Circuit's approach in *Bronsdon*, IBR and ICRP strengthen undue hardship protection in most circuits.¹⁸³ Debtors that

Bronsdon, 421 B.R. 27 (D. Mass. 2009).

¹⁷⁴ *Id.* at *2.

¹⁷⁵ *Bronsdon II*, 435 B.R. at 795.

¹⁷⁶ *Id.* at 803.

¹⁷⁷ *Id.* at 801.

¹⁷⁸ *See id.* at 803-04.

¹⁷⁹ *Id.* at 804.

¹⁸⁰ *Id.* at 802.

¹⁸¹ *See id.*

¹⁸² *Id.* at 804.

¹⁸³ *See, e.g., In re Mosko*, 515 F.3d 319, 326-27 (4th Cir. 2008) (finding that debtors must seek out loan repayment options such as consolidation to show good faith); *In re Tirsch*, 409 F.3d 677, 682-83 (6th Cir. 2005) (failing to take advantage of ICRP precludes good faith finding); *In re Birrane*, 287 B.R. 490, 500 (B.A.P. 9th Cir. 2002) (finding that failure to enroll in ICRP demonstrates lack of good faith effort to repay); *In re Russotto*, 370 B.R. 853, 858-59 (Bankr. S.D. Fla. 2007) (holding that a graduate who fails to use loan consolidation demonstrates a lack of good faith); Terrence L. Michael & Janie M. Phelps, "Judges?! — We Don't Need No Stinking Judges!!!": *The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 92-96 (2005) (explaining that ICRP has become either a determinative or significant factor in determining good faith). *But see In re Fahrenz*, No. 05-24660-WCH, 2008 WL 4330312, at *8-10 (Bankr. D. Mass. Sept. 17, 2008) (holding that failure to enroll in ICRP does not mean a debtor does not need an undue hardship discharge); *In re DeNittis*, 362 B.R. 57, 63-64 (Bankr. D. Mass. 2007) (holding that building a per se test around ICRP would abdicate the court's role in bankruptcy proceedings); Swedback & Prettner, *supra* note 60, at 1685, 1699-702 (explaining that courts have been inconsistent in determining the relevance of ICRP in undue hardship discharge cases).

fail to enroll in IBR or ICRP, for whatever reason, are much less likely to receive an undue hardship discharge.¹⁸⁴ To qualify, student debtors must demonstrate a good faith effort to repay their debts.¹⁸⁵ But courts often view enrollment in ICRP or IBR — even if the monthly payment is zero — as a requirement for debtors to demonstrate good faith.¹⁸⁶ Indeed, the DOE routinely argues that enrollment in repayment plans ought to be a *per se* requirement to find good faith.¹⁸⁷

For example, the Ninth Circuit saw a debtor's failure to enroll in ICRP as a critical factor in *In re Mason*.¹⁸⁸ The debtor, Keith Mason, was a thirty-three-year-old man diagnosed with a learning disability in the third grade.¹⁸⁹ He graduated from an alternative high school and joined the army.¹⁹⁰ After his service, Mason enrolled at Boise State where he earned a low grade point average but graduated with a philosophy degree.¹⁹¹ Nevertheless, Mason applied to law school at Gonzaga University Law School.¹⁹² Gonzaga admitted Mason despite his low grades and poor LSAT score pending his successful completion of a summer program.¹⁹³ After his first year, Gonzaga removed Mason from his class due to deficient academic performance.¹⁹⁴ Mason appealed that decision and Gonzaga readmitted him and provided special accommodations for his learning disability.¹⁹⁵ He graduated with a law degree in 1999.¹⁹⁶

Mason was unable to put his law degree to use.¹⁹⁷ In December 1999, Mason found employment with MicronPC as a “process analyst.”¹⁹⁸ He hoped to join their legal department, but failed the

¹⁸⁴ See *Mosko*, 515 F.3d at 326-27; *Tirch*, 409 F.3d at 682-83; *Birrane*, 287 B.R. at 500; *Russotto*, 370 B.R. at 858-59; Michael & Phelps, *supra* note 183, at 92-96.

¹⁸⁵ See sources cited *supra* note 183 and accompanying text.

¹⁸⁶ See sources cited *supra* note 183 and accompanying text.

¹⁸⁷ See *In re Rutherford*, 317 B.R. 865, 877, 880-81 (Bankr. N.D. Ala. 2004) (“The Government’s primary argument is that the debtor’s failure to fulfill her commitment under its Income Contingent Repayment Plan is *per se* bad faith.”); Michael & Phelps, *supra* note 183, at 92-96; Swedback & Prettner, *supra* note 60, at 1699-702.

¹⁸⁸ See *In re Mason (Mason I)*, 303 B.R. 459, 469 (Bankr. D. Idaho 2004), *aff’d*, 315 B.R. 554 (B.A.P. 9th Cir. 2004), *rev’d*, 464 F.3d 878 (9th Cir. 2006).

¹⁸⁹ *Id.* at 461-62.

¹⁹⁰ *Id.* at 462.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Idaho bar exam in 2000.¹⁹⁹ MicronPC laid off Mason in 2002; he earned \$14.00 per hour at the time.²⁰⁰ Mason found another job installing home siding within a few months.²⁰¹

Mason filed a petition for relief under Chapter 7 of the Bankruptcy Code in January 2003.²⁰² He owed \$209,070.91 in unsecured, non-priority claims.²⁰³ He owed over \$100,000 in student loans.²⁰⁴ Prior to filing, Mason had attempted to enroll in ICRP but his application was denied for an unknown reason.²⁰⁵ At his hearing, the bankruptcy court found that Mason had satisfied the *Brunner* test for most of his student debt.²⁰⁶

The Ninth Circuit reversed.²⁰⁷ The court conceded that Mason may have been unable to maintain a minimal standard of living if his debt was enforced.²⁰⁸ They further agreed that Mason's financial situation was unlikely to improve for the duration of the loan's term.²⁰⁹ Nevertheless, the Ninth Circuit held that Mason had not made a good faith effort to repay his loan.²¹⁰ Central to their holding was Mason's failure to retake the Idaho bar exam or pursue ICRP.²¹¹ Thus, the Ninth Circuit reinstated Mason's student loan debt in full.²¹²

Mason demonstrates how income-based repayment plans have prevented debtors from discharging un-payable debts. Without IBR or ICRP, a large percentage of student borrowers would certainly default. In 2012, the average graduate from a private law school owed almost \$125,000; graduates from public schools owed more than \$75,700.²¹³ On a standard repayment plan, using PLUS loan interest rates for the

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 462-63.

²⁰² *Id.* at 463.

²⁰³ *Id.*

²⁰⁴ *See id.*

²⁰⁵ *Id.* at 468.

²⁰⁶ *See id.* at 469-70. The bankruptcy court discharged all but \$32,400 in principal because it believed that Mason could afford a \$250-a-month payment for 25 years. *Id.*

²⁰⁷ *See In re Mason (Mason II)*, 464 F.3d 878, 885 (9th Cir. 2006).

²⁰⁸ *See id.* at 882.

²⁰⁹ *Id.* at 882-84.

²¹⁰ *Id.* at 885.

²¹¹ *Id.* at 884-85.

²¹² *Id.* at 885.

²¹³ *See* Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools*, A.B.A. J. (Mar. 28, 2012, 5:29 AM CDT), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

entire balance, the average private law school graduate faces a \$1,476 monthly loan payment.²¹⁴ A graduate would have to earn \$99,448 or more for these payments to equal 20% of his or her monthly income, but the median law student earns far less.²¹⁵ Thus, the median student faces a substantial debt burden; those with more debt and lower salaries would almost certainly have a high default rate without programs such as IBR.

Finally, IBR and ICRP may directly increase tuitions by making law school appear more affordable than it is. During debate on the programs, one Congressman wondered whether the program would increase moral hazard among potential students.²¹⁶ Specifically, whether students would knowingly borrow money they knew they could not repay.²¹⁷ The data appears to confirm the suspicion that law students do indeed take on more debt than they can repay under normal circumstances.²¹⁸ Indeed, law schools already advertise the federal programs in order to argue that legal education is affordable.²¹⁹

Risk-free student loans incentivize law schools to raise tuition because they reduce price competition, but increase competition for

²¹⁴ A student who borrowed exclusively in Federal PLUS loans would pay 6.41% per year in interest and a loan fee of 4.288%. See *PLUS Loans*, FED. STUDENT AID, <http://studentaid.ed.gov/types/loans/plus> (last visited Mar. 15, 2014). Inputting these numbers into a loan calculator on a 10-year repayment plan indicates a monthly payment of \$1,476.73. See *Loan Calculator*, FED. STUDENT AID, <http://www.finaid.org/calculators/scripts/loanpayments.cgi> (last visited Mar. 15, 2014).

²¹⁵ See *Loan Calculator*, *supra* note 214 (noting that a borrower would need an annual salary of \$177,235 to afford the loan described *supra* note 213). This is more than double the median salary for new lawyers. See *2012 Starting Salaries Rise*, *supra* note 104 (demonstrating that the median salary for new lawyers is \$61,245).

²¹⁶ See 153 CONG. REC. H7, 538-39 (daily ed. July 11, 2007) (statement of Rep. Mark Souder) (“An income-based repayment program would eliminate once and for all any need for students to weigh their choice of college or university against which type of career they plan to enter after the degree.”); Audette, *supra* note 159, at 174.

²¹⁷ See sources cited *supra* note 216 and accompanying text.

²¹⁸ See discussion *supra* Part I.C (explaining the law student debt crisis).

²¹⁹ See Paul Campos, *So It Has Come to This*, INSIDE L. SCH. SCAM (Aug. 7, 2012, 6:58 AM), <http://insidethelawchoolscam.blogspot.com/2012/08/so-it-has-come-to-this.html>; Greg, *Student Loans — An Interview with Dean Paul Schiff Berman*, NERDWALLET, <http://www.nerdwallet.com/blog/finance/prof/student-loans-interview-dean-paul-schiff-berman/> (last accessed Jan. 13, 2013) (publishing interview with Dean of George Washington Law School who argued that federal programs make law school more affordable); *Loan Consolidation, Repayment, and Forgiveness Programs: Income-Based Repayment*, VT. L. SCH., http://www.vermontlaw.edu/Admissions/Tuition_and_Financial_Aid/Loan_Repayment_and_Loan_Forgivness_Programs/Income-Based_Repayment.htm (last visited Feb. 13, 2014) (explaining that IBR makes monthly payments more affordable but does not mention that the borrower will pay more over the life of the loan).

better facilities and services.²²⁰ Law schools are not as price sensitive as other schools because law students have proven willing to accumulate large amounts of debt to go to *any* law school.²²¹ But law schools do vigorously compete. Law schools, confident that students will pay any price, have launched an arms race for larger faculties, more clinical programs, nicer facilities, and other cost drivers.²²² These improvements increase a law school's relative ranking in *US News*, but they also increase tuition.²²³

III. APPLYING THE PRINCIPLES OF DODD-FRANK TO ADDRESS THE LAW SCHOOL DEBT CRISIS

A. *Dodd-Frank's Safety Lesson: Considering a Borrower's Ability to Pay and Effectively Allocating Risk*

By passing Dodd-Frank, Congress created the Consumer Financial Protection Bureau ("CFPB") in response to observations that financial products may be just as unsafe as tangible goods.²²⁴ CFPB proponents reasoned that financial products, like tangible goods, require robust safety regulation.²²⁵ Dodd-Frank first sought to eliminate mortgage loans that were almost certain to default.²²⁶ Since its passage, the CFPB has aimed to publish rules protecting consumers from the unsafe subprime mortgages defining the financial crisis.²²⁷ It did this by

²²⁰ See TAMANAHA, *supra* note 18, at 126-28.

²²¹ Segal, *Losing Game?*, *supra* note 18; Segal, *Ka Ching!*, *supra* note 111 (discussing how law schools face little tuition competition due to excessive demand).

²²² TAMANAHA, *supra* note 18, at 126-28 (discussing the costly ways law schools compete for professors and students); Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 183-97 (2012) [hereinafter *Crisis of the American Law School*] (discussing how competition for students and USN Rankings affect law school prices); Macchiarola & Abraham, *supra* note 143, at 94 (finding that a "keeping up with the Joneses" mentality encourages lavish spending on new facilities).

²²³ See sources cited *supra* note 222 and accompanying text.

²²⁴ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5301 (2012)), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (establishing the Consumer Finance Protection Bureau, which was then labeled as the "Bureau of Consumer Financial Protection"); see also Bar-Gill & Warren, *supra* note 14, at 3-5 (arguing that consumer products are as dangerous as physical products and should be regulated as such).

²²⁵ See sources cited *supra* note 224.

²²⁶ See Dodd-Frank Act §§ 1411-12 (requiring lenders to make reasonable efforts to determine a borrower's ability to pay); Pottow, *supra* note 15, at 196.

²²⁷ See Pottow, *supra* note 15, at 196 (discussing how the CFPB might operationalize Dodd-Frank requirements); *Consumer Finance Protection Bureau Issues*

amending the Truth in Lending Act (“TILA”) to forbid mortgage lenders from issuing loans without considering a borrower’s ability to pay.²²⁸ Thus, the bill effectively banned loans known to be unpayable.²²⁹

Banning unpayable loans essentially declared that the principle of *caveat emptor* did not apply in mortgage transactions.²³⁰ It also implicitly recognized that the government must be paternalistic in the case of some financial transactions.²³¹ This need is particularly high if information asymmetries are insurmountable, or at least one party in the transaction will act irrationally despite accurate information.²³²

Dodd-Frank also sought to allocate risk to all parties in a lending transaction.²³³ It did this in two ways. First, it forced mortgage securitizers to retain some of the risk of any loan they originate, even if they sold the loan to another entity.²³⁴ Thus, unlike during the subprime craze, mortgage sellers are never divorced from the risks of the loans they pass on.²³⁵ Second, Dodd-Frank established a new cause of action for mortgage debtors.²³⁶ Debtors may sue for discharge of

Rule to Protect Consumers from Irresponsible Lending, CONSUMER FIN. PROTECTION BUREAU (Jan. 10, 2013), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-issues-rule-to-protect-consumers-from-irresponsible-mortgage-lending/>; Meg Handley, *Government Consumer Watch Dog Inks New Mortgage Rules: New Mortgage Rules Could Hinder Consumers with Less-Than-Perfect Credit*, U.S. NEWS & WORLD REP. (Jan. 10, 2013), <http://www.usnews.com/news/articles/2013/01/10/government-consumer-watch-dog-inks-new-mortgage-rules>.

²²⁸ See Dodd-Frank Act §§ 1411-12 (requiring lenders to make a reasonable effort to determine a borrower’s ability to pay); Pottow, *supra* note 15, at 176-78 (discussing Dodd-Frank prohibition on mortgage loans without considering a borrower’s ability to repay).

²²⁹ See sources cited *supra* note 228.

²³⁰ Pottow, *supra* note 15, at 177-78; David Reiss, *Message in a Mortgage: What Dodd-Frank’s “Qualified Mortgage” Tells Us About Ourselves*, 31 REV. BANKING & FIN. L. 717, 729-30 (2012).

²³¹ See Reiss, *supra* note 230, at 724-25.

²³² See Bar-Gill & Warren, *supra* note 14, at 21-22 (arguing that information asymmetries make regulation more important, but regulation must also account for irrational consumers).

²³³ See generally Dodd-Frank Act § 1411 (outlining minimum mortgage lending standards).

²³⁴ See *id.* § 941; David Line Batty, *Dodd-Frank’s Requirement of “Skin in the Game” for Asset-Backed Securities May Scalp Corporate Loan Liquidity*, 15 N.C. BANKING INST. 13, 28-29 (2011) (noting that originators likely fall under the broad definition of “securitizer” under the expansive reach of Dodd-Frank); Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail?*, 3 ALA. C.R. & C.L. L. REV. 1, 34-35 (2012).

²³⁵ See sources cited *supra* note 234.

²³⁶ See Dodd-Frank Act § 1413 (establishing failure to check ability to pay as a

their mortgage liability by proving a lender breached its duty to reasonably investigate the borrower's ability to pay.²³⁷ Thus, lenders who issued unduly dangerous loans always risk losing the entire balance of the loan and the collateral securing it.

B. A Proposal: Apply Dodd-Frank Principles to Direct Loans to Attend Law School

This Part proposes that the DOE should adapt Dodd-Frank's safety mechanisms for mortgage loans to student loans and apply them to Direct Loans for law schools. Specifically, the DOE should gradually disqualify law schools from the Direct Loan program if a significant percentage of their graduates are unable to repay their federal student loans. To determine whether students are able to repay their loans, the DOE should assess the debt-to-income ratios ("DTI") of a law school's graduates. The DOE should disqualify schools with unreasonably high graduate DTI ratios from the program. Ultimately, this proposal would put downward pressure on tuitions by insisting that a law school's student debt levels correlate with the salaries of its graduates.

The DOE has already attempted to apply similar rules to the for-profit colleges and universities via the Gainful Employment Rule.²³⁸ The Gainful Employment Rule targeted for-profit colleges with excessively high rates of student default on student debt.²³⁹ The rule applied two tests to determine whether a for-profit school qualified for federal aid.²⁴⁰ First, schools passed a debt repayment test if at least 35% of students who entered their institution, and were not on deferment, entered repayment.²⁴¹ Second, qualifying schools would not be permitted to graduate students who would be required to pay more than 30% of their discretionary income toward their loans.²⁴²

defense to disclosure); Pottow, *supra* note 15, at 176-77 (discussing Dodd-Frank prohibition on mortgage loans without considering a borrower's ability to repay).

²³⁷ See sources cited *supra* note 236 and accompanying text.

²³⁸ See generally 34 C.F.R. § 668.7 (2012) (proposing the Gainful Employment Rule); Ass'n of Private Colls. & Univs. v. Duncan (*Duncan I*), 870 F. Supp. 2d 133, 141-44 (D.D.C. 2012) (discussing contents of the gainful employment rule); Vasanth Sridharan, *The Debt Crisis in For-Profit Education: How the Industry Has Used Federal Dollars to Send Thousands of Students into Default*, 19 GEO. J. ON POVERTY L. & POL'Y 331, 347-48 (2012) (describing the Gainful Employment Rule).

²³⁹ See Sridharan, *supra* note 238, at 347-48.

²⁴⁰ See *Duncan I*, 870 F. Supp. 2d at 141-44.

²⁴¹ See *id.*

²⁴² See *id.*

The District of Columbia Circuit overturned the Gainful Employment Rule in 2012.²⁴³ For-profit institutions challenged the entire rule by arguing that DOE unreasonably interpreted the statutory command of the HEA.²⁴⁴ The Court found that the debt repayment test was arbitrarily drawn and thus unreasonable.²⁴⁵ But the court found that the discretionary income test was the result of reasonable decision making.²⁴⁶ The court invalidated the law only because it could not sever the debt repayment test from the discretionary income test.²⁴⁷ Thus, the court gave its blessing to the discretionary income test as a standalone law.²⁴⁸

The proposal effectively adapts the repayment investigation principles of Dodd-Frank to the unique nature of student loans. Dodd-Frank insists that safe consumer loans must consider a borrower's ability to pay.²⁴⁹ For mortgages, this requires a reasonable investigation into a potential borrower's current financial picture.²⁵⁰ For student loans, this investigation requires a reasonable investigation into the future earning power of the student.²⁵¹ To reach this determination, the DOE must investigate the earning power of a particular school's graduates.

The proposal would therefore seek to apply another key principle of Dodd-Frank: lenders should not issue loans without minimum underwriting standards. By taking student loans, students make a leveraged investment based on their assessment of their future earning power after attending a particular law school. But they do so at an information disadvantage.²⁵² Taxpayers, who provide the cash up front and bear substantial risk, make a similar investment.²⁵³ They invest in

²⁴³ *Id.* at 158.

²⁴⁴ *See id.*; see also Ass'n of Private Sector Colls. & Univs. v. Duncan (*Duncan II*), 930 F. Supp. 2d 210, 211-12 (D.D.C. 2013).

²⁴⁵ *See Duncan I*, 870 F. Supp. 2d at 149-55.

²⁴⁶ *See id.*

²⁴⁷ *See id.* at 154-55.

²⁴⁸ *See id.* at 152-54.

²⁴⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1412, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5301 (2012)), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (requiring lenders to make a reasonable effort to determine a borrower's ability to pay); Pottow, *supra* note 15, at 196.

²⁵⁰ *See* sources cited *supra* note 249.

²⁵¹ *See, e.g.,* Macchiarola & Abraham, *supra* note 143 (proposing to insert borrower rights into new student loan contracts).

²⁵² *See id.* at 110-13 (describing the information asymmetries inherent in the law school application process).

²⁵³ *See id.* at 93-94.

both the student, who must repay the debt, and the law school, who they entrust to enable qualified students to meet their payment obligations. Unfortunately, the evidence strongly suggests that, at many schools, this investment is doomed to fail.²⁵⁴ Many law schools routinely produce graduates with exceptionally high levels of debt and relatively low monthly incomes.²⁵⁵ By refusing to issue loans — at least of this size — to these law schools, the DOE enforces minimum underwriting standards.

This Note does not suggest a specific DTI ratio for implementation of the program nor the specific threshold that a law school must meet. But it does suggest that the DTI ratio set at where IBR becomes necessary for borrowers is a useful starting point. Through IBR qualifying standards, the DOE has already established the maximum safe amount for student debtors. Currently, IBR reduces the student loan payments of debtors whose monthly payments under a ten-year repayment plan exceed 10% of a student's discretionary income.²⁵⁶ It also establishes twenty years as the maximum acceptable repayment time for student debtors.²⁵⁷ By that metric, students owing more than 10% of their discretionary monthly income over a twenty-year repayment period would carry unsafe debt levels. Thus, Direct Loans would be unwarranted to law schools whose graduates routinely face DTI ratios that meet or exceed this number.

The DOE should exempt student-debtors claiming the public interest exemption, however. This would permit schools to broaden public interest programs without increasing the DTI ratio of its graduates. Further, it would reflect that student debt for public interest lawyers is much safer than other student debts. Unlike other law graduates, public interest graduates have a smaller repayment period before forgiveness and face no tax consequences at discharge.²⁵⁸

²⁵⁴ See discussion *supra* Part II.B.

²⁵⁵ See discussion *supra* Part I.C.

²⁵⁶ See *Income-Based Plan: If Your Student Loan Debt Is High Relative to Your Income, You May Qualify for the Income-Based Repayment Plan (IBR)*, FED. STUDENT AID, <http://www.studentaid.ed.gov/repay-loans/understand/plans/income-based> (last visited Feb 13, 2014) (citing old law of 15% of income over 25 years of repayment); Press Release, The White House, We Can't Wait: Obama Administration to Lower Student Loan Payments for Millions of Borrowers (Oct. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/10/25/we-cant-wait-obama-administration-lower-student-loan-payments-millions-b> (announcing executive action to lower the threshold to 10% of income over 20 years).

²⁵⁷ See sources cited *supra* note 256 and accompanying text.

²⁵⁸ See *Public-Service Loan Forgiveness: If You Work Full-Time in a Public Service Job, You May Qualify for Public Service Loan Forgiveness*, FED. STUDENT AID, <http://www.studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service#what->

If implemented, the proposal would place immediate downward pressure on tuition prices at most law schools.²⁵⁹ Other policy proposals have noted that law schools faced with losing loan dollars would reduce tuitions.²⁶⁰ The median law student — with a median total debt level financed entirely by Grad PLUS loans — would fall under this threshold.²⁶¹ To remain eligible for Direct Loans, law schools would have two options: lower debt levels of their students or increase the earning power of their graduates.

Recent debt and employment figures clearly suggest that many law schools routinely graduate students with DTI ratios that greatly exceed the recommendations of this Note.²⁶² In 2012, at least seventy-eight ABA accredited law schools graduated classes with an average debt load of more than \$100,000 yet sent less than 10% of that class to law firms employing more than 100 people.²⁶³ A notable example is California Western School of Law (“CWSL”), which ranks among the top five programs ranked by graduate debt load.²⁶⁴ A 2012 CWSL graduate owed an average of \$157,748 in loans.²⁶⁵ To meet the DTI standards outlined above, CWSL graduates would need to earn \$113,853 per year.²⁶⁶ Unfortunately, only eight of CWSL’s 283 graduates in 2012 found employment at law firms employing more than 100 attorneys.²⁶⁷ Less than half of CWSL graduates found jobs

must-i-do (last visited Feb. 13, 2014).

²⁵⁹ Several policy proposals have noted that universities faced with losing loan dollars would reduce tuitions. See Macchiarola & Abraham, *supra* note 143, at 126-27; Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 600-01 (2012).

²⁶⁰ See sources cited *supra* note 259.

²⁶¹ See Weiss, *supra* note 213.

²⁶² See TAMANAHA, *supra* note 18, at 122-25; discussion *supra* Part I.A (discussing the price insensitivity of law schools).

²⁶³ See A.B.A. *Employment Report*, *supra* note 117 (select “2012” under “Select Class”; then click “Download Complete Employment Data”); *USN Debt Rankings*, *supra* note 124.

²⁶⁴ See *USN Debt Rankings*, *supra* note 124.

²⁶⁵ *Id.*

²⁶⁶ See *id.* (indicating that the average 2012 graduate of CWSL owes \$157,748 in loans). A student who borrowed exclusively in Grad PLUS Loans would pay 6.41% interest-per-year and a loan fee of 4.288%. See *PLUS Loans*, *supra* note 261. Inputting these numbers into a loan calculator, on a 20-year repayment plan, indicates that the student would need an income of \$128,033 per year to have monthly payments equaling 15% of his or her discretionary income. See *Loan Calculator*, *supra* note 214.

²⁶⁷ See A.B.A. *Employment Report*, *supra* note 117 (select “California Western School of Law” under “Select School”; then select “2012” under “Select Class”; then click “Generate Report”).

requiring a law license, and at least 20% of its graduates had not found any work at all.²⁶⁸

The proposal also adapts the second safety principle of Dodd-Frank: to ensure that all loan beneficiaries share some risk in the lending process.²⁶⁹ At CWSL, 90% of the students financed their education using federal loans.²⁷⁰ This means that taxpayers invested, and CWSL received risk-free, more than \$40 million in Direct Loans for the Class of 2012 alone.²⁷¹ If the DOE implemented the proposal, then CWSL would lose its Direct Loan funding if it continued to graduate students with the same debt to future income levels. Without that revenue, the law school would surely fail. Thus, the proposal applies a key component of Dodd-Frank: it forces debt brokers to keep some skin in the game.

Critics will argue that the proposal will dramatically reduce access to legal training for low-income populations.²⁷² Some law schools may well close. Surviving law schools, seeking to protect their DTI ratios, may require prospective students to pay more of their education in cash. Thus, the policy would undercut the HEA's mission of providing the poor with access to higher education.

These concerns are unwarranted, however, because law schools attempting to admit a disproportionate number of well-heeled students to meet DTI ratios would likely fail. First, unlike other products, law schools are an associate good.²⁷³ The schools with the best rankings are the schools with a reputation for having the best students.²⁷⁴ Thus, rich and poor law students choose to apply to law

²⁶⁸ See *id.*

²⁶⁹ See discussion *supra* Part III.A (discussing how law schools bear no risk with student loans).

²⁷⁰ See *USN Debt Rankings*, *supra* note 124.

²⁷¹ See *id.* (noting 90% of graduates took out federal loans and owed an average of \$157,748); Employment Survey: Class of 2012, California W. Sch. of Law, http://www.cwsl.edu/content/career_services/2012_ERSS_summary_sheet.pdf (noting that the CWSL graduated 283 people in 2012).

²⁷² Many critics have launched similar criticisms of the Gainful Employment Rule. See, e.g., Anthony J. Guida, Jr. & David Figuli, *Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other At-Risk Students*, 79 U. CHI. L. REV. 131, 145-47 (2012) (arguing that the gainful employment rule unfairly singles out poor and minority students).

²⁷³ See Macchiarola & Abraham, *supra* note 143, at 126-27; Henry Hansmann, *Higher Education as an Associative Good* 12-13 (Yale Law Sch. Program for Studies in Law, Econ. & Pub. Policy Working Paper Grp., Paper No. 99-15, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=192576.

²⁷⁴ See sources cited *supra* note 273.

schools for the student body as much as for the institution.²⁷⁵ Accordingly, law schools have a direct incentive to admit the best students possible regardless of economic background.²⁷⁶ Second, the strategy of admitting enough wealthy students to meet DTI ratios is likely not practical anyway. Law schools draw so much money from the Direct Loan program that they are unlikely to fill such a large gap with rich students willing to pay.²⁷⁷

By contrast, there are viable strategies to make law schools more cost-effective for everyone. Law schools could move to a two-year program instead of three.²⁷⁸ Law schools could increase teaching loads of faculty.²⁷⁹ Finally, though the proposal would likely cut into law school revenues, it would also compel universities to stop using law school tuitions to subsidize other programs.²⁸⁰

The proposal may limit access to law school generally, but this is in the interest of sound public policy. The proposal does not directly limit access to law school. Rather, it limits access to dangerous loans to pay for law school. Thus, the proposal's access restriction advances a public policy of protecting borrowers and taxpayers alike from the lifelong dangers of excessive student loans.

²⁷⁵ See sources cited *supra* note 273.

²⁷⁶ See Macchiarola & Abraham, *supra* note 143, at 126-27.

²⁷⁷ See, e.g., *Student Loans*, *supra* note 86 (explaining that 86.3% of law students rely on large federal loans).

²⁷⁸ See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 606-10 (2012) (proposing that the New York bar permit law students to take the bar exam after two years of study); David Van Sandt, *Reduce Credit Requirements*, N.Y. TIMES (July 25, 2012), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/reduce-credit-requirements-for-law-school> ("The third year of law school is not essential for acquiring the core competence to practice."); *Third-Year Law School: Jury's Out on Its Value*, MSNBC (Aug. 10, 2005), http://www.msnbc.msn.com/id/8901797/ns/us_news-education/t/third-year-law-school-jurys-out-its-value/#.UPNulGd_7bg.

New York State is now considering amending its rules to make the third year of law school optional. See Karen Sloan, *FDR Did Fine Without a 3L Year: New York May Let Law Students Once Again Take the Bar Exam After Two Years*, NAT'L L.J. (Jan. 14, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202584156317&slreturn=20130015002358>.

²⁷⁹ Legal academics have remarked that the teaching loads of law faculty have declined even as law school enrollment and faculty salaries have increased. See TAMANAHA, *supra* note 18, at 38-53; Campos, *Crisis of the American Law School*, *supra* note 222, at 186.

²⁸⁰ Law schools routinely pay portions of their profits to other parts of higher education institutions. See Segal, *Ka Ching!*, *supra* note 111 (explaining that some law schools pay 25%–35% of their revenues to the host institution).

If implemented, this proposal would likely threaten the Direct Loan eligibility of a dramatic percentage of law schools. These schools, without reform, would likely close unless they lowered the debt loads of their students through some means. These figures clearly indicate that the DOE must phase in implementation of this proposal. But they also speak to the enormous gravity of the law school debt crisis, the ubiquity of hardship in law school loans, and the dramatic need for corrective action.

C. *Wither Legal Academia?*

Critics will also argue that this policy will harm legal education by reducing the number of qualified law faculty.²⁸¹ Currently, law professors command higher salaries than professors in any other discipline, except for medicine.²⁸² Law school deans and top professors earn more than United States Supreme Court Justices.²⁸³ Critics argue that qualified law professors, faced with declining salary prospects and thus higher opportunity costs, may stop teaching.

Comparisons between the salaries of top-earning private practitioners and law professors are misleading.²⁸⁴ Law professors correctly point out that their salaries often do not compare to the salaries paid by large law firms.²⁸⁵ But this comparison obscures the difference between the two practices. Law professors do not face the minimum hours requirements typical of private practice, nor do they

²⁸¹ See TAMANAHA, *supra* note 18, at 51; Steven M. Davidoff, *The Economics of Law School*, N.Y. TIMES: DEALBOOK (Sept. 24, 2012), <http://dealbook.nytimes.com/2012/09/24/the-economics-of-law-school/>; Theodore Seto, *The Law School Pricing Problem*, TAXPROF BLOG (July 5, 2011), http://taxprof.typepad.com/taxprof_blog/2011/07/seto-the.html.

²⁸² See TAMANAHA, *supra* note 18, at 48-51 (discussing rising faculty salaries); Campos, *Crisis of the American Law School*, *supra* note 222, at 187-91 (discussing faculty compensation).

²⁸³ Compare TAMANAHA, *supra* note 18, at 48 (noting that some law professors are offered more than \$400,000-per-year), with *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/js_1.html (last visited Feb. 13, 2014) (stating that a United States Supreme Court Justice earns \$244,400 annually).

²⁸⁴ See TAMANAHA, *supra* note 18, at 51.

²⁸⁵ Compare Paul Caron, *Law Faculty Salaries, 2011–2012*, TAXPROF BLOG (May 7, 2012), http://taxprof.typepad.com/taxprof_blog/2012/05/law-faculty-.html (showing median salaries ranging from \$130,000–\$181,000 for tenured law professors), with Andrew Ostler, *Law Crossing Survey of Lawyer Salaries of Best Law Firms*, JDJ. (Dec. 28, 2011), <http://www.jdjournal.com/2011/12/28/lawcrossing-survey-of-lawyer-salaries-of-best-law-firms/> (showing median salaries ranging from \$160,000–\$280,000-per-year for big law associates).

charge an hourly rate for their services.²⁸⁶ Tenured law professors have an unparalleled freedom in their professional endeavors.²⁸⁷

Finally, the claim that *most* law professors could earn more in private practice is dubious on its face. The skillsets of legal academics may not easily translate into private practice.²⁸⁸ Law professors need not apologize for what they earn, but law students need not view law professors as purely altruistic actors either.²⁸⁹

The current student debt crisis does suggest that — in some cases — legal scholars are earning more than they should. Currently, law students support legal scholarship via taxpayer-financed loans. Thus, students and taxpayers alike should insist on parity between the earning power of their legal training and the cost of the scholarship they fund. In some exceptional cases, this parity is very hard to find. For example, the dean of New England Law School (“NELS”) currently earns a salary of \$867,000 annually.²⁹⁰ But 89% of NELS students graduating in 2012 took out federal loans and owed an average of \$132,246 in loans.²⁹¹ Only 43% of NELS graduates have found employment that requires a law license, and only five of its 339 graduates found employment at law firms with more than 100

²⁸⁶ See TAMANAHA, *supra* note 18, at 47.

²⁸⁷ See *id.*; Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 362-63 (2006).

²⁸⁸ See TAMANAHA, *supra* note 18, at 47-48; Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602, 608-09 (2006) (discussing how American law professors often have very little exposure to the actual practice of law); Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1605-06 (2008) [hereinafter *The Market*] (noting that the U.S. legal scholarship market is unique because there are very few professors who actually work as attorneys); Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403, 414-15 (2004) (finding that law academics typically must have interdisciplinary degrees now and that hiring committees are placing more importance on these degrees than practice experience).

²⁸⁹ The Association of American Law Schools has recently argued against cost-saving reforms proposed by the A.B.A., in part because they view full-time tenured faculty as models of “selflessness.” See Letter from Michael A. Olivas, President, Ass'n of Am. Law Schs., to Hulett H. Askew, Consultant on Legal Educ. to the Am. Bar Ass'n 3 (Mar. 28, 2011), available at <http://www.aals.org/advocacy/Olivas.pdf>.

²⁹⁰ See Michael Rezendes & Christina Pazzanese, *New England Law Head Draws Scrutiny for His Pay*, BOSTON GLOBE (Jan. 13, 2013), http://www.bostonglobe.com/metro/2013/01/13/law-school-dean-salary-may-nation-highest/r59QMPRZANUkeJOkxhne1K/story.html?s_campaign=8315.

²⁹¹ *USN Debt Rankings*, *supra* note 124.

people.²⁹² The top four professors at New York Law School (“NYLS”) earned salaries ranging from \$308,000 to \$371,000.²⁹³ Meanwhile, the average 2012 NYLS graduate owed \$164,739 in debt.²⁹⁴ Only 5% of the NYLS graduates worked at firms with more than 100 attorneys.²⁹⁵

Critics may be correct when they argue that the proposal will harm legal scholarship. This Note does not argue that legal scholarship, without immediate market gain, is unworthy of investment by taxpayers or future lawyers. But it does suggest that law school revenues and the salaries they fund must bear some relationship to the legal job market. Currently, law schools are generating more graduates than the legal market can employ, and they are charging far more than students can pay.²⁹⁶ The legal market has contracted. The legal academy may need to as well.

Nevertheless, concerns that all of the best professors will bolt from the academy are likely overblown. Law schools that produce employable graduates will probably still be able to pay strong salaries. Structural reforms may permit schools to pay an even greater percentage of their revenues to professors.²⁹⁷ And, most importantly, many people still want to be law professors; there is an intense level of competition for these jobs.²⁹⁸ It is difficult to imagine that a proposal resulting in fewer legal positions (albeit with slightly less pay) would cause an exodus of legal talent.

²⁹² See A.B.A. *Employment Report*, *supra* note 117 (select “New England Law | Boston” under “Select School”; then select “2012” under “Select Class”; then click “Generate Report”).

²⁹³ See TAMANAHA, *supra* note 18, at 48-49.

²⁹⁴ *USN Debt Rankings*, *supra* note 124.

²⁹⁵ See A.B.A. *Employment Report*, *supra* note 117 (select “New York Law school” under “Select School”; then select “2012” under “Select Class”; then click “Generate Report”).

²⁹⁶ See generally Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 14, 2012), http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?_r=0 (“[L]aw schools . . . have been churning out more graduates than the economy can employ, indulging themselves in copious revenues that higher tuitions and bigger classes bring in.”).

²⁹⁷ See Segal, *Ka Ching!*, *supra* note 111 (explaining that reforming the ABA requirements may permit law schools to save more money).

²⁹⁸ See Ulen, *The Market*, *supra* note 288, at 1627 (noting that the academic job market is highly competitive for legal scholars); see also Dennis Curtis, *Can Law Schools and Big Law Firms Be Friends?*, 74 S. CAL. L. REV. 65, 78-79 (2000) (stating that the “law-teaching market has become increasingly competitive”).

CONCLUSION

Dodd-Frank provided a usable framework for assessing the safety of consumer debt. The DOE should apply that framework to the law student debt crisis by refusing to issue unsafe Direct Loans to attend law schools. It would permit the DOE to assess a borrower's ability to pay by ensuring that law school tuitions correlate with the legal job market. Therefore, it does what IBR and ICRP do not. It protects taxpayers from underwriting toxic loans, and students from the dangers of excessive non-dischargeable student loans. The proposal ensures that federal loans, in the spirit of the HEA,²⁹⁹ are pathways to opportunity rather than financial ruin.

²⁹⁹ See S. REP. NO. 673-89, at 7, 36 (1965) (explaining that the HEA was intended to provide poor students with economic opportunity).