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## Deceiving Law Students: Employment Statistics and Tort Liability.

Angie Roberts-Huckaby

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## RECENT DEVELOPMENT

# DECEIVING LAW STUDENTS: EMPLOYMENT STATISTICS AND TORT LIABILITY

ANGIE ROBERTS-HUCKABY

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## I. INTRODUCTION

Controversy is running rampant in American legal education.<sup>1</sup> In less than a year, an unprecedented number of class action lawsuits have been filed against fourteen law schools.<sup>2</sup> These lawsuits allege the schools disseminated fraudulent and misleading statistics regarding post-graduate employment.<sup>3</sup>

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1. See Karen Sloan, *Law Schools' Credibility at Issue*, LEXISNEXIS (Sep. 19, 2011), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Term & Connectors" tab and search "Law Schools' Credibility at Issue") (acknowledging the abundance of criticism targeting law schools' manipulation of employment statistics); see also Carl Bialik, *Law-Schools Jobs Data Are Under Review By Lawyers, Graduates, ABA*, WALL ST. J. L. BLOG (Mar. 16, 2012, 9:29 PM), <http://blogs.wsj.com/numbersguy/law-school-jobs-data-under-review-1126/> (highlighting the controversy that involves nearly every law school because manipulation of employment data is likely to occur at each school); Elizabeth G. Olson, *Law School Fuzzy Grad Jobs Stats: A Federal Offense?*, CNN (Mar. 16, 2012, 10:20 AM), <http://management.fortune.cnn.com/2012/03/16/law-school-fuzzy-grad-jobs-stats-a-federal-offense/> (pointing to the increasing danger for law school administrators who manipulate employment data to elevate their school ranking).

2. See generally Katherine Mangan, *Lawsuits Over Job-Placement Rates Threaten 20 More Law Schools*, CHRON. HIGHER EDUC. (Mar. 14, 2012), <http://chronicle.com/article/Lawsuits-Over-Job-Placement/131163/> (discussing litigation involving numerous law schools and their job-placement rates); Karen Sloan, *Fresh Round of Litigation Targets 12 Law Schools Over Jobs Data*, LEXISNEXIS (Feb. 1, 2012), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "Fresh Round of Litigation Targets 12 Law Schools Over Jobs Data") (listing the following defendant law schools: Albany Law School of Union University, Brooklyn Law School, California Western School of Law, Chicago-Kent College of Law, DePaul University College of Law, Florida Coastal School of Law, Golden Gate University School of Law, Hofstra University Maurice A. Deane School of Law, The John Marshall Law School, University of San Francisco School of Law, Southwestern Law School, and Widener University School of Law).

3. See Carl Bialik, *Job Prospects for Law Grads? The Jury's Out*, WALL ST. J. (Mar. 17, 2012, 12:45 AM), <http://online.wsj.com/article/SB10001424052702304692804577283691965596610.html> (pointing to the response of many frustrated, unemployed law students who are suing their alma maters); Karen Sloan, *Fresh Round of Litigation Targets 12 Law Schools Over Jobs Data*, LEXISNEXIS (Feb.

When applying to law school, an applicant's ultimate goal is to become a lawyer.<sup>4</sup> Law school is not merely an institution students attend to satisfy intellectual curiosity.<sup>5</sup> Rather, law school is a grueling, three-year marathon that challenges students' intellectual reasoning, emotional rationale, and financial security.<sup>6</sup> Therefore, choosing the "right" school is of utmost importance.<sup>7</sup> Unfortunately, fraudulent and misleading post-graduate employment statistics may impact an applicant's ability to intelligently choose whether to pursue law school.<sup>8</sup>

Prior to 2012, the American Bar Association (ABA) did not require accredited law schools to report "graduate employment and salary data directly to the ABA."<sup>9</sup> During that time, the ABA did not hold law schools accountable for the distribution of post-graduate employment statistics,<sup>10</sup> nor were there ABA requirements compelling law schools to clarify whether post-graduate "jobs [were] funded by the schools,

1, 2012), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "Fresh Round of Litigation Targets 12 Law Schools Over Jobs Data") (discussing the merits of the lawsuits brought against law schools).

4. See Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"—"Do the Work!"*, 40 CAL. W. L. REV. 321, 322 (2004) ("Law students attend law school to become lawyers. That is their primary goal and objective.").

5. See MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* 9 (2010) (explaining prospective students should avoid attending law school merely to satisfy intellectual curiosity because "much of the learning in law school is . . . dull").

6. See *id.* at 11, 41 (discussing the toll law school takes on students' emotional and mental intelligence, along with the time and money a legal education requires); see also David Segal, *For Law School Graduates, Debts If Not Job Offers*, N.Y. TIMES, Jan. 9, 2011, at BU1, available at [http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&_r=0) (emphasizing the heavy burden of student loan debt in a difficult job market).

7. See MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* 41 (2010) ("Choosing a law school should take time . . . [as i]t is an expensive proposition, both in terms of money and, more importantly, time.").

8. See *id.* at 37–51 (discussing numerous factors to consider in choosing which law school to attend, including the rankings which are dependent on data that is not transparent); Elizabeth G. Olson, *Law School Fuzzy Grad Jobs Stats: A Federal Offense?*, CNN (Mar. 16, 2012, 10:20 AM), <http://management.fortune.cnn.com/2012/03/16/law-school-fuzzy-grad-jobs-stats-a-federal-offense/> (calling attention to the practice of manipulating employment data among law school officials).

9. See Karen Sloan, *ABA Gives Ground on Law Schools' Graduate Jobs Data Reporting*, LEXISNEXIS (Dec. 5, 2011), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "ABA Gives Ground on Law Schools' Graduate Jobs Data") (referencing the ABA's failure to collect employment statistics from ABA-accredited law schools and the changes the organization made in an effort to satisfy critics claiming the ABA presented an inaccurate picture for law graduates).

10. See *id.* (highlighting the change in reporting "graduate employment and salary data directly to the ABA, rather than through the National Association of Law Placement").

themselves.”<sup>11</sup> Furthermore, the ABA did not require law schools to report “whether graduates [were working] in jobs requiring bar passage,” or if the jobs were permanent, part-time, or merely temporary.<sup>12</sup>

#### A. *Problem One: Non-Disclosure and Inflated Employment Rates*

Law schools have been “playing fast and loose with [their post-graduate] employment data.”<sup>13</sup> Some law schools allegedly reported 80%–90% post-graduate employment with median salaries in the six-figure range.<sup>14</sup> Controversy surrounds these numbers because many schools are not divulging how the school obtained these figures.<sup>15</sup> The employment data and six-figure salary reports are allegedly based on a small number of reporting students without qualifiers, such as employment that is full-time or part-time, contract or permanent, and whether it requires a J.D. or bar passage, compared to those that do not.<sup>16</sup>

Law schools defending lawsuits are reporting 80%–100% employment rates within months following graduation.<sup>17</sup> For example, Thomas M. Cooley School of Law claims 75%–80% of its graduates secure

11. See *id.* (outlining stipulations of the new questionnaire law schools must complete and return to the ABA); see also Elie Mystal, *The ABA Is Slowly Coming Around on Law School Transparency*, ABOVE THE LAW (Oct. 19, 2010, 10:14 AM), <http://abovethelaw.com/tag/law-school-transparency/page/6/> (discussing the need to change the way the ABA collects information from law schools).

12. See Karen Sloan, *ABA Gives Ground on Law Schools' Graduate Jobs Data Reporting*, LEXISNEXIS (Dec. 5, 2011), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “ABA Gives Ground on Law Schools' Graduate Jobs Data”) (listing the additional stipulations law schools are required to follow according to the new ABA questionnaire); see also Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, at SR10, available at <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> (reporting the bleak legal market will force many law graduates to seek employment that does not require bar passage).

13. Class Action Complaint at 4, *MacDonald v. Thomas M. Cooley Law Sch.*, 2012 WL 2994107 (2012) (No. 1:11-CV-831) (arguing the manipulation of employment data “creates an impression of bountiful employment opportunity that in reality does not exist”).

14. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>.

15. See *id.* (interviewing the dean of New York Law School who admitted prospective students were not given a complete picture of employment prospects).

16. See, e.g., Class Action Complaint at 13, *MacDonald*, 2012 WL 2994107 (“Cooley simply presents an overall employment number, and fails to break down what percentage of graduates were employed in either part-time or temporary positions, or whether a job requires a J[.D.] degree.”).

17. See, e.g., *Twelve More Law Schools Sued*, JD J. (Feb. 6, 2012), <http://www.jdjournal.com/2012/02/03/twelve-more-law-schools-sued/> (reporting job placement rates for the twelve law schools facing lawsuits concerning the inflation of employment data).

employment within nine months of graduating.<sup>18</sup> Thomas M. Cooley's "seemingly robust numbers include *any* type of employment, including jobs that have absolutely nothing to do with the legal industry, do not require a J[.]D[.] degree or are temporary or part-time in nature."<sup>19</sup> Thus, if law schools like Cooley were "to disclose the more pertinent employment statistic . . . the numbers would drop dramatically."<sup>20</sup>

Non-disclosure of accurate information and news reports that "[t]he Legal Sector . . . shed 3,500 jobs . . . since September of 2010" inspired fraud allegations.<sup>21</sup> The declining trend in the area of legal employment increased suspicions of fraud because post-graduate employment reports for many law schools did not reflect fewer jobs in the legal sector.<sup>22</sup> Law school reports of 80% employment rates and over 51% employment in the private sector raised suspicions because national averages for the same time frame were well below these percentages.<sup>23</sup>

#### B. *Problem Two: Concealment and Inflated Salaries*

In addition to post-graduate employment statistics, law schools are accused of manipulating the salary range available to their post-graduate

18. See Class Action Complaint at 2, *MacDonald*, 2012 WL 2994107 (highlighting the inaccuracy of the report "that a substantial majority of graduates" found jobs after graduating from Thomas M. Cooley Law School).

19. *Id.* at 3–4 (arguing Cooley based its employment statistics on only a small percent of graduates); see Karen Sloan, *ABA Gives Ground on Law Schools' Graduate Jobs Data Reporting*, LEXISNEXIS (Dec. 5, 2011), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "ABA Gives Ground on Law Schools' Graduate Jobs Data") (highlighting the improved questionnaire distributed by the ABA requires schools to distinguish whether graduates found legal positions requiring a J.D.).

20. Class Action Complaint at 2–3, *MacDonald*, 2012 WL 2994107.

21. Hillary Mantis, *Legal Hiring Down Despite Job Growth In Other Areas of Economy*, NAT'L JURIST (Oct. 21, 2012, 9:33 AM), <http://www.nationaljurist.com/content/legal-hiring-down-despite-job-growth-other-areas-economy>; see e.g., *MacDonald v. Thomas M. Cooley Law Sch.*, No. 1:11-CV-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012) (alleging Cooley misrepresented their post-graduate employment statistics and inflicted harm upon the law students attending the school).

22. See New York Law School 2011 Employment Statistics, [http://www.nyls.edu/user\\_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf](http://www.nyls.edu/user_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf) (reporting 84%–91% employment after graduation); *Thomas M. Cooley Law School 2010 Graduate Employment Report*, <http://www.cooley.edu/consumerinformation/#employment> (follow "2010 Employment Report" hyperlink; then download pdf) (reporting approximately half of their 2010 graduates found employment in private practice).

23. An effort to reconcile these figures led to the discovery of law schools improperly manipulating their graduate employment data. See, e.g., *MacDonald*, 2012 WL 2994107 (resulting litigation from inaccurate employment data disseminated by the school, contrasted with the actual number of post-graduate law students securing employment in the legal sector).

students.<sup>24</sup> Some of the lowest-ranking law schools have disseminated information that their graduates' salary ranges are equal to graduates from Ivy League law schools.<sup>25</sup> The six-figure salary reports are allegedly based on a small number of reporting students that do not distinguish between types of employment.<sup>26</sup> As law schools inflate their employment numbers to the public, the concealment of critical information harms students and impacts their choice to attend these schools.<sup>27</sup> An applicant's initial decision of where to attend law school is greatly influenced by the success rate of former graduates in securing employment and it may guide the expectations and career planning of a current law student.

For 2009 graduates, New York Law School (N.Y.L.S.) reported post-graduate employment rates and salaries equal to those of Harvard Law School.<sup>28</sup> The school published this information on its website stipulating, "[T]he median private-sector salary of alum[ni] who graduated in 2009 . . . was \$160,000."<sup>29</sup> However, the school admitted the website "did not give a complete picture of the prospects for N.Y.L.S. grads."<sup>30</sup> The school defended the posting and claimed they explicitly communicate to "students and applicants, [in materials and conversations] . . . that most graduates find work in small to medium firms at salaries between \$35,000 and \$75,000."<sup>31</sup> It is evident that the strength of the employment numbers posted on the official school website leads to another conclusion:

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24. See, e.g., Class Action Complaint at 3, *MacDonald*, 2012 WL 2994107 (accusing the school of fraud and explaining the factors used to inflate reported salaries).

25. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (discussing New York Law School's claim to share a median salary equal to Harvard Law).

26. See, e.g., Class Action Complaint at 3–5, *MacDonald*, 2012 WL 2994107 (alleging the law school "inflates its graduates' reported mean salaries, by calculating them based on a small, mostly self-selected subset of graduates"); see also *Former Thomas Jefferson Employee Admits to Reporting Inaccurate Employment Data*, NAT'L JURIST (Oct. 26, 2012, 10:46 AM), <http://www.nationaljurist.com/content/former-thomas-jefferson-employee-admits-reporting-inaccurate-employment-data> (reporting the actions of a law school official selecting information to report and censoring unfavorable data).

27. See, e.g., *MacDonald*, 2012 WL 2994107 at \*1 (asserting students relied upon the materials as they were presented by the school); cf. Katherine Mangan, *Lawsuits Over Job-Placement Rates Threaten 20 More Law Schools*, CHRON. HIGHER EDUC. (Mar. 14, 2012), <http://chronicle.com/article/Lawsuits-Over-Job-Placement/131163/> (doubting a prospective law student's reliance on employment statistics in selecting a law school).

28. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all&r=0> (stating the median salary posted by New York Law School was \$160,000, "exactly the same figure cited by Yale and Harvard").

29. *Id.*

30. *Id.*

31. *Id.*

fraudulent information is used to exaggerate the graduates' ability to secure employment equivalent to a Harvard Law graduate.

Students saddled with massive amounts of debt are now alleging fraud in response to the law schools' concealment of accurate salaries students should anticipate after graduation.<sup>32</sup> The fact that it is nearly impossible for students<sup>33</sup> to find accurate post-graduate salary information supports the argument that law schools are actively concealing this crucial information.<sup>34</sup> Further, because lawyers' earning capacities vary greatly,<sup>35</sup> and that salary information is not accessible from any one source, makes it vital that law schools accurately disclose salary information.<sup>36</sup> Consider how the U.S. Bureau of Labor Statistics ("BLS"), which reports the wages for all practicing lawyers, does not include the income of solo

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32. See, e.g., *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (2012) (arguing the law school distributed misleading information the students relied on to their detriment); *MacDonald*, 2012 WL 2994107 (claiming the defendant fraudulently mislead plaintiffs and caused them to incur debt). See generally Jenna Greene, *New York Law School, Thomas Cooley Accused of Job Statistics Fraud*, LEXISNEXIS (Aug. 10, 2011), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "New York Law School, Thomas Cooley Accused of Job Statistics Fraud") (reporting the allegations made by students against their law school); Katherine Mangan, *Lawsuits Over Job-Placement Rates Threaten 20 More Law Schools*, CHRON. HIGHER EDUC. (Mar. 14, 2012), <http://chronicle.com/article/Lawsuits-Over-Job-Placement/131163/> (chronicling numerous law schools called into question for their employment rates after graduation); Karen Sloan, *Fresh Round of Litigation Targets 12 Law Schools Over Jobs Data*, LEXISNEXIS (Feb. 1, 2012), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "Fresh Round of Litigation Targets 12 Law Schools Over Jobs Data"); *Twelve More Law Schools Sued*, JD J. (Feb. 6, 2012), <http://www.jdjournal.com/2012/02/03/twelve-more-law-schools-sued/> (discussing lawsuits involving post-graduate employment data for law schools).

33. Law schools inaccurately reporting post-graduate employment statistics disadvantages both prospective and current law students. Class Action Complaint at 1, 4, *MacDonald v. Thomas M. Cooley Law Sch.*, 2012 WL 2994107 (2012) (No. 1:11-CV-831) (referring to the problem as "systemic fraud").

34. See *id.* at 2–5 (drawing attention to the difficulty applicants face in determining post-graduate salary information for law schools). See generally MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* xii (2010) (discussing the variety of positions lawyers occupy in the community and the vastly different income potential among lawyers).

35. See MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* xii (2010) (discussing the spectrum for the income potential of lawyers); Mary Flood, *Salary Reality: Many Lawyers Don't Earn Big Bucks*, HOUS. CHRON. (July 26, 2007), <http://www.chron.com/business/article/Salary-reality-Many-lawyers-don-t-earn-big-bucks-1841042.php> (describing drastic salary differences among lawyers, depending on firm size and additional factors).

36. Compare BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT STATISTICS, <http://data.bls.gov/cgi-bin/print.pl/oes/current/oes231011.htm> (last visited March. 25, 2013) (providing employment data and percentages of lawyers employed by particular industries), with NALP: THE ASSOCIATION FOR LEGAL CAREER PROFESSIONALS, <http://www.nalp.org/salariesatlargestfirmsupagain?s=%2473%2C000> (last visited March. 25, 2013) (providing median base salaries of associates in accordance with firm size and the associate's practice experience).



practitioners—a group that makes up nearly one-third of the legal profession.<sup>37</sup> Another example of this conflicting information is that the National Association of Legal Placement (NALP) reported the median salary for first year associates in small law firms as \$73,000,<sup>38</sup> but students graduating in the Houston, Texas area reported earning as little as \$30,000 in their first year.<sup>39</sup>

### C. *Problem Three: Inflated Tuitions*

Law schools also face accusations of fraud based on the disparity between the true cost of law school education and the price of tuition.<sup>40</sup> In addition, law schools are accused of relegating up to 30% of their revenues to subsidize other fields of study at their universities.<sup>41</sup> This development is especially alarming because law school tuition rates “rapidly [exceeded the] . . . annual real growth of undergraduate tuition”

37. See, e.g., BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT STATISTICS <http://data.bls.gov/cgi-bin/print.pl/oes/current/oes231011.htm> (last visited March 25, 2013) (failing to report the number of solo practitioners in the legal field); see also MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON 40–41 (2010) (discussing numerous factors lacking consideration in the ranking process).

38. NALP: THE ASSOCIATION FOR LEGAL CAREER PROFESSIONALS, <http://www.nalp.org/salariesatlargestfirmsupagain?s=%2473%2C000> (last visited March 25, 2013); see Debra Cassens Weiss, *Law Firm Associate Salaries 'in Stasis'; First-Year Median Is Still \$115K*, NALP Says, A.B.A. J. (Sept. 12, 2011, 5:29 AM), [http://www.abajournal.com/news/article/law\\_firm\\_associate\\_salaries\\_in\\_stasis\\_median\\_is\\_still\\_115k\\_nalp\\_says/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Top+Stories](http://www.abajournal.com/news/article/law_firm_associate_salaries_in_stasis_median_is_still_115k_nalp_says/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories) (reviewing the survey conducted by NALP for first-year associate salaries at law firms and pointing to another survey conducted by NALP that reported the median salary as \$104,000).

39. See Mary Flood, *Salary Reality: Many Lawyers Don't Earn Big Bucks*, HOUS. CHRON. (July 26, 2007), <http://www.chron.com/business/article/Salary-reality-Many-lawyers-don-t-earn-big-bucks-1841042.php> (“[T]he reality is that first-year graduates from the three Houston law schools make as little as \$30,000 a year and have a median salary of around \$70,000.”).

40. See MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON 49–50 (2010) (detailing the expense of a law school education and its true worth); Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, at SR10, available at <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> (mentioning the high cost of tuition and bleak job market facing law graduates); David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (noting the allure of a law degree enables law schools to increase “tuition four times faster than the soaring cost of college” and increase incoming classes to make an even greater profit while the legal profession suffers its’ worst recession in history).

41. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (acknowledging law schools give a substantial portion of revenue to fund general university programs).

over the last twenty-five years.<sup>42</sup> However, law school graduates are facing limited employment opportunities and a decline in earning potential.<sup>43</sup>

The University of Baltimore School of Law was publicly accused of “raiding [45% of] law school funds to subsidize other academic programs.”<sup>44</sup> Similar to law schools across the nation, Baltimore School of Law’s in-state resident tuition rate increased by 162% from 2000 to 2010.<sup>45</sup> In 2011, the former Dean indicated that an additional tuition increase created an extra \$1.45 million in law school revenues, yet the university only applied \$80,000 to the law school’s fund; the remainder went to the university’s general fund serving the under-graduate population.<sup>46</sup> The university president denied the accusation, claiming only 14% of law school funds were transferred into the university’s general fund.<sup>47</sup> Nonetheless, the State Department of Legislative Services investigated the University of Baltimore and discovered 31% of the law school’s revenue was in fact siphoned into the university’s general fund in 2010.<sup>48</sup>

All ABA-accredited law schools offer a similar quality of legal education.<sup>49</sup> ABA-accredited law schools teach students substantive

42. Karen Sloan, *Law Schools Reflect Wider Problems With Higher Education*, LEXISNEXIS (Dec. 21, 2011), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “Law Schools Reflect Wider Problems With Higher Education”).

43. See David Segal, *For Law School Graduates, Debts If Not Job Offers*, N.Y. TIMES, Jan. 9, 2011, at BU1, available at [http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&_r=0) (emphasizing the financial debt that accompanies a graduating law student in a bleak economy).

44. See Karen Sloan, *Law School ‘Tax’ at Baltimore More Than Twice What University Claimed*, LEXISNEXIS (Feb. 28, 2012), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “Law School ‘Tax’ at Baltimore More Than Twice What University Claimed”) (examining the transfer of revenue to the university’s general fund after the school claimed the transfer was of a lesser amount than reported).

45. See *id.* (comparing tuition increases between the University of Baltimore School of Law and the University of Maryland Francis King Carey School of Law, Maryland’s only public law schools, and noting Baltimore tuition has grown at a faster rate).

46. See *id.* (noting the former dean’s concession that a large percentage of law school revenue, generated by tuition hikes, was allocated to the university’s general fund rather than directly benefitting the law school.)

47. See *id.* (referencing the university’s defense to allegations of diverting law school funds to the general university fund).

48. See *id.* (reporting the findings from the Maryland Department of Legislative Services investigation of Baltimore’s allocation of funds, which determined the law school’s revenues were supporting the entire university).

49. See MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* 37 (2010) (“[E]very ABA-approved law school can offer [a student] an excellent legal education.”).

“black letter law” and analytical thinking.<sup>50</sup> The distribution of revenues among the university and adjoining law school vary on some level. However, some law schools allocate a portion of law student tuition to more than one-third of the university’s costs, even though law school enrollment accounts for roughly 25% of the university’s enrollees.<sup>51</sup>

Therefore, tuition “price gouging” provides an additional ground for fraud allegations against a law school.<sup>52</sup> This practice, and law schools’ use of a grading curve, results in law students across the nation left in the dark until the end of the first year as to exactly how much their legal education is going to cost.<sup>53</sup> A New York Times article explains the traditional grading curve system “carefully rations the number of [letter grades] . . . awarded each semester . . . to all but ensure that a certain number of students . . . lose their scholarships and wind up paying full tuition in their second and third years.”<sup>54</sup> Consequently, it is not until fall semester grades are posted that “thousands of . . . first-year law students . . . [realize] that their financial future is about to change dramatically for the worse,”<sup>55</sup> and they will pay full tuition for the next two years.

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50. *See id.* (assuring that all ABA-approved law schools offer the same general form of a legal education).

51. *See, e.g.*, Karen Sloan, *Law School ‘Tax’ at Baltimore More Than Twice What University Claimed*, LEXISNEXIS (Feb. 28, 2012), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “Law School ‘Tax’ at Baltimore More Than Twice What University Claimed”) (recognizing Baltimore Law School’s enrollment of 28%, while the law school contributes approximately 37% to the university’s total indirect costs).

52. *See* Elie Mystal, *Law School Professionals Want Bill Robinson to Put a Sock in It*, ABOVE THE LAW (Jan. 6, 2012, 4:57 PM), <http://abovethelaw.com/2012/01/law-school-professionals-want-bill-robinson-to-put-a-sock-in-it/> (referencing President Robinson of the ABA making comments regarding “price gouging” and the ABA’s position for oversight); *see also* Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, at SR10, available at <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> (pointing to the increasing tuition rates affecting law students). *See generally* BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) (discussing the general institutional weaknesses of law schools).

53. *See, e.g.*, David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES (Apr. 30, 2011), <http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=all> (noting law schools grade students on a curve, “which carefully rations the number of A’s and B’s, as well as C’s and D’s, awarded each semester . . . [and] all but ensures that a certain number of students . . . will lose their scholarships and wind up paying full tuition in their second and third years”). *But see id.* (reporting some law schools claim to adequately inform students of the likelihood of losing their initial scholarships).

54. *Id.*

55. *Id.*

#### D. *Problems Combined: Existence of Tort Liability*

The inflation of employment rates and salaries, coupled with tuition hikes, raises the question: Are law schools liable in tort for fraud and misrepresentation? In 2010, less than 51% of law school graduates found employment in private law firms.<sup>56</sup> Reports from the end of 2011 indicate the legal sector lost 3,500 jobs in just over a year.<sup>57</sup> Yet, these declining trends were not depicted in post-graduate employment reports for many law schools.<sup>58</sup> Law schools however, continued to disseminate post-graduate employment statistics illustrating employment rates over 80%, reporting over half of graduates find employment in the private sector.<sup>59</sup>

Applicants and students continue to apply to and attend law school. Specifically, “[M]ore than 87,900 potential candidates vied for 60,000 seats at ABA-approved law schools in 2011.”<sup>60</sup> In spite of the overwhelming number of applicants in 2010, law graduates reportedly owed more than \$98,000 on average in student loan debt, and less than 51% secured

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56. See William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Can Will It Last if Law Grads Can't Pay Bills?*, A.B.A. J. (Jan. 1, 2012, 6:20 AM), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/) (comparing the percentage of students with law school debt exceeding \$98,500 to the percentage of students reporting employment in private law firms).

57. Hillary Mantis, *Legal Hiring Down Despite Job Growth In Other Areas of Economy*, NAT'L JURIST (Oct. 21, 2012, 9:33 AM), <http://www.nationaljurist.com/content/legal-hiring-down-despite-job-growth-other-areas-economy>.

58. See, e.g., New York Law School 2011 Employment Statistics, [http://www.nyls.edu/user\\_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf](http://www.nyls.edu/user_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf) (last visited March 25, 2013) (depicting employment statistics for 2011 at 84%-91% without any indication the figures are declining from the previous year); Thomas M. Cooley Law School 2010 Graduate Employment Report, <http://www.cooley.edu/consumerinformation/#employment> (follow “2010 Employment Report” hyperlink; then download pdf) (reflecting employment and salary ranges for Thomas M. Cooley Law School post-graduates which do not indicate a declining pattern); see also Jenna Greene, *New York Law School, Thomas Cooley Accused of Job Statistics Fraud*, LEXISNEXIS (Aug. 10, 2011), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “New York Law School, Thomas Cooley Accused of Job Statistics Fraud”) (detailing the lawsuit filed on behalf of law students suffering harm due to the inaccurate depiction of post-graduate employment data).

59. See, e.g., New York Law School 2011 Employment Statistics, [http://www.nyls.edu/user\\_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf](http://www.nyls.edu/user_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf) (last visited March 25, 2013) (publishing post-graduate employment statistics at or above 80% for 2011); Thomas M. Cooley Law School 2010 Graduate Employment Report, <http://www.cooley.edu/consumerinformation/#employment> (follow “2010 Employment Report” hyperlink; then download pdf) (indicating 52% of 2010 graduates are employed in private practice and earning an average starting salary of \$52,127).

60. William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, A.B.A. J. (Jan. 1, 2012, 6:20 AM), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/).

employment in private law firms.<sup>61</sup> Many critics consider these figures indicative of “false advertising” perpetrated by law schools that claim to turn out post-graduates as if the schools were “J.D. factories.”<sup>62</sup> This Recent Development discusses allegations that law schools are misrepresenting post-graduate success rates and thoroughly examines a law school’s tort liability for fraud and misrepresentation.<sup>63</sup>

#### E. *Preliminary Considerations*

New York Law School’s Dean Richard Matasar proclaimed, “If a law school can’t help its students achieve their goals, ‘we should shut the damn place down.’”<sup>64</sup> Indeed, faculty and staff in American law schools focus on molding law students into competent practicing attorneys.<sup>65</sup> Typically, students extract initial information about a law school from the school’s website.<sup>66</sup> Therefore, is the correlation between a law school’s duty to its students and reporting accurate post-graduate employment statistics enough to raise tort liability for fraud or misrepresentation?

This Recent Development limits its discussion to claims of fraud and misrepresentation made against law schools for allegedly disseminating false and misleading statements about their post-graduate employment statistics. By first focusing on the tort elements of fraudulent misrepresentation and the requirements law students must establish to bring a successful claim, this Recent Development will analyze the school’s potential liability. Subsequently, the focus will shift to acknowledging methods law students can use to establish damages in such cases.

61. *See id.* (noting student debt is capping off around \$98,000, yet, the influx of graduates in a declining job market prolongs the number of years graduates will carry their debt).

62. Jenna Greene, *New York Law School, Thomas Cooley Accused of Job Statistics Fraud*, LEXISNEXIS (Aug. 10, 2011), <http://www.lexis.com/> (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “New York Law School, Thomas Cooley Accused of Job Statistics Fraud”) (calling for accountability from schools like Cooley and New York Law School, which are generally known to operate as diploma mills).

63. *See, e.g., id.*

64. *See* David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakness-tuition-rises.html?pagewanted=all> (quoting New York Law School Dean Richard A. Matasar).

65. *See* MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON 37 (2010) (“[E]very ABA-approved law school . . . [will] teach students . . . substantive law[,] . . . legal policy, and . . . provide training in lawyering skills.”); Robert P. Schuwerk, *The Law Professor As Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 754 (2003-04) (emphasizing a law professor’s part in molding competent and ethical attorneys).

66. *See* MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON 41 (2010) (explaining methods of collecting information to aid students in choosing a law school to attend).

Ultimately, this Recent Development will address the key factors of tort law and how courts may find schools liable for fraudulent misrepresentation.

#### F. *The Tort of Fraudulent Misrepresentation Defined*

“Fraud is an ancient tort.”<sup>67</sup> Decades of litigation have defined the terms of modern day fraud liability.<sup>68</sup> Common law defines fraud as “an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage.”<sup>69</sup> Alternatively, the Restatement (Second) of Torts defines misrepresentation as “not only words spoken or written[,] but also any other conduct that amounts to an assertion not in accordance with the truth.”<sup>70</sup>

Generally, a fraud claim arises when one entity deceives another and causes economic harm to the deceived party.<sup>71</sup> For example, law schools provide deceptive information relating to their post-graduate employment figures.<sup>72</sup> This deceptive information can lead students to incur debts approximating \$357,229<sup>73</sup>, and delay gainful employment for three years after finishing an under-graduate degree, only to receive a salary far less than initially anticipated.<sup>74</sup> Simply put, these lawsuits require plaintiffs to

67. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 11 (2010) (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 727 (5th ed. 1984)).

68. *See id.* (introducing the concept of fraud and its historical foundation).

69. *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 702 (Tex. App.—Fort Worth 2006, pet. denied). For additional Texas cases applying this definition of fraud, see *Kellum v. Smith*, 18 Tex. 835 (1857), *Russell v. Industrial Transportation Company*, 113 Tex. 441 (Tex. 1924), and *Chien v. Chien*, 759 S.W.2d 848, 495 (Tex. App.—Austin 1988, no pet.).

70. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

71. *See* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 11 (2010) (discussing the objective of recovery for a fraud claim).

72. *See* David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (describing New York Law School’s website announcement that the post-graduate median salary is \$160,000, although most students are more likely to make \$35,000–\$75,000 after graduation); *see also* *MacDonald v. Thomas M. Cooley Law Sch.*, No. 1:11-CV-831, 2012 WL 2994107, at \*2 (W.D. Mich. July 20, 2012) (alleging Cooley Law School committed fraud by manipulating statistics by reporting only a small sector of the post-graduate population).

73. *See* William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can’t Pay Bills?*, A.B.A. J. (Jan. 1, 2012, 6:20 AM), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/) (calculating the amount of debt owed when interest is considered).

74. *See* Class Action Complaint at 23–24, *MacDonald v. Thomas M. Cooley Law Sch.*, 2012 WL 2994107 (2012) (No. 1:11-CV-831) (detailing the argument against Thomas Cooley School of Law for manipulating salary information, specifically their failure to report actual mean salaries and

prove they have suffered economic harm from the schools' deceptive post-graduate employment figures.

## II. PROVING FRAUDULENT MISREPRESENTATION

Fraud allegations can be extremely harmful to an institution's reputation.<sup>75</sup> Proving a fraudulent misrepresentation claim—a type of intentional tort—requires overcoming exceptionally high standards.<sup>76</sup> First, the complaint is required to state the fraudulent circumstances with particularity.<sup>77</sup> Beyond the heightened pleading requirement of a fraud claim, the burden of proof is also higher for this cause of action.<sup>78</sup> A plaintiff must prove the fraud by satisfying the standard of clear and convincing evidence.<sup>79</sup>

A fraud claim requires heightened standards in an effort to “allocate[] the ‘risk of error’ between the parties . . . [and emphasize the] relative importance attached to the ultimate decision.”<sup>80</sup> Fraud cases often involve circumstantial evidence, which is easily fabricated.<sup>81</sup> Therefore, in addition to the elevated standard, a plaintiff has the burden of proving the elements of fraud: “1) misrepresentation of material fact; 2) the [individual] of the misrepresentation knew or should have known of the statement's falsity; 3) intent by the [individual] that the representation will induce another to rely and act on it; and 4) resulting injury to the party acting in

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forcing graduates into financial distress, often living paycheck-to-paycheck with job instability and mounting debt).

75. See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 13 (2010) (highlighting the serious nature of fraud allegations by pointing to the seemingly irreparable damage inflicted on an accused business).

76. See *id.* (referring to the elevated standard that accompanies fraud allegations and acknowledging successfully proving fraud is difficult). Due to the extreme repercussions a business may face by being named in a fraud lawsuit, the pleading requirement demands more detail and particularity than other tort claims. *Id.*

77. See *id.* (discussing Rule 9(b) of the Federal Rules of Civil Procedure requiring a plaintiff to state circumstances of the fraud with particularity, which is similar to the requirement adopted by most states).

78. See *id.* (stating strict pleading requirements accompany a standard of clear and convincing evidence in a case of fraud).

79. See *Disner v. Westinghouse Elec. Corp.*, 726 F.2d 1106, 1107–09 (6th Cir. 1984) (noting the majority of Michigan courts require fraud to be proven by clear and convincing evidence). *But see Barrett v. Shanks*, 382 Ill. 434, 440 (1943) (finding the standard for fraud as preponderance of the evidence).

80. *Disner*, 726 F.2d at 1110.

81. *Id.* (“Courts have recognized, perhaps because the nature of the evidence in cases involving allegations of fraud is often circumstantial, that claims of fraud can be fabricated easily.”); see generally *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (addressing evidence in a securities lawsuit).

justifiable reliance on the representation.”<sup>82</sup> Furthermore, the plaintiff must establish damages, which requires demonstrating a causal link between the misrepresentation and harm it caused.<sup>83</sup>

#### A. *Material Misrepresentation*

A misrepresentation of a material fact is essential for a successful fraud claim.<sup>84</sup> The definition of what is material differs slightly across jurisdictions.<sup>85</sup> One way to evaluate materiality is to determine whether the misrepresentation involved information that was significant enough to influence the choice or conduct of the consumer with regard to the product.<sup>86</sup> Alternatively, materiality can be determined by evaluating whether a material representation is “of such nature as to induce action on the part of the complaining party.”<sup>87</sup> A reasonable person standard guides the determination of whether information is material.<sup>88</sup> Jurisdictions recognizing the reasonable person standard consider the alleged misrepresentation and compare the plaintiff’s decision-making process to a reasonable person.<sup>89</sup>

82. Geri Lynn Mankoff, *Florida’s Economic Loss Rule: Will It Devour Fraud in the Inducement Claims When Only Economic Damages Are at Stake?*, 21 NOVA L. REV. 467, 482 (1996).

83. See *Texaco, Inc. v. Phan*, 137 S.W.3d 763, 769 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (discussing fraud liability and holding the evidence lacked a causal link between the claimed damages and the misrepresentations). See generally VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 13 (2010) (setting out the requirements a plaintiff must meet to establish liability in a fraud claim, as provided by case law).

84. See Geri Lynn Mankoff, *Florida’s Economic Loss Rule: Will It Devour Fraud in the Inducement Claims When Only Economic Damages Are at Stake?*, 21 NOVA L. REV. 467, 482 (1996) (detailing the elements of fraud and noting the facts surrounding the act should be thoroughly examined); see also *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th Dist. Ct. App. 1990) (examining the circumstances of the alleged fraud prior to reaching a decision).

85. See 26 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 69:12 (4th ed. 2003) (“[T]he matter of materiality . . . set[s] forth many different formulations of the concept.”).

86. See *F.T.C. v. Bronson Partners, L.L.C.*, 564 F. Supp. 2d 119, 135 (D. Conn. 2008) (reaffirming a material representation is likely to direct the consumer’s actions) (quoting *In re Kraft, Inc.*, 114 F.T.C. 40 (1991)); VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 13 (2010) (defining materiality as “the matter is such that it would be given weight in the plaintiff’s decision-making process”).

87. *Shutter Shop, Inc. v. Amersham Corp.*, 114 F. Supp. 2d 1218, 1225 (M.D. Ala. 2000) (quoting *Graham v. First Union Nat’l Bank of Ga.*, 18 F. Supp. 2d 1310, 1317 (M.D. Ala. 1998)).

88. See *Faulkner Drilling Co., Inc. v. Gross*, 943 S.W.2d 634, 638 (Ky. Ct. App. 1997) (determining a material fact depends “whether it is likely to affect the conduct of a reasonable man and be an inducement of the contract”); cf. *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 9 (Ill. App. Ct., 2001) (applying the element of justifiable reliance and the reasonable person standard).

89. See *Faulkner*, 943 S.W.2d at 638 (declaring a material fact affects a reasonable man’s conduct).



Law students are advised to “[p]ay the greatest attention to a school’s placement record” when choosing which law school to attend.<sup>90</sup> Books such as *Law School Confidential* and other guides intended to aid the law school application process, explain in detail the percentage of graduates with gainful employment is a primary concern for prospective students choosing a law school.<sup>91</sup> Thus, a school’s post-graduate employment records are important and influence students’ choices when determining which law school to attend.<sup>92</sup>

In *Dizick v. Umpqua Community College*,<sup>93</sup> a community college student brought an action for fraudulent representation regarding training advertised by the school for students to become advanced welders.<sup>94</sup> In *Dizick*, the jury found the representations made to the student were false and material because “the plaintiff would not have . . . enrolled or continued in school” with the knowledge that the representations were false.<sup>95</sup> Therefore, if a law school’s post-graduate employment records are false, the records may be considered material when the plaintiff would not have enrolled or continued attending the school knowing the truth about those misrepresentations.<sup>96</sup>

#### 1. Information Readily Available: No Duty to Disclose

In a lawsuit brought against New York Law School, a judge found the post-graduate employment statistics were not “misleading in a material way.”<sup>97</sup> The court determined the misrepresentation was not material because students “have available to them any number of sources of information to review when making their decisions.”<sup>98</sup> Indeed, “[A]n

90. ROBERT H. MILLER, *LAW SCHOOL CONFIDENTIAL* 63 (2000) (explaining the importance placement records have in supplementing a student’s selection process).

91. *See id.* (discussing the quality and type of information gained from reviewing law school placement records).

92. *See id.* at 63, 64 (“[B]ased on the experiences of . . . mentors and a number of other law students[.]” law school placement records are one of the most significant pieces of information for a prospective student).

93. *Dizick v. Umpqua Cmty. Coll.*, 599 P.2d 444 (Or. 1979) (en banc).

94. *Id.* at 445 (providing the procedural history of the student’s action before reviewing the facts surrounding the action for fraudulent misrepresentation).

95. *Id.* at 448 (reporting the jury found the misrepresentations to be material and from that point, the jury only needed to find damages by a preponderance of the evidence for the plaintiff to succeed).

96. *See generally id.* (addressing allegations the community college deceived their students regarding educational advantages); VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 13 (2010) (introducing the factor of materiality in fraud cases).

97. *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 843 (2012).

98. *Id.*

action for fraud may not . . . lie where the complaining party had access to the information at issue;<sup>99</sup> however, a duty to disclose information may exist despite its accessibility.

Courts weigh factors on a case-by-case basis to determine whether there is a duty to disclose information.<sup>100</sup> In this instance, the court should consider “the nature of the fact not disclosed, . . . the materiality or importance of the fact not disclosed, and the respective knowledge of the parties and their means of acquiring knowledge.”<sup>101</sup> Because obtaining post-graduate salary statistics is not accessible to students through diligent inquiry, law schools may owe a duty to disclose information if a court determines it material.<sup>102</sup>

## 2. Information Not Readily Available: Duty to Disclose

The ABA, BLS, NALP, and Bureau of Labor Statistics are sources for finding information about legal employment statistics, including post-graduate information.<sup>103</sup> However, these sources only provide a portion of the information essential to determining whether a student should attend law school.<sup>104</sup> In addition, a law school’s geographic location,<sup>105</sup>

99. Republic Nat’l Bank v. Hales, 75 F. Supp. 2d 300, 317 (S.D.N.Y. 1999).

100. *See id.* (listing the factors courts find relevant but not dispositive, including the relative intelligence of the parties and their relation to each other).

101. *Id.*

102. Inaccurate reports for post-graduate employment strain a prospective student’s ability to make an informed decision on enrolling in law school. *See* MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON xii (2010) (discussing the BLS salary statistics for lawyers and clarifying that some practice areas are left out of the figures); RICHARD MONTAUK, HOW TO GET INTO THE TOP LAW SCHOOLS 50–51 (2008) (commenting on the weak field of useful statistical data available to students in researching information about a law school).

103. *See generally* AMERICAN BAR ASSOCIATION, <http://www.americanbar.org> (last visited March 25, 2013) (providing law employment statistics without including the source for the information); ASSOCIATION FOR LEGAL CAREER PROFESSIONALS, <http://www.nalp.org> (last visited March 25, 2013) (proclaiming NALP is the premier resource for information regarding employment and recruiting in the legal field); U.S. DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, [www.bls.gov](http://www.bls.gov) (last visited March 25, 2013) (collecting attorney employment information in its responsibility for measuring activity in the labor market).

104. *Compare* ASSOCIATION FOR LEGAL CAREER PROFESSIONALS, <http://www.nalp.org> (last visited March 25, 2013) (failing to provide specific regional information in lawyer employment statistics), *and* AMERICAN BAR ASSOCIATION, <http://www.americanbar.org> (last visited March 25, 2013) (limiting the use of employment statistics collected by excluding specific information on how data is obtained), *with* U.S. DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, [www.bls.gov](http://www.bls.gov) (last visited March 25, 2013) (excluding information for solo practitioners in the published figures).

105. *See* MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON xii (2010) (noting regional considerations for the opportunities available at the law school); RICHARD MONTAUK, HOW TO GET INTO THE TOP LAW SCHOOLS 58 (2008) (referencing a law school’s

and the fact that lawyers earn vastly different incomes<sup>106</sup> make post-graduate employment information difficult to obtain from any single source. The lack of accurate and accessible information can lead students to enroll or continue attending law school without knowing the true impact of their decision.<sup>107</sup>

The ABA reports the median salary for first-year associates in law firms consisting of two to twenty-five lawyers is \$73,000.<sup>108</sup> Significantly, the ABA bases this employment data on national statistics and fails to include solo practitioners.<sup>109</sup> The Houston Chronicle reported students graduating in the Houston area earn as little as \$30,000 in their first year.<sup>110</sup> Thus, the ABA statistics contribute to a pool of inconclusive data for students to use when deciding whether they should attend law school, take out student loans, and choose one law school over another.

As previously mentioned, the BLS, which reports the wages for all employed practicing attorneys, excludes solo practitioners' incomes.<sup>111</sup> Solo practitioners comprise nearly one-third of the legal sector,<sup>112</sup> and "the number of solo practitioners . . . represents more than 5% of law firm jobs reported [in 2009], compared with 3.3% for the class of 2008."<sup>113</sup>

ability to place students in the region where the school is located as opposed to obtaining nationwide placement).

106. See MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* xii (2010) (discussing lawyers' widely-varying income potential based on the type of law they practice, years of experience, and whether they work for a large or small firms).

107. See *Dizick v. Umpqua Cmty. Coll.*, 599 P.2d 444 (Or. 1979) (en banc) (considering a community college student's claim for fraud against the community college's dissemination of information); see also *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 834 (2012) (arguing the law school fraudulently induced students to enroll); *MacDonald v. Thomas M. Cooley Law Sch.*, No. 1:11-CV-831, 2012 WL 2994107, at \*1 (W.D. Mich. July 20, 2012) (holding the misrepresentations made by the school did not amount to fraud).

108. See Debra Cassens Weiss, *Law Firm Associate Salaries 'in Stasis'; First-Year Median Is Still \$115K*, *NALP Says*, A.B.A. J. (Sept. 12, 2011, 5:29 AM), [http://www.abajournal.com/news/article/law\\_firm\\_associate\\_salaries\\_in\\_stasis\\_median\\_is\\_still\\_115k\\_nalp\\_says/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Top+Stories](http://www.abajournal.com/news/article/law_firm_associate_salaries_in_stasis_median_is_still_115k_nalp_says/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories) (reviewing a survey for first-year associate salaries at law firms of various sizes).

109. See *id.* (providing annual salary figures based on responses from over 440 law firms located in cities around the nation, but excluding salaries of solo practitioners).

110. See Mary Flood, *Salary Reality: Many Lawyers Don't Earn Big Bucks*, *HOUS. CHRON.* (July 26, 2007), <http://www.chron.com/business/article/Salary-reality-Many-lawyers-don-t-earn-big-bucks-1841042.php> (dispelling the notion most lawyers make a three-figure salary by showing that most recent graduates in Houston will make a median salary of \$70,000).

111. MICHAEL ARIENS, *LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON* xii (2010).

112. See *id.* (observing the portion of the legal profession this group occupies).

113. James G. Leipold, *The Changing Legal Employment Market For New Law School Graduates*, 79 *B. EXAMINER* 6, 8 (Nov. 2010), available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2010/790410\\_Leipold.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2010/790410_Leipold.pdf).

Thus, the BLS and the ABA provide incomplete data for students to rely on in choosing whether to attend law school and how expensive the endeavor will be.

Moreover, simply because the NALP, ABA, and BLS provide national statistics, this does not necessarily mean there is “access to the information at issue.”<sup>114</sup> In effect, this creates a duty to disclose information because “the nature of the fact not disclosed” varies substantially by region and by school.<sup>115</sup> The bottom line is that “regional preference begins to play a role” and “the number [students] should be most concerned about is the school’s ‘placement record’—that is, what percentage of its graduates have gone on to gainful employment, and more importantly, *where?*”<sup>116</sup>

Law schools occupy a superior position compared to the prospective or current student because the student is responsible for collecting information the school distributes to the public, yet acquiring information about post-graduate salary statistics is not accessible to students through diligent inquiries.<sup>117</sup> Law schools have a duty to disclose accurately their post-graduate employment statistics because a student’s only true way of accessing this pertinent information is through the school itself. Further, the post-graduate statistics of an individual school are material because a plaintiff may “not have in fact enrolled or continued in [a specific law] school had the plaintiff[s] known that [the specific law school’s] representations were false.”<sup>118</sup>

#### B. *Scienter: The Knowledge of Falsity or Reckless Disregard for the Truth*

To establish successfully a fraud claim, the plaintiff must prove the defendant had a particular state of mind, known as scienter.<sup>119</sup> Fraud

114. Republic Nat’l Bank v. Hales, 75 F. Supp. 2d 300, 317 (S.D.N.Y. 1999).

115. *Id.*; see also MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON 37–48 (2010) (introducing numerous ways to distinguish which law school is the best fit for the prospective student); RICHARD MONTAUK, HOW TO GET INTO THE TOP LAW SCHOOLS 52, 55 (2008) (advising students “schools differ” and the best way to investigate schools is by exploring school websites).

116. ROBERT H. MILLER, LAW SCHOOL CONFIDENTIAL 62, 63 (2000).

117. See *Hales*, 75 F. Supp. 2d at 317 (examining the relationship between the parties); Dizick v. Umpqua Cmty. Coll., 599 P.2d 444, 448 (1979) (illustrating the potential impact when schools are not held accountable for their lack of disclosure regarding employment and financial statistics).

118. See generally MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON xii (2010) (contending the current methodology used by law schools may limit the value of guides and rankings); RICHARD MONTAUK, HOW TO GET INTO THE TOP LAW SCHOOLS 50–51 (2008) (lamenting college guides do not publish equivalent information for law school students on earning potential and job availability).

119. See VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 16 (2010) (stating the plaintiff must prove the element of scienter in a fraud action).

requires more than a mere promise—it is the combination of “intent to deceive or to mislead,” in addition to a promise.<sup>120</sup> If a plaintiff cannot establish scienter, then a court must decide the judgment in favor of the defendant.<sup>121</sup>

Courts define scienter as “a person who (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.”<sup>122</sup> Alternatively, the Restatement (Second) of Torts defines scienter as statements made when the speaker: “(a) knows or believes that the matter is not as he represents it to be[;] (b) does not have the confidence in the accuracy of his representation that he states or implies[;] or (c) knows that he does not have the basis for his representation that he states or implies.”<sup>123</sup> Scienter can be found in situations where law schools act with “knowledge of falsity[] or reckless disregard for the truth.”<sup>124</sup>

For example, *Gomez-Jimenez v. New York Law School*<sup>125</sup> applied the requisite scienter standard for fraud. In *Gomez-Jimenez*, the school publicly admitted it did not give prospective students a complete picture of post-graduate employment opportunities when the school posted only the median salary of graduates who attained jobs in the private sector (\$75,000), despite the school’s acknowledgement that the majority of its students would begin at firms earning salaries between \$35,000 and \$75,000.<sup>126</sup> In this case, New York Law School either knowingly distributed false information, or published it with a reckless disregard for the truth.<sup>127</sup>

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120. See *Phillips v. Chevron U.S.A., Inc.*, 792 F.2d 521, 526 (5th Cir. 1986) (explaining a promise is not enough to prove fraudulent inducement, but that the actor must have intended to deceive or mislead when he or she made the promise).

121. See, e.g., *Alice D. v. William M.*, 450 N.Y. S.2d 350, 354 (N.Y. Civ. Ct. 1982) (finding for the defendant because the plaintiff could not establish scienter with clear and convincing evidence).

122. *United States v. Chubb Inst.*, No. 06-3562, 2010 WL 1076228, at \*4 (D.N.J. Mar. 22, 2010) (citing 31 U.S.C.A. § 3729(b)(1)–(3) (West 2003 & Supp. 2008)).

123. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

124. See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 16 (2010) (outlining the scienter requirement in a fraud claim, which establishes a culpable state of mind).

125. *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (2012).

126. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (reporting although the school official stood by the information that was made available to prospective students, he “acknowledged it did not give a complete picture of the prospects for N.Y.L.S. graduate[s]”).

127. Compare *id.* (demonstrating school officials were aware the information they were directing towards prospective students was not the complete truth), with VINCENT R. JOHNSON, *ADVANCED*

Not surprisingly, scienter is generally denied by the defendant rather than openly admitted in a lawsuit. Courts must consider the type of misrepresentation made by the defendant, and whether the defendant owed the plaintiff any duty.<sup>128</sup> Plaintiffs are permitted to recover damages when the type of fraud is intentional or reckless and where the bargaining process was subverted.<sup>129</sup> A law school intentionally misrepresents when the school distributes information with the knowledge that it is false.<sup>130</sup> Additionally, the misrepresentation could be reckless if a law school “asserts a fact as of [its] own knowledge without knowing whether it is true or false.”<sup>131</sup>

The *Gomez-Jimenez* court determined the alleged misrepresented “statements [were] neither ‘half-truths’ nor misleading.”<sup>132</sup> The court reasoned the student’s “complaint clearly establishes that plaintiffs had access to publicly available information pertaining to the realities of the legal job market,” and the school “complied with the ABA standards.”<sup>133</sup> The court’s analysis stopped after finding the statements were not “half-truths” or misleading. The court did not examine the fact that the school owes students a duty if the “[school] ha[s] special or superior knowledge of the facts not available to the other party, or where the defendant has communicated half-truth or made some other misleading, partial disclosure.”<sup>134</sup>

As a result, the court never fully examined the scienter requirement in *Gomez-Jimenez*.<sup>135</sup> The court overlooked the issue of students’ inability to

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TORT LAW: A PROBLEM APPROACH 16 (2010) (explaining if a speaker knows or thinks “the matter is not as he represents it to be[.]” then a misrepresentation is fraudulent).

128. See *Wild v. Trans World Airlines, Inc.*, 14 S.W.3d 166, 167–68 (Mo. Ct. App. W.D. 2000) (discussing the duty to disclose). See generally Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation By Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 532 (discussing fiduciary duties and their application).

129. See *Zutz v. Case Corp.*, 422 F.3d 764, 770 (8th Cir. 2005) (acknowledging misrepresentations may either be intentional or reckless, which undermine the bargaining process and allow tort remedies to apply).

130. See generally VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH 16* (2010) (providing a concise summary of the requirements to establish misrepresentations in fraud actions).

131. *Zutz*, 422 F.3d at 770.

132. *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 852 (2012).

133. *Id.*

134. *Id.* (quoting *M & T Bank Corp. v. Gemstone CDO VII, Ltd.*, 23 Misc.3d 1105(A), 2009 WL 921381, at \*8 (N.Y. Sup. Ct., Apr. 7, 2009)).

135. See *id.* (considering only whether the plaintiff had access to the information in question, or whether statements made by the school were “half-truths” or misleading, and not whether the school had the intention to mislead or submit inaccurate information to prospective students).

obtain accurate information about a particular law school's data.<sup>136</sup> Thus, an argument can be made that law schools with superior knowledge of employment data that intentionally release only a portion of their statistics are committing fraud by concealing pertinent information, or recklessly disclosing information the school knows or should have known was only half-true. A successful argument establishes a law school's duty to disclose the pertinent information because students would not otherwise be aware that the representations and reports from the school may be false.<sup>137</sup> In obtaining information about the law school's employment statistics, a student is not in a position to question the validity or accuracy of the reported post-graduate data. Therefore, the affirmative statements the school disseminates which report only a small selection of data from graduating students, without disclosing the limited pool from which the data was gathered, should not be accepted at face value and results in an actionable tort.<sup>138</sup>

### C. *Intent or Expectation to Induce Reliance*

Liability for fraudulent misrepresentation arises when the material misrepresentation is knowingly made with an intent or expectation the target will act in reliance upon the misrepresentation.<sup>139</sup> However, case law frequently overstates the requirements for misrepresentation further raising the liability threshold to show the defendant's culpability.<sup>140</sup> As a result, a misrepresentation made with the intent or expectation to induce

136. *See infra* § I.

137. *See* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 62 (2010) (explaining a plaintiff may rely on the defendant's affirmative representation if the statement is not obviously false and there "are no danger signals calling for inquiry").

138. If the students cannot prove scienter, they may have a chance to bring a cause of action for negligent misrepresentation. *See* *Goehring v. Chapman Univ.*, 121 Cal. Rptr. 3d. 39, 47 (2004) ("The tort of negligent misrepresentation does not require scienter or intent to defraud, but it does, of course, require a showing of resulting damage."); *RESTATEMENT (SECOND) OF TORTS* § 552 (1977) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.").

139. *See* *RESTATEMENT (SECOND) OF TORTS* § 531 cmt. d (1977) ("One has reason to expect a result if he has information from which a reasonable man would conclude that the result will follow or would govern his conduct upon the assumption that it will do so.").

140. *See* Vincent R. Johnson & Shawn M Lovorn, *Misrepresentation By Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 555-56 (2004) (proclaiming the element of scienter is often overstated in misrepresentation cases when a plaintiff only needs to show that the defendant acted with an expectation of reliance, and not with an intent to commit fraud).

reliance is actionable.<sup>141</sup>

Differences between the standards of intent and expectation do not hinge on whether the defendant acts purposefully to cause the victim to rely on the misrepresentation.<sup>142</sup> The defendant merely has to act with the desire to cause the victim's reliance on the misrepresentation.<sup>143</sup> Results based on misrepresentations are "intended if the actor either acts with the desire to cause it or acts believing that there is a substantial certainty that the result will follow from his conduct."<sup>144</sup> Alternatively, the defendant "has a reason to expect a result [from a misrepresentation] if he has information from which a reasonable man would conclude that the result will follow or would govern his conduct."<sup>145</sup> In addition, the "reason-to-expect standard demands more than mere foreseeability; the claimant's reliance must be 'especially likely' and justifiable, and the transaction sued upon must be the type the defendant contemplated."<sup>146</sup>

#### D. *Difficulties Establishing Intent or Expect Reliance*

Law students suing their alma maters may face difficulty in establishing intent or expectation of reliance because this "element of fraud is a focused inquiry, more akin to a rifle shot than a shotgun blast."<sup>147</sup> A defendant's pure opinion or mere puffery is not actionable as a fraudulent misrepresentation.<sup>148</sup> Therefore, alumni must overcome the argument that the post-graduate employment information and statistics are merely the school's opinion.<sup>149</sup>

The idea that employment and salary data could be "vague

141. *See id.* (expounding further into case law examples which exaggerate the requirements for misrepresentation such as scienter and intent).

142. *Cf.* RESTATEMENT (SECOND) OF TORTS § 531 cmt. c, d (1977) (elaborating desire is sufficient to fulfill the element of intent, regardless of whether a party intends the result).

143. *See id.* (explaining the difference between "intent" and "reason to expect" in regard to the mental state needed for a cause of action relating to a misrepresentation).

144. *Id.* at cmt. c.

145. *Id.* at cmt. d.

146. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 219 (Tex. 2011) (quoting *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 560 (Tex. 2001)). *See generally* RESTATEMENT (SECOND) OF TORTS § 531 (1977) (proposing if one party intends or has "reason to expect" that another party will rely on the misrepresentation, then the former party has the mental element required to be liable for fraudulent misrepresentation).

147. *Exxon Corp.*, 348 S.W.3d at 219.

148. *See Holley v. Cent. Auto Parts*, 347 S.W.2d 341, 343 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) (explaining merely stating a product is a "good one" is an opinion and opinions are not actionable as material misrepresentations).

149. *See, e.g., id.* (holding opinions do not rise to the level of fraudulent misrepresentation and concluding a person's statement regarding the size of tires did not impose liability).



representations [that] constitute mere opinions”<sup>150</sup> creates a heavy burden for former law students to overcome. Characterization of this data becomes pivotal: Are the law schools promising students employment and prospective salaries, or are these statements simply instances of puffery or opinions?<sup>151</sup> Two key factors support the notion that the reports are mere opinions and not actionable. First, law schools do not specify the number of reporting students and fail to distinguish between full and part-time employment, contract or permanent employment, and employment requiring or not requiring a J.D.<sup>152</sup> Second, the NALPA only collects general information; therefore, the school’s ability to provide information is limited, and their employment or salary report of an area could be considered vague representations or mere opinions.<sup>153</sup> Essentially, the reports disseminated by the law schools could be viewed as trade talk that does not rise to the level of fraud because the law schools are sparring for an advantage.<sup>154</sup>

Indeed, quantity and value statements are estimated opinions or mere sales talk by a party and do not constitute fraud when both parties have equal access to material information.<sup>155</sup> Nonetheless, when a party has a

150. *Angelo Broad., Inc. v. Satellite Music Network, Inc.* 836 S.W.2d 726, 733 (Tex. App.—Dallas 1992, writ denied).

151. *Cf. Holley*, 347 S.W.2d at 343 (discussing the rule misstatements of opinion are not actionable and remedies for misrepresentations will not lie as they do for misstatements of fact).

152. *See generally* David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (analyzing the information collected by law schools, which often differs from what is advertised to students); Elie Mystal, *The ABA Is Slowly Coming Around on Law School Transparency*, ABOVE THE LAW (Oct. 19, 2010, 10:14 AM), <http://abovethelaw.com/tag/law-school-transparency/page/6/> (pointing to the inefficiencies of the ABA in collecting post-graduate employment data from ABA-approved law schools).

153. *See generally Angelo*, 836 S.W.2d at 733 (contrasting misrepresentation with puffery and determining vague representations will be considered opinions that do not give rise to an action for fraud); Elie Mystal, *The ABA Is Slowly Coming Around on Law School Transparency*, ABOVE THE LAW (Oct. 19, 2010, 10:14 AM), <http://abovethelaw.com/tag/law-school-transparency/page/6/> (highlighting the difficulty in collecting accurate information).

154. *See Guitar Trust Estate v. Boyd*, 120 S.W.2d 914, 919 (Tex. App.—Eastland 1938, no writ) (concluding statements of parties conducting a land transaction were “personal opinion and trade talk” used to pursue an advantage over the other party, but did not constitute fraud). *See generally* Elizabeth G. Olson, *Law School Fuzzy Grad Jobs Stats: A Federal Offense?*, CNN (Mar. 16, 2012, 10:20 AM) <http://management.fortune.cnn.com/2012/03/16/law-school-fuzzy-grad-jobs-stats-a-federal-offense/> (addressing law schools’ efforts to highlight the positive outcomes for potential graduates).

155. Texas jurisprudence has no shortage of cases holding that statements of value do not constitute fraud. *See McCollum v. P/S Invs., Ltd.*, 764 S.W.2d 252, 254 (Tex. App.—Dallas 1988, writ denied) (dissecting the elements of fraud as they apply to the facts at hand (citing *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983))); *Frankfurt v. Wilson*, 353 S.W.2d 490, 496 (Tex. App.—Dallas 1961, no writ) (finding as a general rule, pure expressions of opinion cannot be fraudulent misrepresentations and the rule applies to opinions as to value); *Guitar Trust Estate*, 120 S.W.2d at

special or superior knowledge of the value or quantity, the intent or expectation to induce reliance may exist.<sup>156</sup> However, if the employment data can be viewed as a quantitative figure or a value statement, students may face issues overcoming the intent to induce reliance.

In *Beckett v. Computer Career Institute*,<sup>157</sup> former students sued the Institute because the school represented the “placement rate for graduates was between 85% and 96%.”<sup>158</sup> In contrast to their positive representations, the school was “reporting a placement rate of approximately 50% to its accrediting agency” at the same time.<sup>159</sup> The truth affected students when they completed their education and were unable to obtain employment because they attended and graduated from the Computer Career Institute (CCI).<sup>160</sup>

CCI “argue[d] that, even if there [was] evidence of a misrepresentation concerning its placement rates, there was no evidence of any causal connection” between the damages and the misrepresentations.<sup>161</sup> The graduates claimed “they would not have enrolled in the [Institute] had they known of the actual placement rate for all graduates.”<sup>162</sup> Similar to the law school argument, CCI argued the students “received the education and training that [the students were] promised, that jobs were not promised, and that there was no evidence from which the jury could determine whether their failure to obtain training-related employment was because of the misrepresentations.”<sup>163</sup>

However, the court disagreed. The court emphasized “causation of damages occurs in such situations only when the fact misstated ‘was of a nature calculated’ to bring about the result giving rise to the damages.”<sup>164</sup> Specifically in *Beckett*, the court determined that CCI “was aware that, in

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918–19 (“[A] mere expression of an opinion as to value which proves to be incorrect or false, is not to be classed as a misrepresentation of the material fact upon which reliance may be placed.”); *Marantz v. Weisberg*, 33 S.W.2d 505, 507 (Tex. App.—Fort Worth 1930, writ dismissed w.o.j.) (reiterating the “familiar rule that ordinarily a representation of market value of a commodity is merely an opinion which cannot be made the basis of a recovery for fraud”);

156. *See Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 580 (Mo. Ct. App. W.D. 2000) (discussing the effect of a party’s superior knowledge when it is relied upon by another party and the duty to disclose).

157. *Beckett v. Computer Career Inst., Inc.*, 852 P.2d 840 (Or. Ct. App. 1993).

158. *Id.* at 841.

159. *Id.*

160. *See id.* at 843 (arguing the false employment statistics induced the students to attend and pay tuition to the Computer Career Institute).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (citing *Criqui v. Pearl Music Co.*, 41 Or. App. 511 (Or. Ct. App. 1979)).

reliance on [the school's] representations, [the students] would terminate their employment, enroll in . . . courses[,] and pay the assessed tuition."<sup>165</sup> The court found the jury could conclude that the training provided by CCI would not qualify students for the kind of employment promised.<sup>166</sup>

Similar to *Beckett*, many law schools fail to prepare and enable their students to obtain employment in the field of law. In January 2012, Legal On Ramp Chief Executive Officer Paul Lippe warned the divide between the profession and the legal academy is no longer feasible.<sup>167</sup> He explained that law schools "handicap[] students by sending them into the job market without practical skills, . . . an understanding of how lawyers operate[,] and what clients expect."<sup>168</sup> The lack of practical skills and understanding directly contribute to low job numbers because a majority of corporate clients refuse to pay for first- or second-year associate work.<sup>169</sup> Varying factors contribute to lawyers earning vastly different incomes, and it is nearly impossible for prospective and current law students to find accurate information for the post-graduate salary range they can expect after attending a specific school.<sup>170</sup> This disconnection in published information misleads and misconstrues the reality of post-graduate employment and indicates the student-plaintiffs of future cases may be able to prove intent or expectation to induce reliance on the statistics the law school distributes.<sup>171</sup>

165. *Id.* at 843–44.

166. *See id.* at 844 (holding the jury's determination reflected evidence the school's training failed to equip students with skills promised).

167. *See* Karen Sloan, *What Is Law School For, Anyway?*, LEXISNEXIS (Jan. 16, 2012), <http://www.lexis.com/> (subscription needed) (follow "Find a Source" hyperlink and search "The National Law Journal"; click on "The National Law Journal"; then click on "Terms & Connectors" tab and search "What Is Law School For, Anyway?") (discussing the effort of changing education methods to meet the practice of law).

168. *Id.*

169. *See* Ashby Jones & Joseph Palazzolo, *What's A First-Year Lawyer Worth?—Not Much, Say a Growing Number of Corporate Clients Who Refuse to Pay*, WALL ST. J., Oct. 17, 2011, at B1, *available at* <http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html> (referring to the new trend of corporate clients dictating the attorney's experience level they require working on their account).

170. *See* MICHAEL ARIENS, LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON xii (2010) (discussing the different income potential of lawyers and explaining data reporting income of law school graduates is misleading because statistics omit income for those students working as independent practitioners).

171. *See generally id.* (noting law school employment data is often unreliable).

### E. *Justifiable Reliance*

Law student-plaintiffs may have tremendous difficulty overcoming the element of justifiable reliance because they must also prove they had a right to rely on the data.<sup>172</sup> As previously mentioned, law schools are not bound to the truth of a mere opinion, and law students do not have a right to rely on a representation that is stated to be an opinion.<sup>173</sup> Moreover, students do not have a right to rely upon statements described as plainly absurd.<sup>174</sup> Thus, if disseminated data suggests the salary ranges of graduates from low-ranking law schools are equal to salaries of graduates from Ivy League law schools, then the statements may be found “palpably absurd” and not actionable.<sup>175</sup>

The law expects students to act prudent and diligently in their investigation of information before signing a tuition contract with a law school.<sup>176</sup> Generally, individuals must rely on their own judgment and research prior to entering into a transaction.<sup>177</sup> Law schools are not liable for any fraudulent misrepresentations made to students if the student’s decision to attend their school was based on the student’s independent investigation rather than the school’s misrepresentations.<sup>178</sup>

Nonetheless, student-plaintiffs could successfully argue that their law school was “under a duty to exercise reasonable care to disclose” the truth about prospective post-graduate employment and salaries to law students.<sup>179</sup> Thus, non-disclosure of true post-graduate employment and salaries may qualify as an omission that warrants a duty to disclose because

172. *See* *Guitar Trust Estate v. Boyd*, 120 S.W.2d 914, 918 (Tex. Civ. App.—Eastland 1938, no writ) (highlighting a plaintiff must also have a right to rely on the misrepresentation).

173. *Id.* (clarifying the sentiment that “one has no right to rely upon a representation which is expressly stated to be merely an opinion, for the truth of which the speaker declines to be bound”).

174. *See id.* (describing the exception to rely on a misrepresentation).

175. *Id.*; *see, e.g.*, David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (discussing New York Law School’s claims to share a median salary equal to that of Harvard Law School graduates).

176. *Cf. Guitar Trust Estate*, 120 S.W.2d at 917 (“The law does not place a premium on negligence or unreasonable credulity [and] [p]rudence and diligence should be exercised in the execution of contracts.”).

177. *See id.* (reaffirming the general rule an individual must investigate and rely on personal judgment prior to entering into a transaction).

178. *See* RESTATEMENT (SECOND) OF TORTS § 547 (1) (1977) (“[T]he maker of a fraudulent misrepresentation is not liable to another whose decision to engage in the transaction that the representation was intended to induce is not caused by his belief in the truth of the representation but is the result of an independent investigation made by him.”).

179. *See id.* § 551 (delineating the various instances in which a party may be exposed to liability due to a duty to disclose particular matters).

the law school intends or, at least expects, to induce students to rely upon their misrepresented data.<sup>180</sup> The non-disclosure or concealment of information, which the school knows students do not have access to may cause justifiable reliance, but only if, the school owed a duty to reveal such information.<sup>181</sup>

#### F. *Fiduciary Relationship*

Law schools may owe students a duty to disclose the truth about post-graduate employment and salary data because of a fiduciary relationship of both trust and confidence between the two parties.<sup>182</sup> Unfortunately, both courts and theorists have found it difficult for a fiduciary duty to broadly cover these relationships and maintain its narrow application.<sup>183</sup> “Much of the difficulty may lie in the terms courts have traditionally used to define fiduciary duties, such as ‘trust,’ or from the focus on the ‘vulnerability’ of the beneficiary.”<sup>184</sup> Ultimately “[c]ourts are quick to define the relationship between students and the university as purely contractual.”<sup>185</sup> “They do this to avoid having to determine the adequacy of education and to avoid impinging academic freedom.”<sup>186</sup> By taking this course of action, courts risk leaving the judiciary “without an adequate role to hold schools accountable when they fail to meet the reasonable expectations of students.”<sup>187</sup> Moreover, scholars have noted “[t]he lack of an adequate judicial role is troubling” because the institution is left without external accountability and the students are left without a judicial recourse.<sup>188</sup>

Nevertheless, it appears that in the last few years, courts have found “more legitimacy in fiduciary duty claims against universities and

180. *Cf. id.* § 551 (1) (“One who fails to disclose to another a fact that he knows may justifiably induce the other to act . . . in a business transaction is subject to” liability if a duty arises “to exercise reasonable care to disclose the matter in question”).

181. *See id.* § 551 (2) (providing four circumstances where a duty to disclose information arises between parties entering a contract).

182. *See id.* § 551 (2)(a) (noting the characteristics of a fiduciary relationship).

183. *See* Kent Weeks & Richard Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 183 (2002) (noting the struggle to expand the concept of fiduciary to include the relationship between a university and a student).

184. *Id.*

185. *Id.* at 180.

186. *Id.*

187. *Id.* (quoting Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 211–15 (2000)).

188. *Id.*

colleges.”<sup>189</sup> Indeed, law students and their respective law schools do not deal with each other at arm’s length.<sup>190</sup> Law students stand in a subservient position to faculty members and administrators because they surrender a degree of independence and place their trust and confidence in the educational institution.<sup>191</sup> Professor Alvin Goldman noted that the relationship between a student and a university shares elements of a fiduciary relationship.<sup>192</sup> Therefore, a fiduciary relationship between a law student and his or her law school can exist.<sup>193</sup>

To succeed with a duty of disclosure argument, the law student-plaintiffs must establish the existence of a fiduciary relationship.<sup>194</sup> There are four elements argued to establish a fiduciary relationship between a university and a student: dependency, value, surrendering independence, and “an automatic or habitual manipulation of the actions of the subservient party by the dominant party.”<sup>195</sup> First, law students depend on the university to help them gain their education, which establishes the element of dependency between the student and the school.<sup>196</sup> Second, law students seek guidance from the law school for managing student

189. *Id.* at 158.

190. *See id.* at 180 (holding students and universities do not deal with each other “at arms-length, and, even if they are, the universities typically include such significant disclaimers of liability and reserve rights to modify the ‘contract’ at will, that students are left with no promises at all”).

191. *See id.* at 158 (focusing on the existing dynamic where “[g]raduate student[s] . . . ‘surrender[ a degree] of independence,’ and place[] trust and confidence in faculty members or administrators” (quoting *Shapiro v. Butterfield*, 921 S.W.2d 649, 651–52 (Mo. Ct. App. 1999))).

192. Gregg L. Katz, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 365 (2006) (citing Alvin L. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 671 (1966)).

193. *See id.* at 365–66 (discussing the application of a fiduciary relationship in the student and university context); Kent Weeks & Richard Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 158 (2002) (developing the argument that a fiduciary relationship between a university and a student can exist). Nevertheless, a variety of claims have arisen “[w]ith the growth of social networking sites” because of online misrepresentations that are outside of what is understood as traditional, “but the law of misrepresentation has yet to provide a cause of action for such misrepresentations.” Geelan Fahimy, *Liable for Your Lies: Misrepresentation Law As a Mechanism for Regulating Behavior on Social Networking Sites*, 39 PEPP. L. REV. 367, 393 (2012). Thus, if students rely on the data they receive from school websites, it may pose another obstacle to proving fraud.

194. *See* RESTATEMENT (SECOND) OF TORTS § 551 (1977) (outlining when liability may be imposed for non-disclosure, which includes instances where a fiduciary relationship has been established).

195. *See* Kent Weeks & Richard Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 158–59 (2002) (addressing the four elements needed to establish a fiduciary relationship between a university and their students).

196. *Id.* at 158 (explaining “[o]ne of the key elements in fiduciary relationships is the dependence of the beneficiary on the fiduciary” where one party (the entrustor) becomes dependent on another (the fiduciary) for a certain service).

loans and other financial essentials while enrolled as a full-time student, fulfilling the element of value.<sup>197</sup> Third, as professional students, law students relinquish their independence to the school by agreeing to forgo a career in adulthood in exchange for undertaking the mandatory stipulations imposed by the law school.<sup>198</sup> Finally, the fourth element is established because law students, as the subservient party, devote their trust and confidence to the law school, the dominant party, to direct them on their academic and career ambitions through its faculty and administration.<sup>199</sup>

### G. Damages

A claim for misrepresentation must include damages.<sup>200</sup> Fraud that does not result in damages is not actionable.<sup>201</sup> Therefore, law students must prove the causal link between the defendant's misrepresentation and their damages to be successful.<sup>202</sup> However, proving the existence of damages is a difficult hurdle for law students to overcome due to the dynamics of tort law.<sup>203</sup> Because tort law is not easily described, a plaintiff will have a better chance at succeeding if they establish: (1) the damages they suffered, (2) the principle of their tort cause of action, and (3) the principles behind tort law that justify their line of reasoning.<sup>204</sup>

The good news for law students is that establishing a plaintiff's damages

197. *Id.* at 159 (recognizing students pay tuition, which can be considered a "thing of value," for universities to manage). It should also be noted that law schools generally have a separate financial aid office for law students.

198. *See id.* (emphasizing a necessary element of a fiduciary duty involves surrendering independence).

199. *See id.* ("Facts supporting a student's claim to a specific relationship based on trust can be used to establish that the student has reposed 'trust and confidence in the dominant party.'" (quoting *Shapiro v. Butterfield*, 921 S.W.2d 649, 651–52 (Mo. Ct. App. 1999))).

200. *See* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 13 (2010) ("[A] plaintiff may recover only if it is shown that the material misrepresentation factually and proximately caused damages.").

201. *See, e.g., Fladeboe v. Am. Isuzu Motors Inc.*, 58 Cal. Rptr. 3d 225, 242 (Cal. Ct. App. 2007) ("Deception without resulting loss is not actionable fraud.").

202. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2005) (discussing the relationship between misrepresentation and damages in cases of fraud); *Goehring v. Chapman Univ.*, 17 Cal. Rptr. 3d 39, 47 (Cal. Ct. App. 2004) (indicating there must be a causal connection between damages and the misrepresentation in fraud cases).

203. *See* VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 3 (2010) (discussing the absence of a central place to obtain all tort rules because the field is so dynamic).

204. *See id.* (mentioning the field of tort law cannot be described easily due to its dynamic nature and providing an overview of the establishment of liability in modern tort law); *see, e.g., Lentell*, 396 F.3d at 173 (examining the tort analogy's imperfections).

does not require an unreasonably high burden of proof.<sup>205</sup> Courts require that damages be proven merely by a preponderance of the evidence.<sup>206</sup> Unlike proving that the actual fraud occurred, which requires clear and convincing evidence, the plaintiff's burden of proof for damages in fraud is similar to proof of "damages caused by any other tort."<sup>207</sup>

### 1. Establishing Damages

In *Gomez-Jimenez v. New York Law School*, the judge's order dismissed the law students' case exemplifying the importance of establishing damages.<sup>208</sup> The claim failed in part because the law students failed to satisfy the requirement that each plaintiff suffered actual injury because of the misrepresentative statements.<sup>209</sup> Thus, the first obstacle law students must overcome is establishing actual damages as a result of the misrepresentation.

Although proximate cause is not always specified as an element of fraud, it is always incorporated into the damages requirement.<sup>210</sup> The proximate cause element equates to "reasonable foreseeability."<sup>211</sup> Therefore, foreseeability limits the scope of liability for consequential or special damages.<sup>212</sup>

The plaintiffs suing the law schools face the burden of proving their damages resulted from the misrepresentation.<sup>213</sup> Plaintiffs may seek

205. See, e.g., *Dizick v. Umpqua Cmty. Coll.*, 599 P.2d 444, 448 (1979) (discussing the burden of proof for proving damages in a misrepresentation case is a preponderance of the evidence, while the burden for proving the fraudulent misrepresentation is by clear and convincing evidence).

206. *Id.* ("[T]he trial court did not err in instructing that the extent of damages only had to be proved by a preponderance.")

207. *Id.* ("[O]nce a jury find[s] that the defendant made a fraudulent representation, there is no reason why the burden of proof of damages in fraud should be different from proof of damages caused by any other tort.")

208. See *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 847 (2012) (stating a plaintiff in a fraud case must satisfy all statutory requirements to recover for damages).

209. See *id.* (determining the damages alleged by plaintiffs were remote and speculative).

210. *Cf. Knepper v. Brown*, 195 P.3d 383, 387 (2008) ("[S]ome notion of proximate cause is subsumed under the last element in that abbreviated list: 'Damage to the plaintiff, resulting from [the plaintiff's] reliance [on defendant's representation].'").

211. See *id.* (acknowledging the element of proximate cause is equivalent to reasonable foreseeability).

212. *Cf. id.* at 387–88 ("[T]he scope of liability for an intentional, fraudulent misrepresentation depends on the nature of the misrepresentation, the audience to whom the misrepresentation was directed, and the nature of the action or forbearance, intended or negligent, that the misrepresentation justifiably induced.")

213. See, e.g., *Fladeboe v. Am. Isuzu Motors Inc.*, 58 Cal. Rptr. 3d 225, 242 (Cal. Ct. App. 2007) ("To recover for fraud, a plaintiff must prove loss proximately caused by the defendant's tortious conduct.")



damages and equitable relief which include, but are not limited to: punitive damages; disgorgement of tuition monies; “costs and expenses, including attorneys’ and experts’ fees; and any additional relief” that [a] court determines necessary.”<sup>214</sup> Despite the form it takes, “the injury or damage must not only be distinctly alleged[,] but its causal connection with the reliance on the representation must be shown.”<sup>215</sup> If the student-plaintiff satisfactorily proves the causal connection, not only are compensatory damages<sup>216</sup> recoverable, but so too are punitive damages.<sup>217</sup>

## 2. Compensatory Damages

There are two common ways compensatory damages are measured when plaintiffs sue for economic loss because of fraud: the Contract Rule, (or Benefit of the Bargain) and the Tort Rule (or Out of Pocket Expenses).<sup>218</sup> The Benefit of the Bargain rule measures the difference between the value actually received and the value if there had not been a misrepresentation.<sup>219</sup> The Out of Pocket rule measures the loss between what was paid for and what was received.<sup>220</sup>

As plaintiffs, the law students must consider the facts of their case to select the best method to calculate the damages in a lawsuit. The Benefit of the Bargain rule requires the two parties enter into a contract.<sup>221</sup> On the other hand, the Out of Pocket Rule requires the plaintiff to prove with

214. Class Action Complaint at 15, *MacDonald v. Thomas M. Cooley Law Sch.*, 2012 WL 2994107 (2012).

215. *Goehring v. Chapman Univ.*, 121 Cal. Rptr. 3d 39, 47 (App. Ct. 2004) (citing *Serv. by Medallion, Inc. v. Clorox Co.*, 52 Cal. Rptr. 2d 650, 662 (Cal. Ct. App. 1996)).

216. Compensatory damages are defined as “the damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.” RESTATEMENT (SECOND) OF TORTS § 903 (1979).

217. Punitive damages are defined as “damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.” *Id.* § 908. See generally *Tex. Civ. Prac. & Rem. Code Ann.* § 41.003 (West Supp. 2012) (evidencing one example that when fraud is established, punitive damages are recoverable).

218. See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 74 (2010) (proclaiming the primary ways in which to calculate compensatory damages in situations of economic loss due to fraud).

219. See *id.* (explaining one way to measure damages for fraud).

220. See *id.* (detailing the advantages of one method for measuring damages for fraud).

221. Cf. *id.* (“[T]he victim of a misrepresentation never entered into a contract, so it makes little sense to talk about ‘benefit of the bargain.’”).

reasonable certainty what the bargain was worth.<sup>222</sup> Courts allow some flexibility in measuring damages to compensate a plaintiff for a loss suffered when an alleged fraud does not concern a sale of property.<sup>223</sup>

### 3. Benefit of the Bargain Rule

Law students could employ the Benefit of the Bargain rule, based on their implied contract with the law school, to determine damages.<sup>224</sup> As mentioned previously, this rule is measured by the difference between the value actually received and the amount promised had there not been a misrepresentation.<sup>225</sup> In this situation, measuring the value actually received and the amount promised is very difficult to determine.

In the New York Law School case,<sup>226</sup> the students used the Benefit of the Bargain rule.<sup>227</sup> The students asked for the difference between the true value of the legal education they received and the inflated value they paid.<sup>228</sup> Unfortunately, this difference is not easily calculated.

Law students must prove they did not receive the value they initially bargained for.<sup>229</sup> Although education is valuable, calculating a specific

222. *See id.* (discussing the requirements for calculating damages in this way); *see also* Goehring v. Chapman Univ., 121 Cal. Rptr. 3d 39, 47 (Cal. Ct. App. 2004) (“Damage[s] to be subject to a proper award must be such as follows the act complained of as a legal certainty.”).

223. *Dizick v. Umpqua Cmty. Coll.*, 599 P.2d 444, 449 (1979) (“When the alleged fraud does not involve the sale of property, the proper measure of damages must be flexible to compensate the plaintiff for whatever loss he has suffered.”).

224. *Cf. Hazel Glenn Beh, Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 197–98 (2000) (“The complex relationship between the student and the university is largely implied rather than explicitly stated, thus making it difficult for courts to determine the contractual terms of the apparent ‘contract.’”); *see also* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 74 (2010) (discussing the advantages and disadvantages of methods to calculate damages for claims of fraud).

225. *See* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 74 (2010) (defining the Benefit of the Bargain rule in terms of requirements and limitations where there are economic losses for fraud).

226. *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 847 (2012).

227. *See id.* (dissecting the plaintiff’s argument “that a NYLS degree is worth less than what NYLS allegedly represented it to be in its marketing materials”).

228. *See id.* (requesting the court measure damages “as the difference in value between ‘a degree’ likely to draw a high paying and full-time job, to a degree leading to limited employment opportunities”).

229. *See* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 77 (2010) (reiterating the principle that a party must establish what they bargained for was not what they received). *See generally Gomez-Jimenez*, 943 N.Y.S.2d 834 (analyzing a case where law students were unable to prove they received less than the value promised).

amount is difficult.<sup>230</sup> There is no way of knowing the specific value of a professional education or the level of value the education will bring in the future.<sup>231</sup>

Despite this, students could attempt recovery through Benefit of the Bargain rule by using hard numbers to evaluate the damage. In such an evaluation, students seek the difference between the value promised and the actual value received from a legal education. As an example, student-plaintiffs claim Benefit of the Bargain damages calculated as the difference between the value promised—equivalent to the total amount a law graduate will pay over the life of a twenty-five year amortized loan—and value received—the tuition cost of attending the law school: if the tuition is \$50,000 each year for three years equaling \$150,000 total, damages for the difference paid over twenty-five years with a 7% interest rate, results in \$357,229.<sup>232</sup> Benefit of the Bargain damages total \$207,299, while the student is unable to recover the \$150,000 tuition cost for the education they received.<sup>233</sup> “[T]he measure of damages in a fraud case is the actual amount of the plaintiff’s loss that directly and proximately results from the defendant’s fraudulent conduct.”<sup>234</sup>

Because law students cannot return their education, student-plaintiffs have a better chance of proving their actual loss was directly and proximately caused by the misrepresentations made by the school.

230. See C. Peter Goplerud, III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1088 n.30 (1997) (noting “education . . . has value, although the exact measure is difficult to calculate” and the cost of tuition does not indicate value because it varies among schools).

231. See Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 WOMEN’S RTS. L. REP. 109, 117 (1996) (highlighting the difficulty in predicting the future value of a professional education because it depends on factors difficult to measure). See generally ROBERT H. MILLER, LAW SCHOOL CONFIDENTIAL (2000) (detailing the weight of numerous factors for law school decisions).

232. See William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Can Will It Last if Law Grads Can’t Pay Bills?*, A.B.A. J. (Jan. 1, 2012, 6:20 AM), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_la\\_w\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_la_w_grads_cant_pay_bills/) (calculating the amount law students actually owe in debt).

233. The Benefit of the Bargain rule requires damages be caused by the fraud. See *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 221 n.24 (Tex. 2011) (noting recovery for fraud requires a showing of causation). Thus, a Benefit of the Bargain damages calculation must decrease recovery for any amount not proximately and directly caused by the fraud. See *id.* (noting both proximate and direct causation are requirements for a fraud claim). In effect, student-plaintiffs are precluded from recovering any damages caused by their own ignorance—as when students fail to account for the implications of long-term loan amortizations—because those damages were not caused by any alleged fraud. See *id.* (noting that proving direct and proximate causation is a prerequisite to recovery for fraud).

234. *Id.* (discussing the plaintiff’s actual loss in the measurement of damages for fraud (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 680 (Tex. 1996) (internal quotation marks omitted))).

Specifically, students from lower-ranked schools are not receiving the same salary rates and employment opportunities as those graduating from Ivy League schools, despite the lesser-ranked schools boasting identical post-graduate employment data. The facts of this scenario indicate students can seek damages through the Benefit of the Bargain method—a substantial amount of damages—rather than a complete refund.

#### 4. Out of Pocket Rule

Another method for calculating damages in this type of lawsuit is the Out of Pocket rule, which measures the loss between what was paid for and what was received.<sup>235</sup> The Out of Pocket rule requires the plaintiff prove with reasonable certainty what the bargain was worth.<sup>236</sup> However, it may be challenging for student-plaintiffs to establish bargained-for-value.

Similar to measuring Benefit of the Bargain damages, calculating a specific value for education is difficult.<sup>237</sup> The Out of Pocket rule can use specific numbers to reach a definitive value, such as cost of tuition. At law schools—where law students' tuition contributes to more than one-third of the university budget, and enrollment accounts for just over 25% of the university<sup>238</sup>—students could seek the value of their tuition and the amount the university spends to fund the law school program. Law students should request refunds for 30% of the tuition revenues the university uses to subsidize other fields of study.<sup>239</sup>

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235. See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 74 (2010) (defining Out of Pocket damages as “an amount equivalent to the difference between what the plaintiff paid and what the plaintiff received”).

236. See *Goehring v. Chapman Univ.*, 121 Cal. App. 4th 353, 364 (Cal. Ct. App. 2004) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Agnew v. Parks*, 343 P.2d 118 (Cal. Ct. App. 1959))); VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 74 (2010) (observing that to make a strong case under the Benefit of the Bargain rule, a plaintiff must be able “to prove with reasonable certainty what the bargain was worth”).

237. See C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1088 n.30 (1997) (discussing the difficulty in calculating education's value).

238. See Karen Sloan, *Law School 'Tax' at Baltimore More Than Twice What University Claimed*, LEXISNEXIS (Feb. 28, 2012), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “Law School ‘Tax’ at Baltimore More Than Twice What University Claimed”) (recognizing at Boston University, a substantial amount of law school funds are used for the university's indirect costs while the law student population is far less than one-third of the university students).

239. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market->

For example, if tuition “generated an additional \$1.45 million in revenue . . . [and] only about \$80,000 . . . went back to the law school,”<sup>240</sup> then student-plaintiffs could ask for the difference between the \$80,000 spent to deliver the legal education and the \$1.45 million their tuition generated.<sup>241</sup> Under the Out of Pocket rule, a student-plaintiff can claim its portion of \$1.37 million in damages for paying tuition that did not contribute to the value of his or her education.<sup>242</sup>

### 5. Punitive Damages

Courts award punitive damages as a punishment against the defendant for wrongful acts.<sup>243</sup> The purpose of punitive damages is to deter persons and businesses from committing wrongful acts.<sup>244</sup> In some cases “an award of nominal damages . . . is enough to support a further award of punitive damages, when a tort . . . is committed for an outrageous purpose, but no significant harm . . . result[s].”<sup>245</sup> Although a great amount of actual harm may not be required for punitive damages, an award for nominal damages can limit the punitive damages a plaintiff may recover.<sup>246</sup> Generally, courts limit the amount of punitive damages so that the award does not exceed “a single-digit ratio between punitive and compensatory damages . . . .”<sup>247</sup>

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weakens-tuition-rises.html?pagewanted=all (acknowledging law schools give a weighty portion of tuition revenues to their respective universities for programs that do not collect as much revenue).

240. Karen Sloan, *Law School 'Tax' at Baltimore More Than Twice What University Claimed*, LEXISNEXIS (Feb. 28, 2012), <http://www.lexis.com/> (subscription needed) (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Terms & Connectors” tab and search “Law School ‘Tax’ at Baltimore More Than Twice What University Claimed”).

241. Under this proposition, it is presumed the law students paid university fees that contributed to the general maintenance and upkeep of the university, which should be part of every student’s tuition fees.

242. Under this rule, we assume the schools charged fees for general maintenance and upkeep of the university grounds against all students, paid in conjunction with their tuition. However, on average, this kind of fee accounts for only 10% of a law school’s tuition rate. *See e.g., id.* (providing an example of the disproportionate and the minimal amount of the law schools’ revenue that benefits the law school itself—just over 11% while the remaining law-school-generated funds are used for non-law-school purposes at the university level).

243. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979) (noting one function of punitive damages).

244. *Id.* (noting the second “purpose[] of awarding punitive damages . . . [is] to discourage [the tortfeasor] and others from similar conduct in the future”).

245. *Id.* cmt. c.

246. *See* State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (describing the limits to punitive damages, specifically noting punitive damages amounting to an egregious disparity between the compensatory and punitive damages violate due process).

247. *Id.*

Punitive damages “blend[] together the interests of society and the aggrieved individual, and give[] damages not only to recompense the sufferer, but to punish the offender.”<sup>248</sup> “This rule seems [to be] . . . the general jurisprudence of this country.”<sup>249</sup> Thus, to recover punitive damages, law student-plaintiffs should emphasize the extent of harm caused by the law school’s perpetrated fraud in reporting inflated post-graduate statistics, which encourages a demand of applicants for their school.

Outstanding student loan debt is rapidly rising.<sup>250</sup> It “now exceeds credit card debt,”<sup>251</sup> and recent reports reveal student loan debt has reached one trillion dollars.<sup>252</sup> “Student loan debt could turn into another crisis for the economy, according to the president of the National Association of Consumer Bankruptcy Attorneys.”<sup>253</sup>

The law school itself is in the best position and has the greatest incentive to lift a heavy economic weight off of society.<sup>254</sup> By ceasing the reallocation of funds, law schools can end the practice of overcharging students in tuition and stop compensating for other programs at a university.<sup>255</sup> It has been suggested “there isn’t one big bubble, but many

248. *Graham v. Roder*, 5 Tex. 141, 149 (1849, no writ).

249. *Id.*

250. See Associated Press, *Will Student Loans Be the Next Bubble to Burst?*, N.Y. L.J. (Nov. 8, 2011), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202529477022&slreturn=20120815005919> (“The volume of outstanding student loans is rising rapidly and now exceeds credit card debt, though recent reports of it crossing \$1 trillion may be premature. Moody’s Analytics puts the number at around \$750 billion.”).

251. *Id.*

252. See *id.* (relaying a recent report estimated the aggregate has surpassed the \$1 trillion mark, but noting the report may be premature, especially in light of other reports suggesting a number about 25% lower); see also Elie Mystal, *If Lawsuits Fail, Unemployed Law Students Still Have the Self-Immolation Option*, ABOVE THE LAW (Jan. 24, 2012, 3:49 PM), <http://abovethelaw.com/2012/01/if-lawsuits-fail-unemployed-law-students-still-have-the-self-immolation-option/> (reporting the vast population of unemployed law graduates facing steep loan repayments); David Segal, *For Law School Graduates, Debts If Not Job Offers*, N.Y. TIMES, Jan. 9, 2011, at BU1, available at <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&r=0> (highlighting the burden of student loan debt in a difficult job market).

253. Debra Cassens Weiss, *Bankruptcy Lawyers Warn of Looming Student Loan ‘Debt Bomb’*, A.B.A. J. (Mar. 12, 2012, 7:30 AM), [http://www.abajournal.com/news/article/bankruptcy\\_lawyers\\_warn\\_of\\_looming\\_student\\_loan\\_debt\\_bomb/](http://www.abajournal.com/news/article/bankruptcy_lawyers_warn_of_looming_student_loan_debt_bomb/).

254. See Associated Press, *Will Student Loans Be the Next Bubble to Burst?*, N.Y. L.J. (Nov. 8, 2011), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202529477022&slreturn=20120815005919> (purporting unless schools control their cost of attendance, post-graduate pay premiums could fall to the point where “a degree is no longer worth it”).

255. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (acknowledging law schools distribute up to 30% of tuition revenue to fund general university programs that collect far less revenue).

smaller but significant ones stretching across different sectors ... [including] lawyers who borrow six figures for law school and can't find a job."<sup>256</sup>

Law students contribute to 5% of student loan borrowers who owe more than \$75,000.<sup>257</sup> In 2010, reports indicated law students on average owe more than \$98,000 upon graduation in student loan debt, and many graduated with more than \$120,000 in student loan debt.<sup>258</sup> During the corresponding time period, American law students borrowed \$3.7 billion to pay for their legal education.<sup>259</sup> Considering these steep numbers, reports of some law schools drawing more than 30% of the tuition paid by law students to fund other university programs are tragic.<sup>260</sup>

In order to recover punitive damages that a court agrees is not grossly excessive or arbitrary and which will survive an unconstitutional argument on appeal, the student-plaintiffs must satisfy three guideposts established in *Bunton v. Bentley*.<sup>261</sup> Student-plaintiffs will need to make a showing of "(1) reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."<sup>262</sup>

## 6. Economic Loss Rule

The Economic Loss Rule applies in cases where negligence causes purely economic losses.<sup>263</sup> This rule remains unsettled because it is

256. Associated Press, *Will Student Loans Be the Next Bubble to Burst?*, N.Y. L.J. (Nov. 8, 2011), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202529477022&slreturn=20120815005919>.

257. See Jordan Weissmann, *The 1% of the Student Debt Crisis: Owning \$150,000 in Loans*, ATLANTIC (Mar. 23, 2012 12:35 PM), <http://www.theatlantic.com/business/archive/2012/03/the-1-of-the-student-debt-crisis-owing-150-000-in-loans/254973/> (discussing the percentage anomaly for student loans \$75,000 and above).

258. William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, A.B.A. J. (Jan. 1, 2012, 6:20 AM), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/).

259. *Id.*

260. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (acknowledging law schools provide a healthy percentage of their income to the general university fund for less revenue-generating programs).

261. *Bunton v. Bentley*, 176 S.W.3d 21 (Tex. App.—Tyler 2005, pet. denied).

262. *Id.* at 23.

263. See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 5 (2010) (discussing economic loss and the applicable law between tort and contract).

interpreted along a spectrum of varying definitions.<sup>264</sup> On one end, “[T]ort law offers no redress for negligence that causes only economic losses unaccompanied by personal injuries or property damages.”<sup>265</sup> Alternatively, some jurisdictions—including Texas—recognize “the ‘economic loss’ rule has never been a general rule of *tort* law; it is a rule in *negligence* and *strict product liability* and . . . [p]ure economic loss is commonly recoverable in certain torts.”<sup>266</sup> In fact, Texas recognizes that pure economic loss is recoverable for negligent misrepresentation claims and fraud.<sup>267</sup> Therefore, after student-plaintiffs overcome hurdles imposed by the economic loss rule, they will proceed to the next step: proving damages.

### III. CONCLUSION

#### A. *The Principle Behind Tort Law*

On occasion, “[T]ort law is the vehicle of legal redress for victims of . . . non-tangible economic injuries.”<sup>268</sup> It provides compensation or other types of relief to diverse forms of injuries and damages.<sup>269</sup> The changing ideas and concerns of what duties two people or entities owe one another give rise to the constant change in legal status of new and reformed torts recognized by law.<sup>270</sup>

As a byproduct, societal developments result in novel harms and losses, in turn causing ideas and views to change, thereby allowing recognition of

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264. See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534–36 (2009) (discussing varying interpretations of the economic loss rule, noting distinct applications and highlighting the lack of an answer as to whether there is any unitary theory sufficiently explaining all applications of the rule).

265. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 5 (2010).

266. William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the Economic Loss Rule*, 23 TEX. TECH. L. REV. 477, 492 (1992).

267. See *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 418–19 (Tex. 2011) (noting Texas courts allow recovery for pure economic loss for tort claims, including negligent misrepresentation, fraud, legal malpractice, and nuisance, and dismissing arguments that the economic loss rule precludes these types of claims as oversimplifying the rule while ignoring the aforementioned precedent).

268. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 3 (4th ed. 2009).

269. See *id.* (describing victim compensation for “physical injury or damage to tangible property” as well as “emotional distress, impairment of reputation, and non-tangible economic injuries”).

270. See *id.* (discussing the fluid nature of tort law as constantly reacting in reflection of societal duties).



new torts.<sup>271</sup> When unprecedented developments cause unprecedented damages and injuries, lawsuits seeking compensation from tortfeasors naturally follow.<sup>272</sup> Lawsuits claiming damages recognized by new torts “offer a public mechanism for . . . forcing innovators to internalize the costs of their endeavors.”<sup>273</sup>

Lawsuits following progressive societal shifts play three key roles in maintaining a civil society. First, they create incentives to measure the cost of future harm and hold the responsible party liable<sup>274</sup> so that in the future, other parties in analogous positions will be less likely to cause the same or similar harm to others.<sup>275</sup> Second, lawsuits both reduce incentives to engage in the damage-causing activity and increase precautionary actions.<sup>276</sup> This type of litigation also provides a check and balance on “market excesses by requiring persons who benefit from selling goods or services to bear the burden of incidental losses or at least spread those losses broadly among those who enjoy the goods or services.”<sup>277</sup> Even though damages may be difficult to prove, there is always hope that changing ideas and notions of what duties two people owe each other will give rise to a new or reformed tort recognized by the law.<sup>278</sup>

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271. *See id.* at 5 (acknowledging tort law changes as necessitated by societal needs: “Innovation is frequently followed by litigation because new or expanded practices often cause harm” (quoting Vincent R. Johnson, *Standardized Test, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 668–70 (2007))).

272. *See id.* at 3 (“[I]t has never been of much use to contend that *merely* because an action is new it cannot be brought . . . . If the judges thought a new remedy was necessary, they invented it . . . .” (quoting Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 4–5 (1927))); *see also* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 81 (2010) (noting the extensive and flexible nature of tort law, by which torts often overlap and threaten to overwhelm other areas of law).

273. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 3 (4th ed. 2009) (quoting Vincent R. Johnson, *Standardized Test, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 668–70 (2007)).

274. *See id.* at 7 (“[T]ort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents.”).

275. *See id.* at 5 (explaining when a loss occurs as a result of a new innovation, ensuing lawsuits create incentives for similarly situated parties to implement measures that reduce future harm).

276. *See id.* (noting the lawsuits’ deterrent effect of encouraging innovators to reduce destructive activities or enhance precautionary procedures).

277. *Id.* (quoting Vincent R. Johnson, *Standardized Test, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 668–70 (2007)).

278. *See id.* at 3 (discussing the changing dynamics of tort law and the varying duties that people owe to each another).

### 1. Policy Arguments

According to several hundred years of precedent, modern tort law is viewed as the implementation of policy.<sup>279</sup> This view takes for granted the idea that judges are making and implementing policy decisions when they rule on tort issues.<sup>280</sup> The principles guiding American tort law exist today not because they are necessarily right, but because they are so rooted in our history.<sup>281</sup> The formation of tort law emerged over a course of time when policy concerns were quite different than they are today.<sup>282</sup> While many issues remain the same, some societal concerns have changed dramatically.<sup>283</sup>

One significant change facing America is the economy.<sup>284</sup> “[A] growing chorus of economic observers warn[] that student-loan debt could become a significant albatross on the overall U.S. economy.”<sup>285</sup> In light of this recent challenge, S&P warns the student loan bubble may be next to collapse.<sup>286</sup> Student loan “debt now outpaces credit-card debt, approaching \$1 trillion for the first time.”<sup>287</sup> Thus, the vast contours

279. *See id.* at 10 (observing the idea of judges as policy makers is taken for granted in modern society).

280. *See id.* (pondering the notion of judges serving as policy makers in modern society).

281. *See id.* at 4 (explaining before legislative lawmaking became popularized, judges were allowed to define the law when disputes were placed before them using “a disciplined process of legal analysis and reasoning,” and even today most members of the legal profession “acknowledge that the process involves considerable discretion”).

282. *See id.* at 10 (observing the change in policy concerns relating to tort law over several hundred years).

283. *See id.* at 7 (“[T]he contours of [tort law] have been shaped by the pursuit of a variety of ends . . . [but] there is no comprehensive list of relevant public policy considerations. Yet some arguments have been invoked with such regularity that their historical significance cannot be ignored.”).

284. *See* Debra Cassens Weiss, *Bankruptcy Lawyers Warn of Looming Student Loan ‘Debt Bomb’*, A.B.A. J. (Mar. 12, 2012, 7:30 AM), [http://www.abajournal.com/news/article/bankruptcy\\_lawyers\\_warn\\_of\\_looming\\_student\\_loan\\_debt\\_bomb/](http://www.abajournal.com/news/article/bankruptcy_lawyers_warn_of_looming_student_loan_debt_bomb/) (“Student loan debt could turn into another crisis for the economy . . .”).

285. Tyler Kingkade, *S&P Warns Student Loans May Be the Next Bubble to Burst in US Economy*, HUFFINGTON POST (Feb. 9, 2012 5:02 PM), [http://www.huffingtonpost.com/2012/02/09/sp-warns-student-loans-bubble-burst\\_n\\_1266209.html](http://www.huffingtonpost.com/2012/02/09/sp-warns-student-loans-bubble-burst_n_1266209.html).

286. *See id.* (“The problem: colleges and universities are hamstringed with lower endowments, while students have increasingly lower prospects of ever paying back their loans.”).

287. *Id.* *See generally* Carl Bialik, *Job Prospects for Law Grads? The Jury’s Out*, WALL ST. J. (Mar. 17, 2012, 12:45 AM), <http://online.wsj.com/article/SB10001424052702304692804577283691965596610.html>; David Segal, *For Law School Graduates, Debts If Not Job Offers*, N.Y. TIMES, Jan. 9, 2011, at BU1, *available at* [http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&_r=0) (highlighting the burden of student loan debt in a difficult job market); David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, *available at* <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all> (reporting the expensive cost of a U.S. legal education).

shaping the field of tort law command a “degree of support as being a socially desirable objective” and may support claims by law students seeking economic damages from law schools for misrepresentations.<sup>288</sup> “[C]ourts can even now, if they think fit, enlarge the list” of actionable torts.<sup>289</sup>

## 2. Judiciary's Role in Policy Making

Indeed, it is the legislature's duty to function as the policy-making agency.<sup>290</sup> Unarguably, judges generally lack an extensive background in economics or statistics and are not equipped to “conduct[] even the most basic empirical research” on an issue facing their court.<sup>291</sup> Nonetheless, since the holding of *Marbury v. Madison*<sup>292</sup> in 1803, settled law dictates it is “the province and duty of the judicial department to say what the law is.”<sup>293</sup> Thus, judicial action may be the best remedy for states to address the issue of law schools misrepresenting their post-graduates' earning capacity. The judiciary is in an ideal position to recognize the law students' tort action and halt future misrepresentations, to reduce further hard to the economy.

Federal student loans are governed by federal law, and therefore, must comply with laws established by the United States Department of Education. It is well-settled that state legislatures are preempted from creating laws that conflict with federal law.<sup>294</sup> Conversely, judicial action at the state level may provide the best remedy by targeting schools that contribute to the financial crisis when they misrepresent post-employment figures and induce students to borrow more than they can pay.<sup>295</sup> After

288. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 7 (4th ed. 2009).

289. *Id.* at 3 (quoting Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 4–5 (1927)).

290. *See id.* at 10 (highlighting the legislature's duty to create and implement policy).

291. *See id.* (suggesting judges are poor policy makers because they lack the ability to conduct empirical research and lack knowledge in the arena of economics and statistics).

292. *Marbury v. Madison*, 5 U.S. 137 (1803).

293. *Id.* at 177. *See also* Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 40–42 (2002) (discussing the appropriate role the judiciary should play in policy-making).

294. *See* U.S. CONST. art. VI, cl. 2. (providing federal law is the “supreme Law of the Land”); *see also* *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 516 (1992) (focusing on the dynamics of federal pre-emption).

295. *See* Tyler Kingkade, *SeP Warns Student Loans May Be the Next Bubble to Burst in US Economy*, HUFFINGTON POST (Feb. 9, 2012, 5:02 PM), [http://www.huffingtonpost.com/2012/02/09/sp-warns-student-loans-bubble-burst\\_n\\_1266209.html](http://www.huffingtonpost.com/2012/02/09/sp-warns-student-loans-bubble-burst_n_1266209.html) (noting a challenge to the American economy

all, “[T]ort law is a creature of the state, rather than the national government.”<sup>296</sup> Considering the pervasive acknowledgement that the judiciary “can encourage a strong legislative response . . . to implement costly education reform measures,”<sup>297</sup> and the ability of courts to expand the list of actionable torts,<sup>298</sup> the best remedy to the current misrepresentation issue, which greatly affects the student loan debt weighing on the American economy, is found in the judiciary.

Unfortunately, if courts fail to implement policy and address the fraud perpetrated by law school misrepresentation, student-plaintiffs will continue to suffer injury and face obstacles in establishing their tort cases. Fraud that does not result in damages is not actionable,<sup>299</sup> and establishing each element of this type of fraud is very difficult. Without judicial action motivated by policy arguments, student-plaintiffs face an uphill battle with the task of establishing each element for their tort—resulting in a grim outlook for students’ chances of recovery.

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when many students are misled and induced to accept additional student loans and unrealistic expectations of future earnings).

296. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 4 (4th ed. 2009).

297. Quentin A. Palfrey, *The State Judiciary’s Role in Fulfilling Brown’s Promise*, 8 MICH. J. RACE & L. 1, 43 (2002) (discussing the state judiciary’s policy-making role in education reform).

298. See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 3 (4th ed. 2009) (quoting Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 4–5 (1927)) (discussing the court’s ability to shape tort law by recognizing new tort actions).

299. *Fladeboe v. Am. Isuzu Motors Inc.*, 58 Cal. Rptr. 3d 225, 242 (Cal. Ct. App. 2007) (“Deception without resulting loss is not actionable fraud.” (quoting *Serv. by Medallion, Inc. v. Clorox Co.*, 52 Cal. Rptr. 2d 650 (Cal. Ct. App. 1996))).