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FEDERAL STUDENT LOAN REPAYMENT  
ASSISTANCE FOR PUBLIC INTEREST LAWYERS  
AND OTHER EMPLOYEES OF GOVERNMENTS  
AND NONPROFIT ORGANIZATIONS

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*The problem of high monthly repayment obligations for educational debt has long plagued students, particularly graduate and professional students who desired lower-paying public interest careers. Congress has recently responded very positively. In the College Cost Reduction and Access Act (“CCRAA”),<sup>1</sup> Congress has made it possible for high-debt, lower-income graduates to manage debt repayment through an “income-based repayment” plan.<sup>2</sup> In addition, Congress has created a new program through which public servants—including all government workers and all employees of all nonprofit organizations that are tax-exempt under § 501(c)(3) of the Internal Revenue Code—are entitled to have a substantial portion of their educational debt forgiven after*

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\* Professor of Law and Director of the Center for Applied Legal Studies, Georgetown University. In my capacity as Vice-Chair of the Committee on Government Relations and Student Financial Aid of the American Bar Association’s Section of Legal Education, I helped to advocate for the legislation discussed here. Literally hundreds of thousands of others participated in that effort, including, especially, Professor Peter Winograd of the University of New Mexico School of Law, former Dean L. Kinvin Wroth of Vermont Law School, Dean Nancy Rogers of The Ohio State University Michael E. Moritz College of Law (currently President of the Association of American Law Schools (AALS)), former AALS President Judith Areen, Dean Jerry Parkinson of the University of Wyoming College of Law, former Dean Richard Morgan of the William S. Boyd School of Law, University of Nevada Las Vegas, Dean Emily Spieler of Northeastern University School of Law, Dean T. Alexander Aleinikoff of the Georgetown University Law Center, AALS Executive Director Carl C. Monk, and Kenneth Goldsmith of the American Bar Association. These lawyers, as well as many others who are too numerous to name, deserve the thanks of thousands of public servants in the decades to come. I also especially appreciate the assistance of Mark Kantrowitz, founder of the website FinAid.org, who advised me on technical aspects of student financial aid from time to time and commented on drafts of this Article.

1. Pub. L. No. 110-84, 121 Stat. 784 (2007) (to be codified in scattered sections of 20 U.S.C.).

2. § 203, 121 Stat. at 792-95 (to be codified at 20 U.S.C. §§ 1078-3, 1087e, 1098e).

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*making modest repayments during ten years of full-time employment.<sup>3</sup> Together, these two new programs will enable student borrowers to choose their careers without being unduly influenced by their debt burdens and will enable governments and nonprofit organizations to retain talented professionals who would otherwise be forced to resign after two or three years and seek higher-paying jobs so that they could repay their student loans. This Article describes how the new law will apply to graduates serving in public interest jobs (including those who have already graduated and those who will graduate before the law goes fully into effect). A major purpose of this Article is to help students and high-debt/low-income graduates understand how the new law may help them in their career and financial planning. This Article proposes changing current income tax rules to exempt the forgiveness that the new law provides for public servants.*

## I. INTRODUCTION

In two provisions of the CCRAA, Congress has significantly improved access to higher education, particularly graduate and professional education, for persons who would like to have lower-paying public service careers, but who will be saddled by high educational debts incurred to obtain the education that they need to serve the public. This Article describes why the legislation was necessary, how it will affect educational borrowers, and what further reforms should be adopted. For students and graduates, particularly those planning to become public interest lawyers, it is also a road map to the law's provisions for obtaining loan repayment assistance.

## II. WHY THE NEW LAW WAS NEEDED

In a *Hofstra Law Review* article several years ago, I described the plight of many people who decided to go to law school so that they could serve those who were most in need, including low-income clients, criminal defendants, immigrants, and victims of domestic violence.<sup>4</sup> These idealistic students often discovered, as graduation neared, that they owed so much on their educational loans that they could not afford to live on the low salaries offered by legal aid offices, public defender

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3. § 203(a), 121 Stat. at 793-94 (to be codified at 20 U.S.C. § 1098e(b)(7)(B)).

4. Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 757-63 (2001) (this article was republished as PHILIP G. SCHRAG, *REPAY AS YOU EARN: THE FLAWED GOVERNMENT PROGRAM TO HELP STUDENTS HAVE PUBLIC SERVICE CAREERS* (2002)).

programs, and other nonprofit organizations, or on the modest salaries offered by many state and local governments. By 1999, the vast majority of students borrowed to finance their legal educations, and most of those students graduated from private law schools with educational debt (from undergraduate and graduate education) reaching nearly \$79,000; from public law schools, the corresponding amount was more than \$52,000.<sup>5</sup> For students graduating from many law schools, the median debt figure was higher, and of course many individual graduates had debts much higher than the medians at their schools. On a “standard” ten-year repayment plan, a graduate with \$75,000 of debt would have had to repay \$11,112 annually, a huge percentage of the 1999 median public interest starting salary of \$32,000.<sup>6</sup>

In the following years, as law school tuition and cumulative debt at graduation continued to increase, anecdotal accounts revealed the personal dilemmas of graduates and the difficulties that public interest employers faced. Paula J. Clifford took a \$26,000 job as a prosecutor in Bristol County, Massachusetts, but to repay her \$70,000 debt, she had to keep her college bartending job in Boston, “occasionally serving drinks to defense lawyers she had faced in court.”<sup>7</sup> After five years, at the age of thirty-one, she was still living in her parents’ house and driving a car with 235,000 miles on it. She had to quit for more lucrative employment. Similarly, Claudia M. Vitale worked as a legal aid lawyer and took a second job at a clothing shop so that she could buy clothes for court at a discount. After struggling for three years to make ends meet, she joined a private firm.<sup>8</sup> Angel Fox graduated from Capitol University Law School, where, hoping to become a public defender, she took classes in criminal procedure and held part-time jobs at a battered women’s shelter and the state attorney general’s office. But because she graduated with debt of \$60,000, she gave up her career ambitions and took a job with an

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5. These figures are based on database queries that Mark Kantrowitz made using the 1999-2000 National Postsecondary Student Aid Study (“NPSAS”) and represent median cumulative undergraduate and graduate debt for the 85% of private law school students and 90.4% of public law students who borrowed (non-family loans) for a degree program completed in 1999-2000. The standard error for total cumulative debt was \$4025.20 for public law students and \$3711.60 for private law students with respective weighted sample sizes of 12,900 and 24,000. National Center for Education Statistics, Data Analysis System, <http://nces.ed.gov/das/> (last visited Nov. 11, 2007); E-mail from Mark Kantrowitz, President, FinAid.org, to author (Sept. 12, 2007) (on file with the Hofstra Law Review). The 2001 article reported slightly lower cumulative debt figures based on other sources that were then available. Schrag, *supra* note 4, at 745 tbl.1, 746.

6. Schrag, *supra* note 4, at 748 tbl.2, 753 tbl.3.

7. Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. TIMES, Sept. 12, 2003, at A1.

8. *Id.* at A1, A29.

insurance company.<sup>9</sup> The retention problem became acute for public interest employers. As of 2006, 42% of legal aid lawyers in Illinois planned to leave their jobs within the next three years, in significant measure because of law school debt.<sup>10</sup>

The American Bar Association created a commission to study this problem. It concluded that “[m]any public service employers report having a difficult time attracting the best qualified law graduates. Alternatively, those who do hire law graduates find that, because of educational debt payments, those whom they do hire leave just at the point when they provide the most valuable services.”<sup>11</sup>

Despite many press accounts of these problems, they only got worse. By 2006, among the 80% of law school students who borrow, the median cumulative debt of new graduates had risen from the 1999 level of about \$79,000 to a new high of more than \$103,000, including more than \$83,000 incurred just during the three years of law school. The median debt incurred for legal studies of public law school graduates exceeded \$54,000, a figure that does not include accumulated undergraduate debt.<sup>12</sup> Yet in 2006, the median public interest law starting salaries were only \$36,000 in civil legal aid, \$40,000 in other public interest organizations, and \$43,000 in public defender offices.<sup>13</sup>

President Bill Clinton and Congress made a failed attempt to address this problem through legislation enacted in 1993. With the President’s strong encouragement, Congress created the “income-

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9. Adelle Waldman, *In Debt from Day One*, CHRISTIAN SCI. MONITOR, Mar. 9, 2004, at 11.

10. Michael Higgins, *Exodus of State’s Legal-Aid Lawyers Is Forecast*, CHI. TRIB., Dec. 27, 2006, at 3.

11. ABA COMM’N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 11 (2003), available at <http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf>; accord EQUAL JUSTICE WORKS, FINANCING THE FUTURE: EQUAL JUSTICE WORKS 2004 REPORT ON LAW SCHOOL LOAN REPAYMENT ASSISTANCE AND PUBLIC INTEREST SCHOLARSHIP PROGRAMS 16 (2004).

12. Kelly Field, *Forgiving Loans of Those in Public Service Grows Popular, But Programs Are Unproven*, CHRON. HIGHER EDUC., Nov. 16, 2007, at A20; Vesna Jaksic, *Help May Be On Way for Crushing Law School Debt: Bush Expected to Sign Income-Based Loan Repayment Program Bill*, NAT’L L.J., Sept. 24, 2007, at 21. Slightly lower figures for 2004 (\$94,000 in cumulative debt for private law school graduates, and \$57,000 for public law school graduates) are based on database queries that Mark Kantrowitz made using the 2003-2004 NPSAS and represent median cumulative undergraduate and graduate debt for the 89.3% of private law school students and 85.1% of public law students who borrowed (non-family loans) for a degree program completed in 2003-2004. The standard error for total cumulative debt was \$3559.20 for public law students and \$5226.20 for private law students with respective weighted sample sizes of 14,900 and 25,800. National Center for Education Statistics, Data Analysis System, <http://nces.ed.gov/das/> (last visited Nov. 11, 2007).

13. Press Release, NALP, NALP Publishes New Report on Salaries for Public Sector and Public Interest Attorneys (Sept. 1, 2006), available at <http://www.nalp.org/press/details.php?id=63>.

contingent repayment (“ICR”) option” for student loans.<sup>14</sup> Under this option, a borrower may elect to repay federally-guaranteed and federally-extended loans over a period of twenty-five years, but in any given year, the borrower’s repayment obligation is limited by a formula that ties it to the borrower’s income.<sup>15</sup> Specifically, the borrower is not obligated to repay more than 20% of discretionary income, defined as adjusted gross income minus the federal poverty level applicable to the borrower’s family size.<sup>16</sup> Any money that would be due under a twenty-five year repayment schedule that is not paid because of the income-contingent cap is added to the borrower’s principal, so the principal can become much greater than the original debt. But to prevent that principal balance from growing geometrically, compounding of interest ceases when the principal balance reaches 110% of the original principal and does not resume even if the balance is reduced below that level.<sup>17</sup> Even with this limitation on the growth of the principal, however, a borrower with very high debts and a very low income might find that the principal would never stop growing, requiring monthly payments long after the borrower retired. To prevent this situation, Congress and the Department of Education provided that after twenty-five years of income-contingent repayments, the federal government would forgive the balance of the debt.<sup>18</sup>

The ICR option was made available, without much additional paperwork, to borrowers who had “direct” Stafford loans, that is, educational loans made by the U.S. Department of Education in the Federal Direct Student Loan Program (“FDSLPL”), as opposed to government-guaranteed loans made by banks and other financial institutions through the Federal Family Education Loan Program (“FFELP”).<sup>19</sup> But law student borrowers are not allowed to choose whether they obtain their student loans from the federal government or from a financial institution. Their schools make that choice. In fact, the

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14. ABA COMM’N ON LOAN REPAYMENT AND FORGIVENESS, *supra* note 11, at 36-38; Letter from Carl C. Monk, Executive Director, AALS, to Representative Mike George Miller and Senator Edward M. Kennedy 3 (Sept. 4, 2007), available at <http://www.aals.org/documents/millerkennedy2007.pdf>.

15. Those who borrowed from financial institutions must consolidate into federal direct consolidation loans to use income-contingent repayment. See *infra* notes 21-22 and accompanying text.

16. Income Contingent Repayment Plan, 34 C.F.R. § 685.209(a)(2)(ii) to (a)(3) (2005).

17. *Id.* § 685.209(c)(5).

18. The statute itself gave the Secretary of Education authority to reduce this period of years. 20 U.S.C. § 1087e(d)(1)(D) (2000). But the Secretary has not exercised that authority. See 34 C.F.R. § 685.209(c)(4)(iv).

19. See 34 C.F.R. § 685.209(a).

vast majority of universities (and their law schools) chose to work with banks rather than to join the federal direct lending program. However, students with government-guaranteed bank loans could enjoy the benefits of ICR by consolidating their bank loans into a federal direct consolidation loan from the Department of Education.<sup>20</sup>

The 1993 law assured students who had government-guaranteed loans that they could consolidate into federal direct consolidation loans for the purpose of repaying through the ICR plan. Specifically, they could elect to consolidate if their bank lender declined to offer them “income-sensitive repayment” on terms “acceptable to the borrower.”<sup>21</sup> Income-sensitive plans adjust monthly repayments to lower levels for a few (usually three) years, while borrowers have lower incomes. But they do not solve the problems of borrowers who have very high repayment obligations relative to their incomes for extended periods of time. Furthermore, financial institutions that offer income-sensitive plans do not create repayment schedules that would leave balances remaining after twenty-five years and then forgive those balances, because federal regulations require that the monthly installments be sufficient to repay the debt within the applicable maximum time period of the loan.<sup>22</sup> Since financial institutions may not offer forgiveness, any borrower was able to consolidate into a federal direct loan with ICR by stating that an income-sensitive plan without an extended period of low monthly repayment and without partial forgiveness was not “acceptable.”

At first blush, the ICR plan seemed to respond to the needs of high-debt/low-income borrowers such as law students who desired lower-paying careers with state or local governments, or with nonprofit organizations. It lowered monthly payments, and it provided for eventual forgiveness of debt that would mount because the income-related cap on those payments left funds due but unpaid. But for two reasons, almost no law graduates voluntarily elected ICR.<sup>23</sup>

First, most law borrowers were aghast because they would have to make payments on their student loans for twenty-five years and would still be repaying their own loans when their children were enrolling in college.<sup>24</sup> Second, only government-guaranteed and government-

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20. 20 U.S.C. § 1078-3(b)(5) (2000).

21. *Id.*

22. 34 C.F.R. § 682.209(a)(6)(viii)(C) (2007).

23. Some were involuntarily forced into the ICR plan because they were unable to keep up with repayment obligations under other plans and were about to default. Schrag, *supra* note 4, at 831-32.

24. *Id.* at 791-93.

extended loans were eligible for ICR repayment and eventual forgiveness. To the extent that students borrowed commercially, they had to make monthly payments on those commercial loans on top of their income-contingent repayments. Between 1992 and 2005, Congress did not adjust the ceiling on the amount that graduate and professional students could borrow under the Stafford loan program, the main program through which law students obtained government-guaranteed or government-extended loans. It was frozen at \$18,500 per year, or \$55,500 for the three years of law school.<sup>25</sup> As the cost of attendance rose, a larger and larger percentage of debt was commercial; by the late 1990s, students were borrowing about half of their educational funds from sources that could not be paid off through ICR. No longer was repayment limited as the ICR plan had contemplated.

Aversion to repaying for twenty-five years was the main reason why law students had little interest in ICR, even if they were interested in public service. The fact that commercial loans were not covered was the next-most-important reason.<sup>26</sup>

For similar reasons, law school financial aid advisors did not encourage students to elect ICR. About half of all advisors who knew about ICR did not inform students about it, and only 4% of them helped students do the math so that they could understand whether ICR would be useful for them.<sup>27</sup>

In 2006, Congress solved the commercial loan problem through passage of the Higher Education Reconciliation Act of 2005.<sup>28</sup> It raised the Stafford loan limit only slightly, to \$20,500 a year beginning in 2007, but it created a new government-guaranteed and government-extended loan program, the Grad PLUS loan program, which for most students has replaced commercial loans to cover the gap between the Stafford annual limit and what students needed to borrow to attend school.<sup>29</sup> The interest rate on Grad PLUS loans was higher than on Stafford loans (though lower than on most commercial educational loans), but in principle for ICR borrowers with high debt and low incomes, the interest rate was irrelevant. The ICR formula still capped

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25. *Id.* at 744.

26. *Id.* at 791-92.

27. *Id.* at 796.

28. Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, 120 Stat. 155 (codified in scattered sections of 20 U.S.C.).

29. At the Georgetown University Law Center, in 2007, 85% of loans (by dollar volume) above the Stafford limits were taken out through Grad PLUS rather than commercially. Telephone interview with Charles Pruett, Director of Financial Aid, Georgetown University Law Center, in Wash., D.C. (Sept. 13, 2007).

monthly payments under its income-related formula (and a low-income borrower's total monthly payments would be much lower, because there would be no commercial loans to repay each month on top of ICR repayment). Also, regardless of the interest rate or the amount of accrued interest, balances resulting from consolidations of Stafford loans and Grad PLUS loans into federal direct consolidation loans that were repaid through ICR were forgiven after twenty-five years.<sup>30</sup> But there remained the problem that ICR required twenty-five years of repayment, making it very unattractive to most law student borrowers.

The evident solution to the problem of the failed ICR program was to shorten the period after which forgiveness would occur. Providing more rapid forgiveness for all ICR borrowers would have been very expensive, but the cost to taxpayers could be reduced by limiting the benefit of more rapid forgiveness "to those who had fulfilled a public service requirement, such as having spent at least ten of the previous fifteen years in full-time public service work," even if public service work was defined broadly to include all full-time work for any tax-exempt organization or any agency of any level of government.<sup>31</sup>

The ABA Commission concurred, recommending in 2003 that Congress reduce the period after which forgiveness would occur, provided that the borrower had engaged in substantial public service.<sup>32</sup> According to the Commission, "[s]hortening the forgiveness period to 15 years or less for those graduates who spend a specified period in public service would help the income-contingent repayment option meet its goal: ensuring that debt not foreclose community service-oriented career choices for young graduates."<sup>33</sup>

### III. THE BENEFITS OF THE NEW LEGISLATION

In the CCRAA,<sup>34</sup> Congress significantly reduced the period after which public servants' educational loans were partly forgiven.<sup>35</sup> It also reduced monthly payments for all high-debt/low-income borrowers, supplementing the income-contingent loan repayment program with a

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30. Grad PLUS loans are "PLUS" loans extended directly to graduate students rather than to their parents. 20 U.S.C. § 1078(a)(2) (2000). Federal PLUS loans are eligible for consolidation into federal direct consolidation loans. 34 C.F.R. § 685.220(b) (2005). Federal direct consolidation loans may be repaid through ICR. *Id.* § 685.208(a)(1).

31. Schrag, *supra* note 4, at 850.

32. ABA COMM'N ON LOAN REPAYMENT AND FORGIVENESS, *supra* note 11, at 38-39.

33. *Id.* at 39.

34. Pub. L. No. 110-84, 121 Stat. 784 (2007) (to be codified in scattered sections of 20 U.S.C.).

35. § 401, 121 Stat. at 800 (to be codified at 20 U.S.C. § 1087e(m)(1)).



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new “income-based” repayment (“IBR”) program.<sup>36</sup> The IBR program and the accelerated forgiveness program are contained in two separate titles of the new law, but they work in tandem.

The IBR repayment plan is similar to the ICR plan, but there are important differences. First, the income-based formula for computing the amount due each month results in payments that are lower than under ICR. Second, instead of limiting the compounding of interest on funds that are not paid as a result of the income cap (as in ICR), the government pays any unpaid interest on the subsidized portions of the loans for up to three years after the borrower elects IBR, and it postpones capitalization (and compounding) of unpaid interest until the borrower leaves the IBR repayment plan.<sup>37</sup> The unpaid interest is not capitalized or compounded until the borrower’s income rises so high that the borrower would be repaying at a rate faster than the standard repayment rate.

The CCRAA will significantly help law students and lawyers who desire public interest careers, but its benefits are not limited to public interest lawyers. The new law will help all high-debt/lower-income borrowers to be able to pursue long-term public service careers in many different fields of work, including teaching, social work, military service, nursing, disability assistance, and emergency management. As explained below, some of the provisions of the new law took effect on October 1, 2007, while others do not become effective until July 1, 2009.

#### *A. Section 203: Income-Based Repayment*

Section 203, the brainchild of Senator Edward Kennedy (D-MA), creates a new “income-based repayment” option for repaying student loans. This provision, which does not require a borrower to be engaged in public service, is modeled on the income-contingent repayment option, which remains available. But IBR is more generous for low-income borrowers. Its purpose is to help all high-debt/low-income borrowers afford repayment of their student loans.<sup>38</sup>

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36. § 203, 121 Stat. at 792-95 (to be codified at 20 U.S.C. §§ 1078-3, 1087e, 1098e).

37. It should be noted, however, that on loans being paid through IBR, the government will pay the interest on subsidized portions of loans for any three years in which the borrower is in deferment (under pre-existing law) and, in addition, for an additional three years after the borrower elects to use IBR. § 203(a), 121 Stat. at 793 (to be codified at 20 U.S.C. § 1098e(b)(3)(A)).

38. See 153 CONG. REC. S11241-07 (daily ed. Sept. 7, 2007) (statement of Sen. Kennedy).

This section (which will go into effect on July 1, 2009<sup>39</sup>) creates a method for borrowers to limit their annual educational debt repayment to a reasonable, affordable amount: 15% of discretionary income, where discretionary income is defined as adjusted gross income minus 150% of the poverty level for the borrower's family size.<sup>40</sup>

For example, suppose that a single borrower owes \$100,000,<sup>41</sup> \$75,000 in subsidized and unsubsidized Stafford loans at 6.8% (the current Stafford rate) and \$25,000 at 8.5% (the Grad PLUS rate). Suppose further that the borrower has adjusted gross income of \$40,000 in the first year after graduation.<sup>42</sup> On a standard ten-year repayment schedule, such a borrower would have to pay \$1173 per month (35% of adjusted gross income and a much higher percentage of after-tax income). But under § 203, such a borrower would pay each month  $(\$40,000 - \$15,315) \times (15\%) / 12 = \$309$ , or only 9% of adjusted gross income. That is the monthly repayment in the first year; as the borrower's income rises, the repayment amount will gradually rise, but that increase will be moderated by parallel increases in the federal poverty level. Assuming 3% annual increases in both income and the federal poverty level, the monthly payment in the second year will be \$318. In the tenth year it will be \$403. In the twenty-fifth year, it will be \$627, still far less than the \$1173 that standard repayment would require monthly for ten years.<sup>43</sup>

For some borrowers, the amount due under a standard repayment plan will always exceed 15% of their discretionary income. They will remain in the IBR repayment plan until the debt is paid off or forgiven. But other borrowers who are repaying through IBR will receive substantial raises or other income. If and when the amount that would be

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39. See § 203(c)(1), 121 Stat. at 795.

40. For poverty level figures, see Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147 (Jan. 24, 2007). Recall that under ICR, a borrower repays, annually, 20% of adjusted gross income minus the federal poverty level.

41. This is a not atypical cumulative debt for a graduating law student who attended a private school rather than a state law school. It includes about \$85,000 of debt resulting from borrowing for law school and \$15,000 of unpaid undergraduate debt.

42. Adjusted gross income is gross income less certain deductions, most notably the deduction for certain interest on student loans. The examples used in this Article refer to adjusted gross income. Borrowers should note, however, that beginning in the second year of repayment (that is, after they have paid some interest on their student loans), their gross income could be larger than the adjusted gross income figures used here; only the lower adjusted gross income figure counts for the purpose of computing the repayment obligation.

43. All of the numbers in these examples are current dollar numbers. Assuming inflation, borrowers repay with funds that are worth less than the money originally borrowed. For a discussion of discounting future repayments to net present value, see FinAid.org, Net Present Value, <http://www.finaid.org/loans/npv.phtml> (last visited Nov. 11, 2007).

due under standard repayment no longer exceeds the amount due under income-based repayment, borrowers will no longer be eligible for income-based repayment (nor would income-based repayment result in lower payments than standard repayment). At that point, the amount of interest that was not paid because the borrower's repayments had been capped by the IBR formula will be capitalized (added to the remaining balance), and borrowers will begin to pay the remaining balance under a standard repayment plan. However, the maximum monthly payments under the standard plan repayment will be based on the amount that was owed when the borrower began repaying through IBR, not on the larger amount owed as a result of the capitalized unpaid interest.<sup>44</sup>

If the borrower does *not* perform public service for ten years, most of the amount that is unpaid because of the income-based repayment cap is added to principal and is carried over from year to year until it is capitalized when the borrower leaves the IBR plan,<sup>45</sup> but, as in the ICR plan, any remaining debt is forgiven after twenty-five years.<sup>46</sup> All months of repayment count toward the twenty-five years, provided that the borrower was meeting the obligations of an IBR or ICR repayment plan (or a standard repayment plan if the borrower elected to begin using standard repayment or was required to do so because standard repayments were lower than IBR repayments).<sup>47</sup> To continue with the example described above, assume such a person had 3% annual income increases for twenty-five years, and that the poverty rate also increased 3% per year. Over that period, the borrower will pay \$135,000 in

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44. § 203(a), 121 Stat. at 793 (to be codified at 20 U.S.C. § 1098e(b)(6)(A)). Although the new method of repayment would be "standard" repayment, these rules may require the borrower to make payments for more than ten years until the debt is repaid. As noted below, however, a borrower who is employed in a public sector job while making ten years of repayment will not have to repay for more than ten years, because the remaining balance will be forgiven. *See infra* notes 64-65 and accompanying text. Months during which payments are made pursuant to standard repayment while in public service will still count toward the ten-year requirement for accelerated forgiveness under § 401 of the Act, which is described below. *See infra* Part III.B. Therefore, the funds that would have been due under standard repayment but were unpaid as a result of the IBR income cap before the borrower entered standard repayment will be eligible for forgiveness after ten years of public service.

45. For the subsidized portion of loans, the government will pay the unpaid interest for the first three years. The remaining unpaid interest (and for the unsubsidized portion of loans, all unpaid interest), is added to principal when borrower leaves the IBR plan. § 203(a), 121 Stat. at 793 (to be codified at 20 U.S.C. § 1098e(b)(3)).

46. § 203(a), 121 Stat. at 793-94 (to be codified at 20 U.S.C. § 1098e(b)(7)(B)). Under § 203, the Secretary of Education has authority to reduce this period. *Id.* In addition, periods in which the borrower was in "deferment" of loan repayment because of economic hardship count toward the twenty-five years. § 203(a), 121 Stat. at 794 (to be codified at 20 U.S.C. § 1098e(b)(7)(B)(v)). But periods in which the borrower was not making payments because of "forbearance" do not.

47. § 203(a), 121 Stat. at 793-94 (to be codified at 20 U.S.C. § 1098e(b)(7)-(8)).

principal and interest. But at the twenty-five-year mark, the borrower will still owe \$99,596 in principal and \$46,010 in unpaid interest, both of which the government will write off.<sup>48</sup>

To use IBR, a borrower need not consolidate. The borrower only has to borrow from a lender that offers IBR and elect the IBR plan.<sup>49</sup> However, as noted below, a borrower with a government-guaranteed loan from a financial institution, as opposed to a federal direct loan, must consolidate to obtain the benefits of forgiveness after ten years in a public service job.<sup>50</sup>

Virtually all government-guaranteed loans are eligible to be repaid through IBR, including Stafford and Grad PLUS loans. Parent PLUS loans, as opposed to Grad PLUS loans to students, are not eligible for repayment through this mechanism.<sup>51</sup>

Tables I and II illustrate representative repayment schedules for borrowers who elect IBR and do not qualify for more rapid forgiveness by spending ten years in full-time public service.<sup>52</sup>

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48. These and similar calculations can be performed easily on the FinAid.org IBR calculator website. FinAid.org, Income-Based Repayment Calculator, [http://www.finaid.org/calculators/ibr\\_policy.phtml](http://www.finaid.org/calculators/ibr_policy.phtml) (last visited Nov. 11, 2007).

49. It is not clear that all financial institutions are required to offer IBR. 20 U.S.C. § 1078(b)(9)(A) specifies repayment plans that all financial institutions offering government-guaranteed student loans must offer, but the CCRAA did not amend this section to add IBR as a required option. Competition may drive nearly all of them to do so. For borrowers, it does not matter whether a lender offers IBR or not, because if a lender does not offer IBR initially or through a government-guaranteed consolidation loan to a borrower who desires it, the borrower is entitled to obtain a federal direct consolidation loan on the ground that the lender did not offer IBR terms. § 203(b)(1), 121 Stat. at 794 (amending 20 U.S.C. § 1078-3).

50. See *infra* notes 67-68 and accompanying text.

51. An "excepted PLUS loan" is one that is made to a parent on behalf of the parent's dependent. The new law provides that excepted PLUS loans may not be paid through IBR. § 203(a), 121 Stat. at 792 (to be codified at 20 U.S.C. § 1098e(a)(1)). But Grad PLUS loans are loans made directly to graduate students and therefore are not excepted PLUS loans. See U.S. DEP'T OF EDUC., COLLEGE COST REDUCTION AND ACCESS ACT 11 (Jan. 8, 2008) (DCL GEN-08-01 and FP-08-01) (the balance on Grad PLUS loans, among other types of loans repaid through IBR, is cancelled after twenty-five years of repayment).

52. Readers who are viewing this Article on an electronic database that does not reproduce tables may want to consult the print version of this Article or the .pdf version on <http://www.ssrn.com>. Tables I and II assume 3% annual increases in the federal poverty level.

TABLE I: REPAYMENT AND FORGIVENESS FOR REPRESENTATIVE SINGLE BORROWERS WITH \$100,000 IN QUALIFYING DEBT WHO DO NOT PERFORM TEN YEARS OF PUBLIC SERVICE

Starting income <sup>53</sup>	Annual increases	Monthly payments, year 1	Monthly payments, year 10	Monthly payments, year 25	Total amount paid	Amount forgiven by federal government after 25 years
\$35,000	3%	\$246	\$321	\$500	\$107,655	\$172,970
\$40,000	3%	\$309	\$403	\$627	\$135,000	\$145,606
\$40,000	4%	\$309	\$462	\$893	\$166,119	\$110,239
\$40,000	5%	\$309	\$526	\$1173	\$201,998	\$63,035
\$50,000	3%	\$434	\$566	\$881	\$189,688	\$82,233
\$50,000	4%	\$434	\$640	\$1173	\$228,106	\$23,323
\$55,000	4%	\$496	\$729	\$1173	\$230,086	\$0 <sup>54</sup>

This table assumes an interest rate of 6.8% for \$75,000 and 8.5% for the remaining \$25,000. [Standard repayment would require \$1173 monthly for ten years, for a total repayment of \$140,726]

53. In all tables, starting income refers to adjusted gross income.

54. The debt would be fully repaid by the borrower early in the 23rd year.

TABLE II: REPAYMENT AND FORGIVENESS FOR REPRESENTATIVE SINGLE BORROWERS WITH \$75,000 IN QUALIFYING DEBT AT 6.8% WHO DO NOT PERFORM TEN YEARS OF PUBLIC SERVICE

Starting income	Annual increases	Monthly payments, year 1	Monthly payments, year 10	Monthly payments, year 25 (unless debt fully paid sooner)	Total amount paid	Amount forgiven by federal government after 25 years
\$35,000	3%	\$246	\$321	\$500	\$107,655	\$94,418
\$40,000	3%	\$309	\$403	\$627	\$135,000	\$61,396
\$40,000	4%	\$309	\$462	\$866	\$165,767	\$14,979
\$40,000	5%	\$309	\$526	\$863 <sup>55</sup>	\$165,557	\$0
\$50,000	3%	\$434	\$566	\$807 <sup>56</sup>	\$154,286	\$0
\$50,000	4%	\$434	\$640	\$863 <sup>57</sup>	\$142,600	\$0
\$55,000	4%	\$496	\$729	\$863 <sup>58</sup>	\$129,163	\$0

[Standard repayment would require \$863 monthly for ten years, for a total repayment of \$103,572]

Several conclusions can be drawn from these tables:

1. IBR significantly reduces monthly repayment obligations compared to standard repayment, and it most reduces them in the early years of repayment.
2. The size of the federal subsidy is much greater when the borrower's debt is very high, when the borrower's income is quite low, and when the borrower's annual income increases are 4% or lower.
3. When the borrower's debt is very high, there is a small federal subsidy after twenty-five years even when the borrower's beginning income is as high as \$50,000, provided that annual increases are modest.

55. Highest payment in the 22nd year; debt is paid off before the 23rd year.

56. Highest payment in the 21st year; debt is paid off before the 22nd year.

57. Highest payment in the 18th year; debt is paid off before the 19th year.

58. Highest payment in the 15th year; debt is paid off before the 16th year.

4. As starting salaries and annual rates of increase become larger, the total amount that the borrower must pay over twenty-five years increases substantially, making standard repayment more attractive compared with IBR.

Of course all of these relationships comport with the congressional intent behind IBR—it is a program designed for those for whom standard repayment would be a great hardship.

Borrowers who are employed at high salaries will be unlikely to want to use the new IBR system and would be ineligible to do so because the standard repayment would require smaller payments than the IBR formula. Using the IBR formula, a borrower who owes \$100,000 in educational debt and begins to work in a private law firm with an adjusted gross income of \$110,000 would pay \$1183 per month in the first year, more than the borrower would pay under standard repayment. The debt would be repaid in ten years and the borrower would receive no forgiveness.

As noted in the next section, if a borrower works in public service for ten years, the government's write-off occurs much sooner and is much larger.

#### *B. Section 401—More Rapid Forgiveness for Public Service Employees*

If a borrower plans to work a full-time public service job for at least ten years,<sup>59</sup> the borrower may elect IBR and receive forgiveness after repaying the same monthly amounts—but if the borrower makes ten years of IBR payments after October 1, 2007, while engaged in full-time public service, the remaining balance is forgiven after only ten years of monthly repayments rather than twenty-five years.<sup>60</sup> Earlier forgiveness necessarily means that a larger amount is forgiven.

Tables III and IV show how the hypothetical borrowers described in Tables I and II would repay their loans if they spend ten years in public service, how much they would pay over the ten-year period, and how much the government would forgive.<sup>61</sup>

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59. The statute defines a public service job very broadly. See *infra* notes 69-76 and accompanying text. The statute does not define “full time” employment; presumably the Department of Education will define it in regulations.

60. The borrower must still be employed in a public service job when forgiveness occurs under this provision. § 401, 121 Stat. at 800 (to be codified at 20 U.S.C. § 1087e(m)(1)(B)(i)). See *infra* note 68 and accompanying text regarding breaks in continuous public service.

61. Tables III and IV assume 3% annual increases in the federal poverty level.

TABLE III: REPAYMENT AND FORGIVENESS FOR REPRESENTATIVE SINGLE BORROWERS WITH \$100,000 IN QUALIFYING DEBT WHO PERFORM TEN YEARS OF PUBLIC SERVICE

Starting income	Annual increases	Monthly payments, year 1	Monthly payments, year 10	Total amount paid during 10 years	For purposes of comparison, total paid without public service, over 25 years, from Table I	Amount forgiven by federal government after 10 years
\$35,000	3%	\$246	\$321	\$33,850	\$107,655	\$138,400
\$40,000	3%	\$309	\$403	\$42,448	\$135,000	\$129,802
\$40,000	4%	\$309	\$462	\$45,701	\$166,119	\$126,548
\$40,000	5%	\$309	\$526	\$49,132	\$201,998	\$123,118
\$50,000	3%	\$434	\$566	\$59,644	\$189,688	\$112,606
\$50,000	4%	\$434	\$640	\$63,710	\$228,106	\$108,509
\$55,000	4%	\$496	\$729	\$72,715	\$230,086	\$99,009

This table assumes an interest rate of 6.8% for \$75,000 and 8.5% for the remaining \$25,000. [Standard repayment would require \$1173 monthly for ten years, for a total repayment of \$140,726]

TABLE IV: REPAYMENT AND FORGIVENESS FOR REPRESENTATIVE SINGLE BORROWERS WITH \$75,000 IN QUALIFYING DEBT AT 6.8% WHO PERFORM TEN YEARS OF PUBLIC SERVICE

Starting income	Annual increases	Monthly payments, year 1	Monthly payments, year 10	Total amount paid during 10 years	For purposes of comparison, total paid without public service, over 25 years, from Table II	Amount forgiven by federal government after 10 years
\$35,000	3%	\$246	\$321	\$33,850	\$107,655	\$92,150
\$40,000	3%	\$309	\$403	\$42,448	\$135,000	\$83,552
\$40,000	4%	\$309	\$462	\$45,701	\$165,767	\$80,264
\$40,000	5%	\$309	\$526	\$49,132	\$165,557	\$75,594
\$50,000	3%	\$434	\$566	\$59,543	\$154,286	\$64,059
\$50,000	4%	\$434	\$640	\$63,710	\$142,600	\$59,031
\$55,000	4%	\$496	\$729	\$72,715	\$129,163	\$46,463

[Standard repayment would require \$863 monthly for ten years, for a total repayment of \$103,572]



It follows from Tables III and IV that:

1. Borrowers who elect IBR and perform ten years of public service will end up repaying a far smaller percentage of their student loans than comparable borrowers who do not complete ten years of service. Typically, a borrower who performs public service will repay only about one-fourth to one-half as much money as a borrower who does not.
2. The savings to public service borrowers are substantial even at the relatively “high” end of the public service pay scale, such as employees who start at \$50,000 and have 4% annual raises.

Congress has achieved what it set out to do: provide some relief for all high-debt/low-income borrowers, while providing very substantial student loan repayment relief for those who make the sacrifice of choosing long-term, lower-income public service careers.

What about outliers—that is, borrowers who have borrowed much more for their educations than the average graduate of a professional school? Consider, for example, a hypothetical student who needed to borrow every penny to attend a four-year college, obtain a two-year master’s degree in social work, and a law degree. Such a person might finish school with \$200,000 in debt that qualified for repayment through IBR, with a weighted average interest rate of 7.5%. She might then go on to provide legal services to poor families. If this borrower began employment with adjusted gross income of \$42,000 per year and had annual increases of 3.5% during ten years of public service employment, she would make monthly repayments of between \$334 (the first year) and \$466 (the tenth year). These amounts are much lower than the \$2374 that she would owe monthly under standard repayment. During the ten-year period she would repay a total of \$47,572, as opposed to \$284,884 during the same period under a standard repayment plan.<sup>62</sup> At the end of the ten years, because of accumulating interest, she would still owe \$302,428 and the federal government would forgive this entire amount.<sup>63</sup>

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62. Her required monthly payments would also be much lower than they would be under a plan for fixed monthly payment over a long period of time. If she were to pay at a fixed monthly rate for thirty years, for example, she would have to pay \$1398 per month, and she would repay a total of \$503,433, as opposed to \$47,572.

63. For borrowers with such high debt and such low income relative to that debt, IBR is attractive even if ten-year forgiveness is not earned. If we keep all of the facts constant for this hypothetical borrower except for public service employment, and assume that she must wait twenty-five years before she receives forgiveness, she will end up making monthly payments that increase

Stafford loans and Grad PLUS loans (but not PLUS loans to the parents of students) are eligible for repayment under this plan. To take advantage of this special ten-year forgiveness provision, however, a borrower who had government-guaranteed loans<sup>64</sup> must first consolidate prior educational debt into a “federal direct consolidation loan.”<sup>65</sup> Section 203(b)(1)(B) of the new law guarantees borrowers the right to make this consolidation for the purpose of using the public service loan forgiveness plan.<sup>66</sup> The law permits consolidation for any borrower who “chooses” consolidation “for the purposes of using the public service loan forgiveness program.”<sup>67</sup> It does not require the borrower either to have obtained a public service job or to provide proof that such a job has been offered.

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slowly from \$334 to \$810, and she will repay a total of \$161,628 (more than three times as much as if she had performed ten years of public service work). But at the end of the twenty-five-year period, the federal government will forgive \$413,372.

64. Students at approximately 20% to 25% of universities borrow for undergraduate or graduate education directly from the U.S. Department of Education through the federal direct loan program. E-mail from Mark Kantrowitz, President, FinAid.org, to author (Nov. 15, 2007) (reporting his analysis of National Student Loan Data System data on September 24, 2007) (on file with the Hofstra Law Review); Madeleine May Kunin, Op-Ed., *A Math Lesson on College Loans*, N.Y. TIMES, June 13, 2007, at A21. According to Governor Kunin, a former Deputy Secretary of Education, the percentage of schools using the federal direct loan program is not higher because, although the government believes that it costs the government less to make these loans itself (1.7% of the value of the loan) than to pay private lenders (7.5%) to service them, “[w]hen Republicans took control of Congress in 1994, they passed a law that prohibited the Education Department from encouraging or requiring colleges to switch to the direct loan program.” Kunin, *supra*, at A21.

Borrowers with federal direct loans do not have to consolidate in order to repay through IBR and be eligible for public service forgiveness. *See* § 401, 121 Stat. at 800 (to be codified at 20 U.S.C. § 1087e(m)(1)(A)). The CCRAA makes the public service forgiveness privilege available to students from the other 75% to 80% of universities by allowing such forgiveness for “eligible federal direct loan[s],” defining such loans to include federal direct consolidation loans, and granting a right to consolidate government-guaranteed Stafford and Grad PLUS loans into federal direct consolidation loans for those who desire to use the public interest loan forgiveness program. § 401, 121 Stat. at 800 (to be codified at 20 U.S.C. § 1087e(m)(3)(A)); § 203(b)(1), 121 Stat. at 794 (amending 20 U.S.C. § 1078-3).

65. Federal direct consolidation loans that were used to discharge liability on a PLUS loan to the borrower’s parents (for undergraduate education) may not be repaid through IBR, but federal direct consolidation loans made to discharge indebtedness from Grad PLUS loans may be repaid through IBR. § 203(a), 121 Stat. at 792 (to be codified at 20 U.S.C. § 1098e(a)(2)). Along with Stafford and Grad PLUS loans, Perkins loans may be consolidated into federal direct consolidation loans and thereby become eligible for forgiveness, but consolidating Perkins loans causes those loans to lose some of their advantages. *See* U.S. Dep’t of Education, *Understanding Loan Consolidation: Is It the Right Move for You?*, <http://www.ombudsman.ed.gov/consolidation.html> (last visited Nov. 11, 2007).

66. § 203(b)(1)(B), 121 Stat. at 794 (amending 20 U.S.C. § 1078-3). Some media descriptions of the CCRAA overlooked the consolidation option and incorrectly reported that the benefits of the program are available only to students who had direct federal loans.

67. *Id.*

The law does not require that the ten years of public service be continuous. A borrower may, for example, take parental leave or may temporarily leave public service for some other reason (including work outside of the public sector). However, before the borrower qualifies for accelerated forgiveness, the borrower must make 120 payments under some combination of IBR, income-contingent repayment, or standard repayment while serving full time in a public service job and must also hold such a job when forgiveness occurs.<sup>68</sup>

Section 401 defines the public service jobs eligible for this special ten-year forgiveness. The definition includes both a list of categories of jobs that are eligible *and* a catch-all clause that sweeps in many additional employers.<sup>69</sup> The catch-all clause was first suggested by Representative John Sarbanes (D-MD) in a separate bill.<sup>70</sup> His suggestion was later incorporated into the version of House Bill 2669 that passed the House and was ultimately accepted by the Senate as well.<sup>71</sup>

For lawyers and staff members of legal organizations, the specifically listed category of those eligible consists of those in “government” and in “public interest law services (including prosecution or public defense or legal advocacy in low-income communities at a nonprofit organization).”<sup>72</sup>

Depending on how “public interest law services” is defined in regulations that will probably be written during 2008,<sup>73</sup> that description may or may not capture all public interest lawyers and their staff. For example, it may or may not cover those who work in educating groups

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68. § 401, 121 Stat. at 800 (to be codified at 20 U.S.C. § 1087e(m)(1)). Furthermore, only payments made on eligible federal direct loans (including federal direct consolidation loans) count toward the 120 required payments. *Id.* Therefore, borrowers with government-guaranteed loans who want to use the public service loan forgiveness program should consolidate their qualifying student loans into a federal direct consolidation loan as soon as possible.

69. § 401, 121 Stat. at 801 (to be codified at 20 U.S.C. § 1087e(m)(3)(B)).

70. Education for Public Service Act of 2007, H.R. 2661, 110th Cong. (2007).

71. *See* H.R. 2669, 110th Cong. § 401 (2007). Representative Sarbanes had only been a member of Congress for eight months when his proposal became law, an unusual example of an extraordinarily important successful policy initiative by a freshman member.

72. § 401, 121 Stat. at 801 (to be codified at 20 U.S.C. § 1087e(m)(3)(B)(i)).

73. In October 2007, the Department of Education announced that it would seek to develop its rules for IBR through negotiated rulemaking. Office of Postsecondary Education; Notice of Negotiated Rulemaking for Programs Authorized Under Title IV of the Higher Education Act of 1965, as amended, 72 Fed. Reg. 59,494 (Oct. 22, 2007). Although the Department selects representatives from what it regards as key stakeholder organizations to serve as negotiators, the negotiated rulemaking procedures include opportunities for citizen participation as well. *Id.* at 59,495.

of clients or the public, training other lawyers, policy advocacy, fundraising, or administration.<sup>74</sup>

Fortunately, virtually all non-governmental public interest lawyers will be swept into coverage by the catch-all clause, even if they do not work in what is ultimately defined as “public interest law services.” The catch-all clause extends the benefits of § 401 to all borrowers who work in “a full time job . . . at an organization that is described in § 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under § 501(a) of such Code.”<sup>75</sup>

Thus, the benefits of § 401 appear to apply to everyone who works for a government, everyone who works for a “501(c)(3)” organization, and certain other categories of persons (for example, persons working in “public service for the elderly” even if they do not work for governments or “501(c)(3)” organizations).<sup>76</sup>

#### IV. TRANSITION RULES

The combined effect of sections 203 and 401 will not be fully available to borrowers until July 1, 2009, but some of the benefits of

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74. It would be difficult, however, for the Department of Education to distinguish among public service lawyers according to the tasks that they perform because many and perhaps most public interest lawyers perform many different kinds of tasks in the course of a week, often moving almost seamlessly among individual representation, issue advocacy, research, training, and public education. For example, in this author’s first job after graduating from law school, he worked for a nonprofit organization (the NAACP Legal Defense Fund), spending much of his time representing low-income individuals in consumer protection litigation. But he also served as the Chair of the Consumer Advisory Council of the City of New York, drafted the City’s Consumer Protection Act of 1969 and advocated its adoption by the City Council, wrote a law review article and several popular articles advocating law reform to benefit the poor, gave public talks, helped train more junior lawyers, and taught a law school course on consumer protection. Much of that work was advocacy, and much of it was on behalf of low-income individuals, but not all of it was traditional courtroom advocacy, and nearly all of it was performed in his employer’s midtown Manhattan headquarters, not “in” a low-income community.

75. § 401, 121 Stat. at 801 (to be codified at 20 U.S.C. § 1087e(m)(3)(B)(i)). Section 401 defines a public interest job as “a full-time job *in* emergency management, government, military service, public safety, law enforcement, public health, public education (including early childhood education), social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy in low-income communities at a nonprofit organization), public child care, public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, *or at* an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code.” *Id.* (emphasis added).

76. *See id.* The term “public interest law services” may cover some lawyers who are not included in the “catch-all” clause at the end of the definition. It may include, for example, any lawyers providing civil legal aid in low-income communities for nonprofit organizations that are tax-exempt under § 501(c)(4), rather than § 501(c)(3), of the Internal Revenue Code, and prosecutors employed by international tribunals.

§ 401 (working toward forgiveness after ten years) are already available. The following illustrates how persons who have graduated or will graduate before July 1, 2009, may use the new law.<sup>77</sup>

*A. Borrowers Who Graduated<sup>78</sup> and Entered Loan Repayment Before October 1, 2007*

Borrowers who began to repay their Stafford and Grad PLUS loans before October 1, 2007, may receive partial benefits under this law.<sup>79</sup> If they have federal direct loans (very few law schools are part of the federal direct lending program), are employed in public service jobs, and plan to remain employed in the public sector for ten more years, they may elect immediately to begin paying pursuant to the income-contingent repayment option (which has been available since 1993), and then they may switch to IBR after July 1, 2009. Their monthly repayments under ICR, after October 1, 2007, will count toward the 120 months (ten years) of repayment after which forgiveness will occur (if they have remained in public service through the date of forgiveness). After October 1, 2007, payments that they make under a standard repayment plan while they are in the process of converting to income-contingent repayment (or after July 1, 2009, to income-based repayment) will also count toward the 120 payments.<sup>80</sup> But payments that they made through any repayment method before October 1, 2007, will not count.

Borrowers who entered repayment before October 1, 2007, and have government-guaranteed loans rather than federal direct loans may

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77. This analysis assumes that Congress will not pass a Technical Corrections Act simplifying the transition.

78. In this Article, the term “graduated” is used for the sake of clarity, though technically speaking, in the loan repayment industry, the dates that matter are those of consolidation and of the beginning of the repayment period. However, borrowers may not consolidate until they are in the grace period after graduation or in repayment.

79. Grad PLUS loans, which along with Stafford loans are eligible for repayment through ICR and IBR, and for forgiveness, became available only in 2006. Students who entered graduate and professional schools before Grad PLUS loans became available may have taken out private or commercial loans for the difference between the ceiling on Stafford borrowing and the cost of attendance. Private and commercial loans are not eligible for ICR or IBR repayment or for forgiveness.

80. Payments made under a standard ten-year repayment plan count toward the 120 month period, but to the extent that borrowers make such payments, they will not benefit from forgiveness, because what is forgiven is the difference between the funds owed under a standard plan and amounts owed under an income-contingent or income-based plan. Therefore, borrowers planning long-term public service careers should repay through IBR or ICR for as many of the ten years of repayment as they can.

elect the income-contingent repayment option only by consolidating into a federal direct consolidation loan.<sup>81</sup> They may consolidate whether or not they want to enter public service and seek accelerated forgiveness. If they do want accelerated forgiveness, only payments made after this consolidation, and after October 1, 2007, count toward the 120 payment requirement.<sup>82</sup> The right to consolidate into a federal direct loan in order to repay the loan through the income-contingent repayment option (and after July 1, 2009, through income-based repayment<sup>83</sup>) is guaranteed,<sup>84</sup> except that a borrower who previously consolidated may not consolidate again unless the loan has been submitted to a guarantee agency to prevent a default.<sup>85</sup> However, if a borrower who has already consolidated waits until after July 1, 2008, to seek a second consolidation and wants to consolidate to use the CCRAA's program for accelerated forgiveness for public service employment, the loan need not have been submitted for default aversion.<sup>86</sup>

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81. Under ICR, the monthly repayment requirement is higher than it will be under IBR. The ICR monthly repayment requirement is 20% of AGI minus the federal poverty level. Using the earlier example of a borrower with \$100,000 of debt, a starting salary of \$40,000, and income growth of 4% annually, ICR would yield monthly payments starting at \$497 in the first year and increasing to \$726 in the tenth year, significantly higher than under IBR, but still much lower than the \$1151 standard repayment over a ten year period. But while the payments are somewhat higher, forgiveness of the remaining balance after ten years of public service will still occur, and an ICR borrower can start paying through IBR after that program starts in July 2009. Section 401 of the CCRAA specifically states that persons who have made 120 monthly payments (ten years) under either the IBR plan or the ICR plan (or a standard ten-year repayment plan, or any combination of these) while employed in a public service job are eligible for forgiveness of the remaining balance. § 401, 121 Stat. at 800 (to be codified at 20 U.S.C. § 1087e(m)(1)).

82. Only payments made through ICR, IBR (after July 1, 2009), or at rates no lower than those of standard repayment count toward the 120 months for accelerated forgiveness. *See id.*

83. § 203(b)(2)(B) to (C), 121 Stat. at 795 (amending 20 U.S.C. § 1078-3).

84. 20 U.S.C. § 1078-3(b)(5) (2000). However, some officials of the Department of Education, which must process the consolidation, may not realize that the law permits such borrowers to consolidate. A 2006 law that prevented consolidation at the option of the borrower was repealed. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, § 7015(d), 120 Stat. 418, 485 (amending 20 U.S.C. § 1078-3). Borrowers who have trouble because officials do not realize that the law changed should contact the Federal Student Aid Ombudsman in the Department of Education. The Ombudsman may be contacted at 1-877-577-2575 or by e-mail at [fsoombudsmanoffice@ed.gov](mailto:fsoombudsmanoffice@ed.gov).

85. 20 U.S.C.A. § 1078-3(a)(3)(B)(i)(V) (2006).

86. *See* § 203(c)(2), 121 Stat. at 795.

*B. Borrowers Who Graduate After October 1, 2007, but Before July 1, 2008*

Direct loan borrowers may elect the income-contingent repayment option while waiting for the 2009 start date of IBR. All ICR or IBR payments made after October 1, 2007, while in public service, will qualify for the 120-month period after which forgiveness of the balance occurs.<sup>87</sup> Borrowers with government-guaranteed loans must consolidate, as described above, before their payments will count.

*C. Borrowers Who Graduate After July 1, 2008, but Before July 1, 2009*

Those with direct federal loans may elect income-contingent repayment while waiting for IBR to begin, and all payments pursuant to this plan will count toward the 120-month requirement. Those with government-guaranteed loans must first consolidate into a federal direct consolidation loan.<sup>88</sup> May 2009 graduates will be able to elect IBR within two months after they graduate. Those who plan public service careers and repayment through IBR will be able to consolidate for that purpose almost immediately after graduation and will be able to start repaying through IBR in July.

*D. Borrowers Who Graduate After July 1, 2009*

The law will be fully effective. Graduates with direct loans who plan to enter public service for ten years to qualify for forgiveness may simply elect income-based repayment. Those with government-guaranteed loans who plan to use the new forgiveness provision must consolidate their loans into a federal direct consolidation loan and may choose income-contingent or income-based repayment; either type of repayment will qualify for the 120-payment public service forgiveness

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87. A borrower who previously consolidated but plans to perform ten years of public service to qualify for forgiveness might have to wait for several months to consolidate because, at present, re-consolidation into a federal direct consolidation loan is permitted only for the purpose of using ICR and only if the borrower's current loan has been submitted to a guarantee agency for default aversion. 20 U.S.C.A. § 1078-3(a)(3)(B)(i)(V). After July 1, 2009, a second consolidation is also permitted for the purpose of entering income-contingent repayment if the loan is already in default. § 203(b)(2)(A)(ii), 203(c)(1), 121 Stat. at 795 (amending 20 U.S.C. § 1078-3). The CCRAA amends the restrictions to allow reconsolidation for the purpose of using the public interest loan forgiveness program. § 203(b)(1)(A), 121 Stat. at 794 (amending 20 U.S.C. § 1078-3). This amendment goes into effect on July 1, 2008, a year before IBR starts in July 2009. § 203(c)(2), 121 Stat. at 795.

88. Borrowers who previously consolidated may have to wait to reconsolidate. *See supra* note 87 and accompanying text.

privilege. They have a right to obtain federal direct consolidation loans for this purpose.<sup>89</sup> Most such borrowers will elect income-based repayment because the monthly payments are lower and therefore the amount of eventual forgiveness is higher. Borrowers who previously consolidated and who do *not* plan to enter public service for ten years may not consolidate for the purpose of using income-based or income-contingent repayment unless their loan has been submitted to a guarantee agency for default aversion or is already in default.

Borrowers who enter the ten-year forgiveness program but who leave public service employment before making 120 payments (and do not plan to resume public service and qualify for accelerated forgiveness) may continue to use ICR, standard repayment, or, if they are eligible, IBR. But they will not qualify for forgiveness at the end of ten years.

Borrowers who plan only a few years of public service before switching to high-paying jobs should think carefully about whether it is advisable to use IBR or even ICR, because the amount due will build up as a result of capitalized unpaid interest, and any unpaid balance will not be forgiven until the borrower has made twenty-five years of repayment. As Table I demonstrates, IBR can be valuable even to high-debt/lower-income borrowers who do not perform public service. But each individual's circumstances will be different, so no blanket advice is feasible for borrowers who do not plan to remain in public service long enough to earn accelerated forgiveness.

In summary, students should consult their schools' financial aid advisors, because every individual's situation is different. But in general, these conclusions seem to follow as a result of enactment of the CCRAA:

Before graduation:

1. Students who are virtually certain that they will perform ten years of public service and who need to obtain loans for higher education should borrow to the maximum extent possible through federal-direct or federally-guaranteed loans, because only those loans are eligible for forgiveness through the CCRAA. Specifically, they should obtain Stafford loans up to the loan limit of that program and Grad Plus loans to the extent needed thereafter. They should avoid purely commercial loans, credit card debt, and family loans that will have to be repaid,

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89. § 203(b)(1)(A), 121 Stat. at 794 (amending 20 U.S.C. § 1078-3(a)(3)(B)(i)). This amendment is effective July 1, 2008. § 203(c)(2), 121 Stat. at 795.



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even if the interest rate is lower than the 8.5% rate on Grad PLUS loans, because those other types of debt are not eligible for federal forgiveness.

2. Students who think that they might perform ten years of public service but are not certain that they will do so should attempt to find out whether their credit-worthiness will enable them to obtain commercial loans (for the difference between the Stafford loan limit and what they need to borrow) at rates lower than the Grad PLUS rate.<sup>90</sup> If not, they should obtain Grad PLUS rather than commercial loans. For most students, the Grad PLUS rate will be lower,<sup>91</sup> and therefore Grad PLUS loans will be more attractive whether or not the borrower plans to do public service work. Other things (such as origination fees) being equal, a student might want to choose a Grad PLUS lender that allows repayment through IBR,<sup>92</sup> because if the student later decides not to consolidate for the purpose of using the public interest program, the student would still be able to pay at a low monthly rate for the first few years of employment.
3. Students who think that they might want to perform ten years of public service but are not certain, and who have such good credit ratings that commercial loans would bear interest rates lower than 8.5% must make a difficult choice. The commercial loans may have lower interest rates, but monthly payments may be higher than Grad PLUS loans repaid through IBR, and they will almost certainly not include any possibility of forgiveness of unpaid balances after either ten or twenty-five years. Such students should think very hard about the depth of their commitment to public service and should discuss the trade-offs with financial aid advisors.

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90. The interest rate on Grad PLUS loans is set by law and is currently 8.5%. The commercial interest rate for educational loans beyond the Stafford loan limit is a function of the prime rate and the credit-worthiness of the individual borrower. *See, e.g.*, SallieMae, LAWLOANS Private Loans, [http://www.salliemae.com/get\\_student\\_loan/find\\_student\\_loan/grad/law\\_school\\_loans/lawloans\\_private\\_student\\_loans/](http://www.salliemae.com/get_student_loan/find_student_loan/grad/law_school_loans/lawloans_private_student_loans/) (last visited Nov. 11, 2007). With incentives for making every payment on time, commercial loan rates may appear to be lower than 8.5%, but the rate reductions are actually smaller than they appear in lenders' advertising, and fewer than 10% of borrowers are actually able to make every payment on time and earn reductions. FinAid.org, Student Loan Discounts, <http://www.finaid.org/loans/studentloandiscounts.phtml> (last visited Nov. 11, 2007).

91. FinAid.org, Graduate and Professional Student PLUS Loans, <http://www.finaid.org/loans/gradplus.phtml> (last visited Nov. 11, 2007).

92. *See supra* note 79 and accompanying text.

After graduation:

1. High-debt borrowers who plan to spend at least ten years in public service careers should consolidate their Stafford and Grad PLUS student loans into federal direct consolidation loans,<sup>93</sup> use income-contingent repayment until July 1, 2009, and switch to income-based repayment on July 1, 2009.<sup>94</sup>
2. High-debt borrowers who do not expect to do ten years of public service but nevertheless expect low incomes for a long period of time may also want to consider IBR (or ICR), though this will cause their total payments to increase, and no forgiveness will occur until twenty-five years have elapsed.<sup>95</sup>
3. High-debt/low-income borrowers who are not in public service, or who plan only a few years of public service and who expect their incomes to rise substantially over time, might use IBR (or ICR) to ease the repayment burden for a few years, but this repayment method will require a higher level of total repayment compared to standard repayment. They will probably repay the total amount owed before twenty-five years elapse, and therefore they will not qualify for forgiveness.

#### V. TREATMENT OF MARRIED BORROWERS WHO USE IBR OR ICR

As originally enacted, the CCRAA imposed a severe penalty on married borrowers who repaid through IBR. The IBR formula required payment of “15 percent of the result obtained by calculating, on at least an annual basis, the amount by which—(i) the borrower’s, and the borrower’s spouse’s (if applicable), adjusted gross income; exceeds (ii) 150 percent of the poverty line . . . .”<sup>96</sup> If the term “if applicable” meant “if the borrower is married,” the result could have tripled or quadrupled

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93. Borrowers already in direct lending need not consolidate.

94. See Tables III and IV, *supra* Part III.B, for illustrative advantages.

95. See Tables I and II, *supra* Part III.A, for illustrative advantages. Borrowers who do not expect forgiveness after ten years might consider making monthly payments that are large enough to cover the monthly interest on their debt, even though this amount will be more than the IBR schedule requires. This will prevent the original debt from growing larger through the accumulation of interest, reducing the amount that the borrowers will have to repay if their incomes rise. However, this strategy will also limit the amount of forgiveness to the original principal if forgiveness occurs before the debt is fully repaid.

96. College Cost Reduction and Access Act, Pub. L. No. 110-84, § 203(a), 121 Stat. 784, 792 (2007) (to be codified at 20 U.S.C. § 1098e(a)(3)(B)).

the monthly repayment obligation of a borrower who married a person who had income but no qualifying debt.<sup>97</sup>

This provision probably would have deterred some individuals from marrying and others from using IBR or making use of forgiveness for public service.<sup>98</sup> Fortunately, Congress repealed this marriage penalty three months after it passed the CCRAA. Section 2 of Public Law 110-153, a technical amendment to the Higher Education Act, allows a married borrower who files a separate income tax return to have IBR repayment obligations calculated solely on the basis of the borrower's own income and student loans, disregarding the income of the borrower's spouse.<sup>99</sup>

For a borrower who marries and files a separate return, IBR repayment (and in some cases, tax) obligations will still increase, because certain deductions and credits (including the partial tax deduction student loan interest, the earned income credit, and the child care credit) are not available to married borrowers who file separately.<sup>100</sup> Also, at certain higher income levels, personal income tax rates are slightly higher for married borrowers who file separate returns than for those who file joint returns. However, the additional costs resulting from having to pay income tax as a married borrower filing separately are, for most borrowers, nowhere near as large as the marriage penalty that would have been imposed by the CCRAA as originally enacted.<sup>101</sup>

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97. For example, a single borrower with debt of \$100,000 and adjusted gross income of \$35,000 would repay \$246 per month during the first year of IBR repayment. But if such a borrower married a person with adjusted gross income of \$65,000, the borrower's repayment obligation would suddenly jump to \$993 per month, a nearly four-fold increase.

98. The much higher payments required by this provision would have correspondingly reduced the amount of debt forgiven.

99. Pub. L. No. 110-153, 121 Stat. 1824 (2007) (amending 20 U.S.C. § 1098e).

100. Internal Revenue Service, Tax Topics—Topic 456 Student Loan Interest Deduction, <http://www.irs.gov/taxtopics/tc456.html> (last visited Dec. 20, 2007); Internal Revenue Service, Tax Topics—Topic 601 Earned Income Credit, <http://www.irs.gov/taxtopics/tc601.html> (last visited Dec. 20, 2007); Internal Revenue Service, Tax Topics—Topic 602 Child and Dependent Care Credit, <http://www.irs.gov/taxtopics/tc602.html> (last visited Dec. 20, 2007).

101. For example, a single borrower with a gross income of \$35,000 and debt of \$100,000 would pay \$2568 per year under IBR. If that person lived, unmarried, with a person who had gross income of \$60,000, the couple's joint net income, after loan repayment and federal income tax, would be approximately \$79,987. Upon marriage, the annual IBR repayment under the CCRAA as originally enacted would increase to \$10,752, and although the tax would decrease a bit if a joint return was filed, the couple's net income would be only \$72,267—reflecting a marriage penalty of \$7720. Thanks to the technical amendment, the spouses can file separate returns. The annual loan repayment decreases to \$2952 (a bit higher than for the single borrower because the borrower's adjusted gross income is higher as a result of losing the interest deduction). But the couple's annual net income will be \$79,048, only \$849 (rather than \$7720) higher than it would be if the individuals remained unmarried. Calculating the differential in this way understates the marriage penalty for

For certain married borrowers who live in community property states, Public Law 110-153 is not entirely a satisfactory solution to the problem.<sup>102</sup> Those who file joint returns are not exempted by this statute from having to compute their IBR repayment on the basis of the couple's combined adjusted gross income. Married persons who live in community property states are permitted to file separate federal tax returns, but the community property laws of those states attribute half of the combined wages (and certain other income) of the couple to each person, and therefore a borrower living in such a state who files a separate return would have to include half of the couple's joint wages on the borrower's return.<sup>103</sup> As a result, a Massachusetts borrower with high educational debt and wage income of \$40,000, whose spouse earns \$60,000, would do best to file a separate return and base IBR repayment on only \$40,000, whereas the same borrower in California would have to base IBR repayment on \$50,000 (half of the combined income).<sup>104</sup> In Massachusetts, on the other hand, if the borrower's spouse had no income (for example, while the borrower's spouse engaged in full-time child care), the borrower would have to base IBR repayment on \$40,000 (after filing either a joint or a separate return) while the borrower's California counterpart who filed a separate return could base it on only \$20,000.

Public Law 110-153 did not eliminate or reduce an existing marriage penalty for those who choose to repay through ICR, but the Secretary of Education could and should do so, conforming the treatment of married ICR repayers to that of IBR repayers. Current ICR

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some IBR repayers because although it takes into account the loss of the student loan interest deduction, it does not take into account the loss of the earned income tax credit or the child and dependent tax credit for a married borrower who must file separately to avoid taking spousal income into account for purposes of calculating an IBR repayment obligation.

In principle, Congress could eliminate the marriage penalty for IBR borrowers altogether by allowing them to take account only of their own incomes while still allowing them to file joint returns. This solution, however, would produce challenging verification problems. Under the solution that Congress actually adopted, a borrower can simply file the borrower's own tax return to obtain the advantages of IBR. If a borrower were allowed to use only the borrower's own income for IBR purposes and joint tax filing were permitted, the borrower would presumably have to recompute his or her tax obligations as if filing separately and submit a nominal separate tax return to the Department of Education for verification of income. The borrower's spouse might also be required to file a nominal return. The additional work load for borrowers, spouses, and the government would be substantial.

102. I am grateful to Steve Walsh for bringing this issue to my attention.

103. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUBLICATION 555, COMMUNITY PROPERTY 4 (2007), available at <http://www.irs.gov/pub/irs-pdf/p555.pdf>.

104. The Californian could, however, file a joint return and enjoy the benefits of the credits and deductions that are denied to a married person who files separately.

regulations require aggregation of spouses' income even if the spouses file separate tax returns.<sup>105</sup> But the Higher Education Act does not require that outcome; it requires the imputation of spousal incomes only to married borrowers who file joint tax returns.<sup>106</sup> The Secretary could therefore amend the regulation to allow separate filers to base income-contingent repayment only on their own incomes and educational debts.

The Secretary of Education may decide to provide an additional option, apart from the formula specified in Public Law 110-153, for couples in which both parties are repaying student loans through IBR. Current regulations provide that where married persons are both repaying loans through ICR, they may file joint tax returns and base their ICR repayments on their combined incomes and combined student loans.<sup>107</sup> The Secretary may provide the same opportunity for couples where both spouses are eligible for IBR repayment.<sup>108</sup>

## VI. TAXATION OF FORGIVENESS

The taxation of student loan forgiveness is a surprisingly hodge-podge matter. In general, forgiveness of a debt is considered income.<sup>109</sup> However, in § 108(f) of the Internal Revenue Code, Congress has exempted from gross income (and therefore from adjusted gross income) the forgiveness of certain student loans. The amount forgiven is not income if the loan was a "student loan" that was "made by . . . the United States" in order "to assist the individual in attending" a university, and the loan instrument provided that the debt would be discharged if the individual worked for a certain period of time in "certain professions for any of a broad class of employers."<sup>110</sup>

ICR and IBR forgiveness at the end of twenty-five years is taxable because such forgiveness is not dependent on work by the borrower for a

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105. 34 C.F.R. § 685.209(b)(1) (2005).

106. 20 U.S.C. § 1087e(e)(2) (2000). In fact, the Department's current ICR regulation appears to be inconsistent with this provision of the statute, which specifies that the ICR repayment schedule should be based "on the adjusted gross income . . . of the borrower" and provides for only one exception to that rule: where "the borrower is married and files a Federal income tax return jointly with the borrower's spouse." *Id.*

107. 34 C.F.R. § 685.209(b)(1) to (2).

108. Section 203(a) of the CCRAA directed the Secretary of Education to establish procedures to implement IBR and in doing so to consider the procedures established in accordance with § 455(e)(1) of the Higher Education Act, which authorized procedures to implement ICR. *See* College Cost Reduction and Access Act, Pub. L. No. 110-84, § 203(a), 121 Stat. 784, 794 (2007) (to be codified at 20 U.S.C. § 1098e(c)). The procedures for joint treatment of debts and income of two-ICR families were established pursuant to that section of the Act.

109. 26 U.S.C. § 61(a)(12) (2000).

110. *Id.* § 108(f)(1) to (2).

particular class of employers. Indeed, it does not require the borrower to have worked at all. At the other end of the spectrum, the forgiveness, after ten years, of loans that were partly repaid through IBR or ICR appears to be exempt from taxation at least for the 20% to 25% of borrowers who received federal direct loans while in school, because ten-year forgiveness of these loans made by the United States is available only to borrowers who worked for public service employers and because the loans were extended to assist the borrowers to attend educational institutions.

But the application of § 108 to federal direct consolidation loans of what were originally government-guaranteed student loans (even to loans consolidated for the express purpose of enabling the student to participate in the public interest loan forgiveness program) is uncertain. Is a consolidation loan that is made *after* the borrower graduates made “to assist” a borrower “in attending” the school? Perhaps so—borrowers are aware of the CCRAA and they attend school with knowledge that they can later consolidate their loans and qualify for public service forgiveness. On the other hand, the Internal Revenue Service might take the view that a loan is made “to assist” a borrower to attend school only if it is made before a particular school year has begun.

Several law schools have their own loan forgiveness programs, and although the loans extended to graduates and forgiven by most of these programs are also loans made after graduation, they are excluded from gross income by an additional provision of § 108(f). That provision renders forgiveness of certain refinanced loans exempt from taxation, including most loans forgiven by law school loan repayment assistance programs for alumni serving in public interest jobs.<sup>111</sup> But it is of no help

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111. *See id.* § 108(f)(2). According to this provision, a student loan includes “any loan made by an educational organization . . . to refinance a [prior] loan to an individual to assist the individual in attending any such educational organization but only if the refinancing loan is pursuant to a program of the refinancing organization,” *id.*, which is designed to encourage its students to serve in occupations with unmet needs or in areas with unmet needs. At least sixty-one law schools take advantage of this provision by structuring their loan repayment assistance programs to provide their own forgivable loans, rather than grants, to qualifying graduates. HEATHER WELLS JARVIS, EQUAL JUSTICE WORKS, FINANCING THE FUTURE: RESPONSES TO THE RISING DEBT OF LAW STUDENTS 16 (2d ed. 2006), available at <http://66.11.231.149/files/financing-the-future2006.pdf>.

In 2006, a dictum in a footnote of a non-precedential Tax Court decision suggested that forgiveness was not available for law school graduates because law was not one of the “certain professions” referred to by § 108(f)(1). *Moloney v. Comm’r*, T.C. Summ. Op. 2006-53, at n.5 (2006). The court relied, however, on a description of § 108(f) written in 1984 by the Staff of the Joint Committee on Taxation, which stated that the “certain professions” referred to in the law were medicine, nursing and teaching. *Id.* (citing STAFF OF JOINT COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 (Comm. Print 1984)). The Staff’s 1984 description of the reach of § 108(f) at that time could not

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to borrowers whose loans are forgiven by the federal government for public service, because it refers only to refinancing by schools, not by the federal government.

Perhaps a Revenue Ruling from the Treasury Department could clarify that since students who obtain federally guaranteed student loans have a right to consolidate into federal direct consolidation loans to use the public service forgiveness program, the federal consolidation loans to such borrowers, though formally made after graduation, are, like the original loans, made for the purpose of enabling the borrowers to attend an educational institution. If the Treasury Department does not do so in the near future, Congress should amend § 108 to exempt from gross income the discharge of student loans that were consolidated by the federal government and forgiven under the public interest provisions of the CCRAA.<sup>112</sup>

Congress might also want to make exempt from taxation the forgiveness that will occur for ICR and IBR borrowers at the end of twenty-five years. The purpose of that exemption would not be to facilitate public service but to avoid catastrophic taxation of very large amounts of forgiveness provided to low-income borrowers who have been repaying their loans, as required by law, for a generation. There may be some interest in this reform on Capitol Hill. In 2007, for example, Senator Hillary Clinton introduced a bill that would make ICR forgiveness tax exempt.<sup>113</sup>

Until the Treasury Department or Congress acts, borrowers repaying through IBR or ICR and expecting substantial forgiveness through the public interest loan forgiveness program or at the end of twenty-five years can take steps to protect themselves against a large tax liability in a future year. They could lay funds aside periodically in high-

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have referred to the legal profession, because law school LRAP programs did not then exist. The statutory term “certain professions” does not self-evidently limit the tax benefit of § 108(f) to persons in the three professions listed by the Committee staff or to professions for which loan repayment programs existed in 1984. *See* Letter from Prof. Ellen Aprill to Eric San Juan, Deputy Tax Legislative Counsel (Feb. 16, 2007) (on file with author).

112. Congress should amend the law not only to avoid taking with one hand (the tax law) what it gives with the other (the Higher Education Act), but also to avoid arbitrarily favoring students who had loans that were originally made by the federal government over students whose schools participated in the government-guaranteed student loan program. Congress could not practically have addressed this issue in the CCRAA, because that legislation was developed by the education committees, while tax legislation must originate in the House Ways and Means committee.

113. Student Borrower Bill of Rights Act of 2007, S. 511, 110th Cong. § 6(b) (2007). The Senate Bill does not refer to forgiveness under the new ten-year public service forgiveness plan, because that plan did not exist when the bill was introduced. Some of the reforms proposed in Senator Clinton’s bill were adopted by the CCRAA.

interest CDs or government bonds to pay the possible tax upon forgiveness. If Congress exempts the forgiveness from taxation, they will enjoy unexpected nest eggs from these savings.

#### VII. ADDITIONAL LOAN FORGIVENESS FOR CERTAIN PUBLIC INTEREST LAWYERS

As this issue of the *Hofstra Law Review* goes to press in December 2007, Congress is on the verge of providing additional loan forgiveness to public interest lawyers who enter particular fields in which there is a crushing public need. The Senate has passed a bill that would offer additional partial loan forgiveness to three categories of public interest lawyers: civil legal aid lawyers, public defenders, and prosecutors.<sup>114</sup> The House of Representatives Committee on Education and Labor has unanimously reported a similar bill to the full House.<sup>115</sup> Provisions in these two bills would permit the federal government to extend some forgiveness to these public interest lawyers soon after repayment period begins and would not require a full ten years of public service.<sup>116</sup>

Section 946 of Senate Bill 1642 and section 425 of House Bill 4137 (as amended by the Committee on Education and Labor) would create a new § 428L of the Higher Education Act,<sup>117</sup> under which borrowers who plan to serve as civil legal assistance attorneys for at least three years could enter into agreements with the U.S. Department of Education, under which they would commit to serve as civil legal aid lawyers for at least three years and the government could repay the borrowers'

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114. S. 1642, 110th Cong. (2007).

115. H.R. 4137, 110th Cong. (2007). The provisions of the House Bill 4137 relating to loan forgiveness for prosecutors and defenders, as originally introduced, are available at Thomas, the Library of Congress's website for federal legislation, <http://thomas.loc.gov>. The provisions relating to forgiveness for civil legal aid lawyers were added in the manager's amendment that was approved by the Committee on Education and Labor by a voice vote on November 15, 2007. The text of the amendment and the favorable committee vote on both the amendment and the bill can be found at <http://edlabor.house.gov/markups/fc20071114.shtml> (last visited Dec. 20, 2007).

116. Readers should note that these bills have not yet been enacted, and that even if they are enacted, their provisions may change significantly as a result of amendments on the House floor or negotiations between the House and the Senate. In addition, as noted in the text, the availability of forgiveness under these provisions depends on congressional appropriations.

117. Senate Bill 1642 appears to have a typographical error, in that the clear intention of § 946 is to amend the Higher Education Act by adding a new § 428L to Title IV, but § 946 does not state the law to which § 428L is to be added. The House counterpart, § 425 of House Bill 4137 as reported by the Committee on Education and Labor, does specify that § 428L is to be added to the Higher Education Act, so presumably this problem will be addressed in the conference committee after the House approves its bill.



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educational loans during the term of the agreement.<sup>118</sup> Annual repayment by the government would be limited to \$6000 per borrower per year and \$40,000 during the borrower's lifetime. Unlike § 401 of the CCRAA, which is an entitlement program, funds would be available under the new § 428L only to the extent of annual congressional appropriations.<sup>119</sup> In the event that not enough funds were appropriated to fund loan repayment for all civil legal assistance lawyers who applied, priority would be given to those who had practiced for five years or less, had spent at least 90% of their time in practice as civil legal assistance lawyers, had received loan repayment under the program during the previous fiscal year, and had completed less than three years of the required service under an agreement with the government. Eligible borrowers could repay their loans through standard ten-year repayment plans and will not be required to elect IBR or ICR repayment.

Civil legal assistance attorneys are defined as full-time lawyers for nonprofit organizations that provide legal assistance with respect to civil matters to low-income individuals without a fee, and who provide such services. This definition includes both lawyers who are employed by grantees of the Legal Services Corporation and those who work for nonprofit legal aid societies that do not receive grants from the Corporation. It might be interpreted to include only lawyers who provide direct services, as opposed to those who serve as administrators or fundraisers, though arguably even the lawyers who are engaged in supporting or indirect services are also providing legal assistance.

Section 952 of Senate Bill 1642 (adding a new Part "JJ" to the Omnibus Crime Control and Safe Streets Act of 1968) and section 951 of House Bill 4137 would provide similar benefits for prosecutors and public defenders (including prosecutors and defenders of alleged juvenile offenders), although there are several important differences. This program would be administered by the Department of Justice, rather than the Department of Education. The amount that could be repaid annually by the government would be \$10,000, rather than \$6000, although the lifetime maximum would be \$40,000 as it would be for

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118. S. 1642, 110th Cong. § 946 (2007); H.R. 4137, 110th Cong. § 425 (2007) (as amended). Borrowers who voluntarily left their jobs would be obligated to repay the amounts paid by the government.

119. Senate Bill 1642 authorizes appropriations of \$10 million for fiscal year 2008 and such sums as may be necessary in future years. House Bill 4137 authorizes the appropriation of \$10 million for fiscal year 2009 and such sums as may be necessary for each of the four succeeding years. Of course an authorization of an appropriation is not an appropriation.

civil legal aid lawyers.<sup>120</sup> Priority rules for allocation of loan repayment benefits are also somewhat different from those applicable to civil legal aid lawyers. Under the Senate bill, the Attorney General would be directed to “determine a fair allocation of repayment benefits among prosecutors and public defenders, and among employing entities nationwide.”<sup>121</sup> Under the House bill, priority is to be given to those who have the least ability to repay their loans “considering whether the borrower is the beneficiary of any other student loan repayment program.”<sup>122</sup> Under both bills, priority would also go to those who had already benefited from the program and who had completed less than three years of service under their first agreement with the Attorney General.

Many prosecutors and public defenders see enactment of these provisions as vital to the fairness of the criminal justice system. Some prosecutors and defenders’ offices are having considerable difficulty in hiring and retaining lawyers, with the result that the remaining lawyers have untenable case loads.<sup>123</sup>

These bills complement and are not inconsistent with the CCRAA; their loan forgiveness provisions would offer additional assistance to qualifying lawyers. The new bills focus on providing loan assistance in the early years of employment, and if enacted will reduce the remaining debt that the federal government would forgive for those who use IBR during any part of ten years of public service. They will also enable new lawyers to serve in the designated types of public service jobs without making a psychological or economic commitment to career-length public service. Section 401 of the CCRAA, by contrast, will help students who expect long-term careers in public service and will benefit a very broad swath of employees who serve for a long time in government, the military, and nonprofit organizations.

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120. The rationale for making more rapid repayment available to prosecutors and defenders than to civil legal aid lawyers is not apparent to this author, in view of the fact that average starting salaries for civil legal aid lawyers (\$36,000) are lower than for prosecutors and defenders (\$43,000). NALP, *supra* note 13. Another odd anomaly is that the definition of prosecutors and defenders explicitly includes those who engage in the education, supervision, and training of others in their offices, while the definition of civil legal aid lawyers does not.

121. S. 1642, 110th Cong. § 952 (2007).

122. H.R. 4137, 110th Cong. § 951 (2007).

123. See Letter from Karen J. Mathis, President, American Bar Association, to Senators Patrick Leahy and Arlen Specter (Mar. 7, 2007), available at [http://www.abanet.org/poladv/letters/legaled/2007mar05\\_loanforgive\\_1.pdf](http://www.abanet.org/poladv/letters/legaled/2007mar05_loanforgive_1.pdf).

### VIII. COORDINATING THE CCRAA WITH LAW SCHOOL AND OTHER LOAN REPAYMENT ASSISTANCE PROGRAMS

The CCRAA (and any additional loan forgiveness programs that become law in 2008) will undoubtedly stimulate reconsideration of the shape of certain existing programs administered by some law schools, states, and employers. About 100 of the approximately 190 American law schools have adopted their own law-school-funded loan repayment and assistance programs (“LRAPs”), though many of them have very limited funds to dispense and assist only a few alumni in public service each year.<sup>124</sup> In addition, some states and some public service employers, including several federal agencies,<sup>125</sup> have created their own loan repayment assistance programs to assist certain lawyers.<sup>126</sup> Law schools, states, and public service employers may now want to restructure their own LRAP plans to make their funds go further and help more students.<sup>127</sup>

For example, some law schools might define job-related eligibility for their programs as broadly as the CCRAA does, limit their LRAP assistance to the portion of funds that the graduate would have to repay under IBR (that is, 15% of (AGI minus 150% of the poverty level)), and limit LRAP payments to the first ten years after the borrower leaves

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124. JARVIS, *supra* note 111, at iv. Only eighteen schools provided assistance to more than twenty graduates in 2004-2005. *Id.*

125. See U.S. Office of Personnel Management, Student Loan Repayment Program, <http://www.opm.gov/oca/pay/studentloan/> (last visited Dec. 20, 2007).

126. JARVIS, *supra* note 111, at 21-24.

127. Because of the complex transitional rules, these institutions and agencies might want to make any LRAP changes effective for classes graduating in May 2009, or later. But publishing new LRAP rules much earlier than 2009 could help current students who will graduate in 2009 with their financial planning.

Law schools that provide LRAP benefits to graduates who become federal employees should be aware of 18 U.S.C. § 209 (2000), which makes it unlawful for federal (or District of Columbia) employees to receive compensation or salary supplementation from private sources, with several exceptions. That law also makes payment of such compensation an offense. The exceptions do not at present include payments under public service LRAP programs. Section 953 of House Bill 4137 would add such an exception for LRAP programs, but only if the school provides loan repayment assistance to federal employees “under the same terms and conditions as are available under such policy to other students of the institution who are performing public service and who qualify for such repayment or forbearance.” This provision probably means that federal employees may not receive more LRAP generous assistance than other LRAP beneficiaries. But it could also be construed to mean that a law school may not reduce its LRAP assistance proportionally to federal prosecutors or defenders (who may receive benefits through programs created by Senate Bill 1642 and House Bill 4137) or to other federal employees who receive federal LRAP assistance through the federal student loan repayment program.

school.<sup>128</sup> Beneficiaries whose debt-to-income ratios kept them eligible for IBR for ten years would therefore have to pay nothing at all out of their pockets for their legal educations, provided that they continued to work in public service.<sup>129</sup> Borrowers who did not spend a full ten years in public service would still pay nothing out of pocket for as long as they continued to qualify for IBR and worked for public service employers. Schools that could not afford to pay the entire portion of loan repayment for which the borrower was responsible could pay part of it (for example, 7.5% rather than the entire 15% of the discretionary income that graduates had to repay under IBR), reducing the students' monthly payments, although not to zero.<sup>130</sup> Similarly, state and employer-based

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128. Law school and other programs would not literally have to *require* beneficiaries to elect IBR, but could limit assistance to the amount that those using IBR would have to pay out of pocket. Coordination of federal and non-federal programs involves two other complications, however. First, what should law schools do about assistance for the relatively few graduates who, as students, had such high credit ratings that commercial loans had lower interest rates than Grad PLUS loans, and who therefore accepted commercial loans that could not be repaid through IBR? It may be difficult for schools to tell students who decide, years after accepting such loans, that because they gave up the possibility of making the low monthly payments that the CCRAA permits, the school will now refrain from providing the loan repayment assistance they now desire. Nevertheless, limiting benefits from constricted budgets to the payments required by IBR may not be extremely unfair to these students, particularly if schools prominently publish information counseling their entering students to avoid commercial debt if they might want to qualify for IBR repayment or public service forgiveness.

The second complication involves which loan forgiveness programs must be primary. If the House version of the priority system for allocating funds to prosecutors and defenders prevails, law schools with LRAP programs may find that their graduates who become prosecutors and defenders are first in line for loan repayment by the federal government. *See supra* note 123 and accompanying text. They might try to make prosecutors and defenders ineligible for law school LRAP assistance in order to pass the burden to the federal government, but Congress might respond by prohibiting them from excluding these categories of public servants from their programs.

129. Because law students typically have such high debt, remaining eligible for IBR for ten years will not be problematic for most graduates who enter public service. For example, a married borrower with a \$100,000 debt who begins work at the relatively high public service AGI of \$50,000 and enjoys an above-average annual increase of 5% will remain eligible for ten years. In the tenth year, that borrower's AGI would be \$93,080, and the monthly payment would be \$829. At the end of that year, the government would forgive \$88,110 of remaining debt.

130. As suggested in the text, law schools and others might for the sake of simplicity treat all employment settings that are eligible for ten-year forgiveness under the federal law as also eligible for law school LRAP subsidies. A school with a very limited LRAP budget could decide to define eligibility more narrowly than under federal law, but it might decide that it is administratively simpler to define eligibility as in federal law and to accommodate its budget restrictions by requiring graduates to make, on their own, some portion of the required partial repayment under the IBR formula. The few law schools that have huge endowments and extremely well-funded LRAP programs might go in the other direction, providing higher levels of benefits than the borrower would be required to repay under IBR. Graduates of these schools could therefore elect standard repayment, and their law schools' LRAP programs might pick up most or all of their repayment obligations. Such schools might also expand the definition of eligible employment to cover, for example, service in private law firms that pay low salaries. *See, e.g.*, Harvard Law School Student

programs may want to rethink their own rules for loan repayment to use their funds most efficiently in view of the enactment of the CCRAA.