

# Curing the Cost Disease: Legal Education, Legal Services, and the Role of Income-Contingent Loans

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## I. Introduction

An odd feature of the debate about the role of legal education in the United States is the simultaneous broad acceptance of the proposition that we have too many law schools and too many law students,<sup>1</sup> and also of the proposition that our country has a severe problem with access to justice.<sup>2</sup> The conventional wisdom that there are not enough jobs for law school graduates is in tension with the fact that likely millions of citizens interact with the legal system—without both state and private parties—without adequate counsel and representation. Law schools are closing even as many individuals and families deal with some of the most important legal aspects of their lives—such as immigration, family, domestic violence, disability, veterans’ benefits, and housing issues—without a good lawyer, or even any lawyer at all. Yes, many graduates of lower-ranked law schools struggle to find legal jobs, but if they walked into family court and asked who needs a lawyer, many hands would shoot up.

What explains this disconnect? There is an unstated qualifier when we say that there are not enough law jobs. What we really mean is that there are not enough law jobs *that could pay enough to make the investment in a law degree worthwhile*. Here, I mean investment in the broadest sense, including the opportunity cost of not choosing a different career and the sweat equity involved in three years of study and passing the bar exam. But for purposes of this article, I also

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1. See, e.g., Steven J. Harper, *Too Many Law Students, Too Few Jobs*, N.Y. TIMES (Aug. 25, 2015), <https://nyti.ms/iNyjHt5>; Greg Toppo, *Why You Might Want to Think Twice Before Going to Law School*, USA TODAY (June 28, 2017), <https://www.usatoday.com/story/news/2017/06/28/law-schools-hunkering-down-enrollment-slips/430213001>; Eric Posner, *The Real Problem With Law Schools: Too Many Lawyers*, SLATE (Apr. 2, 2013), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/04/the\\_real\\_problem\\_with\\_law\\_schools\\_too\\_many\\_lawyers.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_real_problem_with_law_schools_too_many_lawyers.html).
2. LEGAL SVCS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), <https://www.lsc.gov/justicegap2017> (finding that “86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help”).

mean in it the narrow sense of the monetary cost of a legal education. There are many steps our country would have to take to make justice more available to more people, but one of them is to make legal education more affordable, to encourage more people to study law and join the bar. Another is to make legal services themselves more affordable, so more people would be willing to get counsel when they need it.<sup>3</sup>

But making both legal education and legal services more affordable is, as we have found, incredibly difficult. And this is not because of some broad systemic failure in these industries, but rather because of natural, even positive, economic forces. As labor-intensive services, both legal education and legal services are subject to an economic phenomenon known as “Baumol’s cost disease,” which explains why the prices of goods and services with no or slow growth in labor productivity increase faster than inflation over time. The “disease” moniker underscores that the rising prices are troubling for these services, and also that they are caused by something deeper than, e.g., a misallocation of resources. But as I explain in more detail in Part III below, the causes of the cost disease are actually positive trends, namely economy-wide growth in productivity and wages. Quite simply, if the wages for those who work in legal education and legal services continue to rise, so will the prices of those services (barring the creation of some industry-disrupting technology). One person’s wage is another person’s price.<sup>4</sup>

However, the silver lining of the cost disease is that it has a cure. That is, to the extent that price growth in legal education and legal services is driven by increases in productivity elsewhere in the economy and in wages overall, the economy as a whole can also afford the price increases in the goods and services afflicted by the cost disease. But since the benefits of productivity and wage growth are not evenly distributed—not by a long shot—managing the cost

3. For purposes of narrative simplicity, this article will generally refer to the lack of legal services in terms of direct representation in legal matters, such as cases in family or immigration court or in administrative proceedings for government benefits, but the argument also extends to indirect services. For example, our public/private “hidden” welfare state depends heavily on privately run programs, such as employer-provided health care and retirement plans, unemployment insurance, tort liability, and labor and workplace protections, all of which at some level require the administration of competent lawyers. *See generally*, JACOB HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND SOCIAL BENEFITS IN THE UNITED STATES* (2002); JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* (2003). Moreover, many of our public transfer programs are through the tax system—for example, the earned income and child tax credits, the successful administration of which again necessitates a role for attorneys to help navigate the interaction between individuals and the state. *See, e.g.*, CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997). And, given the increasing and unidirectional growth in the complexity of our world, these demands will only increase. *See, e.g.*, John R. Brooks, *Quasi-Public Spending*, 104 *GEO. L.J.* 1057 (2016).
4. The cost disease is not the only cause of increases in the cost of legal education. For example, law schools have also been driven by the marketplace to offer expanded clinical and bar exam training. But even holding the package of services constant, the cost disease would still predict above-inflation growth in prices. *See infra* Part III.A.

disease requires some socialization of the costs. There are any number of tools we could use to do this, but in the context of legal education, a major tool for socializing these costs is the income-driven repayment (“IDR”) program for federal student loans.

From 2008 to 2015, through a series of statutory and regulatory changes, Congress and the Obama administration dramatically reshaped the student loan system, and by extension our country’s system of higher education finance generally.<sup>5</sup> By 2018, 90% of all student lending is directly from the federal government,<sup>6</sup> and all of those loans (and most earlier loans) can, using one of the IDR programs, be paid back on an income-contingent basis, typically as 10% of discretionary income for twenty years, followed by forgiveness of the remaining loan balance. In effect, all higher education, including legal education, can be paid for by sharing a portion of one’s income with the federal government, much as we use the income tax to pay for other government-provided goods and services.

IDR has quietly become a massively important part of higher education finance. As of the second quarter of 2019, 48% of the Department of Education’s loan portfolio in repayment was enrolled in one of the IDR plans—that’s \$469 billion of student debt owed by over 8 million borrowers.<sup>7</sup> And because of the way the plans are designed, income-contingent loans are particularly important in funding law school and other graduate and professional education. While an undergraduate can borrow at most \$57,500 from the federal government (and typically closer to \$27,000)<sup>8</sup>, a graduate or professional student can borrow up to the full cost of attendance.<sup>9</sup> That amount is set by each school and includes costs of living; it can be \$100,000 per year for law school.<sup>10</sup>

Because of the intimate connection between legal education and legal services, and the similar effects of the cost disease on each, this article calls for understanding income-contingent student loans not just as a way to help individuals afford law school, but as at least part of a broader set of policies

5. See John R. Brooks, *The Case for More Debt: Expanding College Affordability by Expanding Income-Driven Repayment*, 2018 UTAH L. REV. 847, 849-66 [hereinafter *Case for More Debt*] (discussing legislative and regulatory history); John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO L.J. 229, 251-53 (2016) [hereinafter *Income-Driven Repayment*] (discussing legislative and regulatory history).
6. COLL. BD., TRENDS IN STUDENT AID 2018, at 15 fig.6 (2018). <https://trends.collegeboard.org/student-aid>.
7. Federal Student Aid, U.S. Dep’t of Educ., *Direct Loan Portfolio by Repayment Plan, Federally Managed Portfolio by Repayment Plan* tab, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited Sept. 4, 2019).
8. See *infra* notes 67-68 and accompanying text.
9. See *infra* note 69 and accompanying text.
10. See, e.g., *Costs and Budgeting: Standard Cost of Attendance*, Columbia Law School, <https://www.law.columbia.edu/financial-aid/costs-and-billing/costs-budgeting> (2019-2020 cost of attendance of \$101,345); *Student Expense Budget*, NYU Law School, <http://www.law.nyu.edu/financialaid/budgetandbudgeting/studentexpensebudget> (2019-2020 cost of attendance of \$99,850).

to increase access to justice in our country. This article proceeds as follows. Part II shows the rising costs of both legal education and legal services, and how they have followed similar paths. Part III roots this cost growth in the cost disease, and explains how the cost disease works and what its implications are, particularly for legal education and legal services. Part IV explains why managing the cost disease requires some socialization of the costs, i.e., spreading the costs widely across a society, and in a progressive way. Part V argues that income-contingent loans partially serve this role. This part also takes a critical look at the Public Service Loan Forgiveness program, counterintuitively arguing that it has serious flaws in its goal of serving the broader public interest. Part VI concludes.

## II. Rising Costs

In this part I briefly review some of the data regarding rising costs of both legal education and legal services. At least for the period of 1999 to 2013, for which we have the fullest data, the costs appear to have risen roughly the same amount, around 75% over that fifteen-year period. (An important exception is public law school tuition, about which more below.) This growth is significantly faster than overall inflation (the Consumer Price Index grew around 40% over that period), or even the inflation indexes that track higher education costs (which grew around 57% over that period).

What follows is not intended as a rigorous statistical analysis, in part because it is difficult to get a truly accurate picture of the cost of legal education due to a lack of public data, and also because there will always be a number of confounding factors, not the least of which is that the United States faced two deep recessions during this fifteen-year period. Moreover, both legal education and legal services underwent significant structural changes during this time. What I want to illustrate is not so much rigorous numbers as broad trends, which I hope would be roughly the same in direction and magnitude regardless of particular methodological choices.

### *A. The Rising Cost of Legal Education*

It is abundantly clear that nominal law school tuition and fees (i.e., listed tuition and fees before accounting for financial aid and other discounting)<sup>11</sup> have been rising rapidly for decades. According to the American Bar Association, average in-state tuition for public law schools rose from \$2,006 in 1985 to \$23,879 in 2013, an increase of over 1000% over twenty-nine years (an average annual growth rate of about 9.3%).<sup>12</sup> Private law school tuition and fees rose from \$7,526 to \$41,985, an increase of over 450% (6.35% per

11. For simplicity I just refer to “tuition” hereafter unless otherwise specified.

12. *Statistics Archives, Law School Tuition (1985-2013; Public/Private)*, AM. BAR ASSOC., [https://www.americanbar.org/groups/legal\\_education/resources/statistics/statistics-archives/](https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/) (last visited Aug. 6, 2019).

year).<sup>13</sup> Over the 1999-2013 period, these annual growth rates were 8.62% and 5.18%, respectively. By contrast, inflation, as measured by the Consumer Price Index, has averaged more like 2.47% per year during that period.<sup>14</sup> (Table 1 summarizes these and other growth rates.)

But focusing only on schools' posted *gross* tuition is a mistake, since schools have always discounted their tuition based on both student need and merit. Moreover, school discounting appears to be increasing in recent years, slowing the overall growth rate in *net* tuition. Data are hard to come by, since schools are fairly tight with their proprietary data. The ABA published discounted net tuition data for public and private law schools for the years 1999, 2004, 2009, and 2013, which show discount rates for public schools rising from 19% to 30% and for private schools from 15% to 26%.<sup>15</sup>

Figure 1 shows the growth of gross and net tuition over these periods (with a shorter period for net tuition, covering 1999-2013, the range of years that the ABA's discounting information covers). To generate the chart, I simply assumed linear growth in discount rates between the years for which we have data. The chart shows that the growth rate for net tuition is slightly slower than the growth rate for gross tuition, with the rise in discount rates partially offsetting the more accelerated growth of gross tuition in recent years. Net tuition for public schools rises at an average growth rate of 7.65% and for private schools at 4.14% during this period. The rates are still high, but materially slower than that the 8.62% and 5.18% rates for gross tuition.

The faster rise of public law school tuition (net and gross) deserves some further discussion. As we will see below, *private* school net tuition tracks more closely with the growth rate for legal services. But *public* law school tuition, even net of a generous average 30% discount rate, has risen at a substantially higher rate. (Figure 2, which is scaled to have 1999=100, shows clearly how much public net tuition growth is an outlier compared with the growth in other costs.) The causes of cost growth in legal education, and in higher education in general, are heavily debated, but one cause that seems fairly certain for public schools is the decline in direct state government funding for higher education.<sup>16</sup> This is particularly true for law schools, many of which

13. *Id.*

14. Bureau of Labor Statistics, *CPI-All Urban Consumers (Current Series)*, <https://www.bls.gov/cpi/data> (last visited Sept. 4, 2019).

15. Author's calculations based on AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FINANCING OF LEGAL EDUCATION, Report 22-30 figs.4a, 4b, 5a, 5c [<https://perma.cc/C8HW-H56W>]. These are average numbers, and so they likely mask wide disparities across schools and across students. In particular, many law schools increased merit-based discounts in the early 2010s as application numbers decreased.

16. See, e.g., Douglas A. Webber, *State Disinvestment and Tuition at Public Institutions*, 66 *ECON. ED. REV.* 1, 3 (2017) (finding that as much as 41.2% of public tuition increases is due to state disinvestment); Sandy Baum et al., *Tuition and State Appropriations: Using Evidence and Logic to Gain Perspective* 16, Urban Institute Report (2018) (summarizing research showing "somewhere between 25 and 50 percent of an appropriations cut offset by tuition increase").

have become essentially private institutions, with barely any government support at all. This confounds the data, since nominal tuition data reflect not only increases in the total cost of providing legal education, but also a shift in the source of payments, from state governments to students. Since private law schools never had state funding to lose, their tuition growth likely tracks more closely to underlying cost growth than public school tuition does.

### *B. Rising Cost of Legal Services*

The rising cost of legal services seems to receive less attention as a public policy issue (at least among law professors) than the rising cost of legal education, but it is still a very real and important phenomenon. It is also more difficult to track, because of the diffusion of both legal service providers and those who pay for legal services. Purchasers of legal services include everyone from corporations paying over \$1000 per hour for white-shoe New York firms to local governments paying court-appointed attorneys, and even to in-house counsel.

Since I am more interested in growth rates than absolute costs, I am using the data from the Producer Price Index published by the Bureau of Labor Statistics.<sup>17</sup> The BLS data go back only to 1997, but there appears to have been a methodological change in 1999, so I look at the index just from 1999 to 2013. Over this period, the PPI index for legal services experienced an average annual growth rate of 3.94%.<sup>18</sup> As with legal education, this is significantly faster than the growth in overall consumer prices, which averaged 2.2% over the period.<sup>19</sup>

### *C. Comparing Cost Growth in Legal Education and Legal Services*

Figure 2 shows the relative increases in net tuition for public and private law schools and for legal services, alongside the increases in CPI and a measure of inflation in higher education, the Higher Education Price Index (“HEPI”),<sup>20</sup> for the period 1999-2013 and all scaled so that 1999=100 for all the cost measures.

As noted above, public law school net tuition is a clear outlier, in part because it reflects not just rising costs but also cuts in direct state government funding. But looking at the other measures shows higher education costs in general rising about one-and-a-half times faster than overall prices, and both

17. Even if one might have doubts about the components of the index (something I do not have the expertise to judge), my hope is that any errors are at least consistent over time, so that growth in the index is still reflective of the growth in overall costs.

18. Bureau of Labor Statistics, *PPI Industry Group Data for Legal Services*, <https://www.bls.gov/ppi/data.htm> (last visited Sept. 4, 2019).

19. See *CPI-All Urban Consumers*, *supra* note 14. This is a slightly slower rate than noted at note 14 because I am looking at the 1999-2017 period.

20. Commonfund Institute, *Commonfund Higher Education Price Index*, 2016 Update 3, tbl. a, <https://www.commonfund.org/commonfund-institute/higher-education-price-index-hepi>.

private law school net tuition and legal services rising at about twice the rate of inflation.

The key takeaway here is the very similar growth trajectory of the cost of legal education and the cost of legal services. I discuss in the next section why it is not surprising, and even expected, for the costs of these two services to rise at similar rates. But we should also understand that if we think the rising cost of legal education is a crisis, then the very same logic applies to legal services as well. And because of the intimate connection between these two services, we should think about common solutions.

### III. Understanding the Cost Disease

While there are likely many and varied reasons for the rising costs of both legal education and legal services, a likely cause of at least some of that rise is simply that both are labor-intensive services, which in general see costs rise faster than inflation—an economic phenomenon often called “Baumol’s cost disease.”<sup>21</sup> The cost disease helps to explain the ever-increasing costs of a number of goods and services in the economy, including health care, education, policing, firefighting, and social services.

I explain the cost disease briefly below, but at the outset it is worth noting that the label “disease” is somewhat of a misnomer, as we will see. The cost disease is fundamentally a product of healthy economic forces; furthermore, cost increases caused by the cost disease are affordable by definition. The cost disease raises difficult public policy challenges, but it is ultimately a political, not economic, problem.<sup>22</sup>

The essence of the cost disease is that as wages rise over time, industries that are not able easily to increase the productivity of their workers will see their prices rise along with wages. The clearest example is the one used by William Baumol and William Bowen in their first paper on the subject: live performing arts.<sup>23</sup> It takes the same number of actors the same amount of time to perform Henry IV Part I today as it did in 1600—the labor productivity of live theater actors has barely budged in 400 years. Yet actors do not expect to earn 1600-era real wages, since costs and standards of living are much higher today. To generate funds to support those higher wages, ticket prices must go up as well.

The story gets a bit more complex when considering the source of wage growth. There is of course a lot that goes into the determination of wages,

21. See, e.g., WILLIAM J. BAUMOL, *THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T* (2012).

22. I am not saying that *all* cost increases are healthy or appropriate. Cost increases driven by, e.g., mismanagement, rent-seeking, supply or demand shortages, etc., are real problems. I am just making the narrower point that cost increases *as a result only of the cost disease* are not inherently an economic problem, even if they can be a political or public choice problem. See William J. Baumol, *Health Care, Education and the Cost Disease: A Looming Crisis for Public Choice*, 77 *PUB. CHOICE* 17 (1993).

23. William J. Baumol & William G. Bowen, *On the Performing Arts: The Anatomy of Their Economic Problems*, 55 *AM. ECON. REV.* 495 (1965).

including the relative bargaining power of labor and capital. But the *ability* for firms to pay higher wages comes largely from improvements in labor productivity due to the investment of capital and from innovations and inventions. The capital and innovations let a given worker produce more output—through the use of tools, machines, training, technology, etc. At least some of that increased output will go to the worker in the form of higher wages.<sup>24</sup>

But these wage increases do not affect workers in these high-labor productivity industries only. Upward pressure on wages in the high-productivity sectors cause wages to rise in low-productivity sectors as well, since all sectors have to draw from the same labor market.<sup>25</sup> But the low-productivity sectors do not have the same increase in output per worker. If their labor costs go up, the prices for the goods and services have to go up as well. In contrast, high-productivity sectors can often pay higher wages even as real prices for their goods and services fall.

Returning to the performing arts example, we can also see how innovation and productivity can counteract the cost disease. Inventions such as audio and video recording, radio, movies, TV, and the Internet have made the creation and distribution of entertainment vastly more cost-effective, so that a given performance can now reach millions of people at an affordable price. But this underscores the point that the key is technological innovation; for industries like education where (effective) teaching technology is lacking,<sup>26</sup> the cost disease continues to be dominant. Moreover, it also highlights that the innovation in question often involves substitution—e.g., switching from live to recorded performances. These are not necessarily equivalent products, and as long as there remains a demand for live performance (or live classroom teaching), the cost disease will continue to play a role.

24. This is not to say that productivity necessarily leads to wage growth, and there is evidence that in recent decades much of the growth in output from labor productivity has accrued to owners of capital. See, e.g., Economic Policy Institute, *The Productivity-Pay Gap*, <https://www.epi.org/productivity-pay-gap> (last visited Sept. 4, 2019). But it remains the case that for there to be *any* real wage growth over time, labor productivity has to increase.
25. ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? 36-37 (2011); BAUMOL, COST DISEASE, *supra* note 21, at 21 (“In the long run, wages for all workers throughout a country’s economy tend to go up and down together.”).
26. Studies generally conclude that in-person education continues to be superior to online education. See, e.g., Cassandra M.D. Hart, Elizabeth Friedmann & Michael Hill, *Online Course-Taking and Student Outcomes in California Community Colleges*, 13 EDUC. FIN. & POL’Y 42 (2018); Di Xu & Shanna S. Jaggars, *Performance Gaps Between Online and Face-to-Face Courses: Differences Across Types of Students and Academic Subject Areas*, 85 J. HIGHER EDUC. 633 (2014); David Figlio, Mark Rush & Lu Yin, *Is It Live or Is It Internet? Experimental Estimates of the Effects of Online Instruction on Student Learning*, 31 J. LAB. ECON. 763 (2013). But see William G. Bowen, Matthew M. Chingos, Kelly A. Lack & Thomas I. Nygren, *Interactive Learning Online at Public Universities: Evidence from a Six-Campus Randomized Trial*, 33 J. POL’Y ANALYSIS & MGMT. 94 (2014) (finding learning outcomes essentially the same for online and in-person).



### A. Cost Disease in Legal Education

After live performing arts, education is perhaps the industry that best fits the cost-disease story.<sup>27</sup> A given teacher or professor has a pretty hard upward bound on the number of students that he or she can teach—there is only so much time to grade papers and tests, and only so much space in a classroom or lecture hall. But teachers and professors still expect their wages to rise over time, and if those wages rise faster than inflation, then so will the costs of education generally.

To be sure, professors' salaries are not the only sources of cost increases in higher education. As schools have started providing a broader range of services, administrative and capital expenses have also risen. And, as in every industry, there is also likely a degree of waste and rent-seeking. But classes taught or led by professors remain the central product of higher education. According to Department of Education data, total compensation (salary plus benefits)<sup>28</sup> for professors grew at around 3.8% a year between 1998 and 2011.<sup>29</sup> Good data on law professors specifically is hard to come by, but we can probably assume that law professors' salaries grew at a similar rate. This falls a bit short of the 4.14% average growth rate for private school net tuition, but is in the same ballpark, and substantially more than average CPI of around 2%.<sup>30</sup>

27. Brooks, *Income-Driven Repayment*, *supra* note 5, 239-42; *see generally* ARCHIBALD & FELDMAN, *supra* note 25.
28. It is important to include the value of benefits, since it is an increasingly important portion of overall compensation, and because it has been rising faster than cash wages. *See infra* notes 39-40 and accompanying text.
29. To calculate this I used salary data for full professors and average benefits per full-time faculty member since NCES data did not separate out benefits by academic rank. I used full professor salary on the assumption that law schools generally rely on tenured faculty whose salaries are at the top end of overall faculty salaries. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Digest of Educ. Statistics, tbls. 316.10 & 316.70 (2017), [https://nces.ed.gov/programs/digest/current\\_tables.asp](https://nces.ed.gov/programs/digest/current_tables.asp).
30. Two other theories of cost growth in higher education are Bowen's revenue theory of costs and the related Bennett hypothesis. Briefly, the revenue theory of costs argues that, because schools are mission-driven and compete over prestige, they will tend to absorb all sources of revenue provided to them by increasing spending. HOWARD R. BOWEN, *THE COSTS OF HIGHER EDUCATION* (1980). The Bennett hypothesis (named for former Secretary of Education William Bennett) is related and argues that schools will absorb all forms of aid into higher tuition, without any net benefit for students. William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES (Feb. 18, 1987), at A31, <http://nyti.ms/2GGiqB3>. The evidence for these theories is mixed. *See* ARCHIBALD & FELDMAN, *supra* note 25, at 92-113 (on Bowen and related theories of dysfunction); 201-06 & 267-69 (on Bennett). Moreover, there is some evidence that the Bennett hypothesis has not affected law school prices in particular. Robert Kelchen, *An Empirical Examination of the Bennett Hypothesis in Law School Prices*, SSRN Working Paper (Nov. 2017), <https://ssrn.com/abstract=3067252>. But even if Bowen and Bennett describe real effects, neither is necessarily in conflict with the cost disease. The cost disease describes market forces on wages and related costs in low-productivity industries; the revenue theory of costs and the Bennett hypothesis speak more to the budget constraint—that is, the relative availability of the funds to pay those higher costs. In contrast, consider public K-12 education, where political constraints on tax increases have constrained teacher wage

It is worth noting that there are—of course—productivity improvements in higher education. For undergraduate education, the main ways that schools have tried to improve productivity are by using cheaper labor, like graduate students and adjunct professors, and by offering online courses. These tools have had perhaps less of an effect on law school than on undergraduate education, but even if they come to be used widely, it is not clear at all that they would precipitate the sort of productivity improvements that could substantially slow or reverse cost increases.<sup>31</sup> For one thing, they still rely heavily on labor. Even online courses still need graders, discussion leaders, and so on, and these workers would expect raises. Moreover, these interventions likely have a negative effect on quality, and delivering a lower-quality product at the same price is just as inflationary as delivering the same quality at a higher price.<sup>32</sup> There will likely always be a demand for full-time professors teaching live in a classroom, and that product will remain expensive. Indeed, law schools have also faced pressures to *increase* in-person teaching; the push for clinical education and bar exam preparation courses, and for smaller classes generally, puts upward pressure on labor costs.<sup>33</sup>

But even allowing for all the technological interventions that have improved teaching and research productivity—like digital research and communication, online course management, and computer technology in general—does not counter the cost-disease story. The cost disease requires only *low* productivity growth, not none at all. As long as productivity gains lag behind wage growth, costs will continue to rise faster than inflation. Even the most techno-optimist visions of online or AI-driven education are unlikely to match the exponential growth in labor productivity we have seen in, say, agriculture, an industry that has gone from employing the majority of all workers in 1870<sup>34</sup> to practically no one today,<sup>35</sup> even while increasing output to enormous levels.

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growth in many school districts. See, e.g., Sylvia Allegretto & Lawrence Mishel, *The Teacher Pay Gap Is Wider than Ever*, ECONOMIC POLICY INSTITUTE REPORT (2016), <https://www.epi.org/publication/the-teacher-pay-gap-is-wider-than-ever-teachers-pay-continues-to-fall-further-behind-pay-of-comparable-workers>. Instead of teacher wage increases, we see growing class sizes and teacher strikes. The cost disease cannot be willed away.

31. For a fuller discussion of this point, see Brooks, *Income-Driven Repayment*, *supra* note 5, at 242-44.
32. See, e.g., BAUMOL, *supra* note 21, at 20-21 (noting that demands for higher labor productivity in health care can lead to a decline in quality).
33. See, e.g., ARCHIBALD & FELDMAN, *supra* note 25, at 72-73 (noting this general trend throughout higher education and its corresponding demand on resources).
34. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 138 (1975).
35. Bureau of Labor Statistics, *Employment by Major Industry Sector*, <https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm> (last updated Oct. 24, 2017) (showing roughly 1.5% of the labor force employed in agriculture in 2016).

### B. Cost Disease in Legal Services

The same basic story applies in legal services: a fundamentally labor-intensive exercise that has seen some technological innovations that improve productivity somewhat, but not on nearly the scale that would be required to slow or reverse real cost growth. Beyond the general labor-saving technologies, like e-mail and word processing, innovations like online legal databases and text-analyzing discovery software have shortened the amount of time lawyers and other legal workers spend on these tasks. And we are told that an AI-driven future without lawyers is just around the corner. But the bedrock service provided by attorneys—representation in court and other legal proceedings—remains as labor-intensive as ever, and no foreseeable technology can replace it. As with legal education, attempts to save money—e.g., by pushing people into arbitration or settlement, using do-it-yourself online services, or simply appearing *pro se*—likely mean a lower-quality product, and thus do not actually address inflationary pressures.

While the Producer Price Index for legal services rose an average of 3.76% between 1999 and 2017,<sup>36</sup> hourly lawyer wages grew at an average rate of 2.59% over that period, according to BLS data.<sup>37</sup> But these data come from the Occupational Employment Statistics survey, which does not include benefits, such as health care and retirement plan contributions.<sup>38</sup> BLS data from the National Compensation Survey show that the benefits portion of total compensation for all civilian workers has been rising at a rate of around 3.4% in recent years,<sup>39</sup> compared with 2.4% for wages and salaries.<sup>40</sup> Extrapolating, we can probably assume that overall lawyer compensation grew at closer to 3.6% annually, very close to the growth rate in the cost of legal services, again supporting the claim that rising costs are largely a function of rising wages.

## IV. Curing the Cost Disease

The previous section argued that the cost disease may help to explain the rising costs of both legal education and legal services, since both are labor-intensive industries not well-suited to the productivity-enhancing technologies that have flourished in some other industries. And the compensation data for law professors and for lawyers also fit reasonably well with that story, with both rising materially faster than overall inflation, and fairly close to the rise

36. Bureau of Labor Statistics, *PPI Industry Group Data for Legal Services*, <https://www.bls.gov/ppi/data.htm> (last visited Sept. 4, 2019).

37. Author's calculations from Bureau of Labor Statistics, *Occupational Employment Statistics*, <https://www.bls.gov/oes/tables.htm> (last visited Aug. 28, 2018).

38. See Bureau of Labor Statistics, *Occupational Employment Statistics, Frequently Asked Questions*, [https://www.bls.gov/oes/oes\\_ques.htm](https://www.bls.gov/oes/oes_ques.htm) (last visited Sept. 4, 2019).

39. Author's calculations based on Bureau of Labor Statistics, *Employer Costs for Employee Compensation, All Civilian Total Benefits for All Occupations, Cost per Hour, 2004-2018*, <https://www.bls.gov/data> (last visited Aug. 28, 2018).

40. *Id.*

in overall costs for legal education and legal services, respectively, especially when total compensation is considered.<sup>41</sup>

So far, this story sounds truly bleak—costs for necessary services rising ever faster, with little that we can do to stop it other than suppressing wage growth or substituting inferior products or services—more MOOCs and mandatory arbitrations, more adjunct professors and online legal forms. But labeling this phenomenon a “disease” is actually too negative, since it is a product of positive economic forces—productivity and wage growth. Moreover, those same forces can end up curing the cost disease. The same productivity improvements that drive wage growth also create the savings needed to pay for that cost growth—that is, an economy as a whole will always be able to afford cost increases because of the cost disease. The catch is that income and wealth inequality make it such that *a given individual* may not be able to afford the cost increases. Ultimately, the cost disease ends up being a distributional issue that requires us to make difficult choices about whether to limit goods such as legal education and legal services to only those with the most resources, or whether to socialize and share the costs.

#### *A. Enough Money in the Economy*

Before turning to the distributional implications of the cost disease, we should understand that rising costs as a result of wage growth in sectors without corresponding productivity gains are affordable to the economy as a whole. Recall that the driver of wage growth in this story is rising labor productivity in some sectors of the economy. A given worker, using capital, technological innovation, and skills can produce more output per hour of work, and at least some of that comes back to the worker in the form of higher wages. But those same productivity improvements can also drive down real prices for the goods being produced or otherwise free up economic resources. In essence, the money we save on lower prices for toasters and televisions can be used to pay the higher prices for education and legal services (and health care and other cost-disease-afflicted goods and services).<sup>42</sup> The overall bundle of goods society consumes does not need to change much at all, even if the allocation of money within the bundle changes a lot.

Another way to think about it is that if cost-disease price increases mostly track labor compensation growth—as they do for legal education and legal services—then, *on average*, people can pay the rising costs out of their rising labor incomes. If for some reason productivity slows such that wage growth slows as well, then that also slows the upward pressure on the costs of labor-intensive services, keeping the services affordable on average.

41. It should be noted that professors and lawyers are far from the only people employed in legal education and legal services. But the same general argument applies, since the industries in general are labor-intensive; there is not a ton of room for massive productivity improvement among administrative and support employees at law schools, for example.

42. See BAUMOL, COST DISEASE, *supra* note 21, 43-58.

Now, this is obviously a vastly oversimplified story. Three issues in particular make addressing the cost disease much more challenging. First, capital's share of income appears to be rising, in part because capital is taking a bigger share of the gains from productivity improvements than economic theory suggests should happen in a competitive labor market.<sup>43</sup> Some suggest this is because of monopsony conditions among employers,<sup>44</sup> the decline of labor unions,<sup>45</sup> and other factors that limit the bargaining power of labor.<sup>46</sup> But why it is happening is beyond the scope of this article; I observe only that labor may be capturing fewer of the rewards of productivity gains in the form of wages than we might hope. This may not necessarily be a problem for the cost disease, however, since limited wage growth could also limit price increases in labor-intensive services. But the next point challenges that.

Second, growing inequality, even just in labor income, makes the effects of cost growth vary depending on where one is in the income distribution. Professionals and those with college degrees have seen decent wage growth, while working- and middle-class workers have not.<sup>47</sup> So looking only at average wage growth masks important distributional differences. Those most struggling to keep up with cost-disease-driven inflation in health care and education are also those who are receiving the least gains from productivity-driven wage growth. At the same time, as we have seen, the wages of those who work in legal education (and higher education generally) and legal services have risen, driving the costs of those services higher.<sup>48</sup> In other words, the divergence in wage growth between professionals and those with college degrees versus others is not only a driver of inequality in its own right, but also drives further inequality in the ability to afford goods and services affected by the cost disease.

43. See, e.g., Bureau of Labor Statistics, U.S. Department of Labor, *Labor Share of Output Has Declined Since 1947* (Mar. 7, 2017), <https://www.bls.gov/opub/ted/2017/labor-share-of-output-has-declined-since-1947.htm>; Economic Policy Institute, *The Productivity-Pay Gap* (Aug. 2018), <https://www.epi.org/productivity-pay-gap>.
44. See, e.g., Suresh Naidu, Eric Posner & Glen Weyl, *More and More Companies Have Monopoly Power Over Workers' Wages. That's Killing the Economy*, VOX (Apr. 6, 2018), <https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality>.
45. See, e.g., Karl Russell, Ben Casselman, Patricia Cohen, Conor Dougherty & Noam Scheiber, *6 Reasons that Pay Has Lagged Behind U.S. Job Growth*, N.Y. TIMES (Feb. 1, 2018), <https://nyti.ms/2FAKPGO>.
46. *Id.*
47. See, e.g., Elise Gould, *Looking at the Latest Wage Data by Education Level*, ECONOMIC POLICY INSTITUTE BLOG (Sept. 1, 2016), <https://www.epi.org/blog/looking-at-the-latest-wage-data-by-education-level>.
48. See Nat'l Ctr. for Educ. Statistics, *supra* note 29; Bureau of Labor Statistics, *Occupational Employment Statistics*, *supra* 37 and accompanying text; Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), <https://hbr.org/2017/10/why-wages-arent-growing-in-america> (noting distribution differences in wage growth).

Third, as noted above, much of the growth in total labor compensation has gone to benefits, especially employer-provided health insurance.<sup>49</sup> So even where labor has captured some of the gains from productivity improvements, those gains have largely gone to pay the rising cost of health care, another service afflicted by the cost disease. Health care is a complicated issue that is (thankfully) beyond the scope of this article, but even if we make the heroic assumption that all of the cost increases in health care are wholly attributable to the cost disease (in which case they would not necessarily be a bad thing), the fact that health care is generally paid upfront by employers or through paycheck withholding means that it may partly crowd out other goods and services with rising costs, particularly for those individuals with slow or flat wage growth. As evidenced by the slower growth in cash wages compared with overall compensation, health care's first bite at the apple leaves less for other goods and services.

The challenge, therefore, is that while the cost disease story tells us that there ought to be enough resources in an economy to afford rising prices in low-labor-productivity growth industries such as legal education and legal services, the distribution of those resources among individuals and households can still make some goods and services unaffordable for large swaths of society. Ultimately, the cost disease is an issue not of economic efficiency but rather of equity and fairness.

### *B. Socializing the Costs*

A first-best solution to the distributional issues created by the cost disease is to improve distribution, i.e., to generate policies that drive wage growth, especially in the lower ends of the income distribution.<sup>50</sup> Barring that, the other choices available are 1) top-down cost controls,<sup>51</sup> 2) rationing by income, or 3) some socializing of the costs. In my view, the first is unacceptable for economic reasons<sup>52</sup> and the second for justice and fairness reasons, which means we are

49. See Bureau of Labor Statistics, *Employer Costs for Employee Compensation*, *supra* note 39 and accompanying text; Anna Stansbury & Lawrence Summers, *Productivity and Pay: Is the Link Broken?*, NBER Working Paper No. 24165, at 8-9 and n.7 (2017).
50. The growth would have to be significant, since we would need wages to catch up to where they should be to match the growth that has occurred in education and higher education, plus continue to grow along with those costs going forward. This could have the potential to increase cost-disease pressures, since presumably at least some of those higher wages would be paid to individuals working in low-productivity industries, driving prices in those industries yet higher.
51. Recall that by assumption I am addressing cost increases arising from the cost disease, i.e., due to market-driven wage growth in low-productivity growth industries. To the degree that there are other factors affecting costs, like waste, rent-seeking, or monopoly, other policy tools should be considered.
52. Recall that cost-disease price increases reflect the real costs of providing the good or service. Forcing price controls could therefore make production of the goods or services uneconomical.

left trying to figure out some way to spread the costs across society, to bear them collectively and progressively.

In the context of legal education and legal services, what would this entail? The most basic tool for socializing a good or service in this way is government itself. From a public finance perspective, government is just a group of people coming together to collectively acquire goods and services that the private market cannot provide well or at all.<sup>53</sup> Government can get around the collective action, asymmetrical information, and intergenerational problems that can lead to market failure, and it can also provide a mechanism—progressive taxation—for paying for goods in a way that is affordable for everyone. If we believe, as I have argued here, that we are underproviding legal services, and therefore also underproviding legal education, in part because of cost pressures that are largely a function of income and wealth inequality, then perhaps government should step in and provide these services directly. All law schools become direct-funded public institutions and all legal services are government-provided, with progressive taxes used to pay the associated costs.

Of course there would be a number of problems with this approach. First, the politics of raising taxes and expanding the public sector to that degree is challenging, to say the least. Second, the services would be provided regardless of ability to pay, which could end up being a regressive transfer, or at least more generous to higher-income individuals than necessary, since many of those individuals can afford to pay out of pocket.<sup>54</sup> Third, and probably most importantly, it would severely affect the independence of both the academy and the bar, two professions that thrive on freedom from unnecessary government intrusion. For the bar in particular, much of its most important work is challenging unlawful government action; that role could be threatened if every lawyer were an employee of the government.

These are simplistic objections to a simplistic proposal. More sophisticated proposals might generate different responses, but it is not my purpose here to unpack all the possible forms of government funding for these services. Instead, I want to argue that income-contingent loans, as currently embodied in the income-driven repayment program, provide at least a partial pathway to progressive public funding while avoiding some of the worst objections above.

## V. The Partial Solution of IDR and PSLF

The problem as laid out so far is the following: Legal services are vital and necessary services in our democracy, particularly in an era of large government and complex regulation. But our country is far short of meeting the demand for legal services, in part because of the high costs of the labor-

53. For an articulation of this “public finance” view of government and the competing “public choice” view, see generally JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE* (1999).

54. See John Brooks, Brian Galle & Brendan Maher, *Cross-Subsidies: Government’s Hidden Pocketbook*, 106 *Geo. L.J.* 1229, 1261-66 (discussing the issue of inframarginal individuals and summarizing research).

intensive service of lawyering. Producing lawyers is also expensive, which in turns exacerbates the cost pressures on legal services, since lawyers may feel the need to recoup the significant private investment they have made in their human capital, and many schools cannot feasibly lower their prices. Providing sufficient direct funding to fund both legal services and legal education would be politically and fiscally challenging, and furthermore could undermine the vital independence of both the academy and the bar.

I argue in this part that income-contingent loans can provide a solution to this problem, though only a partial and imperfect one. They are not the only solution, of course, but since they are a policy tool already in place we should begin to see them not just as a narrow tool to help law and other students afford their student loans, but rather as a broader mechanism to secure sufficient, progressive funding to pay not only for legal education, but for legal services in general.

In this part, I first lay out some of the details of the loan programs. They are complex, and I omit some of the fine print here in service of the larger conceptual and policy argument. (I refer interested readers to some of my other work to understand the programs in more detail.<sup>55</sup>) I then explain why these loans can serve as a progressive funding mechanism for legal education and, by extension, legal services. Finally, I take a closer look at the Public Service Loan Forgiveness program in particular and explain why, despite good intentions, it does not fit well into this broader conception of the role of income-contingent loans.

#### *A. Income-Driven Repayment Programs (“IDR”)*

The Department of Education has several different programs under the heading of income-driven repayment: Income-Based Repayment (IBR), Pay As You Earn (PAYE), and Revised Pay As You Earn (REPAYE).<sup>56</sup> IBR actually comes in two forms, depending on the type and vintage of the loan. And there is also an early, less generous program, Income-Contingent Repayment (ICR), that started in the 1990s, but never had much adoption. Finally, Public Service Loan Forgiveness (PSLF) can also apply to any loan.

This alphabet soup of programs makes summarizing the program details difficult, and mostly beyond the scope of this paper. For our purposes, we can generalize somewhat. First, the programs allow borrowers to make monthly loan payments that are no more than (usually) 10% of “discretionary income,” where discretionary income is (usually) the borrower’s adjusted gross income minus 150% of the relevant federal poverty threshold.<sup>57</sup> After twenty to twenty-

55. See Brooks, *Case for More Debt*, *supra* note 5; Brooks, *Income-Driven Repayment*, *supra* note 5.

56. See Brooks, *Case for More Debt*, *supra* note 5, at 849-56. For a review of the major features of each program; see also Federal Student Aid, U.S. Dep’t of Educ., *Income-Driven Plans*, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven>.

57. 34 C.F.R. §§ 685.209(a)(2)(i) (2018) (PAYE); 685.209(c)(2)(i) (2018) (REPAYE); and 685.221(b)(1) (2018) (IBR).



five years (or ten years for those in PSLF<sup>58</sup>), any remaining loan balance is forgiven.<sup>59</sup> The programs differ most substantially in their rules for interest accrual and capitalization, which can make an enormous difference over the life of the loan, even though the rules may not always be clear to borrowers *ex ante*.<sup>60</sup>

Two other differences in the programs are worth mention. First, in all of the programs except for REPAYE, a borrower pays the *lesser* of 10% of discretionary income or the standard loan repayment amount.<sup>61</sup> So when a borrower's income gets high enough, she reverts to a typical flat loan service schedule. For REPAYE, by contrast, the borrower continues to pay 10% of discretionary income no matter what her income.<sup>62</sup> Second, for borrowers not in PSLF, the forgiveness of the debt may create gross income for tax purposes, meaning that in practice the full amount of the loan is not really forgiven.<sup>63</sup> For PSLF, by contrast, the tax code explicitly excludes the amount of canceled debt from gross income.<sup>64</sup>

### *B. IDR is Progressive Public Funding of Legal Education*

The brief sketch of the programs above reveals that the IDR programs can be thought of as a sort of income surtax on former students to pay for higher education.<sup>65</sup> The government provides the funds for tuition upfront, and finances that payment by collecting a percentage of a graduate's income; that is not so far off from the way the government funds its other programs, goods, and services largely through the personal income tax. Of course, there are vast differences between the student loan program and the tax system, especially the facts that the future obligation from a loan borrower is classified as a balance sheet liability whereas future tax payments are not, that the "surtax" here is only on former borrowers, and that the loan repayments end

58. 34 C.F.R. § 685.219(c)(1)(iii) (2018).

59. 34 C.F.R. §§ 685.209(a)(6)(i) (2018) (PAYE); 685.209(c)(5)(ii)(A) (2018) (REPAYE); and 685.221(f)(1) (2018) (IBR).

60. See Brooks, *Case for More Debt*, *supra* note 5, at 849-56 (reviewing and comparing interest rules).

61. See, e.g., 34 C.F.R. § 685.209(a)(4)(i)(A) (2018). A borrower in PAYE pays no more than what the standard loan payment would be, even if the income-contingent payment would be higher.

62. The REPAYE regulations do not include a provision similar to 34 C.F.R. § 685.209(a)(4)(i). See Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,608, 39,618 (July 9, 2015) (explaining this aspect of REPAYE).

63. While this appears to be the accepted view, I think it is wrong as a matter of policy and is also based on a misapplication of legal precedents. See John R. Brooks, *Treasury Should Exclude Income from Discharge of Student Loans*, 152 TAX NOTES 751 (Aug. 1, 2016) [hereinafter Brooks, *Student Loan Discharge*].

64. I.R.C. § 108(f) (2019).

65. For expanded arguments on this point, see John R. Brooks, *Student Loans as Taxes*, 151 TAX NOTES 513 (Apr. 25, 2016); Brooks, *Income-Driven Repayment*, *supra* note 5, at 258-63.

after a period whereas tax obligations do not. But at a high level of generality, income-contingent loans from the government are more analogous to tax payments than they are to, say, standard commercial loans.

If that is so, then IDR provides a form of progressive funding for higher education not so different from free tuition paid for with higher income taxes.<sup>66</sup> And this is particularly true for law schools and other graduate and professional schools. IDR essentially applies only to federal Direct Loans to students, and Direct Loans to undergraduates are capped at fairly low amounts—a total of \$27,000 for a four-year student who is still a dependent of his or her parents,<sup>67</sup> and a maximum of \$57,500 for an independent student with more than four years of schooling.<sup>68</sup> But as of this writing, graduate and professional students can borrow up to the full cost of attendance,<sup>69</sup> an amount that includes not just tuition and fees, but also the student's expected cost of living.<sup>70</sup> In other words, it is not impossible for a law school to have its entire tuition revenue come from IDR-eligible loans and for all of those loans to be paid back as a percentage of its graduates' income.<sup>71</sup> In that case, the federal government would essentially be taxing the law school's graduates to cover the costs of running the school.

This form of funding should be contrasted with other potential mechanisms for paying for legal education, including direct government funding of schools and direct grants to students. These are already part of the mix of revenue sources used to pay for higher education (along with charitable contributions), so the question is whether direct government funding should be relied on more heavily in place of using tuition funded by income-contingent loans. As noted above, the political challenges of direct funding are steep. But it is also debatable whether direct funding would even be desirable.

Direct funding of schools at the levels needed to make up for tuition revenue has the potential to be regressive, since the benefits would accrue to all students, not just those most in need.<sup>72</sup> It would be much more expensive to

66. Especially when you consider that large majority of those with higher incomes went to college.

67. 20 U.S.C. §§ 1078(b), 1078-8(d)(3) (2019).

68. 20 U.S.C. § 1078-8(d)(4)(B) (2019).

69. Direct Loan limits for graduate and professional students are higher than for undergraduates. 34 C.F.R. §§ 685.203(b)(2)(iii), (c)(2) (2018) (annual limit of \$20,500); *id.* at § 685.203(e)(3) (lifetime limit of \$138,500). But graduate and professional students can also take out Grad PLUS loans up to the full cost of attendance, *see* 34 C.F.R. §§ 685.203(f), (g) (2018). Those loans are also eligible for IDR, *see, e.g.*, 34 C.F.R. § 685.209(a)(ii) (2018) (excepting from IDR only Direct PLUS Loans made to parent borrowers, but not to student borrowers).

70. 20 U.S.C. § 1087ll (2019).

71. Under the "90/10" rule, private for-profit schools can have at most 90% of their revenue from federal student loans and other federal aid, but that rule does not apply to public and private nonprofit schools. *See* 34 C.F.R. § 668.14(b)(16) (2018).

72. This would depend on how progressive the revenue source is. If free college were paid for with, e.g., a wealth tax or higher rates on the highest-income taxpayers, the overall policy

lower tuitions for everyone than to lower them only for those who cannot afford current tuition levels. Furthermore, much of that money would be wasted on inframarginal consumers, those who do not need additional subsidies to change their behavior.<sup>73</sup>

Similarly, more generous grants to students, while better targeted to those who have greater need *ex ante*, do little to help those who may struggle after graduation. A law student from a poor family may go on to be a big-firm law partner, and it is fair and equitable to ask that person to pay for the full cost of her education rather than ask taxpayers to support her. Income-contingent loans target their benefits to those who have the fewest monetary rewards from their education, paid for by those with the most.<sup>74</sup>

Indeed, as currently structured, the student loan program overall is almost entirely self-financing, meaning that the more successful borrowers subsidize those in IDR. The estimated net cost of IDR to the government over the life of a loan—due to delayed payments, interest subsidies, and loan forgiveness—is almost entirely covered by the estimated profit from non-IDR loans, because of relatively high interest rates (for 2018-2019 Grad PLUS loans charged 7.6%).<sup>75</sup> According to Department of Education data, the “subsidy rate” for new loans to students in 2019 is 0.14%.<sup>76</sup> That is, the government estimates that over the full lives of all new loans to students in 2019, it will collect 0.14% less than it lends out on those loans, in present value,<sup>77</sup> even after accounting for the likely costs of IDR.<sup>78</sup> That is a mere \$117 million on loan volume of \$85 billion. And

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could be progressive. If funded with, e.g., a consumption tax, such as a value-added tax, the overall policy could be regressive.

73. See Brooks, Galle & Maher, *supra* note 54, at 1261-66 and accompanying text.

74. See Brooks, *Income-Driven Repayment*, *supra* note 5, at 268-72.

75. Federal Student Aid, U.S. Dep’t of Educ., *Interest Rates and Fees*, <https://studentaid.ed.gov/sa/types/loans/interest-rates> (last visited Aug. 9, 2019).

76. Author’s calculations based on data from U.S. Dep’t of Educ., *Student Loans Overview, Fiscal Year 2020 Budget Proposal*, Q-25, <https://www2.ed.gov/about/overview/budget/budget20/justifications/q-sloverview.pdf> (last visited Aug. 9, 2019). In this calculation I am leaving out loans consolidated in 2019 (because the set includes earlier loan cohorts) and also loans to parents. Loans to parents are (mostly) not eligible for IDR, and, like loans to grad students, charge high interest rates. They are therefore the most profitable for the government, with an estimated subsidy rate of -34.43% (meaning that the government expects to collect 34.43% more than it lends out to parents, in present value). *Id.* Consolidated loans, in contrast, have some of the highest positive subsidy rates: 12.03% in 2019. *Id.* Including consolidated loans and parent loans, the subsidy rate goes up to 0.61%, *id.*, so even across the full portfolio of 2019 loans, the system is largely self-financing.

77. By “present value,” I mean after discounting future payments to the current period using a risk-free discount rate. Therefore, these subsidy rates (positive and negative) are calculated after assuming an interest-like return for the time value of money. For example, a 0% subsidy rate would still mean that the government had earned some interest, equal to the discount rate used in calculating present value.

78. The Federal Credit Reform Act of 1990 requires federal loan-making agencies to calculate the cost of new loan disbursements as the difference between the net present value of loan

for graduate loans—the ones used by law students—the government expects to collect 2.3% more than it lends out in present value, even after accounting for IDR.<sup>79</sup> Essentially all of the cost of IDR is borne by borrowers who go on to have income high enough to pay the full principal and interest on their loans, and that is particularly true for lawyers.

To be clear, none of this is to say that financing legal education with income-contingent loans clearly dominates direct government funding (or vice versa). It is just to say that IDR does provide a form of progressive funding of higher education, and that therefore the comparison between student loans and direct government funding is more subtle and nuanced than we might first assume.

### *C. IDR Can Be Progressive Public Funding of Legal Services*

An argument of this article is that the need for legal services cannot be met with the current supply of lawyers, and this is in part because the cost disease has pushed the costs of legal services out of reach of those who have not seen sufficient wage gains over time, particularly after accounting for the rising costs of other cost disease-afflicted services, like health care.<sup>80</sup> In essence, what a large segment of the population is able or willing to pay is not sufficient to pay the costs and meet the wage expectations of a professional with an expensive advanced degree. The implication of this is that to expand the supply of legal services requires at least some socialization of the costs, just as we have partially socialized the costs of health care and higher education.

Of course, we already do some amount of socialization for legal services. Public defenders and legal aid corporations, for example, provide much-needed services to low-income clients, subsidized by government and private grants. But these do not come close to meeting the needs of clients dealing with family, immigration, disability, housing, or other civil matters where representation is not guaranteed, to say nothing of the often inadequate representation in criminal proceedings.<sup>81</sup> Moreover, this legal work is partially subsidized by *the lawyers themselves* in the form of lower wages. Government and public interest law jobs generally pay lower salaries than law firms or private practice, and lawyers in private practice who serve low- and middle-income individuals and families make lower salaries than those serving businesses

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outlays and receipts over the full life of the loan. 2 U.S.C. §§ 661a(5), 661c (2012). This is in contrast to budgeting for direct spending, which generally just counts outlays within a ten-year budget window.

79. Author's calculations based on *Student Loans Overview*, *supra* note 76, at Q-25.

80. Another cost that has grown faster than inflation for many households is the cost of housing. The cost of housing is related to the cost disease, in the sense that construction is labor-intensive and has limited opportunities for technological innovation to drive prices down. But market prices seem to be driven much more by scarcity than these more structural reasons, particular in desirable locations like New York City and other major cities. Some zoning rules also have the effect of limiting productivity, since they can impede the ability to build multiple housing units in a single building on a single parcel.

81. See LEGAL SVCS. CORP., *supra* note 2.

and high-net-worth individuals and families. This can be seen in part by the well-known bimodal distribution of starting salaries for lawyers. According to NALP, the average starting salary for the Class of 2016 is around \$90,000, but half of all law graduates actually start with an income under \$65,000.<sup>82</sup> The average is skewed because of a cluster of around 16% of law graduates who start out in large firms with starting salaries of \$180,000 or more.<sup>83</sup>

Expanding legal services further into underserved areas may require some degree of public or collective funding, but whether or not that is the case, it will almost certainly require attorneys to continue to accept lower wages for these kinds of work. But that is a heavy ask, to put a significant part of the social cost of serving underserved clients onto the backs of the lawyers themselves, particularly when they are also largely responsible for the investment in their human capital. One way to spread at least some of those costs more collectively is through IDR. By shifting some of the costs of legal education off of the lawyers serving the neediest clients and onto more financially successful lawyers (and, by extension, the clients they serve), IDR can lead to somewhat more disposable income for these lawyers, helping to ease some of the pressures of the cost disease on legal services.

To be clear, IDR is not a full solution for dealing with the many problems of access to justice—far from it. But when we recall the deep connection between legal education and legal services, we can see IDR not just as a tool to benefit lawyers, but also as a tool to benefit the communities many lawyers serve. Viewed in this way, IDR is a way of pooling at least some of the costs of ensuring that everyone can navigate our increasingly legalized society and administrative state.

#### *D. The Promise and Problem of Public Service Loan Forgiveness*

The argument above—that subsidizing some of the costs of legal education can be a subsidy to expand legal services and access to justice—is also part of the argument behind Public Service Loan Forgiveness.<sup>84</sup> PSLF stands somewhat apart from the more general IDR programs. IDR applies to all borrowers, while PSLF applies only to borrowers working in particular

82. Judith N. Collins, *Jobs & JDs: Employment for the Class of 2016—Selected Findings*, NAT'L ASS'N FOR LAW PLACEMENT 2-3 (2017), <https://www.nalp.org/uploads/SelectedFindingsClassof2016.pdf>.

83. Michael Simkovic and Frank McIntyre have shown that over a career, lawyers still do quite well financially. Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014). They show that even lawyers in the twenty-fifth percentile of earnings over a career make an earnings premium over bachelor's degree holders that likely covers at least the cost of their legal education. *Id.* at 260. But, that would not necessarily hold if there were an expansion in the number of attorneys serving needier populations. Their wages would likely be lower than the current average, and the expanded supply of lawyers could bring down wages for everyone.

84. See, e.g., Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27 (2007).

government or public interest jobs.<sup>85</sup> Under general IDR, the borrower pays 10% of his or her discretionary income and then qualifies for loan forgiveness after twenty to twenty-five years (really only partial forgiveness under current law, because the forgiveness is taxable).<sup>86</sup> Under PSLF, the borrower still pays 10% of discretionary income, but qualifies for forgiveness after ten years (and the forgiveness is tax-free).<sup>87</sup> Thus, PSLF is substantially more generous than general IDR (particularly because years eleven to twenty of a lawyer's career are likely to be much higher earning than years one to ten).

Critics of IDR suggest that the program is far too generous, especially to lawyers and other professionals,<sup>88</sup> but it is really the generosity of PSLF in particular that is the source of their concerns. In my view, the generosity of PSLF is not in and of itself a problem—it is quite reasonable for society as a whole to bear the bulk of the cost of developing the skills of a person working in the public interest.<sup>89</sup> But the *relative* treatment of PSLF borrowers compared with all other borrowers based on a bright, but arbitrary, line is less defensible.

First, there is simply the issue of need. Income, as imperfect as it is, is our general metric of a person's need and a person's ability to pay. A lawyer working in the *private* sector making income of \$X has the same need and the same ability to pay as a person working in the *public* sector making income of \$X. In taxation, we look at notions like horizontal equity to determine tax fairness and justice. Our income tax says that by having the same income, these two individuals have the same ability to pay taxes, and the source of the income is largely irrelevant. It is not obvious why that answer should be different for student loans, especially if we consider those loan payments to similar to taxes.

Second, if measurement of need cannot explain the different treatment, can we explain it in terms of programmatic goals? That is, can PSLF be defended as a decision to invest more substantial public resources into educating those who work in government or public interest careers compared with the private sector? Perhaps, but the particular choices of how to measure that subsidy are problematic. For one, the sharp line-drawing between what is a "public interest" job and what is not belies a more nuanced reality. As this article has argued, many attorneys in private practice also serve substantial public interests, and we have a public interest in having even more attorneys in private practice. Moreover, it is not clear why the ten-year mark is the point at which to measure the subsidy. If forgiveness were at year twenty, and the borrower continued to be in a relatively low-paying public interest job in years

85. 34 C.F.R. § 685.219(c)(1) (2018).

86. See *supra* notes 63-64 and accompanying text.

87. See *supra* notes 58, 64 and accompanying text.

88. See, e.g., Jason Delisle & Alexander Holt, NEW AM. FOUND., *Safety Net or Windfall?: Examining Changes to Income-Based Repayment for Federal Student Loans* 10 (2012), <https://www.newamerica.org/education-policy/policy-papers/safety-net-or-windfall>.

89. See Brooks, *Income-Driven Repayment*, *supra* note 5, at 264-67.

eleven to twenty, the income-contingent payments and ultimate forgiveness would still be generous. But if a borrower ends up having a more lucrative later career, some of that value could be captured through higher payments in years eleven to twenty. Finally, many people—not just lawyers—may move between the private and public sector throughout their careers, and it is not obvious to me that requiring ten years of strict public service work (and/or the hassle of moving between different repayment programs) creates the right incentives.

In part, these first two points collapse into one. The measurement both of a person's need and of how much a person is sacrificing from his or her own earnings to contribute to the public good are both captured (albeit imperfectly) by the person's income. Attempting to further differentiate requires line-drawing. By its nature, that sort of line-drawing will be imperfect and introduces massive differences in treatment based on formalistic distinctions. As of the first quarter of 2018, approximately one-third of all applications for certification that a job qualified for PSLF had been denied, according to the Department of Education.<sup>90</sup> Even if some of those applications were shots in the dark, it is likely either that a significant number of borrowers mistakenly believed that they qualified, or (worse) that the approval process is broken. Looking only at income provides a fairer and more objective measure than a bureaucracy (typically at a private loan servicing company) trying to apply a flawed definition of "public interest."<sup>91</sup>

Third, if we cannot differentiate the two based on need and programmatic goals, we have to look to more subjective notions like merit and desert—one of these lawyers simply deserves a more generous transfer because of the meritorious choice to work in the public interest (even if we could define that well). I think the moral weakness of this position speaks for itself, particularly because the underlying structure of the student loan program means that these benefits go disproportionately to those with graduate and professional degrees, rather than the many others who also work in the public interest.<sup>92</sup>

Finally, and more practically, the gulf between the treatment of PSLF and other IDR borrowers opens up the broader IDR program to political attack,<sup>93</sup>

90. Federal Student Aid, U.S. Dep't of Educ., *Public Service Loan Forgiveness Employment Certification Forms Report*, on file with author.

91. See Ron Lieber, *A Student Loan Nightmare: The Teacher in the Wrong Payment Plan*, N.Y. TIMES (Oct. 27, 2017), <https://nyti.ms/2yRpsyN>.

92. Recall that the limits of the underlying federal Direct Loans mean that IDR benefits for those with only undergraduate loans are also limited. See *supra* notes 67-69 and accompanying text. Thus, a person with only an undergraduate degree working in the public interest implicitly is asked to pay more of the cost of her education than a similar person with a graduate or professional degree.

93. See, e.g., Delisle & Holt, *supra* note 88; John R. Brooks, *Don't Let the GOP Dismantle Obama's Student Loan Reforms*, N.Y. TIMES (Apr. 9, 2018), <https://nyti.ms/2GI9WMQ>; Jason Delisle, *The Coming Public Service Loan Forgiveness Bonanza*, BROOKINGS INST., 2 Evidence Speaks Reps. No.2 (Sept. 22, 2016), <http://brook.gs/2cpk5yW>.

and the cost of PSLF limits the ability to expand IDR into other areas. I have argued elsewhere both for expanding the amount of IDR-eligible debt that is available to undergraduates<sup>94</sup> and for excluding the forgiven debt from gross income for tax purposes.<sup>95</sup> Both would likely have some fiscal cost, and reforming PSLF is a compelling way to offset those costs. Reform of PSLF could also allow more targeted benefits to the neediest borrowers in general IDR, such as by using a graduated repayment rate structure instead of the current flat 10% rate. While a full consideration of possible reforms to PSLF and IDR is beyond the scope of this article, unpacking the economic, policy, and moral arguments undergirding IDR will be a necessary part of that project.

## VI. Conclusion

Legal education and legal services are, by their very nature, expensive, and those high costs pose a deep threat to justice. Our increasingly complex, regulatory, and legalized world requires the mediation of professionals trained to navigate complicated legal and regulatory systems, but the high cost of training and retaining lawyers means that many individuals and households go without, and the systems intended to ensure broad welfare and shared prosperity go unattended. The cost disease has a very real effect not just on economic justice, but on civil and legal justice as well.

Addressing these issues will require multiple solutions, but we should recognize that we already have in place a tool that could effectively provide progressive, public funding of legal education—a tool to help cure the cost disease. Income-driven repayment, by tying student loan payments to income and forgiving loans after a period of time, helps to ensure that legal education is affordable to anyone, regardless of her ultimate practice area or even career. And that, in turn, can mean more lawyers working in the public interest and serving moderate-income households. Income-contingent loans are not, and cannot be, the only solution, but any broader reform must consider their already central role in financing legal education and legal services.

94. Brooks, *Case for More Debt*, *supra* note 5.

95. Brooks, *Student Loan Discharge*, *supra* note 63.



**Table 1: Average Annual Growth Rates, 1999-2013**

Public school, in-state listed (gross) tuition	8.80%
Private school listed tuition	5.18%
Public school net tuition	7.65%
Private school net tuition	4.14%
PPI for legal services	3.99%
Professor compensation (salary & benefits)*	3.81%
Lawyer salaries (salary & estimate of benefits)	3.6%
HEPI	3.31%
CPI-U	2.47%

\* 1997-2011

Sources cited in text



