

# Solvency and Survival after the Boom—A Different Perspective

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## Introduction

Higher education is understandably troubled about the prospectives of declining enrollments caused by the decrease in the next ten years of at least 15 percent in the number of high school graduates.<sup>1</sup> Legal educators have reflected much less concern, primarily because of an assumption that the demand for lawyers will remain relatively stable and because applicant pools still greatly exceed the number of places in the nation's law schools.<sup>2</sup> The presence of such a large national pool of persons who at present wish to attend law school tends to obscure a different problem—whether college graduates who wish to attend law school will continue to be willing and able to pay the costs of legal education.

The halcyon years of the seventies in which legal education prospered are being replaced by a less auspicious era. Faculty who attended law school in the 1960s and 1970s have not experienced the austerity that has characterized legal education through almost all of its history until the recent boom.<sup>3</sup> Recent history provides an introduction to problems on the horizon.

Legal education has always suffered from inadequate financing as compared to other graduate and professional education. Much law school

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1. Report of the Joint AALS-LSAC Committee on Demand for Legal Education in the 1980's [July, 1980], Tables 1,2 [hereinafter cited as Joint Committee Report]. Some estimate a 20 percent decline in the number of 22-year-olds during the decade. F.L. Davis, *A Model of the Legal Professionalization Process: Thinking about Thinking, and Behaving like a Lawyer* 72 (unpublished dissertation, 1983).
2. Joint Committee Report, Table 5; Consultants' Memorandum QS8283-15, James P. White, Consultant on Legal Education to the American Bar Association, to Deans of ABA Approved Law Schools, December 20, 1982, [hereinafter cited as Consultant's Memorandum]. It has been estimated that the demand for lawyers will increase 33 to 37 percent by 1995. U.S. Dept. of Labor, Bureau of Labor Statistics Monthly Labor Review, November, 1983, at 39. The size of the profession in 1984 has been estimated at approximately 610,000. Joint Committee Report at 9. Approximately 43,000 persons were admitted to the Bar in 1982. Section on Legal Education and Admission to the Bar, American Bar Association, *A Review of Legal Education in the United States, Fall 1982, Law Schools and the Bar Admissions Requirements 40* (1983) [hereinafter cited as *Review of Legal Education*]. It is obvious that supply will exceed demand if the Bureau of Labor Statistics is reasonably accurate in its forecasts and present levels of enrollment continue.
3. Robert B. Stevens, *Law School: Legal Education in America from the 1850's to the 1980's* (Chapel Hill, N.C., 1983).

education has been subsidized, but at a lower subsidy level than elsewhere in the university. Many private law schools have frequently functioned as profit centers, generating funds needed elsewhere. The price paid for the absence of adequate subsidies has affected the quality of law school programs and has been reflected in high student-faculty ratios and more contact hours of faculty, a narrow range of courses taught, presumably related to the profession's perception of subjects that should be learned, and the absence or scarcity of small seminars and clinical education programs.<sup>4</sup> A low level of scholarship has also resulted in some schools where teaching loads have discouraged or precluded effective research and publication.

### Recent History

In the 1970s law schools were able to improve quality because of two main factors: (1) a major increase in the applicant pool and enrollment and (2) major increases in tuition in the private schools and state subsidies in the public sector. These developments produced better students and more of them, thereby providing funds to do things not previously possible.

The major increase in enrollment took place between 1968 and 1975.<sup>5</sup> The extraordinary increase in the number of women was the most significant factor.<sup>6</sup> Almost simultaneously, federal support for graduate students, initiated in the post-Sputnik era, began to diminish, and students, diverted previously from law to other disciplines by the availability of lucrative graduate fellowships, began to study law. The reduced number of new jobs on college faculties as a result of the projected decrease of college entrants accelerated the trend.

Too little is known about how much of the boom in enrollment had its origin in the "new idealism" of the Kennedy legacy which inspired young people toward public service, whether in the Peace Corps or neighborhood law offices. It is certain that both applicant pools and enrollments have continued at high levels after such appeals subsided.

Enrollments stabilized after 1974.<sup>7</sup> The hallmark of the last decade has been increases in tuition, particularly in the private schools, occurring much faster than previously and at rates greater than inflation.<sup>8</sup> Increased tuition revenues were used to finance improvements as well as meet inflation.

4. The problem is not peculiar to the United States. The recent Report by the Consultative Group on Research and Education in Law to the Social Sciences and Humanities Research Council of Canada concluded that "our survey of teaching methods and curriculum shows that most students receive no exposure at all to scholarly subjects such as legal history or theory or interdisciplinary perspectives on law, and that few have anything more than minimal exposure; that the agenda of most courses is highly analytical rather than reflective; that most students receive no formal research training beyond a basic course in bibliography or legal writing; and that faculty/student ratios are generally too high to permit 'hands on' supervision of student scholarly work." *Law and Learning* 135 (1983) (The Arthurs Report).
5. Enrollment in ABA-approved schools increased from 62,779 in 1968 to 116,991 in 1975. The number increased to 127,828 in 1982. *Review of Legal Education* at 39.
6. Enrollment of women increased from 2,906 in 1967 to 47,083 in 1982. *Id.* at 40.
7. See note 5 *supra*. The increase in the number of women has been accompanied by a slight decrease in the number of men during this period.
8. Consultant's Memorandum QS 8283-27, March 4, 1983.

It was possible to raise tuition annually in large amounts because (1) the pool of capable applicants exceeded the number of seats in first-year classes;<sup>9</sup> (2) loan funds readily available to students permitted them to pay the increased tuition; (3) students were prepared to borrow money, in part because law jobs were available at salaries perceived to be sufficient to permit repayment of loans without unacceptable sacrifice.

These factors are understood by most legal educators. Less well understood is the importance of federal loan programs in sustaining enrollment and permitting tuition increases, and the relationship of these programs, placement realities, and problems of loan repayment to students' willingness to borrow. Too frequently legal educators take the federal programs for granted, are unaware of their limitations, and assume that students will continue to be willing to borrow whatever is necessary to finance a legal education.

A failure to understand the remarkable coincidence of events which has permitted law schools to increase size and improve quality simultaneously also blurs thinking about other realities of legal education. There is a tendency to view the difference between salaries of law professors and practitioners as a "subsidy" by the professoriat to legal education, rather than either the result of supply and demand, or a manifestation of a societal attitude that academic lifestyles and security will always provide enough of the best at less than market wages. Admission practices of the 1950s and 1960s are criticized as "unethical" because of the high attrition that resulted from admission of high-risk students who were given an opportunity to achieve professional status at their own expense.<sup>10</sup> Present programs of admission, faculty compensation, curriculum diversity, library acquisitions, and financial aid have come to be regarded as the minimal level that can be tolerated and a base upon which additional programs of skills training for lawyer competency and a renewed commitment to scholarship should be built, with little or no consideration about where the resources can be found to maintain the status quo, much less build Utopia.

This article examines two basic assumptions that underlie our present system for financing legal education and efforts to improve it: (1) the public should maintain and increase its subsidy for legal education; (2) students will continue to be willing to borrow money in large amounts to finance a legal education. Our intent is to play the devil's advocate in the hope that more thoughtful attention will be given to these problems by legal educators.

9. Consultant's Memorandum QS 8283-15, *supra* note 2. Bok has pointed out that the "average board scores of the top 2000 or 3000 law students exceed those of their counterparts entering other graduate schools and occupations, with the possible exception of medicine, while approximately 40 percent of Rhodes scholars in recent years go on to law school, dwarfing the number entering any other graduate or professional occupation." Derek Bok, *A Flawed System*, May-June 1983 *Harvard Magazine* 38, 41, reprinted with critical commentaries, 33 *J. Legal Educ.* 570, 573 (1983).
10. Such criticisms are frequently made by the same people who laud affirmative action programs in which high-risk students who are financed by the tuition of their classmates experience similar rates of attrition.

### Continuance and Increase of Public Subsidies

Potential consumers of legal education probably will not be able to pay the costs of a legal education from current resources if law schools continue to do business as usual, i.e., attempting to educate the renaissance lawyer who has the doctrinal and conceptual foundations to move into any area of the law, introducing such students to the skills of lawyering, and simultaneously facilitating high-quality legal scholarship by faculty. Educational programs of such breadth are simply too expensive. Some form of subsidy will be necessary to bridge the gap between the student's capacity to pay and total costs.

Potential sources of subsidies are several, but continuation of legal education in anything like its present form requires acceptance of the proposition that most law students must treat a legal education as a capital asset, financed in significant measure by loans, and repaid over the productive professional life of student borrowers. The amount of the loan is dependent upon other variables, chiefly the availability of parental support and the amount of other subsidies. In state schools, the difference between educational costs and tuition is a direct public subsidy that will reduce the student's reliance on loans, but this subsidy frequently functions only as a tuition rebate, requiring many law students whose parents are not affluent to borrow to pay living costs. In private schools, the loan needed is likely to be greater because of the tuition differential between private and public schools—caused principally by the absence of the direct public subsidy—although loans may be less important for some students in a few schools where endowments and institutional policy permit scholarships in significant amounts.

The prerequisites of a workable system for such loans are ready availability of large loans (at least for students in private schools), and existence of insurance or guarantees against default to attract lenders. It may also be necessary to provide some subsidy to lenders, if they are expected to handle a large volume of small transactions, and subsidization of interest to borrowers, at least when interest rates are high. If the most needy are to receive assistance, eligibility for loans probably must be based exclusively on need rather than such criteria as risk of default usually employed by lenders, a policy inevitably resulting in higher default rates.

These functions are performed by three federal loan programs that currently subsidize legal education, especially in private law schools, which is financed in the first instance more by the Federal government than by parents, students, or the law schools themselves. In 1982-83, over two-thirds of all of the tuition and fee revenues at ABA-accredited law schools (\$466 million) was attributable either to the Guaranteed Student Law program (GSL-\$285 million) or the Parental Loan for Undergraduate Student Program (PLUS-\$21 million).<sup>11</sup> Although law students in 1982-83 constitute

11. Consultant's Memorandum QS 8283-45, June 20, 1983 (Table J-1). The ratios appear to be approximately the same in 1983-84 with \$547 million in tuition and fees at 164 reporting law schools.

less than 10 percent of the 1.25 million individuals enrolled in graduate and professional education and less than 1 percent of all of the higher education population, they accounted for 4.9 percent of the dollar volume nationwide in GSLs (which was estimated to be \$6.1 billion), between 10 and 15 percent of all PLUS loans newly extended (\$100 million) and over 3 percent of all NDSL funds (\$640 million).<sup>12</sup>

The GSL program has been in existence since 1965. Law students have to be enrolled at least half-time, maintain satisfactory progress in school, and sign a form that they have either registered for the draft or are not required to do so (e.g., because they are female). If their family income is less than \$30,000, or if they meet income eligibility standards that reflect the number of members in their family enrolled in higher education and the cost of attendance at their particular school (including not only tuition but also nine-month cost of living), they can obtain as much as \$5,000 a year less a 5 percent origination fee and an insurance premium, or an effective \$4,600. A three-year maximum for GSLs is \$15,000. No interest is due on the loan while the student is in school, but repayment begins six months after graduation at an interest rate of 8 percent (if the borrower took out a loan after September 13, 1983) or 7 percent (if the borrower had any GSLs prior to January 1, 1981) or 9 percent (all other borrowers).<sup>13</sup>

PLUS loans came into being in 1981 as a response to parental need for loans to finance costly higher education and cover graduate student borrowers as well. They provide \$2,685 a year (\$3,000 less a 1 percent guarantee fee) regardless of need and are currently repayable 60 days after the loan is disbursed, that is, during the years that the student is in law school, at an interest rate of 12 percent.<sup>14</sup>

Both GSL and PLUS loans usually require the borrower to contact a bank or other lending agency, including state agencies, but this is no longer true for law students. In the summer of 1983, in order to facilitate access by law students in every part of the United States to the GSL and PLUS programs, the Law School Admissions Council initiated the Law School Assured Access Program (LSAAP). LSAAP, which the Council operates in conjunction with the Student Loan Marketing Association, the Higher Education Assistance Foundation, and a bank in Washington, D.C., combines the two programs in one package (dependent, of course, on income eligibility for GSL), makes PLUS as well as GSL interest-free during the years in law school, and streamlines the application process, permitting the student and law school to complete the application and route it directly to the Council without a visit to a bank or other lender. LSAAP makes loans available to law students from parts of the country, particularly in the South, where banks have been reluctant to participate in GSL or to make the full \$5,000 available and permits deferral-accrual of the interest on PLUS.<sup>15</sup> LSAAP means that most

12. Appendix, Budget of the United States Government Fiscal Year 1984 I-I 12.

13. The specific terms of the GSL program appear in Title IV-B of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071-1087-2.

14. The PLUS/ALAS program is section 428B of Title IV-B, 20 U.S.C. § 1078-2.

15. Law School Admission Council, Law School Admission Bulletin, May-June 1983.

potential law students can readily obtain \$8,000 in loans to go to school.

The NDSL program dates back to 1958. NDSLs are given out by the universities, not banks, as part of a student's financial aid package. Law students can receive up to \$5,000 per academic year or \$12,000 throughout their undergraduate and graduate years combined, with repayment only after graduation at a 5 percent interest rate. Most other eligibility characteristics are the same as for GSLs.<sup>16</sup> Law students receive a disproportionate share of the funds available from this source compared to their numbers (3 percent of NDSL money, 1 percent of students) despite preferences for undergraduates expressed by many universities.<sup>17</sup>

State schools have a different requirement to continue business as usual. Average tuition in state schools has risen slightly less than private schools over the long haul in terms of percentage increases, but the tuition gap has increased,<sup>18</sup> significantly between most public and most private schools. The difference between mounting costs and tuition must be paid for by a constantly increasing state subsidy unless tuition goes up in the same amount as costs. State legislatures must increase subsidies in amounts at least equal to increases in costs, if state schools are to be able to maintain their present education programs without raising tuition.

Continuation of GSL, PLUS, and continued legislative support for state schools may not be enough to meet these financial challenges. Weaknesses in existing programs may require additional sources of loans, at least in the private schools.

Legal education has become extremely costly in recent years. In the 95 private law schools that reported figures for 1983-84, over 83 percent (79 schools) charged tuition of over \$5,000, without taking into account the cost of room and board. Fifty-four schools or 57 percent exceeded \$6,000, while 24 were higher than \$7,200. Nor is going to a public law school inexpensive anymore. In 75 percent of the public law schools, (55 of 73 reporting schools), the tuition charged a nonresident student was in excess of \$3,000 (13 schools charged more than \$5,000). Thus, in over three-quarters of all law schools, both public and private, the \$5,000 maximum GSL was no longer sufficient to support a student in law school in 1983, let alone in future years.<sup>19</sup> Indeed, in 1983-84, the projected cost of living for nine months for an unmarried student not residing in school-supplied and subsidized housing itself exceeded \$5,000 in 105 of 170 law schools supplying the requisite data.

The \$5,000 ceiling on GSLs is clearly inadequate, even with an additional \$3,000 from PLUS. The provisions of the Higher Education Act of 1965 governing the GSLs permit the Secretary of Education to raise that \$5,000 (as

16. Title IV-E of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1087aa-1087::

17. Consultant's Memorandum QS 8283-45, *supra* note 11 (Table J-4) and Appendix, *supra* note 12 at I-110.

18. It is sometimes forgotten that a public school with a tuition of \$2,000 increases costs only by \$200 by raising tuition 10 percent, while a 5 percent increase in tuition at a private school with a tuition of \$6,000 increases costs by \$300. Statement of increases in percentages obscures the reality.

19. Preliminary data compiled by Consultant James P. White, Table F-2, December 15, 1983.

well as the \$25,000 total for undergraduate and professional education combined) if he determines that more is warranted for students engaged in specialized training with exceptionally high costs of education, but thus far this authority has not been used. Without such an increase, GSL and PLUS may quickly become too small to furnish enough support to enable many individuals to attend law school.

Combining tuition and living expenses, the average full costs of attendance for law students at private and public (resident and nonresident) institutions in 1983-84 were \$11,929, \$7,361, and \$9,529 respectively.<sup>20</sup> If general inflation for the next six academic years averages 5 percent, while law school tuition continues to climb during that period at the same rate as over the last nine years, the full costs of attendance in 1989-90 will approximate \$20,273, \$10,570, and \$19,130, respectively. Even if tuition accelerates less rapidly, total costs still will increase significantly.

The average student starting at a private law school this past fall can expect to pay almost \$40,000 to obtain his or her degree. For a 1990 law graduate, the cost could exceed \$55,000. Nor does the \$55,000 figure cover all prospective law students. For quite a few it is likely to be more. Room and board costs are significantly higher in certain urban areas on the West and East Coast. Furthermore, the average private school tuition of \$6,236 was exceeded in 1983-84 by 48 of the 95 private law schools, including 24 over \$7,000 and 13 over \$8,000.<sup>21</sup> If tuition continues to rise at 12.5 percent per year, the most expensive schools could cost over \$19,000 a year by 1989, excluding \$7,000 to \$9,000 in room, board, and other living expenses. Such schools, in the absence of very high levels of private and/or public subvention, would be beyond the reach of most students from middle-class families, let alone those from low-income backgrounds.

An obvious issue is whether the public will or should continue, much less increase, subsidies to legal education by paying annually increasing subsidies to state schools, and by guaranteeing loans and subsidizing interest at least in a core federal program for students in state and private schools upon which supplemental private programs may be anchored.

Some outside of legal education may suspect that the public interest might be well served by less than 173 approved schools<sup>22</sup> in which approximately 128,000 students study and from which at least 35,000<sup>23</sup> graduate each year to join a bar that has more than doubled over the last twenty years.<sup>24</sup> The status quo may seem more justified to those aspiring to go to law school and to law teachers than to the public at large.

The question of solvency and survival after the boom is begged if the basic issues concerning the continuation of legal education in its present form and at its present size are assumed and if competing demands for public support

20. Compiled from data, *supra* note 19, and unpublished data from Consultant James P. White on cost-of-living expenses at 173 law schools in 1983-84.

21. Preliminary data, *supra* note 19.

22. The Judge Advocate General's School is excluded from the count.

23. Review of Legal Education at 1, 39, 40.

24. Joint Committee Report at 11.

are ignored. Devising discipline-wide solutions that will insure solvency for all schools through public subsidies is unwise without examining the assumptions underlying such subsidies.

Legal education does not have the broad-based support that characterizes medical education. The relative priority is not helped by the maldistribution of legal services which results from failure to develop adequate publicly supported programs such as Medicaid, Medicare, deductibility of employer-financed insurance programs, and income tax deductions that have greatly broadened accessibility to medical services. Legal services in general remain a luxury of businesses and the upper middle-class except for criminal matters and poorly-financed civil programs for the most needy. Lawyers, of course, have played a major role in fashioning the instruments of economic development, political accommodation, protection of individual rights, and limitations upon the power of government which are the hallmark of American society, but is the present number of schools or students required for similar contributions in the future?

Whether government or the profession should attempt to limit growth is not the issue.<sup>25</sup> Whether government should continue or increase the public subsidy to maintain the present level of enrollment and increase the size of the profession poses a different question. At a time when national productivity is lagging, unemployment is at levels regarded as unacceptable until recently, federal deficits are at all-time highs, the social security system is in jeopardy, social welfare programs are being cut, and the alleged needs of the defense establishment stagger the imagination, across-the-board subsidies to law students may very well not be a high national priority.

Without totally agreeing with everything President Bok says,<sup>26</sup> one can appreciate his political sagacity in speaking to concern among the intelligentsia about legal education and to a more widespread public concern about the legal profession. Legal education must face the issue of why law schools deserve the kinds and amounts of public subsidies they now receive directly and indirectly. Public expenditures that achieve extremely important public purposes such as broadening access to legal services, reducing costs of such services, or protecting rights that otherwise would not be vindicated can

25. Proposals to limit law school enrollment, ban new law schools, or place a national ceiling on admissions to the bar are unwise and reflect a recurrent, if illusory, dream that the antitrust laws do not apply to the legal profession. See A Glut of Lawyers—Impact on U.S., U.S. News & World Report 59, 61 (December 19, 1983). A more interesting approach to controlling numbers might require present members of the bar to undergo periodic competency examinations for continued licensing. See Chesterfield Smith, Random Thoughts about Recertification, Specialization, and Continuing Education, 29 Okla. L. Rev. 629, 631 (1976). The problem does not disappear, however, by suggesting that law school administrators abstain from “the unprofitable effort” of determining appropriate institutional responses to “the burgeoning of law school enrollment,” and rely instead on the market economy to work out problems. Rex E. Lee, We Train Society’s Generalists, IXV Syllabus 5 (1983). Faith in the market economy to solve problems without institutional planning seems to be more common by those who have a dominant market position because of resources or reputation, have assured subsidies or applicant demand because of religious affiliation, or, in common with many other components of the American economy, assume a “free market” in which public subsidies will continue indefinitely.

26. Bok, *supra* note 9.



easily be justified. Subsidies may also be justified if they assure the presence in law schools of a significant number of caucasians from different social classes, or minority persons without regard to social class, or people with different motivations, different commitments to justice, or even different intellectual capacities. We may even be able to justify what we are doing on the basis that we train "society's generalists."<sup>27</sup> If so, legal education must begin to build its case to demonstrate how subsidies accomplish these ends.

Law schools can surely make an effective case for public subsidies for minorities, persons prepared to practice in lawyer-short areas, or persons prepared to enter low-paying jobs of high public utility, such as legal aid. The case is much less clear for provision of the tuition subsidy that state schools provide to affluent white male students (by holding tuition far below costs) or loan subsidies for upper-middle class students attending expensive private schools who are technically "independent," but who drive \$12,000 cars given to them by their parents and who will receive a beginning salary higher than the highest salary that will ever be earned by most of their fellow citizens whose taxes are subsidizing them.

Legal education, ironically, is most effective in obtaining federal support when it does nothing or speaks vaguely of "development of human capital through higher education" or of "a national commitment to education," analogizing federal loans for law students with the GI Bill. The articulation of specific and really important needs, i.e., education of more minority lawyers, results in annual efforts simply to maintain a \$1,000,000 federal appropriation that has not increased in over a decade.

Why has legal education been successful thus far? Primarily its success can be attributed to its not having been noticed. Law students are the third party beneficiaries of legislative support of graduate students, undergraduate students and others, groups with more political clout and perhaps stronger cases for public support. Neither Congress nor any national administration has ever deliberately decided that the nation needs more lawyers or even greater access to law school, or that the best way to accomplish these objectives is a loan to any law student who needs one, subsidization of interest rates, compensation to lenders, and guarantee of loans, while permitting loans to be repaid in devalued dollars by borrowers who have been able to deduct interest payments.<sup>28</sup> Yet that is what has occurred. Availability of these loans has made it possible for schools to maintain enrollment of high quality in full-time divisions and to increase tuition significantly.

The Reagan administration flirted with the idea of denying GSLs to both law students and graduate students in 1982, and may renew and broaden its

27. See Lee, *supra* note 25. Defense of subsidies on this ground might require explanation of why seven years of university education with our present curricula is the most efficient way to achieve the objective.

28. The Brademas Commission recently included law students with graduate students in its recommendations for increasing financial support to graduate education, although few of the reasons stated for support of graduate education are persuasive when applied to law students. Report of National Commission on Student Financial Assistance, Signs of Trouble and Evasion: A Report On Graduate Education in America 7-8 (1983).

attack on the program if the President is reelected. The Sequoia Institute has been funded by the Department of Education to study the current student loan system and to develop an alternative model that shifts the student loan program away from federal subsidies and into private financing. The project has begun with the assumption that high federal subsidies have encouraged many to borrow unnecessarily and have undermined the traditional responsibility of students and parents, and that the alternative program should be self-financed and involve no costs to the federal government. Some proposals under study have considerable merit, i.e., an extended period for repayment graduated to reflect lifetime earnings growth, but on balance the direction of movement does not bode well for legal education.<sup>29</sup>

The federal loan programs are the only subsidies available in most private schools and are dwarfed by direct state subsidies in public schools. State schools, for good reason, have a long history of public support. On occasion clear and compelling reasons have been presented for the need for large subsidies in a particular state law school, but in general, the reasons why large public subsidies are appropriate for in-state undergraduate students have been accepted as a rationale for equal or greater subsidies to law students without discussion of significant differences that might affect the amount or form of the subsidy. Most of the subsidy to law schools is distributed across the board in the form of low tuition without reference to the need of individual students, and rarely does the total amount of the subsidy made available to the school bear any relation to the need of the state for more lawyers. On occasion, legislators say that there is no need for a state law school to expand, but discussion falls short of the issues of relating direct subsidy per student to the number of lawyers, heterogeneity of the bar, or accessibility of legal services to the public. Law school subsidies are usually an appendage to the state university appropriations bill and, in general, law schools fare well, or poorly, depending upon the success of the state university at the legislative trough.

State schools may face greater problems in the future. North Carolina provides an example. Located in the Sun Belt, commonly viewed as the economic mecca for the 1980s, it is the tenth most populous state. Its population grew over 15 percent between 1970 and 1980<sup>30</sup> and has grown faster than any southern state except Texas and Florida during the past twenty years.<sup>31</sup> Its economy has kept pace with almost \$2 billion in investment and 32,000 new industrial jobs in 1981.<sup>32</sup> The Charlotte metropolitan area, the Piedmont Crescent, and the Research Triangle reflect growth, diversity, and a remarkable growth of cultural institutions, but slightly more than half of the people continue to live in rural areas.<sup>33</sup>

The apparel, lumber and wood products, furniture and textiles sectors of its industrial base account for over one-half of the state's total manufacturing

29. The Educational Credit Trust, Sequoia Institute Project Description, August 22, 1983.

30. 1 Draft Final Report, Governor's Task Force on Science and Technology, New Challenges for a New Era 9 (1983) [hereinafter cited as *New Challenges for a New Era*].

31. *Id.* at 8.

32. *Id.*

33. *Id.* at 9.

employment despite impressive<sup>34</sup> new initiatives to attract microelectronics and other "high tech" industries.<sup>34</sup> Despite improvement, average industrial wages are the lowest in the nation and the state ranks near the bottom in per capita earnings.<sup>35</sup> The state experienced more plant closings than any other state in 1982.<sup>36</sup> In the fall of 1983 there were more than 300,000 North Carolinians out of work, many with no expectation of being rehired.<sup>37</sup> An additional 400,000 persons were underemployed in jobs that offer "little pay or less future."<sup>38</sup>

The reality and impact of foreign competition, the need for technological innovation in existing enterprises, the opportunities for development of new "high tech" industries, particularly in the information and service sectors of the economy, are all recognized.<sup>39</sup> So also is the "structural unemployment" that will result as technology replaces workers in old jobs and new jobs require different skills.<sup>40</sup> It is a special problem in a state in which 45 percent of the adult population did not complete high school.<sup>41</sup> On the horizon are a galaxy of problems that must be faced if (or when) tobacco ceases to be the most important source of income for a high percentage of the state's farmers.

North Carolina has three private law schools that receive no state subsidies, as well as two state schools, one of which historically was a school for blacks. The level of subsidization of students in the public law schools is difficult to determine since the state budget office does not maintain copies of university operating budgets and line item appropriations do not identify schools within a university, but the subsidy is probably not less than \$4,000 per student for approximately 1,000 students.<sup>42</sup>

Last year the public and private law schools of the state graduated approximately 750 students.<sup>43</sup> The state bar admitted 478 persons (including those studying out of state) to a bar that numbers 8,500.<sup>44</sup> The size of the bar, which has doubled in fifteen years, was increased by 295.<sup>45</sup>

North Carolina ranked 36th in expenditures per pupil in public elementary and secondary education in 1982, 38th in pupil-teacher ratio, and 41st in

34. *Id.* at 8. 2 New Challenges for a New Era 31-35.

35. 1 New Challenges for a New Era. North Carolina 2000: Commission of the Future of North Carolina, *The Future of North Carolina: Goals and Recommendations for the Year 2000 96*, [hereinafter cited as *North Carolina 2000 Report*]. North Carolina per capita income has improved from 71 percent of the U.S. per capita income in 1960 to 80 percent in 1983. Nevertheless, its rank of 41st among the states is unchanged from 1945. 2 *The North Carolina Independent* 1 (January 20 - February 2, 1984).

36. 2 New Challenges for a New Era 2.

37. *Id.* at 3.

38. *Id.*

39. 2 New Challenges for a New Era, 3, 13. *North Carolina 2000 Report* 97-101.

40. 2 New Challenges for a New Era, 55, 72.

41. 1 New Challenges for a New Era 9.

42. The exact amount would depend on allocation of indirect costs, whether buildings or equipment were depreciated and similar factors.

43. B. E. James, *Reflections—When Is Enough Too Much?*, 30 *N.C. Bar Q.* 12 (1983).

44. *Id.*

45. *Id.*

graduation rate among the states.<sup>46</sup> Of the 21 states that utilize SAT scores, only Georgia reported lower average scores.<sup>47</sup> Approximately two-thirds of public expenditures come from the state.<sup>48</sup> The share of the state's budget allocated to public education has declined from 62 percent of the total budget in 1963-64 to 40.4 percent in 1982-83.<sup>49</sup> The absence of a fiscal equalization program results in disparities between districts that provide significant supplements to state appropriations and those that do not.<sup>50</sup>

The problems of K-12 education have not disappeared. Almost 800,000 North Carolinians have less than an eighth-grade education; almost 25,000 students drop out of North Carolina's high schools each year.<sup>51</sup> Recent estimates suggest that as much as \$1.8 billion may be required to meet critical needs of school improvements during the next six years.<sup>52</sup> North Carolina shares the problems of other states concerning teachers' salaries, training in science, mathematics, foreign languages, and computerization.

In summary, among other problems, the state is faced with danger to a significant portion of its industrial base, the need to adjust to higher levels of technology to compete, the threat of significant structural unemployment accompanying such changes, the need to provide training for workers whose jobs are lost and to improve elementary and secondary education for the next generation, and a possible significant exodus from farms to the cities in the coming years. The state must face all these problems with the likelihood of reduced federal support. Should it be assumed without argument that providing subsidies of \$12,000 tax free, without regard to need, to 300-350 new students each year in order to educate new lawyers for a bar that has doubled in fifteen years is as important as educating engineers and scientists in such fields as microelectronics and biotechnology to cope with the problems facing industry and agriculture, or, perhaps more important, improving high schools and post secondary technical institutes to train unemployed workers and the next generations of students?

In the fiscal year that ended on June 30, 1982, North Carolina expended approximately \$6.5 million to assigned counsel for the representation of almost 37,000 adult indigent defendants in noncapital cases, an average of \$186 per case. An additional \$2 million was expended on six public defender offices which represented over 15,000 defendants. The total expended for public defenders and assigned counsel, transcripts, expert witness fees, and

46. U. S. Department of Education, *State Education Statistics: State Performance Outcomes, Resource Outputs, and Population Characteristics, 1972 and 1982*, January 5, 1984; *USA Today*, January 6, 1984, 7A. Expenditures as a percent of income have improved significantly during the last decade, but its rank of 28 in 1982 also reflects the low average income in the state.

47. *Id.*

48. 4 *New Challenges for a New Era*.

49. It is interesting to compare the state's ranking of 36th in expenditures per pupil with its ranking of 8th in state and local appropriations per student in publicly supported higher education. 23 *The Chronicle of Higher Education*, p. 8. February 24, 1982.

50. North Carolina 2000 Report, *supra* note 35, at 28-30.

51. 4 *New Challenges for a New Era* 4.

52. *Id.*

medical examinations in all criminal and juvenile cases, and services of guardian *ad litem* in juvenile cases was approximately \$11 million.<sup>53</sup> Should it be assumed that new dollars are better spent in increasing state subsidies to educate new lawyers than in utilizing the services of lawyers now in practice to meet existing needs?

Other states undoubtedly face formidable problems. States with decreasing rates of population growth, aged factories, higher rates of unemployment, higher unionism, greater energy costs, more serious environmental problems, and more concentrated population in urban areas, may face more difficult problems.

Lest we be misunderstood, we do support a strong system of state-supported law schools and federal assistance so that qualified needy students can finance a legal education through loans. Our point is that we must begin now to articulate our case and modify our demands where we are unable to justify all that we have sought in the past.

Legal education must be prepared to defend its public subsidies to policy makers and the public. It must rationalize for itself the costs that make such subsidies necessary. That it is more cost-effective than most, if not all, other forms of graduate education may not be comfort enough.

Legal educators might start by examining how they have spent the increased funds made available during the last fifteen years: What has been accomplished? Are better-educated lawyers being graduated now than previously? The answers will be different for each school, but most will be able to measure progress. Undoubtedly the presence of a limited number of minority students, better admissions profiles, improved legal writing programs, and modest clinical programs will stand out in most schools, with reduction in student-faculty ratios deserving special note in others. But faculty salaries and libraries are probably the big winners in most schools, with increases in financial aid and administrative support following.

The degree to which law schools have committed resources to the research function that characterizes other graduate disciplines in a university is hard to ascertain. A quality research capability in any educational institution is expensive in faculty time, logistical support, and libraries. Most faculty agree with the traditional position that a commitment to research is part of a job description of a professional law teacher, and most feel that a professor should have the time and facilities to permit pursuit of that objective.

The difference between legal education and most other academic enterprises is that its research function is primarily financed by either student tuition or public subsidies that are made available ostensibly for the instruction of students and not to facilitate faculty research. Research in other disciplines, such as medicine and the sciences, is subsidized, but much of the subsidy is expressly for supporting specific research being done by a specified person. Research in a law school is supported by library acquisitions, faculty salaries, sabbaticals, secretarial assistance, word processing, and research assistance, and the costs are met in general by increasing tuition or state subsidies.

53. B. E. James, Reflections—Gideon's Trumpet, 30 N.C. Bar Q. 20. (1983).

Rarely does a law school attempt to isolate the costs fairly attributed to its research as distinguished from its teaching functions. Rarely does a law school explore the impact upon its instructional program that would occur if its research capacity was impaired (for example, by reducing library expenditures for materials rarely, if ever, used by students) or its instructional capacity was augmented by allocating more resources to activities that directly affect teaching (for example, skills training or additional seminars). Even more rarely does it ask itself for whom legal scholarship is really important if neither the public nor the profession is willing to pay for most of it directly, requiring that it be bootlegged in the present manner. Such an inquiry might lead to even more difficult problems such as distinctions among the kinds of legal scholarship and legitimate sources of support for each,<sup>54</sup> perhaps even that royalties received by a professor from casebooks or materials produced for consumption by the profession might suitably be taxed by a school in some manner to reflect the hidden subsidy received by the author in the production of such materials.

What if we conclude that we will be fortunate to retain our present level of subsidies and that new subsidies to meet increased student needs probably must be met from other sources? Bruce Zimmer has suggested some of the alternatives in his thoughtful paper.<sup>55</sup>

State legislatures may authorize state revenue bonds, and if the Internal Revenue Code continues to protect income from such bonds from federal taxation, additional loan capital may become available from this source. Universities using such programs may be required to guarantee loans, thereby mortgaging their endowments. Other schools may form consortia to persuade institutional lenders to make supplemental loans available to students, but either guarantees, insurance against defaults, or insurance premiums added to loan balances will presumably be required. Loan default insurance or subsidization of interest while the student is in school will result in program costs to participating schools, probably to be met from increased tuition or from funds now used for financial assistance, further reducing capacity to attract the best high-need applicants, particularly in private schools. Insurance premiums would obviously increase the cost to the lender. The risk to endowment from loan guarantees or the cost of default insurance may cause schools to question present policy that conditions loan eligibility only on student need. Risk to endowment or cost of insurance can be kept modest if loans are granted only to those who pose the least risk of default, but heterogeneity will surely suffer if funds are unavailable to high-risk students with the greatest need. A galaxy of problems requires thoughtful consideration by faculties.

#### Willingness to Borrow

The second common assumption is that students will continue to be willing to borrow large sums of money annually if such loans are available

54. See, e.g., Symposium, American Legal Scholarship: Directions and Dilemmas, 33 J. Legal Educ. 403-58 (1983).

55. See Zimmer, *supra* at 437.

to them. Several factors must be considered in analyzing whether such an assumption makes sense: (1) How much will students be required to borrow? (2) To what degree will they be conscious of the debt they are accumulating and its implications for their future? (3) What are their placement prospects and how do they perceive them?

In the past it has made sense for students to borrow as much as anyone would lend them if they could gain admittance to a school with a good placement program. Tuition costs were secondary if students were virtually assured high paying jobs after graduation that permitted them to repay loans without hardship. There is much less justification for borrowing money to pay high tuition in the absence of such prospects. Greater reluctance to assume large loans can be anticipated at all but a few schools if the placement market becomes more bleak, rates of bar passage decrease, and a smaller percentage of associates become partners.

The coming crisis in the financing of legal education will not revolve solely around the ability to obtain sufficient funds for the attendance in law school. An equally or more serious problem will be the ability to repay the borrowed money. Debt burdens are high and mounting. Debt burdens in the future may well prove impossible for some young and even middle-aged lawyers to handle. Significant effects may be expected upon career choices (how can less than the wealthiest of graduates afford to elect public-interest work or legal services?), upon family (how can a graduate afford the additional costs of marriage unless the spouse-to-be brings wealth or an income to the marriage?), and upon capital investment (how great a delay will be required for the purchase of a home or a car?).

Law students who applied to their schools for aid in 1982-83 (well over two-thirds of all students) had already accumulated a median debt of \$4,700 at the time they entered law school and were leaving with an estimated cumulative debt of \$14,700, with the upper quarter at \$18,100.<sup>56</sup> Some estimates of average law student debt upon graduation in 1983 place it as high as \$15,676.<sup>57</sup>

Even if neither the GSL nor the PLUS/ALAS maxima are adjusted upward in the next few years, many graduates of the class of 1986 and future years are likely to emerge with at least \$36,700 in debt, if they utilize all of their GSL and PLUS/ALAS eligibility as part of LSAAP (\$25,000 in GSLs, \$9,000 in PLUS, \$2,700 in accrued PLUS interest). While the average student may have less debt in the next five years, debts for law graduates did increase by 20.5 percent between 1981 and 1983, which means that average debt will approximate \$20,000-\$21,000 by 1986. Students from low-income backgrounds who attend the highest cost private law schools will have even more debt than \$36,700 to the extent that they obtain NDSL, state, or school loans.

Can the average beginning lawyer earning \$24,000 a year (now) or \$30,000 (the projection for 1986) readily sustain that debt? The answer is "no" if the

56. Terry Hartle & Richard Wabnick, *The Educational Indebtedness of Graduate and Professional Students*, and Table 6, April, 1983 (paper prepared for the National Commission on Student Financial Assistance).

57. Paul Butler-Nalin, Allen Sanderson & David Redman, *Financing Graduate Education* 2.34 (February, 1983) (paper prepared for the Consortium on Financing Higher Education).

repayment period is restricted to the basic ten-year term. Even if the first-year lawyer obtains one of the best corporate law firm offers in a major urban area, he will have trouble repaying the debt within the ten-year frame. A borrower of \$25,000 in GSLs at 8 percent and \$11,700 of PLUS loans at 12 percent would have to pay back \$484.56 a month for ten years or \$5,815 a year. That amounts to 24 percent of the average pretax earnings of the average beginning lawyers. At \$30,000, post tax earnings, taking into account the deductibility of interest being repaid, would be \$1,886 a month, resulting in nearly 26 percent of take-home pay going to educational debt repayment.

Even if first-year earnings of 1986-87 were in the \$48,000 range, well beyond the level likely for most graduates, a student who had made full use of LSAAP would still have to allocate 12.1 percent of gross income and 17.1 percent of disposable income to paying off the loan. The only studies published of debt manageability indicate that these are intolerable debt levels, since the most generous analyses suggest that borrowers cannot afford to repay educational debts in excess of 15 percent of pretax income (some go as low as a 3 to 6 percent range) or 8 percent of posttax income.<sup>58</sup>

Is there a way for borrowers to avoid being overwhelmed by the prospect of repayment and forced into default, conduct that clearly would undermine the political viability of the program? The only immediate solution is to make loan repayment terms more flexible. Congress did precisely that in 1980 when it permitted Sallie Mae to engage in loan consolidation. By using the consolidation that existed prior to November 1983, a graduating student could combine GSLs and NDSLs into a 7 percent package extendible to as much as twenty years (in practice, only for loans totaling more than \$16,000) and with provision for graduated repayment options. Thus, a borrower could choose either to make level payments over the course of twenty years or start at a low level and then accelerate with increases every two years, either gradual or steep (the gradual increase would be 6.3 percent over the base every twenty-four months, if the full eighty-month repayment period were selected).<sup>59</sup>

The combination of the twenty-year payout and the gradually accelerating repayment enabled students who were uncertain of their initial earning capacity, or who desired to undertake some form of public service, to select the graduated option and attempt to shoulder their revised debt burden, although repayment was still difficult. The same \$36,000 spread over twenty years would result in repayments of approximately \$3,500 in the first year (15.5 percent of net on a \$30,000 income; 10.3 percent for \$48,000) and could even be lowered to as little as \$2,800 on a graduated repayment basis in the first two years, reducing the maximum burden of the average student to slightly more than 12 percent of disposable income.

58. Robert Hartman, *Credit for College 14* (New York, 1971); Joseph Froomkin, *Study of the Advantages and Disadvantages of Loans to Women* (December, 1974) (paper prepared for the Department of Health, Education, and Welfare); Dwight Horch, *Estimating Manageable Educational Loan Limits for Graduate and Professional Students* (Princeton, N.J., 1978).

59. Student Loan Marketing Association, *The Options Selector* (1983).



Consolidation and graduated repayment authority lapsed last November, however, threatening to make the debt incurred by attendance to many private law schools excessive for most students, but only after they emerge from law school. Congress may still act to extend the privilege of consolidation. If it does so, it will be effectively recognizing that legal education has become a capital asset like a home that is paid for over a lifetime and no longer is a service purchased on a pay-as-you-go basis.

Thus far efforts to persuade many students to enter law school or to attend the most expensive law schools has rarely been accompanied by advice about the debts that they may be required to face in the future. Relatively little information is made available about placement prior to matriculation. To the extent that a student views the \$48,000 job as an attainable Holy Grail instead of a rarity achieved by less than 1 percent of graduates each year, there will be little reluctance to enroll and to undertake successive loans in the blithe hope of repayment. Honest advice accompanied by as much information as is available may well discourage students who otherwise would be clamoring for admittance.

### **Our Responsibility**

Issues of professional responsibility are posed to law schools that deserve consideration. Legal educators talk of the "public profession of law," the need to provide representation for all in need of legal services, and similar lofty goals. Is it really reasonable to assume that graduates who have been subsidized, but who have also incurred debts of \$20,000-\$40,000 to obtain a law degree and are paying as much as \$480 a month in interest alone, will initially have concerns other than a job that will permit them to repay the loan? Should public schools encourage students who have benefited from even higher public subsidies to be more altruistically motivated if lucrative opportunities to represent business and financial interests become available to them? Do private law schools have an obligation to advise students about alternative schools of high quality that might cost less? Is there an obligation to inform an applicant of the real costs of a legal education if there is reason to believe that he does not understand the full implications of the choices facing him? Is legal education justified in seeking greater support from the public if it concludes that other social needs are more deserving than the education of as many lawyers as it is now training? Or are these questions none of our business or beyond our influence?