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Redeeming a Lost Generation: "The Year of Law School Litigation" and the Future of the Law School Transparency Movement

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Redeeming a Lost Generation: "The Year of Law School Litigation" and the Future of the Law School Transparency Movement

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> What we have here is [a] powder keg, and if law schools don't solve this problem, there will be a day when . . . some plaintiff's lawyer[] shows up and says, "This looks like illegal deception."[1]

INTRODUCTION

For years, law professors,[2] journalists,[3] bloggers,[4] and even the American Bar Association (ABA)[5] have warned prospective law students about the declining

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1. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1 [hereinafter Segal, *Is Law School a Losing Game?*] (quoting Professor William Henderson). Professor Henderson's prediction appeared in the first of several much-discussed articles by Segal about the state of American legal education. *See, e.g.*, David Segal, *Behind the Curve*, N.Y. TIMES, May 1, 2011, at BU1 [hereinafter Segal, *Behind the Curve*]; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1 [hereinafter Segal, *Law School Economics*]; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1. Segal's articles have been well received by many with an interest in American legal education, but some believe the articles exaggerate the problems facing American law schools today. *See, e.g.*, David Lat, *Law School Accreditation: What Is To Be Done?*, ABOVE THE L. (Nov. 13, 2011, 3:22 PM), http://abovethelaw.com/2011/11/law-school-accreditation-what-is-to-be-done/ (indicating that Dean David Yellen of the Loyola University Chicago School of Law "referred to the hard-hitting articles written by David Segal for the New York Times, which cast some law schools in a bad light, as 'despicable' and lacking in nuance").

2. *See, e.g.*, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 136–44 (2012); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 496 (2004) ("The golden era of American legal education is drawing to a close. Loans will be more closely monitored. Family resources will be tested. Fewer opportunities will be available. Salaries will be depressed. Greater numbers of graduates will compete for fewer slots in the market."); Herwig Schlunk, *Mamas Don't Let Your Babies Grow Up to Be . . . Lawyers* 10–14 (Vand. L. & Econ., Working Paper No. 09-29, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497044 (arguing that, due to opportunity cost, going to law school can be a poor economic investment even for some students who do well at elite law schools); Andrew P. Morriss & William D. Henderson, *The New Math of Legal Education*, YOUNG LAW., July 2008, at 1 ("The current trends in tuition and starting salaries at large firms are unsustainable in the long term. In the short term, these trends are leaving more and more law school graduates worse off economically than if they had never attended law school."). *But see, e.g.*, Cynthia E. Nance, *The Value of a Law Degree*, 96 IOWA L. REV. 1629 (2011) (arguing that the relative affordability of public law schools makes a law degree from such an institution a good value).

3. *See, e.g.*, Karen Sloan, *Going to Law School? Proceed With Caution*, NAT'L L.J. (Dec. 14, 2009), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202436393903&sl

value proposition of attending law school in the United States. However, until relatively recently, those admonitions seemed to fall mostly on deaf ears. Even as law school tuition grew more expensive[6] and legal employment became harder to find,[7] students continued to flock to law schools in ever-increasing numbers.[8] Indeed, because "[l]aw school has traditionally been thought of as a safe harbor in a poor economy,"[9] applications to law schools actually *increased* during the recent recession,[10] even as the nation's largest law firms shed almost 10,000 attorney positions.[11]

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return=20120823114029 ("[T]he rising cost of legal education and the dearth of jobs available to new graduates is prompting more people to urge prospective law students to think twice before they write their first tuition check.").

4. *See* Lucille A. Jewel, *You're Doing it Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession,* 12 MINN J.L. SCI. & TECH. 239, 263–64 (2011) ("The law school scam blogging movement is a community of mostly lower-tier law school graduates who . . . argue that law schools 'scammed' them into borrowing excessive sums of money to attend law school by painting . . . a picture that does not accurately reflect the placement and salary statistics for a school's graduates.").

5. *See* ABA COMM'N ON THE IMPACT OF THE ECON. CRISES ON THE PROFESSION AND LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL 1 (2009) ("Far too many law students expect that earning a law degree will solve their financial problems for life. In reality, however, attending law school can become a financial burden for law students who fail to consider carefully the financial implications of their decision.").

6. *See* ABA Section of Legal Educ. & Admissions to the Bar, *Law School Tuition 1985–2011*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf. During the last three decades, the cost of law school tuition at both public and private law schools has gone up at between double and triple the general rate of inflation. Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 5 (2008). However, more than half of all students receive some form of discount on the published tuition price. 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, 6:20AM), http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/.

7. For example, across the country, there were about twice as many people who passed the bar in 2009 as there were job openings for lawyers. Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES ECONOMIX BLOG (June 27, 2011, 11:35 AM), http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/?partner=rss&emc=rss.

8. *See* ABA Section of Legal Educ. & Admissions to the Bar, *Enrollment and Degrees Awarded 1963–2011*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf.

9. TAMANAHA, *supra* note 2, at 136.

10. *See LSAC Volume Summary*, LSAC.ORG, http://www.lsac.org/LSACResources/Data/LSAC-volume-summary.asp. However, the correlation between rising unemployment and rising law school applications was much weaker during this recession than in previous ones. TAMANAHA, *supra* note 2, at 160–61.

11. David Brown, *The NLJ 250: Editor's Note*, NAT'L L.J. (Apr. 25, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546887393. The Great Recession clearly had a very negative effect on the legal employment market, but the legal profession has also undergone a "paradigm shift," which means that although current law students can

Recently, law school graduates have faced the worst entry-level legal employment market in half a century,[12] and while many of these graduates have nevertheless managed to secure good positions, others have not been so fortunate. For thousands of unemployed and underemployed recent law school graduates—especially those who had to borrow heavily to pay for law school—the decision to attend law school has proved financially disastrous.[13] Many in this "Lost Generation" of law students may never enjoy the opportunity to practice law in a meaningful way, much less obtain any significant return on the time and (usually borrowed) money they invested in their legal education.[14]

Given the vast discrepancy between the employment prospects these students anticipated and the employment opportunities they actually enjoy, many feel that their law schools misled them about the economic value of the education those schools provide.[15] Believing their alma maters have caused them legally cognizable injuries, alumni of at least fifteen law schools have even filed purported class-action lawsuits seeking tens of millions of dollars in damages for those alleged injuries.[16] Although the true significance of these lawsuits cannot be fully appreciated at this time, the lawsuits have already contributed to the goals of the law school transparency movement, and those with an interest in legal education will certainly follow the lawsuits with great interest. This Note will explore the impact of this new type of class-action litigation by focusing primarily on three lawsuits that were filed in 2011—*Alaburda v. Thomas Jefferson School of Law*,[17] *Gomez-Jimenez v. New York Law School*,[18] and *MacDonald v. Thomas M. Cooley Law School*.[19] Specifically, this Note argues that class-action lawsuits against individual law schools might usefully supplement other potential methods for persuading law schools to heed the calls for increased transparency, and will continue to serve a purpose even if the legal education industry adopts—or is made to adopt—additional reform in that area.

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hope for improvement in the legal employment market, the "golden age" of BigLaw hiring is likely over. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011, 4:40 AM), http://www.abajournal.com/magazine/article/paradigm_shift/.

12. James G. Leipold, *The Changing Legal Employment Market for New Law School Graduates*, B. EXAMINER, Nov. 2010, at 6, 6.

13. *See supra* notes 6–8 and accompanying text.

14. The term "Lost Generation" has been used by some to refer to the law school classes of 2008, 2009, and 2010. *E.g.*, Lindsey Skerrett, *The Lost Generation*, JD RISING (May 31, 2011), http://minnlawyer.com/jdr/2011/05/31/the-lost-generation/.

15. *E.g.*, Leslie Kwoh, *Irate Law School Grads Say They Were Misled About Job Prospects*, STAR-LEDGER (Aug. 15, 2010, 9:30 AM), http://www.nj.com/business/index.ssf/2010/08/irate_law_school_grads_say_the.html ("As they enter the worst job market in decades, many young would-be lawyers are turning on their alma maters, blaming their quandary on high tuitions, lax accreditation standards and misleading job placement figures.").

16. *See infra* notes 102–48 and accompanying text.

17. Complaint, Alaburda v. Thomas Jefferson Sch. of Law, No. 37-2011-00091898-CU-FR-CTL, 2011 WL 2109327 (Cal. Super. Ct. May 26, 2011).

18. Gomez-Jimenez v. New York Law Sch., 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012).

19. MacDonald v. Thomas M. Cooley Law Sch., No. 11-cv-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012).

This Note is divided into four Parts. Part I briefly describes why, despite recent ABA reforms, there is still a need for law schools to be more transparent about the employment outcomes of their recent graduates. Part II describes a few methods by which law schools may be pressured to improve their transparency in this area if the ABA fails to take additional action in a timely fashion. With the context provided by Parts I and II, Part III uses the three above-mentioned cases, along with several others that were filed in 2012, to explore the special role this relatively novel type of class-action litigation may come to fill within the broader law school transparency movement. Some of the immediate effects of the lawsuits are discussed in Part IV.

I. THE LAW SCHOOL TRANSPARENCY PROBLEM

With the benefit of hindsight, many recent law school graduates can now see clearly that their decision to go to law school was a mistake.[20] While some of these graduates certainly could have—and should have—anticipated that law school might be a poor investment,[21] others probably could not have realized ex ante just how financially ruinous their decision to go to law school would ultimately prove to be. For example, it would have been quite difficult for someone who applied to law schools in 2005 to anticipate how weak the entry-level legal employment market would be when she graduated in 2009.[22] On the other hand, someone who started law school in 2008 or 2009 would have had more of an opportunity to observe the signs of weakness in the legal employment market before deciding to pursue a legal education.

Although some of the blame for the dire financial position in which many recent law school graduates find themselves "surely rests with law students and graduates who did not perform their due diligence before deciding whether to attend law school[, a] good portion of the blame . . . rests squarely on the shoulders of law schools and their lack of transparency in representing the state of the legal market."[23] "Many law schools all but explicitly promise[d] that, within a few

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20. Twenty-one percent of law students regret their decision to go to law school. LEXISNEXIS, STATE OF THE LEGAL INDUSTRY SURVEY, 29 (2009), *available at* http://www.lexisnexis.com/document/State_of_the_Legal_Industry_Survey_Findings.pdf. Because recent graduates are confronted with the harsh realities of the legal employment market more directly than current law students are, the percentage of recent graduates who regret going to law school is presumably higher.

21. Moira Herbst, *Lawsuits Against Law Schools Weak: Legal Ed Experts*, THOMSON REUTERS (Feb. 26, 2012), http://newsandinsight.thomsonreuters.com/New_York/News/2012/02_-_February/Lawsuits_against_law_schools_weak__legal_ed_experts/ (quoting Professor Mark Gergen) ("'People going to bottom-tier law schools ought to know that they won't go like hot cakes on the job market.' . . . But that doesn't mean you're allowed to exploit their vulnerability.").

22. *See supra* note 12 and accompanying text.

23. Daniel S. Harawa, Note, *A Numbers Game: The Ethicality of Law School Reporting Practices*, 24 GEO. J. LEGAL ETHICS 607, 607 (2011). It is true that law schools are not the only institutions of higher education that have been accused of misrepresenting the employment opportunities available to graduates. *E.g.*, Mark C. Taylor, *Reform the PhD System or Close It Down*, 472 NATURE 261 (2011) ("In many fields, [the American Ph.D.

months of graduation, practically all of their graduates [would] obtain jobs as lawyers," even though the realities of the legal employment market often meant that less than half of those students would obtain full-time legal positions.[24] Dissatisfied "customers" of such law schools might be faulted for taking that school-specific information at face value, but belated admonitions of caveat emptor are not particularly helpful to students who have already borrowed hundreds of thousands of dollars to obtain a degree that has proven to be of little economic value to them.[25]

Of course, there are those who believe—not unreasonably, perhaps—that prospective law students *should* be able to take at face value the information law schools provide regarding the employment outcomes of their recent graduates.[26] One would certainly hope that prospective law students would be savvy enough to see through some law schools' efforts to obfuscate their employment statistics, but one might also hope that law school administrators and ABA officials would take it upon themselves to ensure that naïve, would-be lawyers are provided with *all* of the information they need to make an informed decision about whether and where to attend law school. After all, practicing lawyers are prohibited from making misleading statements about their services, even when the statements are technically truthful.[27] It seems reasonable to expect law school

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system] creates only a cruel fantasy of future employment that promotes the self-interest of faculty members at the expense of students. The reality is that there are very few jobs for people who might have spent up to 12 years on their degrees."). However, even assuming *arguendo* that Ph.D. programs mislead prospective students about the value of their degrees to the same extent that law schools do (an unlikely proposition given the extremely aggressive marketing practices employed by many law schools), that would merely mean that reform is needed in both areas, not that there is not a transparency problem in the legal education industry.

24. Paul Campos, *Served: How Law Schools Completely Misrepresent Their Job Numbers*, NEW REPUBLIC (Apr. 25, 2011, 12:00 AM), http://www.tnr.com/article/87251/law-school-employment-harvard-yale-georgetown?page=0,0.

25. *Compare* MacDonald v. Thomas M. Cooley Law Sch., No. 11-cv-831, 2012 WL 2994107, at *11 (W.D. Mich. July 20, 2012) ("The bottom line is that the statistics provided by Cooley and other law schools in a format required by the ABA were so vague and incomplete as to be meaningless and could not reasonably be relied upon. But, as put in the phrase we lawyers learn early in law school—*caveat emptor*."), *with* Paul Campos, *Caveat Emptor and Law School Employment Numbers*, INSIDE L. SCH. SCAM (Sept. 11, 2011), http://insidethelawschoolscam.blogspot.com/2011/09/caveat-emptor-and-law-school-employment.html ("To anyone who has taken the time to investigate the subject, it's obvious that the standard practices of law schools regarding their employment numbers fail" to satisfy "[t]he nasty old common law doctrine of caveat emptor.").

26. *See, e.g.*, William D. Henderson & Andrew P. Morriss, *How the Rankings Arms Race Has Undercut Morality*, NAT'L JURIST, Mar. 2011, at 8, 9; Campos, *supra* note 25; Herbst, *supra* note 21; *see generally* Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Education*, 38 J.C. & U.L. 47 (2011) (discussing ethics in the for-profit higher education industry).

27. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, *or omits a fact necessary to make the statement considered as a whole not materially misleading*.") (emphasis added).

administrators—many of whom are or have been members of the bar—to be equally cautious about the claims they make regarding the economic value of the education their schools provide.[28]

Unfortunately, it has become increasingly clear in recent years that the employment statistics reported by many law schools—even if truthful in a technical sense—have nevertheless painted an unrealistically positive picture of the legal employment market. Various commentators have identified numerous problems with the way law schools report their employment statistics,[29] but much of the criticism law schools have received in this area has centered around two major problems: (1) the employment statistics law schools provided to prospective students were, until recently, "so vague and incomplete as to be meaningless"[30]; and (2) these statistics have been, and continue to be, based on unaudited reports compiled by the law schools themselves.

A. "Employment" ≠ "Gainful Employment"

The most obvious problem with the employment statistics law schools provide to prospective law students is the fact that, for many years (this recently changed),[31] the ABA allowed law schools to count graduates doing almost any kind of work—including part-time work, temporary work, and nonlegal work—as "employed" for purposes of their published employment rates.[32] Thus, graduates who worked part-time at Starbucks were considered just as "employed" as graduates who made six-figure salaries working at large law firms,[33] even though prospective law students generally attend law school expecting to obtain full-time work for which a law degree is required or preferred, and generally need to find such a job in order to be able to service their student loans after graduation.

Similarly, for many years, law schools were able to further inflate their employment statistics by offering graduates low-paying, temporary positions funded by the law schools themselves so otherwise jobless graduates would be

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28. Ben Trachtenberg, *Law School Marketing and Legal Ethics* 38 (Univ. Missouri Sch. L. Leg. Stud. Research Paper No. 2012-41, 2012) ("In addition to violating moral norms against lying, dishonest law school marketing, when committed by lawyers, violates rules of professional conduct enacted to regulate the legal profession."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192694.

29. *See generally* Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012).

30. *Thomas M. Cooley Law Sch.*, 2012 WL 2994107, at *11.

31. *See infra* notes 48–57 and accompanying text.

32. Amended Complaint at 25–27, Gomez-Jimenez v. New York Law Sch., 943 N.Y.S.2d 834 (N.Y. Sup. Ct. Nov. 21, 2011) (No. 652226/2011), Doc. No. 10 [hereinafter NYLS Complaint]; *Thomas M. Cooley Law Sch.*, 2012 WL 2994107, at *6.

33. This practice is even more indefensible in light of the fact that, for many years, the National Association of Law Placement has collected comprehensive employment statistics from most law schools. *See* NYLS Complaint, *supra* note 32, at 26. That data was used by NALP to compile aggregate statistical information about the employment outcomes of graduates of all ABA-approved law schools, but law schools were not required to release that information to the public. *Id.*; *see also infra* notes 48–50 and accompanying text.

considered "employed" for purposes of the school's employment statistics.[34] For example, Washington and Lee University School of Law reported that 89.4% of its 2010 graduates were employed at graduation despite the fact that 46.3% of those counted as "employed" at graduation were actually employed as "Post-Grad Fellows" by the law school.[35] Although Washington and Lee did disclose on its website the number of its students receiving these temporary positions[36] (something law schools with similar programs have not always done),[37] the 89.4% figure—without caveats—is what the school reported to *U.S. News*.[38] Considering that less than half of the 2010 Washington and Lee class had actually managed to secure permanent employment by graduation,[39] it seems relatively clear that, at least in this instance, the employment data Washington and Lee reported to *U.S. News* painted an unrealistically positive picture of the employment opportunities available to recent graduates of that law school. Thus, prospective law students who relied primarily on *U.S. News* for information about potential law schools might have grossly underestimated just how difficult it would be for them to secure gainful employment after law school.

B. Unaudited, Self-Reported Surveys Are Inherently Unreliable

The second major problem with the way law schools have been reporting their employment data stems from the fact that the data is necessarily based on self-reported surveys of recent graduates.[40] Because law schools need only report information from graduates who willingly return the surveys, law schools' employment statistics—especially their salary statistics—are often based on

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34. Bernie Burk, *A Stunning But Largely Unnoticed Anomaly in Recent Employment Outcomes Data Suggests That Things May Be Even Worse Out There than We Imagined,* FACULTY LOUNGE (Mar. 19, 2012, 10:27 PM), http://www.thefacultylounge.org/2012/03/a-stunning-but-largely-unnoticed-anomaly-in-recent-employment-outcomes-data-suggests-that-things-may.html.

35. *Employment Statistics for the Class of 2010*, WASH. & LEE UNIV. SCH. OF LAW, http://law.wlu.edu/deptimages/Admissions/FINAL%20Statistical%20Report%20Class%20of%202010-9%20Month.pdf [hereinafter WASH. & LEE UNIV. SCH. OF LAW] (figures exclude graduates seeking advanced degrees rather than employment).

36. *Id.*

37. *See* Bernie Burk, *Employment Outcomes II: What We Know About School-Funded Temporary "Bridge" Positions at First-Tier Law Schools*, FACULTY LOUNGE (Mar. 28, 2012, 2:37 PM), http://www.thefacultylounge.org/2012/03/employment-outcomes-ii-what-we-know-about-school-funded-temporary-bridge-positions-at-first-tier-law.html.

38. *See* Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, U.S. NEWS & WORLD REPORT (Mar. 12, 2012), http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings. Although *U.S. News* plans to follow the ABA in requiring law schools to report more "granular" employment data in the future, it did not do so for its most recent rankings. *Id.*

39. *See* WASH. & LEE UNIV. SCH. OF LAW, *supra* note 35.

40. Law schools must report "the placement in employment of, and types of employment obtained by, graduates of the institution's degree or certificate programs, gathered from such sources as alumni surveys, student satisfaction surveys, . . . or other relevant sources." 20 U.S.C. § 1092(a)(1)(R) (Supp. IV 2011).

unrepresentative samples of recent graduates.[41] For example, based on a sampling of just 22% of its 2010 graduates, New York Law School (NYLS) reported that the average starting salary for its graduates in private practice is $107,343.[42] However, because alumni in high paying jobs are more likely to receive and respond to salary surveys than are the unemployed and underemployed, the true average salary earned by graduates of NYLS's 2010 graduating class was likely significantly lower than the reported average.[43]

NYLS is by no means the only law school to boast of high salaries based on relatively small samples of its recent graduates. Indeed, in the 2012 *U.S. News* law school rankings, nearly seventy law schools posted salary figures taken from half or fewer of their graduates with full-time jobs in the private sector, with four schools using salary figures taken from just five to 10% of those graduates.[44] While one might expect that such low response rates merely reflect the sensitive nature of the surveys, the fact that some law schools, including some lower-ranked law schools, are able to obtain salary information from most of their recent graduates indicates that law schools clearly could obtain salary information from their graduates if the law schools made obtaining that information a priority.[45] Further, the fact that a number of law schools already collect at least some employment data from virtually all of their graduates suggests that collecting salary information from recent graduates would probably not require a significant expenditure of additional institutional resources.[46]

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41. TAMANAHA, *supra* note 2, at 146–47. Further, until relatively recently, *U.S. News & World Report* counted as employed 25% of those graduates whose employment status was unknown. Bob Morse, *ABA May Revise Law School Job Reporting*, U.S. NEWS & WORLD REP. (Mar. 17, 2011), http://www.usnews.com/education/blogs/college-rankings-blog/2011/03/17/aba-may-revise-law-school-job-reporting. This provided law schools with a disincentive to seek employment information from those graduates they suspected of being unemployed. Henderson & Morriss, *supra* note 26, at 9.

42. *See* NYLS Complaint, *supra* note 32, at 21–22. For additional examples, see TAMANAHA, *supra* note 2, at 146–54; *see also* Leipold, *supra* note 12, at 11 for a discussion of how the bimodal distribution of entry-level legal salaries may also cause students to overestimate what starting salary they are likely to earn upon graduation.

43. *See* NYLS Complaint, *supra* note 32, at 24–25.

44. TAMANAHA, *supra* note 2, at 146–47.

45. *Id.* at 147–49 (explaining that although there is generally a strong correlation between a law school's *U.S. News* ranking and the percentage of its graduates who report their full-time, private-sector salaries, "[a] number of lower-ranked schools have relatively high response rates: Texas Southern (97 percent); Charlotte (86 percent); and La Verne (85 percent)").

46. For example, the Indiana University Maurer School of Law managed to obtain information regarding the employment status of all but one of the 195 members of its 2011 graduating class, yet only collected salary information for seventy-three of those graduates. NAT'L ASS'N FOR LAW PLACEMENT, INDIANA UNIVERSITY MAURER SCHOOL OF LAW-BLOOMINGTON: CLASS OF 2011 SUMMARY REPORT (2012), *available at* http://www.law.indiana.edu/careers/reports/doc/nalp_2011.pdf. Presumably, the institutional resources involved in encouraging graduates to be more forthcoming about their salary information are relatively small compared to the institutional resources required to distribute and process the employment surveys themselves.

As the foregoing discussion suggests, even if law school administrators had followed the ABA's reporting guidelines scrupulously, the employment statistics they reported would have exaggerated the success recent alums have had obtaining gainful employment. Obviously, the problem would be much worse if law school administrators actually reported factually inaccurate data. Unfortunately, because the employment data law schools report is not independently audited, it would be extremely difficult to catch a law school in the act of falsifying its data.[47] The fact that some law school administrators have already exhibited a willingness to falsify the data they report to the ABA thus provides a compelling reason to maintain a healthy skepticism about the accuracy of the already misleading employment statistics.[48]

C. Recent ABA Reforms

Fortunately, the ABA has finally begun to respond to demands for it to require law schools to make their employment statistics more useful to prospective students. In the past, most law schools reported detailed placement information to the National Association of Law Placement (NALP), but only reported basic (and relatively unhelpful) placement data to the ABA and the public.[49] Under pressure, some law schools eventually began to release their NALP reports to the public,[50] but law schools were never required to release those reports and NALP only ever

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47. *See* Letter from Barbara Boxer, U.S. Senator, to Stephen N. Zack, President of the Am. Bar Ass'n (May 20, 2011), *available at* http://www.lawschooltransparency.com/Boxer-ABA_Letter_May_2011.pdf. The ABA may impose penalties on law schools that intentionally report fraudulent data, *see* A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 103 4 (2012), *available at* http://www.abanow.org/2012/06/2012am103/; *Amendment Made to Standard 509, Rule 16 and Foreign Program Criteria*, AMERICANBAR.ORG (2012), http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/fall_2012/2012-2013_changestoabastandardsandrules.html, but the lack of any mechanism for independently verifying the data law schools report makes the deterrent value of such penalties questionable.

48. *See infra* note 73. A number of schools have also admitted to accidentally misreporting various figures. For example, several law schools—including Barry University School of Law, University of Kansas School of Law, and Rutgers School of Law (Camden)—have admitted to reporting that their students graduate with a lower level of average indebtedness than they actually do. Chelsea Phipps, *Reports of Our (Low) Debt Have Been Greatly Exaggerated*, WALL. ST. J. L. BLOG (Aug. 8, 2012, 3:20 PM), http://blogs.wsj.com/law/2012/08/08/law-schools-misreported-debt-figures-to-us-news-aba/. While there has not yet been any indication that these figures were intentionally misreported, some commentators have expressed skepticism as to whether the misrepresentations were truly the result of "honest mistakes." *See, e.g.*, Staci Zaretsky, *Law Schools Misreport Debt Figures to the ABA; To No One's Shock, the ABA Does Nothing*, ABOVE THE L. (Aug. 9, 2012, 12:21 PM), http://abovethelaw.com/2012/08/law-schools-misreport-debt-figures-to-the-aba-to-no-ones-shock-the-aba-does-nothing/.

49. *NALP and the ABA Must Compromise*, L. SCH. TRANPSARENCY (Aug. 3, 2011, 7:28 PM), http://www.lawschooltransparency.com/2011/08/nalp-and-the-aba-must-compromise/.

50. *See infra* notes 93–94 and accompanying text.

released the information reported by law schools in aggregate form.[51] This unsatisfactory state of affairs began to change when the ABA's Questionnaire Committee announced in July 2011 that it would begin requiring law schools to "unbundle" their placement statistics and report those statistics directly to the ABA.[52] Specifically, the Committee announced:

> [T]he 2011 Annual Questionnaire will request from law schools information on their graduates' employment status, employment types, and employment locations. It will also request information on whether a graduate's employment is long-term or short-term. Finally, it will ask how many, if any, positions held by their graduates are funded by the law school or university.[53]

In addition, the Committee announced that it would collect salary information from each of the law schools and report the "the 25th, median, and 75th percentile salaries of jobs obtained in the various types in each state and region" in the *Official Guide to ABA Law Schools*.[54]

The ABA's House of Delegates made further progress towards improving law school transparency as recently as August 2012 when it approved changes to Standard 509, the rule that describes the consumer information law schools must report to remain accredited by the ABA.[55] For the most part, the changes brought Standard 509 in line with the changes already made by the Questionnaire Committee.[56] However, the revised Standard 509 also requires law schools to disclose their scholarship retention rates and the sample size upon which their salary surveys are based.[57] Given all of the criticism law schools have received over their lack of transparency in these two areas,[58] these relatively minor changes represent a significant improvement over the status quo.

Unfortunately, these much-needed reforms come far too late to be of any benefit to the thousands of recent graduates who have little to show for their three years in law school except six-figures worth of nondischargeable student loans. Additionally, the ABA—so far—has rejected calls for it to force law school administrators to disclose the salary data the ABA collects from each law school,[59]

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51. *NALP and the ABA Must Compromise*, *supra* note 49.

52. Memorandum from Hulett H. Askew, Consultant on Legal Education, and Arthur R. Gaudio, Chair, Questionnaire Committee, to Law School Deans and Career Services Officers 1 (July 27, 2011), *available at* http://www.lawschooltransparency.com/documents/2011-07-27-AskewGaudio-to-LawSchools.pdf.

53. *Id.* at 1–2.

54. *Id.* at 2.

55. *ABA House of Delegates Approves Standard 509 and Rule 16*, L. SCH. TRANSPARENCY (Aug. 6, 2012, 2:59 PM), http://www.lawschooltransparency.com/category/american-bar-association/aba-watch/.

56. Karen Sloan, *ABA Backs Off Making Law Schools Report Graduates' Salaries*, NAT'L L.J. (Mar. 19, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&slreturn=20120723155436.

57. A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR, *supra* note 47, at 2–3.

58. *See infra* note 97; *supra* notes 38–42 and accompanying text.

59. Sloan, *supra* note 56. The chief problem with the ABA's current approach (i.e.

and seems to have largely ignored requests that it start requiring law schools to have their employment statistics independently audited. The ABA's Task Force on the Future of Legal Education might eventually recommend such reforms, but the task force is not expected to complete its work until 2014.[60] Given that the ABA has already taken some basic steps to improve law school transparency,[61] there is good reason to believe that the ABA will wait until after the task force releases its findings before implementing any additional reforms designed to improve law school transparency.

D. A Caveat: Transparency Has Its Limits

Of course, a lack of transparency regarding the employment outcomes of recent graduates is by no means the only problem facing the legal education industry today.[62] Indeed, it must be admitted that increased transparency alone would probably not deter some law students from making poor decisions about whether and where to attend law school.[63] For example, better information likely would not prevent some students from grossly overestimating their chances of maintaining their grade-contingent scholarships[64] or securing high-paying work at a large law firm,[65] and many prospective law students would probably continue to attach far too much importance to the *U.S. News* law school rankings.[66] Nevertheless, even if

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reporting aggregated salary data for each state) is that "[w]ithout the school-specific salary reporting, there is no way for prospective law students to differentiate between the graduate salaries of lower and higher-ranking law schools in any given state." *Id.*

60. *ABA President Names Task Force on the Future of Legal Education*, ABA NOW (July 31, 2012), http://www.abanow.org/2012/07/aba-president-names-task-force-on-the-future-of-legal-education/.

61. *See supra* notes 51–56 and accompanying text.

62. *See generally* TAMANAHA, *supra* note 2.

63. Sloan, *supra* note 3 (quoting Professor William Henderson) ("Even if [law schools] communicated the realities [of the legal employment market] in a statistically valid way to prospective students, some of them still won't process that information.").

64. *Compare* Segal, *Behind the Curve*, *supra* note 1 (arguing that law schools do a poor job of warning students about how difficult it will be for them to earn the grades necessary to maintain their grade-contingent scholarships), *with* Saul Levmore, *The Rage Over Conditional Scholarships*, UNIV. CHI. FACULTY BLOG (May 16, 2011, 3:32 PM), http://uchicagolaw.typepad.com/faculty/2011/05/the-rage-over-conditional-scholarships.html (explaining that, in the author's opinion, grade-contingent scholarships "[do] not so much set out to fool customers as [try] to deal with the problem of transfers"). Whether or not offering grade-contingent scholarship should be characterized as a "bait and switch" tactic, as Segal suggests, losing a grade-contingent scholarship can significantly alter the value proposition of attending law school, especially if it comes as a surprise to the person losing it. In any event, the ABA now requires law schools to disclose more information about scholarship retention rates than it once did. *See supra* note 57 and accompanying text.

65. According to Dean Gary Roberts of the Indiana University Robert H. McKinney School of Law, "[m]any law students are like high school basketball players" who "all think they'll play for the NBA when they graduate." Rebecca Berfanger, *Law Schools Discuss Loans, Jobs*, IND. LAW. (Feb. 2, 2011), http://www.theindianalawyer.com/article?articleId=25665. Consequently, according to Dean Roberts, "[i]f you're a law student and think you'll make $140,000 right out of law school, you're an idiot." *Id.*

66. In a recent poll of prospective law students, 32% said that a law school's ranking is

some law students would not make good use of more accurate employment data, it is highly desirable that accurate employment data be collected anyway. At least some prospective law students would make good use of the additional information,[67] and policymakers will need access to the information if they are to address the various other problems confronting the legal education industry today.[68]

II. SOME RECENT EFFORTS TO SOLVE THE LAW SCHOOL TRANSPARENCY PROBLEM

The most obvious solution to the law school transparency problem is, of course, for the ABA to use its accrediting authority to force law schools to provide comprehensive, independently verified information about the employment outcomes of their recent graduates. Unfortunately, while recently enacted ABA reforms have closed some of the loopholes that had allowed law schools to count almost all of their graduates as "employed" regardless of how many of those graduates were actually able to secure gainful legal employment, the ABA has so far proven unwilling to require law schools to report detailed salary information or to have their employment statistics independently audited.[69]

Reasonable minds may disagree as to whether these additional reforms are desirable,[70] but assuming that it is desirable for law schools to provide more

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the most critical factor in their decision about where to go to school, compared with 8% who considered a law school's job placement statistics to be the most important factor. Russell Schaffer & Carina Wong, *Kaplan Test Prep Survey: Despite an Uncertain Employment Landscape, Law School Applicants Still Consider School Rankings Far More Important than Job Placement Rates When Deciding Where to Apply* (June 19, 2012), http://press.kaptest.com/press-releases/kaplan-test-prep-survey-despite-an-uncertain-employment-landscape-law-school-applicants-still-consider-school-rankings-far-more-important-than-job-placement-rates-when-deciding-where-to-apply. *But see Shocked About Kaplan's Survey Results? New Information Comes to Light*, L. SCH. TRANSPARENCY (Dec. 3, 2010, 12:04 PM), http://www.lawschooltransparency.com/2010/12/shocked-about-kaplans-survey-results-new-information-comes-to-light/ (explaining various reasons why an earlier edition of the poll may have overstated the emphasis prospective students attach to the rankings).

67. Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 618 (2010) ("With more accurate information, the market should then take over as students who wish to succeed in the job market gravitate to those schools most able to facilitate their success.").

68. For example, brutally honest information about the true state of the legal employment market might convince the Education Department "to force law schools to demonstrate, as a condition of receiving federal loan money, a minimum threshold of employability and income upon graduation." Henderson & Zahorsky, *supra* note 6.

69. *See supra* notes 59–60 and accompanying text.

70. Some argue that salary surveys should not be required because low response rates might make them misleading. Karen Sloan, *ABA Backs off Making Law Schools Report Graduates' Salaries*, NAT'L L.J. (Mar. 19, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&slreturn=20120716083955. This is certainly a legitimate concern, but it seems that the better course would be to make a concerted effort to increase the response rates, not to simply deprive prospective law students of information they will need to determine whether it makes good economic sense for them to attend law school. Some law schools have also cited privacy concerns as a reason not to provide detailed salary information to the public. *Initial Request Responses*, L. SCH. TRANSPARENCY (Sept. 14, 2010, 12:01 AM), http://www.lawschooltransparency.com/2010/09/initial-request-responses/

comprehensive and more reliable information about the employment outcomes of their recent graduates, how can law schools be made to do this if the ABA is unwilling to take further steps to increase law school transparency? This Part highlights a few additional ways in which law schools could be further pressured to improve transparency in the relatively near future.[71] Specifically, it addresses (A) the influence of *U.S. News*, (B) the voluntary efforts some law schools are taking to increase their own transparency, (C) the advocacy efforts of organizations like Law School Transparency, and (D) the possibility of action by Congress or the Department of Education.

A. U.S. News & World Report

For better or worse, *U.S. News*, a for-profit magazine that has often been accused of exacerbating the problems in the American legal education system,[72] probably has almost as much power as the ABA itself to solve the law school transparency problem. Law schools face tremendous pressure to improve their *U.S. News* ranking,[73] and many will go to great lengths to do so, regardless of whether or not their efforts will improve the quality of the education they provide.[74]

(quoting administrators from various law schools). However, some schools have chosen to voluntarily release salary information that is quite detailed. *E.g.*, *Comprehensive Employment Statistics*, UNIV. OF MICH. L. SCH., http://www.law.umich.edu/careers/classstats/Pages/employmentstats.aspx. This suggests that efforts to increase transparency in this area need not compromise the privacy of recent graduates.

71. This Part is by no means an exhaustive list of all of the possible methods for solving the law school transparency problems. *See, e.g.*, Morgan Cloud & George Shepherd, *Law Deans in Jail* (Emory Legal Studies Research Paper No. 12-199, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990746 (discussing the potential for action by the Department of Justice); Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools That Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, 15 J. CONSUMER & COM. L. 97 (2012) (discussing the potential for action by the Federal Trade Commission).

72. *See, e.g.*, TAMANAHA, *supra* note 2, at 78 ("When called to account for their conduct, legal educators point the finger at the *US News* ranking system."); *see generally* Kyle P. McEntee & Derek M. Tokaz, *Take This Job and Count It*, 2 J.L. 309 (2012).

73. Daniel J.H. Greenwood, *Market Irrationality in the Law School "Arms Race,"* HUFFINGTON POST (May 6, 2011, 5:57 PM), http://www.huffingtonpost.com/daniel-j-h-greenwood/market-irrationality-in-t_b_856400.html ("Any school that dares to ignore the [*U.S. News*] rankings risks a death spiral of rapidly departing employers, students and faculty, leading to lower ranking and even more problems."). Nancy Rapoport, the former dean of the University of Houston Law Center, even claims that the law school's decline in the ranking provided the final push for her resignation as the school's dean. Leigh Jones, *Law School Deans Feel the Heat from Ranking*, NAT'L L.J. (May 1, 2006), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005452512&Law_school_deans_feel_the_heat_from_ranking.

74. See Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 232–42 (2006) for a discussion on the sometimes bizarre incentives the *U.S. News* rankings create for providers of legal education. For example, "a law school could literally burn a huge sum of money and, as long as the flames were meant to teach something to the students—the craziness of the U.S. News algorithm, perhaps?—the school would benefit in the rankings." *Answers to*

Because job placement rates factor significantly into a law school's ranking,[75] and because law schools that do not massage their employment statistics will find themselves at a competitive disadvantage vis-à-vis those law schools that do, *U.S. News*—until recently—provided law school administrators with a disincentive to provide comprehensive data about the employment outcomes of their recent graduates.[76] Fortunately, *U.S. News*'s editors now seem to agree that there is a need for increased law school transparency.[77] The magazine has already changed its methodology in the attempt to provide a more realistic portrait of the current job market for new J.D. graduates,[78] and plans to incorporate a recent ABA reform (i.e. the requirement that law schools "reveal such key stats as how many graduates had jobs that are full time or part time, short term or long term, and that actually require the J.D. degree") into its methodology for future rankings.[79]

These changes represent an improvement over the methodology used in previous versions of the ranking, but *U.S. News* could probably push law schools to provide even more comprehensive and reliable information about the employment outcomes of their recent graduates if the magazine chose to do so. Given the great lengths to which law school administrators will go to improve their *U.S. News* ranking, it is likely that law schools would, for example, provide detailed salary

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Reader Questions About Law School, N.Y. TIMES ECONOMIX BLOG (Dec. 20, 2011, 11:08 AM), http://economix.blogs.nytimes.com/2011/12/20/answers-to-reader-questions-about-law-school/. That law school administrators act with those incentives in mind was evidenced by a recent report that concluded the *U.S. News* law school ranking, not the ABA Accreditation standards, has largely driven the rising cost of American legal education. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 25 (2009). Indeed, some law school administrators have even proved willing to engage in fraudulent activity to better their *U.S. News* ranking. For example, Villanova University School of Law has been censured by the ABA for reporting inaccurate admissions. Letter from Hulett H. Askew, Consultant on Legal Educ. to the ABA, to Peter M. Donohue, President, Villanova Univ., and John Y. Gotanda, Dean, Villanova Univ. Sch. of Law (Aug. 12, 2011). The University of Illinois has also admitted to similar misconduct. JONES DAY & DUFF & PHELPS, UNIVERSITY OF ILLINOIS COLLEGE OF LAW CLASS PROFILE REPORTING 2–5 (2011).

75. *See* Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, U.S. NEWS & WORLD REP. (Mar. 12, 2012), http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings (explaining that various indices of "placement success" are weighted by .20 in formula the magazine uses to compile its rankings).

76. *See* Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25, 27 (2006) ("[M]any schools would prefer not to have to manipulate these factors, but the current system of ranking strongly pressures them to do so. If schools do not engage in manipulation, but their competitors do, then they will lose students—and eventually much else as well.").

77. *See* Bob Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, U.S. NEWS & WORLD REP. (March 9, 2011), http://www.usnews.com/education/blogs/college-rankings-blog/2011/03/09/us-news-urges-law-school-deans-to-improve-employment-data.

78. *See* Morse & Flanigan, *supra* note 75 ("For the second year in row, . . . employment rates are figured solely based on the number of grads working at that point in time full or part time in a legal or nonlegal job divided by the total number of J.D. graduates.").

79. *Id.*; *see also supra* notes 49–54 and accompanying text.

information or agree to have their employment statistics independently verified if doing so were a prerequisite for inclusion in future editions of the ranking.[80] However, even though *U.S. News* probably has the power to unilaterally demand more robust data from law schools, the magazine's rankings guru, Bob Morse, has indicated that the magazine would prefer for the ABA—the organization actually charged with regulating law schools—to take a leadership role in this area.[81]

Furthermore, *U.S. News* has little incentive to promote reform in this area. *U.S. News* is in the business of selling magazines, and it would almost certainly sell fewer copies of its annual law school guide if it did anything that might discourage prospective students from attending law school.[82] To be sure, *U.S. News* may need to change its methodology somewhat from time to time in order to maintain its perceived legitimacy,[83] but it is simply unrealistic to expect *U.S. News* to use its influence to spearhead a permanent solution to the law school transparency problem.

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80. After all, some law schools have even radically reduced the numbers of part-time students they accept in apparent response to changes in the ranking's methodology. *See* TAMANAHA, *supra* note 2, at 87–88 (describing how the George Washington and Brooklyn law schools greatly reduced their part-time classes once enrolling large numbers of part-time students was no longer beneficial to their *U.S. News* rankings). If law schools are willing to make such drastic changes at *U.S. News'* behest, it seems reasonable to expect that they would also be willing to comply with relatively simple reporting requirements.

81. Segal, *Is Law School a Losing Game?*, *supra* note 1 (quoting Bob Morse) ("And what about U.S. News? The editors could, but won't unilaterally demand better data from law schools. 'Do we have the power to do that? Yes, I think we do,' said Robert Morse, who oversees the law school rankings. 'But . . . it would be awkward if U.S. News imposed [a new standard] by itself. It would be preferable if the A.B.A. took a leadership role in this.'").

82. *See, e.g.*, Elie Mystal, *Most Schools Would Like Law School Transparency to Just Go Away*, ABOVE THE L. (Sept. 14, 2010, 2:16 PM), http://www.abovethelaw.com/2010/09/most-schools-would-like-law-school-transparency-to-just-go-away/ ("What possible reason does U.S. News have to ask more detailed questions about employment statistics? So it can tacitly admit it has been part of the problem all along? So more people read it and think '. . . I shouldn't go to law school,' which does nothing but hurt the (for-profit) magazine's newsstand sales and circulation? U.S. News will *never* stand up to law schools and force them to stop inflating their employment numbers, not so long as the magazine's business managers want to keep people thinking about going to law school.").

83. *U.S. News* has significant power over law schools because "students choosing between law schools attach preeminent weight to the ranking," at least in part, because top law firms hire heavily from highly ranked law schools. TAMANAHA, *supra* note 2, at 79. Presumably, if prospective students and hiring partners at top law firms were to agree that the rankings were materially flawed, they would cease to attach as much importance to the rankings. Consequently, *U.S. News* might have to change its methodology from time to time based on the opinions of these two groups. On the other hand, the fact that many legal educators believe the ranking to be flawed is seemingly irrelevant. "Legal educators endlessly gripe that the *US News* ranking is bunk, poking holes in every aspect of its construction and methodology," yet these complaints have no apparent effect on their behavior because "the ranking creates its own reality." *Id.* at 79–80.

B. Voluntary Self-Imposed Reform

Law schools could, of course, disclose more information than what the ABA requires regarding the employment outcomes achieved by recent graduates, and some law schools have already started to do that.[84] Such efforts could potentially put pressure on other law schools to do the same. When comparing similarly ranked law schools, some prospective law students would be expected to draw adverse inferences against schools that were less forthright than their peers regarding the employment outcomes of their recent graduates.[85] As more law schools voluntarily publish comprehensive employment statistics on their websites, or provide that information to third parties like Law School Transparency,[86] holdouts would probably feel increasing pressure to do the same.

Although law schools that have taken initiative in this area are pushing the rest of the legal education industry in the right direction, such efforts alone are unlikely to solve the law school transparency problem. That is because a significant number of prospective students care a great deal more about a law school's ranking than they do about its employment statistics.[87] Thus, to the extent that providing better employment data was incompatible with maintaining a strong *U.S. News* rank, the pressure law school administrators experience to maintain their school's ranking would probably outweigh any peer pressure they would experience to provide better employment data.

More importantly, efforts by law schools to voluntarily improve their transparency have concentrated mostly on the types of reforms the ABA recently implemented, such as distinguishing between full-time employment and part-time employment. While some law schools do provide salary information about their recent graduates,[88] even schools recognized for their transparency efforts continue to produce salary statistics based on information collected from relatively small percentages of their graduating classes.[89] Similarly, there have been few efforts to address the concern that the data law schools report is not independently verified.

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84. For an evaluation of the transparency of each accredited law school's website, see *Transparency Index*, L. SCH. TRANSPARENCY, http://www.lawschooltransparency.com/reform/projects/transparency-index/.

85. *See* David Lat, *The University of Chicago Law School Offers Detailed Employment Data; Will Other Schools Follow Suit?*, ABOVE THE L. (Dec. 14, 2011, 10:19 AM), http://abovethelaw.com/2011/12/the-university-of-chicago-law-school-offers-detailed-employment-data-will-other-schools-follow-suit/.

86. *See infra* Part II.C.

87. *See supra* note 83 and accompanying text.

88. *See Transparency Index*, *supra* note 84.

89. For example, the University of Michigan Law School was recently voted the most honest law school in America in an *Above the Law* reader poll, Elie Mystal, *ATL March Madness (2012): Michigan Is the Most Honest Law School*, ABOVE THE L. (Apr. 2, 2012, 6:03 PM), http://www.abovethelaw.com/2012/04/atl-march-madness-2012-michigan-is-the-most-honest-law-school/, and yet the percentage of graduates responding to the law school's salary survey actually declined over recent years from 84% for the class of 2009 to only 60% for the class of 2011. *Comprehensive Employment Statistics*, *supra* note 70. While Michigan's response rates compare favorably with the national average (65% for the class of 2010 compared to the national average of 58% for the same year), *id.*, they do not compare

While it is conceivable that law schools that have been relatively forthcoming about their employment statistics might turn their attention to these additional reforms now that the ABA has begun requiring all law schools to disaggregate their employment statistics, it seems relatively unlikely that law schools would implement these additional reforms on their own. Whereas earlier reforms merely required law schools to publicize information they were, for the most part, already collecting,[90] many additional reforms (e.g. having employment data audited by a third party) would require the schools to incur some additional expense. Thus, it is somewhat unlikely that enough law schools would take initiative in this area that other schools would experience pressure to do the same.

C. Law School Transparency

Law School Transparency (LST) is a Tennessee nonprofit that has been at the forefront of the law school transparency movement. Its advocacy efforts have been influential in raising awareness about the problem of law school transparency,[91] and its website is one of the best sources for comprehensive information and breaking news on the subject.[92] Further, after some initial resistance, it appears that at least some law schools are beginning to take LST's message seriously. In 2010, the organization sent letters to every ABA-approved law school seeking very detailed employment statistics, but no law school provided the information LST requested.[93] However, in late 2011, LST sent a second round of letters in which it asked law school administrators to merely release the detailed employment statistics the schools had already reported to NALP for the class of 2010.[94] Over fifty schools complied with this second request, either by sending the information to LST directly or by making the information available on their websites.[95]

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favorably with, for example, the 98.56% response rate achieved by Harvard Law School (also for the class of 2010). *Employment Statistics*, HARVARD L. SCH., http://www.law.harvard.edu/current/careers/ocs/employment-statistics/index.html. Of course, most graduates of an elite law school like Michigan are probably able to secure high-paying jobs if they desire to go into private practice, but a sample of only 60% of a law school's graduating class might be quite unrepresentative at a law school that has a more difficult time placing graduates in good positions.

90. *See* NYLS Complaint, *supra* note 32, at 26; *supra* notes 49–54 and accompanying text.

91. *See, e.g.*, McEntee & Lynch, *supra* note 29; McEntee & Tokaz, *supra* note 72.

92. *See* L. SCH. TRANSPARENCY, http://www.lawschooltransparency.com/.

93. Karen Sloan, *Law School Transparency Hopes the Second Time's the Charm on Data*, NAT'L L.J. (Dec. 15, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202535790371&Law_School_Transparency_hopes_the_second_times_the_charm_on_data&slreturn=1.

94. *LST Requests Class of 2010 Employment Information from Law Schools*, L. SCH. TRANSPARENCY (Dec. 14, 2011, 2:20 PM), http://www.lawschooltransparency.com/2011/12/lst-requests-class-of-2010-employment-information-from-law-schools/. For LST's most recent data request, see *LST Requests Class of 2011 NALP Reports*, L. SCH. TRANSPARENCY (June 28, 2012, 3:21 PM), http://www.lawschooltransparency.com/2012/06/lst-requests-class-of-2011-nalp-reports/.

95. *Class of 2010 NALP Report Database,* L. SCH. TRANSPARENCY, http://www.lawschooltransparency.com/clearinghouse/2010-nalp-report-database/.

Although the positive response LST received to its second request is encouraging, the fact remains that the overwhelming majority of American law schools are still withholding the data LST requested. Thus, while pressure from organizations like LST may have persuaded some law schools to release more detailed employment statistics than what the ABA requires those schools to disclose, LST lacks any authority to force compliance with its requests. Consequently, about three-fourths of ABA-approved law schools are still ignoring those requests.[96]

D. Congress and/or the Department of Education

Given the interest of at least a few members of Congress—including Sen. Barbara Boxer, Sen. Tom Coburn, and Sen. Charles Grassley—in the law school transparency problem,[97] one possible (though somewhat extreme) solution to the problem would involve Congress or the Department of Education stripping the ABA of its accrediting authority and giving that authority to some other organization that would implement the reforms the ABA is either unable or unwilling to impose on law schools. While unlikely, such drastic action is not completely implausible because the ABA has long been criticized for using its accrediting authority in an "arbitrary and capricious" manner,[98] and the National Advisory Committee on Institutional Quality and Integrity recently found that the

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96. There are currently 201 ABA-approved law schools that confer J.D. degrees. *ABA-Approved Law Schools*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html.

97. *See, e.g.*, Ashby Jones, *Lawmakers Probe Data from Law Schools*, WALL ST. J. Nov. 14, 2011, at A5 (stating that unnamed U.S. senators are "strongly considering" the possibility of holding hearings on the state of American legal education); Letter from Barbara Boxer, U.S. Senator, to Stephen N. Zack, President, Am. Bar Ass'n, (May 20, 2011) (commenting on the need for independent oversight in the collection of employment data, easy access to employment information by students, and additional transparency regarding merit-based scholarship retention rates), *available at* http://www.lawschool transparency.com/Boxer-ABA_Letter_May_2011.pdf; Letter from Tom A. Coburn & Barbara Boxer, U.S. Senators, to Kathleen Tighe, Inspector Gen., U.S. Dep't of Educ. (Oct. 13, 2011), *available at* http://www.lawschooltransparency.com/documents/2011-10-13-Coburn-and-Boxer-to-Dept-of-Education-IG.pdf (asking the Inspector General to answer six questions regarding the cost and effectiveness of law school education over the last ten years); Letter from Charles E. Grassley, U.S. Senator, to Stephen N. Zack, President, Am. Bar Ass'n (July 11, 2011), *available at* http://www.lawschooltransparency.com/documents/2011-07-11-Grassley-to-ABA.pdf (asking thirty-one questions about the retention of merit-based scholarships and the ABA's accreditation process).

98. *See, e.g.*, Mathew D. Staver & Anita L. Staver, *Lifting the Veil: An Exposé on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1 (2003). In late 2011, the ABA was sued by Lincoln Memorial University Duncan School of Law after the ABA denied the law school provisional accreditation. *See* Complaint, Lincoln Mem'l Univ. Duncan Sch. of Law v. Am. Bar Ass'n, No. 3:11-cv-608 (E.D. Tenn. 2011). The lawsuit illustrates the difficult position in which the ABA finds itself: it has been widely criticized for not imposing more stringent accreditation standards on law schools, but if it does, it risks being sued for violating antitrust laws.

ABA was not in compliance with seventeen regulations applicable to the use of its accrediting authority.[99] A similar, less drastic option would be for the Department of Education to require law schools to demonstrate, as a condition of receiving federally guaranteed student loans, that their graduates enjoy a certain minimum level of employment success upon graduation.[100]

While it is certainly possible that Congress (or the Department of Education at Congress' behest) could take action that would require law schools to be more transparent about the employment outcomes of their recent graduates, the possibility of such action seems very remote. By requiring law schools to report more comprehensive employment statistics and to disclose information about their scholarship retention rates, the ABA has already addressed many of the concerns expressed by members of Congress.[101] True, the ABA has so far largely ignored some other concerns the senators expressed (e.g. the fact that the employment data is not independently audited), but the fact that the ABA has finally begun to address the law school transparency problem makes the need for congressional action less pressing than it might have otherwise been. Further, congressional action will necessarily be a long time coming, if it comes at all,[102] so those with an interest in promoting law school transparency would therefore be wise to pursue other potential avenues of reform while waiting on Congress to take up the issue.

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99. NAT'L ADVISORY COMM. ON INST'AL QUALITY AND INTEGRITY, REPORT OF THE JUNE 8–10 MEETING 14 (2011), *available at* http://www2.ed.gov/about/bdscomm/list/naciqi-dir/spring-2011-report.pdf.

100. Henderson & Zahorsky, *supra* note 6. Another less severe solution would be to allow the ABA to retain its accreditation authority, but require law schools to submit annual reports directly to the Department of Education. This was the approach advocated by a coalition of the presidents of fifty-five individual law school Student Bar Associations. *See SBA President Coalition Endorses Ideas Behind New Bill*, L. SCH. TRANSPARENCY (May 18, 2011, 8:15 AM), http://www.lawschooltransparency.com/2011/05/sba-president-coalition-endorses-ideas-behind-new-bill/. However, some commentators believe such a drastic approach to be premature. *See id.*

101. *Compare supra* notes 49–58 and accompanying text, *with supra* note 97 and accompanying text.

102. At the end of 2011, there were rumors that the U.S. Senate Committee on Commerce, Science, and Transportation would hold hearings on law schools during 2012. Karen Sloan, *The Year the Chickens Came Home to Roost,* NAT'L L.J. (Dec. 26, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202536517436&slreturn=20120716121336. As of August 15, 2012, however, no congressional committee had formally announced its intention to conduct hearings on the subject of law school reform. Thus, there is good reason to suspect that members of Congress will wait until after the ABA's Task Force on the Future of Legal Education completes its work before Congress itself begins any formal investigation into the subject. *See ABA President Names Task Force on the Future of Legal Education*, *supra* note 60. The task force is not expected to release its findings until 2014. *See id.*

III. CLASS-ACTION LAWSUITS AS A SOLUTION TO THE LAW SCHOOL TRANSPARENCY PROBLEM

On May 26, 2011, Anna Alaburda, a 2008 honors graduate of Thomas Jefferson School of Law (TJSL), sued the law school in California state court on behalf of a purported class comprised of as many as 2300 recent graduates and current TJSL students,[103] claiming:

> TJSL is more concerned with raking in millions of dollars in tuition and fees than educating and training its students. The disservice TJSL is doing to its students and society generally is readily apparent. Many TJSL graduates will never be offered work as attorneys or otherwise be in a position to profit from their law school education. And they will be forced to repay hundreds of thousands of dollars in school loans that are nearly impossible to discharge, even in bankruptcy.[104]

The lawsuit pleaded several causes of action—including intentional fraud, negligent misrepresentation, and various unfair business practices—arising from the law school's publication of allegedly misleading employment statistics and sought compensatory damages and restitution in excess of $50 million, plus punitive damages and injunctive relief.[105]

Although TJSL was the first law school to be sued by recent graduates because of its misleading employment statistics,[106] it certainly will not be the last. Similar lawsuits have already been filed against NYLS,[107] Thomas M. Cooley Law School

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103. *See* Third Amended Complaint at 7, Alaburda v. Thomas Jefferson Sch. of Law, No. 37-2011-00091898-CU-FR-CTL (Cal. Super. Ct. Sept. 15, 2011) [hereinafter TJSL Complaint]. Applicable statutes of limitation will limit the potential class sizes of such lawsuits. *See* Order Regarding Rulings at Oral Argument, Macdonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831, at 4 (W.D. Mich. June 7, 2012), ECF No. 51. Because the class members could have arguably relied upon any fraudulent statements in deciding to stay enrolled in the law school, the appropriate point at which to start counting for purposes of applicable statutes of limitation is probably the beginning of each student's last semester of law school (the last point at which they could have decided to stop paying Cooley additional tuition monies). *See id.* Of course, applicable statutes of limitation would limit the damages some otherwise eligible class members could claim. *See id.*

104. TJSL Complaint, *supra* note 103, at 2.

105. *See id.* at 9–17.

106. *Alaburda* was the first class-action lawsuit filed against a law school for alleged misrepresentation about its employment statistics, but it was not the first time a law school was sued for allegedly misrepresenting the value of its degrees. *See, e.g.*, Rodi v. S. New England Sch. of Law, 532 F.3d 11 (1st Cir. 2008) (affirming the district court's grant of summary judgment for the defendants). Rodi claimed he was misled about the school's accreditation status by letters from the school's dean, and raised claims similar to those raised by Alaburda. The court found that Rodi did not rely on the statements, and that even if he did, his reliance was unreasonable. *Id.* at 17. It is worth noting, however, that the court had previously held that Rodi's lawsuit stated valid claims under Massachusetts law. Rodi v. S. New England Sch. of Law, 389 F.3d 5 (1st Cir. 2004).

107. Gomez-Jimenez v. New York Law Sch., 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012).

("Cooley"),[108] and several other law schools.[109] So far, these lawsuits have met with mixed reactions by the courts, but they have at least raised the possibility that class-action litigation could be used to help solve the law school transparency problem. This Part discusses this new type of litigation by first providing background information about the lawsuits, including precedent for them. It then discusses some possible objections that plaintiffs in the lawsuits will have to overcome if their claims are to succeed.

A. "The Year of Law School Litigation"

According to the NYLS and Cooley complaints, "false and fraudulent representations and omissions are endemic in the law school industry, as nearly every school to a certain degree blatantly manipulates their employment data to make themselves more attractive to prospective students."[110] Given this allegation, it is unsurprising that additional lawsuits followed relatively quickly after Anna Alaburda filed her lawsuit against TJSL on May 26, 2011. On August 10, 2011, attorneys from the Kurzon Strauss law firm filed purported class-action lawsuits on behalf of NYLS and Cooley's graduates and current students.[111] These attorneys—particularly David Anziska and Jesse Strauss (who now operate their own law firms)[112]—have been at the forefront of the law school lawsuits ever since.[113]

1. The Lawsuits Against NYLS & Cooley

Like Alaburda's complaint against TJSL, the complaints filed against NYLS and Cooley accused the law schools of fraud,[114] negligent misrepresentation,[115] and

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108. MacDonald v. Thomas M. Cooley Law Sch., No. 11-cv-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012).

109. *See infra* notes 136–47 and accompanying text.

110. Amended Class Action Complaint at 4, *Thomas M. Cooley Law Sch.*, No. 11-cv-831 (W.D. Mich. Nov. 9, 2011) ECF No. 22 [hereinafter Cooley Complaint]; NYLS Complaint, *supra* note 32, at 5.

111. Class Action Complaint, *Thomas M. Cooley Law Sch.*, No. 11-cv-831, ECF No. 1; Class Action Complaint, *New York Law Sch.*, 943 N.Y.S.2d 834, Doc. No. 1.

112. In the fall of 2011, the Kurzon Strauss law firm dissolved and was replaced by two separate firms operated by former partners, Jeff Kurzon and Jesse Strauss. *See* KURZON LLP, http://kurzon.com/; STRAUSS L. PLLC, http://strausslawpllc.com/. Around the same time, David Anziska apparently started his own law firm. *See* L. OFFICES DAVID ANZISKA, http://www.anziskalaw.com/Home_Page.html.

113. Various other attorneys are involved in the lawsuits as well. *See* Staci Zaretsky, *Twelve More Law Schools Slapped with Class Action Lawsuits Over Employment Data*, ABOVE THE L. (Feb. 1, 2012, 2:53 PM), http://www.abovethelaw.com/2012/02/twelve-more-law-schools-slapped-with-class-action-lawsuits-over-employment-data/.

114. Cooley Complaint, *supra* note 110, at 56–60; TJSL Complaint, *supra* note 103, at 11–14; NYLS Complaint, *supra* note 32, at 53–56.

115. Cooley Complaint, *supra* note 110, at 60–63; TJSL Complaint, *supra* note 103, at 15; NYLS Complaint, *supra* note 32, at 56–59.

various unfair business practices.[116] Indeed, the three complaints were quite similar to each other in many respects, as Cooley noted in its Brief in Support of Motion to Dismiss.[117] As with the TJLS complaint, the gist of both the NYLS and Cooley complaints was that the plaintiffs were "naïve, relatively unsophisticated consumers"[118] who justifiably relied on misleading or inaccurate employment statistics in making their decision to attend law school.[119] The relief requested in the NYLS and Cooley complaints was similar to that requested in the TJLS complaint as well,[120] but given that all of the lawsuits seek to remedy "a systemic, ongoing fraud that is ubiquitous in the legal education industry,"[121] some similarity among the lawsuits was probably unavoidable.

It appears that one of the primary reasons the Kurzon Strauss attorneys targeted NYLS and Cooley for their first lawsuits is the fact that the schools are, in the words of those attorneys, veritable "JD factories."[122] To the extent this is a fair characterization of the two law schools, it is especially true of Cooley. Indeed, with approximately 4000 students at five campuses across Michigan and Florida,[123] being the largest law school in the country is actually one of Cooley's stated goals.[124] Given this goal, it is relatively unsurprising that Cooley also happens to be the least selective ABA-approved law school by a considerable margin: its 83%

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116. Cooley Complaint, *supra* note 110, at 54–56 (violations of the Michigan Consumer Protection Act); TJSL Complaint, *supra* note 103, at 9–11, 15–16 (violations of the California Unfair Competition Law, False Advertising Act, and Consumer Legal Remedies Act); NYLS Complaint, *supra* note 32, at 50–53 (violations of the New York Deceptive Acts and Practices Law).

117. Brief in Support of Defendant Thomas M. Cooley Law School's Motion to Dismiss at 4, MacDonald v. Thomas M. Cooley Law Sch., No. 11-cv-831 (W.D. Mich. Oct. 20, 2011), ECF No. 18 [hereinafter Cooley's Motion to Dismiss] ("[T]he two Kurzon complaints repeat the same allegations from the Thomas Jefferson complaint . . . [a]nd each Kurzon complaint is a copy-and-paste job of the other—no fewer than 77 paragraphs of the complaints are nearly identical save the swapping of school names.").

118. Cooley Complaint, *supra* note 110, at 39; NYLS Complaint, *supra* note 32, at 34.

119. *See* Cooley Complaint, *supra* note 110, at 58, 61; NYLS Complaint, *supra* note 32, at 54, 57–58.

120. *Compare* Cooley Complaint, *supra* note 110, at 63–64, *and* NYLS Complaint, *supra* note 32, at 59–60, *with* TJLS Complaint *supra* note 103, at 16–17. While all three complaints request injunctive relief to order the law schools to change their marketing practices, injunctive relief is discussed at greater length in the Cooley and NYLS complaints.

121. Cooley Complaint, *supra* note 110, at 1; NYLS Complaint, *supra* note 32, at 1. Future would-be plaintiffs might want to consider avoiding the use of such sweeping rhetoric. For example, Cooley seized upon that quote to argue (unsuccessfully) that the plaintiffs' claims should be dismissed for failing to join the ABA and NALP as parties even though the plaintiffs never actually requested that the court rewrite the ABA and NALP reporting standards. S*ee* Cooley's Motion to Dismiss, *supra* note 117, at 12–17; *infra* Part III.C.2.

122. *Class Actions as a Tool of Social Change*, L. SCH. TRANSPARENCY (Aug. 10, 2011, 2:47 PM), http://www.lawschooltransparency.com/2011/08/class-actions-as-a-tool-of-social-change/.

123. *See* Cooley Complaint, *supra* note 110, at 23.

124. BOARD OF DIRECTORS, THOMAS M. COOLEY LAW SCH., THOMAS M. COOLEY LAW SCHOOL'S STRATEGIC PLAN FOR TWENTY-FIRST CENTURY LEGAL EDUCATION 4 (2009).

acceptance rate is nearly 15 percentage points higher than the second least selective school.[125]

These factors alone made Cooley a good target for a lawsuit, but Cooley is also unusually aggressive compared with its peers in the way it markets itself to prospective law students. For example, although *U.S. News* ranks Cooley in the bottom tier of law schools,[126] Cooley's founder, Thomas Brennan, and its current dean, Don DeLuc, publish their own annual ranking of law schools in which they recently ranked Cooley as the second-best law school in the country.[127] Presumably, Cooley's ranking is designed to make the law school appear more attractive to prospective students, but the ranking has been widely criticized by the broader legal community.[128] Nevertheless, Brennan and DeLuc—who incidentally earned $370,000 and $523,213, respectively, in 2009[129]—continue to publish the ranking year after year, no doubt to the chagrin of many Cooley alums.

While NYLS enjoys a somewhat better reputation than Cooley,[130] NYLS is also more expensive than Cooley. During the 2012–2013 academic year, NYLS charged

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125. Cooley Complaint, *supra* note 110, at 23–24. Cooley also boasts the lowest mean LSAT score (146) and mean undergraduate GPA (2.99) of any ABA-approved law school. *Id.* at 24.

126. *Id.* at 35.

127. *See* THOMAS E. BRENNAN & DON LEDUC, JUDGING THE LAW SCHOOLS 1 (12th ed. 2010): *available at* http://www.cooley.edu/rankings/_docs/Judging_12th_Ed_2010.pdf.

128. *See, e.g.*, Brian Leiter, Commentary, *How to Rank Law Schools*, 81 IND. L.J. 47, 51–52 (2006) ("[T]he bizarre Thomas M. Cooley law school rankings . . . contain no useful information and are uniformly ignored by students, faculty, and in most discussions of rankings."); Dora R. Bertram, *Annotated Bibliography: Ranking of Law Schools by* U.S. News & World Report 7 (Wash. Univ. St. Louis Sch. Law Legal Studies Research Paper Series, Paper No. 10-08-03, 2010), *available at* http://ssrn.com/abstract=1658653 ("[The Cooley ranking has been] [w]idely discredited and viewed as an alternative [to the *U.S. News* ranking] with the sole purpose of ranking the Thomas M. Cooley Law School highly."); Elie Mystal, *Latest Cooley Law School Rankings Achieve New Heights of Intellectual Dishonesty*, ABOVE THE L. (Feb. 8, 2011, 6:23 PM), http://abovethelaw.com/2011/02/latest-cooley-law-school-rankings-achieve-new-heights-of-intellectual-dishonesty/ ("Cooley is not the second-best law school in America and even the Cooley people responsible for putting together this list know it. You have to make your own decisions about what such intellectual dishonesty says about the people who made this list.").

129. Cooley Complaint, *supra* note 110, at 6.

130. For example, it is ranked in the third-tier by *U.S. News*. *See Best Law Schools: New York Law School*, U.S. NEWS & WORLD REP., http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/new-york-law-school-03109. Additionally, in stark contrast to Cooley's administration, Richard A. Matasar, who was until recently NYLS' dean, "has been one of the legal academy's most dogged and scolding critics, and he has repeatedly urged professors and fellow deans to rethink the basics of the law school business model and put the interests of students first." Segal, *Law School Economics*, *supra* note 1. Segal believes the "strange case" of Richard Matasar illustrates why the legal education system probably cannot be reformed from within. *Id.* Whether or not Segal's analysis is correct, the high-profile article (which also suggested that NYLS drastically increased its enrollment primarily to maintain its AAA Moody's credit rating) did not paint a very flattering picture of the school. Consequently, the article may explain why NYLS was among one of the first law schools to be targeted for a lawsuit.

$49,225 in tuition and fees,[131] making it about as expensive as several elite law schools.[132] Especially in light of the large surplus of lawyers produced annually by the Empire State,[133] the value proposition of attending NYLS is probably as questionable as the value proposition of attending Cooley. Thus, it is little wonder that the Kurzon Strauss law firm was able to find several NYLS alums willing to serve as named plaintiffs.

2. More Lawsuits & Rumors of Lawsuits

On October 5, 2011, David Anziska and Jesse Strauss, the lead attorneys in the lawsuits against NYLS and Cooley, announced plans to sue fifteen additional law schools when they found at least three alumni from each school willing to serve as named plaintiffs.[134] At that time, they expressed a strong belief that "by the end of 2012, almost every [law] school in the nation will be sued."[135] For their part, the attorneys said they hoped to make 2012 "the year of law school litigation" by suing "as many law schools" as possible, with the ultimate goal of eventually forcing "a global settlement through the ABA."[136]

On February 1, 2012, the lawyers followed through on their earlier threats by filing purported class-action lawsuits against an additional twelve law schools—including Albany Law School of Union University,[137] Brooklyn Law

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131. *Tuition and Financial Aid*, N.Y. L. SCH., http://www.nyls.edu/prospective_students/tuition_and_financial_aid.

132. *See, e.g.*, *Annual Cost of Attendance Budget*, U. VA. SCH. L., http://www.law.virginia.edu/html/prospectives/finaid/tuition.htm ($51,400 for nonresident tuition and fees); *Estimated Budget*, U. TEX. SCH. LAW, http://www.utexas.edu/law/finaid/costs/ ($49,244 for nonresident tuition and fees); *2012–2013 Tuition Fees per Semester*, GEO. U. L. CENTER., http://www.law.georgetown.edu/campus-services/student-accounts//upload/2012-13-GU-Law-Tuition-Fees-posting.pdf ($48,835 for tuition and fees).

133. The state of New York is projected to need only 2100 new lawyers each year through 2015, but 9787 people passed the New York state bar exam in 2009. *See* Rampell, *supra* note 7.

134. *See* Karen Sloan, *Another 15 Law Schools Targeted Over Jobs Data*, NAT'L L.J. (Oct. 5, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202517930210&slreturn=20121003092042. According to Anziska and Strauss, they targeted these specific schools "either because alumni or students approached them with concerns, or because the postgraduate job data they have reported to the American Bar Association were 'implausible.'" *Id.*

135. *Id.*

136. Staci Zaretsky, *Calling All Disgruntled Law School Graduates: Will You Ring in the New Year by Suing Your School*, ABOVE THE L. (Dec. 14, 2011, 4:02 PM), http://abovethelaw.com/2011/12/calling-all-disgruntled-law-school-graduates-will-you-ring-in-the-new-year-by-suing-your-school/ (quoting David Anziska).

137. Class Action Complaint, Austin v. Albany Law Sch. of Union Univ., No. A00014/2012, 2013 WL 45884 (N.Y. Sup. Ct. Feb. 1, 2012), ECF No. 1. This lawsuit was dismissed after the New York Supreme Court Appellate Division issued its *Gomez-Jimenez v. NYLS* opinion, which the *Austin* court recognized as binding precedent. *See* Austin v. Albany Law Sch. of Union Univ., 2013 WL 45884 at *7 (N.Y. Sup. Ct. 2013); Gomez-Jimenez v. N.Y. Law Sch., 2012 WL 6620602 (N.Y. App. Div. 2012).

School,[138] Maurice A. Deane School of Law at Hofstra University,[139] Florida Coastal Law School,[140] Illinois Institute of Technology Chicago-Kent College of Law,[141] DePaul University College of Law,[142] The John Marshall Law School,[143] California Western School of Law,[144] Southwestern Law School,[145] Golden Gate University School of Law,[146] University of San Francisco School of Law,[147] and Widener University School of Law.[148] According to Anziska and Strauss, they targeted these specific schools "either because alumni or students approached them with concerns, or because the postgraduate job data they have reported to the American Bar Association were 'implausible.'"[149]

As the February 2012 round of lawsuits illustrates, law schools that are private, expensive, and poorly ranked are particularly likely to be targeted for class-action lawsuits because alumni of such schools are particularly likely to be dissatisfied with the economic value of their legal education.[150] Nevertheless, more highly ranked law schools are not necessarily immune to this type of litigation.[151] On

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138. Amended Class Action Complaint, Bevelacqua v. Brooklyn Law Sch., No. 500175/2012 (N.Y. Sup. Ct. May 17, 2012), ECF No. 18 (originally filed Feb. 1, 2012).

139. Class Action Complaint, Richins v. Hofstra Univ., No. 12-cv-01110 (E.D.N.Y. Mar. 6, 2012), *removed from* No. 600138 (N.Y. Sup. Ct. Feb. 1, 2012).

140. Complaint, Casey v. Florida Coastal Sch. of Law, Inc., No. 12-cv-20785-MGC (S.D. Fla. Feb. 27, 2012), *removed from* No. 12-03990-CA-40 (Fla. Cir. Ct. Feb. 1, 2012).

141. Class Action Complaint, Evans v. Illinois Inst. of Tech., No. 12-CH-03522 (Ill. Cir. Ct. Feb. 1, 2012).

142. First Amended Class Action Complaint, Phillips v. DePaul Univ., No. 12-cv-1791 (N.D. Ill. Apr. 6, 2012), ECF No. 16, *removed from* No. 12-CH-03523 (Ill. Cir. Ct. Feb. 1, 2012). This case was eventually remanded back to the state court, *see* Memorandum Order, Phillips v. DePaul Univ., No. 12-cv-1791 (N.D. Ill. Apr. 24, 2012), ECF No. 19, which ultimately dismissed the lawsuit for reasons similar to those discussed in the dismissals of the Cooley and NYLS cases. *Compare* Memorandum and Order, Phillips v. DePaul Univ., No. 12-CH-03523 (Ill. Cir. Ct. Sept. 11, 2012), *with infra* notes 170–205 and accompanying text.

143. Class Action Complaint, Johnson v. John Marshall Law Sch., No. 12-CH-03494 (Ill. Cir. Ct. Feb. 1, 2012).

144. Class Action Complaint, Chaves v. Cal. W. Sch. of Law, No. 37-2012-D0091627-CU-BT-CTL (Cal. Super. Ct. Feb. 1, 2012).

145. Class Action Complaint, Derby v. Sw. Law Sch., No. BC478133 (Cal. Super. Ct. Feb. 1, 2012).

146. First Amended Class Action Complaint, Arring v. Golden Gate Univ., No. CGC-12-517837 (Cal. Super. Ct. May 4, 2012) (originally filed Feb. 1, 2012).

147. First Amended Class Action Complaint, Hallock v. Univ. S.F., No. CGC-12-517861 (Cal. Super. Ct. May 4, 2012) (originally filed Feb. 1, 2012).

148. Amended Class Action Complaint, Harnish v. Widener Univ. Sch. of Law, No. 12-cv-608 (D.N.J. Apr. 27, 2012), ECF No. 8 (originally filed Feb. 1, 2012).

149. Sloan, *supra* note 134.

150. *See Breaking: Class Action Suit Filed Against Thomas Jefferson School of Law*, L. SCH. TRANSPARENCY (May 27, 2011, 3:01 AM), http://www.lawschooltransparency.com/2011/05/breaking-class-action-suit-filed-against-thomas-jefferson-school-of-law/.

151. *See* Brief in Opposition to Defendant's Motion to Dismiss at 11 n.5, MacDonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831 (W.D. Mich. Dec. 22, 2011), ECF No. 37 ("Because most law schools report deceptive and misleading employment data, almost every

March 14, 2012, Anziska and Strauss announced plans to sue an additional twenty law schools in ten states, including two top-50 schools and eight top-100 schools.[152] While the attorneys failed to sue any of the schools by Memorial Day 2012, as was their stated goal,[153] the announcement raises the possibility that additional lawsuits against these or other law schools may be forthcoming.

3. Early Opinions on the Lawsuits

Of course, whether or not additional lawsuits will be forthcoming may depend in no small part on how the first fifteen lawsuits are resolved. While it is impossible to predict whether any of the pending cases will ultimately result in a judgment or settlement, early rulings indicate that at least some of the cases have a chance of avoiding summary disposition. In March 2012, the judge hearing the case against TJSL informed the law school that its demurrer "was not well-taken,"[154] and in July 2012, the judge hearing the cases against Golden Gate University School of Law and San Francisco University School of Law overruled the demurrers the two schools had filed in their respective lawsuits.[155]

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law school in the nation is vulnerable to a suit such as this.").

152. *See* Karen Sloan, *Plaintiffs' Firms Target Another 20 Law Schools, Alleging Fraud,* NAT'L L.J. (Mar. 14, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202545575181&Graduates_target_another_law_schools_alleging_fraud&slreturn=20120719142504. The following law schools were those targeted for lawsuits by the announcement: American University Washington College of Law; Catholic University of America Columbus School of Law; Chapman University School of Law; Loyola Law School, Los Angeles; Loyola University Chicago School of Law; University of Miami School of Law; New England School of Law; Pace Law School; Pepperdine University School of Law; Roger Williams University School of Law; Saint Louis University School of Law; St. John's University School of Law; St. Thomas University School of Law, Miami; Seattle University School of Law; Stetson University College of Law; Syracuse University College of Law; Valparaiso University School of Law; Western New England University School of Law; Whittier Law School; and Yeshiva University Benjamin N. Cardozo School of Law. *Id.*

153. *Id.*

154. *See* Staci Zaretsky, *Breaking: Thomas Jefferson School of Law's Motion to Dismiss DENIED—And Twenty More Law Schools to Be Sued*, ABOVE THE L. (Mar. 14, 2012, 2:42 PM), http://www.abovethelaw.com/2012/03/twenty-more-law-schools-targeted-for-class-action-lawsuits/ (quoting Brian Procel, attorney for plaintiff Anna Alaburda). After the case entered into discovery, a former Assistant Director at TJSL's Career Services Office came forward alleging that her supervisors instructed her to use various methods to artificially inflate TJSL's employment statistics. *See* Declaration of Karen Grant, Alaburda v. Thomas Jefferson Sch. of Law, No. 37-2011-00091898-CU-FR-CTL (Cal. Super. Ct. Oct. 18, 2012). If these allegations are true, "TJSL could face sanctions from the American Bar Association as severe as losing accreditation." *Breaking: Ex-CSO Assistant Director from Thomas Jefferson Admits to Fraud, Alleges Deliberate Scheme by Law School*, L. SCH. TRANSPARENCY (Oct. 23, 2012, 10:00 AM), http://www.lawschooltransparency.com/2012/10/ex-cso-assistant-director-from-tjls-admits-to-fraud/. For its part, TJSL has officially denied the allegations. *Litigation Update*, T. JEFFERSON SCH. L. (Nov. 30, 2012), http://www.tjsl.edu/news-media/2012/7835.

155. Order Overruling Demurrer to First Amended Complaint, Arring v. Golden Gate Univ., No. CGC-12-517837 (Cal. Super. Ct. July 19, 2012) [*hereinafter* Order Overruling Golden Gate's Demurrer]; Order Overruling Demurrer to First Amended Complaint,

On the other hand, the judges hearing the cases against NYLS and Cooley have granted motions dismissing those two lawsuits.[156] While obviously disappointing to the plaintiffs and attorneys involved in the lawsuits, the decision did not exactly come as a surprise. At least according to a statement Anziska and Strauss issued *after* the case against NYLS had been dismissed, the attorneys "always expected for many of [the] issues to ultimately be resolved on an appellate level."[157] To that end, the two have already filed appeals of both the NYLS and Cooley decisions with the New York Supreme Court's Appellate Division and the Sixth Circuit Court of Appeals, respectively.[158] The New York Supreme Court's Appellate Division has already affirmed the lower-court's decision to dismiss the lawsuit against NYLS,[159] but other appellate courts might be more sympathetic to the plaintiffs' claims than some of the trial courts were initially.

B. Precedent for the Lawsuits

Alaburda v. Thomas Jefferson School of Law was a groundbreaking case, but there is some precedent for this type of litigation.[160] For example, the California Culinary Academy (CCA) recently agreed to pay $40 million to settle class-action lawsuits brought by graduates who accused the school of exaggerating its employment rates, prestige, and selectivity.[161] Per the terms of a consolidated

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Hallock v. Univ. S.F., No. CGC-12-517861 (Cal. Super. Ct. July 19, 2012) [*hereinafter* Order Overruling Univ. S.F.'s Demurrer].

156. *See* MacDonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012); Gomez-Jimenez v. N.Y. Law Sch., 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012). The lawsuit against DePaul University has also been dismissed. *See supra* note 142.

157. Staci Zaretsky, *Breaking: Class Action Lawsuit Against New York Law School Dismissed*, ABOVE THE L. (Mar. 21, 2012 12:12 PM), http://abovethelaw.com/2012/03/breaking-class-action-lawsuit-against-new-york-law-school-dismissed/. Of course, given the procedural posture of the cases, the plaintiffs could win at the appellate level but ultimately lose on remand, so success at the appellate level is necessary but not by itself sufficient for the plaintiffs to succeed in their claims.

158. Notice of Appeal, *Thomas M. Cooley Law Sch.*, 2012 WL 2994107, ECF No. 57; Gomez-Jimenez v. N.Y. Law Sch., 2012 WL 6620602 (N.Y. App. Div. 2012). Although the New York Supreme Court's Appellate Division ultimately affirmed the lower court's order dismissing the lawsuit against NYLS, the court was "not unsympathetic to [the] plaintiffs' concerns." *Id.* at *4. The court recognized that students "sometimes make decisions to yoke themselves and their spouses and/or their children to a crushing burden because the schools have made misleading representations that give the impression that a full time job is easily obtainable when in fact it is not." *Id.* In light of "this reality" and the "high ethical standards" that are a source of pride to the legal profession, the court stated that NYLS and its peers "owe prospective students more than just barebones compliance with their legal obligations [and] . . . have at least an ethical obligation of absolute candor to their prospective students." *Id.*

159. Gomez-Jimenez v. N.Y. Law Sch., 2012 WL 6620602 (N.Y. App. Div. 2012).

160. *See generally* Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 538–40 (2012); Joseph Sipley, Note, *For-Profit Education and Federal Funding: Bad Outcomes for Students and Taxpayers*, 64 RUTGERS L. REV. 267, 287–88 (2011).

161. *See* Order Regarding Preliminary Approval of Class Action Settlement and Class

settlement, which was given final approval in April 2012 by the San Francisco Superior Court,[162] the 8500 class members are each potentially eligible to receive thousands of dollars in tuition rebates.[163] CCA also agreed to change its recruiting practices and improve its disclosures to prospective students, although the settlement did not require CCA or its publicly-traded parent company, Career Education Corporation ("Career Education"), to admit to any wrongdoing.[164] According to a Career Education spokesman, the company agreed to settle the lawsuits because "they were too expensive to litigate and distracting to employees."[165]

Unsurprisingly, the success of the CCA case has helped generate interest for additional class-actions against for-profit institutions of higher education.[166] While there may be important factual and legal differences between the CCA case and the law school lawsuits, the CCA case provides a model for how a settlement between a law school and its graduates might be structured. It should also make some law school administrators—particularly those at law schools based in California—somewhat nervous about the prospect of having to defend a similar lawsuit.

Of course, the most obviously relevant precedent for the law school lawsuits is the law school lawsuits themselves. Unsurprisingly, law school defendants have been quick to offer the orders dismissing the NYLS and Cooley cases as supplemental authority supporting their own motions to dismiss.[167] However, because the cases raise claims that sound in state law, which will necessarily vary from jurisdiction to jurisdiction, these early cases will not be directly precedential to many subsequent cases.[168] Certainly, judges in subsequent lawsuits may look to these two cases for persuasive authority on some of the issues raised in the

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Notice, Ex. 1, at 6–7, Amador v. California Culinary Acad., No. CGC-07-467710 (Cal. Super. Ct. Mar. 20, 2011).

162. *See* Order Granting Final Approval of Class Action Settlement and Granting Plaintiff's Motion for Attorney's Fees and Costs at 3, Amador v. California Culinary Acad., No. CGC-07-467710 (Cal. Super. Ct. Apr. 18, 2011).

163. *See* Order Regarding Preliminary Approval of Class Action Settlement and Class Notice, Ex. 1, at 9–11, California Culinary Acad., No. CGC-07-467710.

164. *See id.* Ex. 1, at 9.

165. Terence Chea, *Culinary Schools Grads Claim They Were Ripped Off*, NBCNEWS.COM (Sept. 4, 2011, 5:35 PM), www.msnbc.msn.com/id/44393771/ns/us_news-life/t/culinary-school-grads-claim-they-were-ripped/%20#.UDEYSqkpMWF.

166. *See, e.g.*, Class Action Complaint, Kimble v. Rhodes Coll., No. 3:10-cv-05786-EMC (N.D. Cal. Dec. 20, 2010) (a purported class action brought on behalf of graduates of Everest College alleging, among other things, that the college misrepresented its job placement rates to prospective students).

167. *See, e.g.*, Notice of Filing Supplemental Authority in Support of Motion to Dismiss the Complaint, Casey v. Fla. Coastal Sch. of Law, Inc., No. 1:12-cv-20785-MGC (S.D. Fla. Mar. 22, 2012), ECF No. 10 (offering a copy of the order dismissing the NYLS case).

168. *See* Peter Lattman, *9 Graduates Lose Case Against New York Law School*, N.Y. TIMES DEALBOOK (Mar. 22, 2012, 7:59 PM), http://dealbook.nytimes.com/2012/03/22/9-graduates-lose-case-against-new-york-law-school/?ref=business. Perhaps for this reason, the order dismissing the lawsuit against DePaul University does not even cite the NYLS and Cooley cases. *See* Memorandum and Order, Phillips v. DePaul Univ., No. 12-CH-03523 (Ill. Cir. Ct. Sept. 11, 2012).

lawsuits, but the mere fact that some of the purported class-action lawsuits against law schools have been dismissed does not mean that defendants in subsequent lawsuits will not still have to vigorously defend themselves.[169]

C. Some Possible Objections to the Lawsuits

Because each of these class-action lawsuits raise claims that sound in state law, and because law schools in many different states have now been targeted for lawsuits,[170] it is not feasible (within the space provided for this Note) to analyze the merits of all of the various claims and defenses parties litigating such lawsuits might raise. However, the plaintiffs in each of the lawsuits accuse their alma maters of the same basic wrongdoing, so this Part describes a few—but by no means all—potential objections one might raise against any of the lawsuits. While plaintiffs in these lawsuits could also lose on more technical grounds,[171] they will certainly need to convince the courts to side with them on each of these potential objections if their claims are to ultimately succeed.

1. Have ABA Reforms Rendered the Lawsuit Moot?

When the ABA was doing nothing about the law school transparency problem and individual law schools—with the ABA's blessing—were offering prospective students employment statistics that were "so vague and incomplete as to be meaningless,"[172] class-action lawsuits against individual law schools were seen by some as a potential way to solve the law school transparency problem.[173] However, in light of recent ABA reforms, which may have been motivated in part by the lawsuits themselves,[174] the idea of using the lawsuits as a vehicle for social change may have lost some of its appeal. Nevertheless, the ABA has not yet completely solved the law school transparency problem,[175] so the lawsuits may still have a role to play in helping solve that problem.

This is particularly true as it relates to a problem the ABA is currently ignoring—the fact that law school employment statistics are currently based on

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169. However, if many additional cases are summarily dismissed, it is less likely that potential plaintiffs would file similar suits in the future. Additionally, those cases that ultimately result an appellate decision will create precedent that will be binding upon courts within that jurisdiction hearing similar lawsuits. *See, e.g.*, Austin v. Albany Law Sch. of Union Univ., 2013 WL 45884 at *7 (N.Y. Sup. Ct. 2013) (recognizing *Gomez-Jimenez v. N.Y. Law Sch.*, 2012 WL 6620602 (N.Y. App. Div. 2012) as binding precedent).

170. *See supra* notes 103–48 and accompanying text.

171. *See, e.g.*, Opinion Granting Cooley's Motion to Dismiss at 9, MacDonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012) (holding that the Complaint does not allege a claim under the Michigan Consumer Protection Act because the plaintiffs purchased Cooley's legal education "primarily for [a] business or commercial [purpose]").

172. Opinion Granting Cooley's Motion to Dismiss at *11, *Thomas M. Cooley Law Schl.*, 2012 WL 2994107.

173. *See, e.g.*, *Class Actions as a Tool of Social Change*, *supra* note 122.

174. *See* Sloan, *supra* note 134.

175. *See supra* note 59 and accompanying text.

unaudited reports compiled by the law schools themselves. In an early interview regarding the lawsuits, David Anziska said:

> [A]ll law schools must have their employment data audited. There can be no more self-reporting of unaudited employment data released to the public. *Over my dead body*, this has to happen, because the incentive to cheat is too great. All law schools must be forced to have their employment data independently verified. I will *not* sign off on an agreement that does not have that in it. *Period*. It *will not* happen.[176]

Although attorneys working on other cases may feel differently about the relative importance of requiring law schools to have their employment data independently verified, Anziska's comments indicate that increased transparency will likely be a component of any settlement agreement between law schools and their alumni, at least as long as law school transparency remains a problem.

Additionally, the ABA reforms are necessarily forward looking. The ABA is not going to create an ex post facto rule that punishes law schools for making statements that actually complied with the ABA's previous (inadequate) reporting requirements. However, state courts can punish law schools for making those same statements if they were made in violation of state law.[177] Thus, unlike ABA reforms, class-action litigation has the potential to punish law schools for their prior bad acts and to compensate plaintiffs who may have been injured by those bad acts, making it a potentially useful supplement to ABA reforms in this area.

2. Are the ABA and NALP Necessary Parties to the Lawsuits?

Given that Anziska and Strauss ultimately wish to "force a global settlement through the ABA,"[178] why did they not sue the ABA to begin with? They say it is because the plaintiffs paid their tuition money to the law schools, not the ABA, and because the attorneys wanted to initially "hit the primary tortfeasors and bad actors."[179] Nevertheless, defendants in some of the lawsuits have argued that because the plaintiffs seek a system-wide remedy, the ABA and NALP are necessary parties to the lawsuits.[180]

While it is certainly understandable why defendants would make this argument, it is not a particularly convincing one. Even Judge Quist, who ultimately granted

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176. Staci Zaretsky, *Fifteen More Law Schools to Be Hit with Class Action Lawsuits Over Post-Grad Employment Rates*, ABOVE THE L. (Oct. 5, 2011, 2:50 PM), http://abovethelaw.com/2011/10/fifteen-more-law-schools-to-be-hit-with-class-action-lawsuits-over-post-grad-employment-rates/ (emphasis in original) (quoting David Anziska).

177. *See* Order Regarding Rulings At Oral Argument at 3, MacDonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831 (W.D. Mich. June 7, 2012), ECF No. 51 ("Neither field preemption nor express preemption prevents Plaintiffs from raising their claims, all of which are based on state law.").

178. *See supra* note 136 and accompanying text.

179. Zaretsky, *supra* note 136 (quoting David Anziska).

180. *See* Cooley's Motion to Dismiss, *supra* note 117, at 6–7.

Cooley's motion to dismiss,[181] disagreed with Cooley on this particular issue, explaining:

> Even though Plaintiff's goal may be to fix systemic problems in law school employment data reporting, that goal is not what they seek to accomplish with *this particular lawsuit*. Plaintiffs seek damages and equitable relief solely from Cooley and its agents. . . . Along with damages, Plaintiffs seek an injunction that would require Cooley to report more accurate employment data. *The ABA's and NALP's standards are a floor, not a ceiling*. Cooley could provide prospective and current students with data that contains more information than the employment statistics required by the ABA and NALP, while at the same time complying with the ABA's and NALP's requirements.[182]

Even though the plaintiffs' attorneys who brought the lawsuits did so as part of their plan to sue enough schools to force a "global settlement through the ABA,"[183] none of the lawsuits request relief from the ABA or NALP. Thus, there is no apparent reason to believe that either organization should be considered a necessary party to any of the lawsuits.

3. Did the Law Schools Actually Make Any False Statements?

Perhaps the biggest problem with the law school lawsuits is the fact that many of the representations of which the plaintiffs complain were not objectively false. For example, although it is probably true that the "percentage of graduates employed" statistics law schools provided to prospective students were somewhat misleading (because they did not differentiate between part-time, full-time, legal, and nonlegal jobs), even the plaintiffs in these lawsuits must acknowledge that the defendants never actually claimed that their "percentage of graduates employed" statistics only counted full-time legal jobs.[184] Thus, to the extent the plaintiffs might have been misled by the statistics, it is because the plaintiffs themselves misinterpreted the statistics, not because the statistics were factually inaccurate.[185]

On the other hand, it could be argued that the context in which the allegedly fraudulent employment statistics were disclosed (i.e. in materials designed to attract and retain students) implied that the employment statistics referred to "jobs for which a [legal] education is [required or preferred] and . . . not . . . for which a

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181. *See* Opinion Granting Cooley's Motion to Dismiss, MacDonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012).

182. Order Regarding Rulings At Oral Argument at 2, *Thomas M. Cooley Law Sch.*, No. 1:11-cv-831, ECF No. 51 (emphasis added) (citations omitted). The phrase "[t]he ABA's and NALP's standards are a floor, not a ceiling" was subsequently stricken from the opinion at Cooley's request, *see* Order, MacDonald v. Thomas M. Cooley Law Sch., No. 1:11-cv-831 (W.D. Mich. June 20, 2012), ECF No. 53, but the sentiment and reasoning of the opinion still imply as much.

183. *See supra* note 136 and accompanying text.

184. *See* MacDonald v. Thomas M. Cooley Law Sch., No. 11-cv-831, 2012 WL 2994107, at *6 (W.D. Mich. July 20, 2012).

185. *See id.*

[legal] education is irrelevant or of minimal utility."[186] According to this view, which Judge Kahn acknowledged in his orders overruling the University of San Francisco School of Law ("San Francisco") and Golden Gate University School of Law ("Golden Gate") demurrers,[187] that the employment statistics might be factually accurate "is 'truthiness' in the technical sense that lawyers are infamous for, but [not] honest."[188] Thus, even though the plaintiffs in these lawsuits have been unable to produce any evidence that the law schools published employment statistics that were factually untrue, Judge Khan's orders suggest that summary disposition of the lawsuits might be inappropriate.

4. Did the Plaintiffs Reasonably Rely on Any False Statements?

While reasonable minds might disagree about whether or not prospective law students are sophisticated consumers,[189] the plaintiffs in these lawsuits might have a difficult time demonstrating that they reasonably relied on any fraudulent statements made by the defendants. For example, the *Cooley* plaintiffs claimed "Cooley's statistics are at odds with the employment statistics reported by NALP because, despite Cooley's lenient admission standards and bottom-tier ranking, Cooley's statistics suggest that it had a higher placement rate than 40% of the nation's law schools."[190] However, because such "basic deductive reasoning" provides a reason to question Cooley's published employment statistics, Cooley was able to argue—successfully—that the plaintiffs could not have reasonably relied on those employment statistics.[191]

Similarly, many of the law schools "advertised employment rates that exceeded their bar pass rates, which implies that not all the jobs were lawyer jobs."[192] Because bar admission is a prerequisite to practice law, some of the defendants have argued that "any reasonable reader would immediately recognize" that the "employed nine months after graduation" statistic must include non-lawyer positions.[193] Although it seems questionable whether *any* reasonable reader would

186. Order Overruling Golden Gate's Demurrer, *supra* note 155, at 2.

187. *Id.*; Order Overruling Univ. S.F.'s Demurrer, *supra* note 155, at 2. To be clear, Judge Kahn refused to grant the defendants demurrers because he recognized this possibility, not because he endorsed it himself at that time. *Id.*

188. TAMANAHA, *supra* note 2, at 74.

189. *Compare* Gomez-Jimenez v. N.Y. Law Sch., 943 N.Y.S.2d 834, 843 (N.Y. Sup. Ct. 2012) ("By anyone's definition, reasonable consumers—college graduates—seriously considering law schools are a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their post-college options, such as applying for professional school."), *with Thomas M. Cooley Law Sch.*, 2012 WL 2994107, at *10 ("This Court does not necessarily agree that college graduates are particularly sophisticated in making career or business decisions. Sometimes hope and dreams triumph over experience and common sense.").

190. *Thomas M. Cooley Law Sch.*, 2012 WL 2994107, at *2.

191. *Id.* at *6.

192. TAMANAHA, *supra* note 2, at 74.

193. Memorandum of Points and Authorities in Support of Defendant Thomas Jefferson School of Law's Demurrer to Plaintiff's First Amended Complaint at 2, Alaburda v. Thomas Jefferson Sch. of Law, No. 37-2011-00091898-CU-FR-CTL (Cal. Super. Ct. July 18, 2011)

have *immediately* put two and two together, it cannot be denied that "[s]keptical prospective students who conducted a diligent investigation into the employment numbers would have realized that something didn't add up."[194]

These arguments managed to convince the judges hearing the NYLS and Cooley cases that the plaintiffs in those cases could not have reasonably relied on any misrepresentations the defendants may have made, but Judge Kahn explicitly rejected such arguments in overruling demurrers filed in the above-mentioned San Francisco and Golden Gate cases.[195] After noting that "California case law establishes that ordinarily the issue of whether a statement is likely to deceive a reasonable consumer is a question of fact," the judge held that the issue of whether the employment statistics would have misled reasonable consumers was "simply not amenable to resolution on a demurrer and must await factual development by the parties."[196] Thus, even if the fraud claims made by the plaintiffs' in the various law school lawsuits ultimately fail due to the unreasonableness of any reliance on their part, the cases may nevertheless avoid summary disposition. On the other hand, the need for "factual development by the parties" might also provide the defendants with a basis for arguing that the lawsuits should not be certified as class actions or coordinated with related lawsuits.[197]

5. Are the Damages the Plaintiffs Allege Too Remote and/or Speculative?

Even if the plaintiffs in the lawsuits could establish that the law schools made fraudulent statements regarding their employment rates and that the plaintiffs reasonably relied on those fraudulent statements when deciding to enroll and remain enrolled at those law schools, the plaintiffs may have a difficult time establishing exactly how they were injured by those fraudulent statements. For example, after struggling for about a year to find work despite sending out "tens" of resumes, Alexandra Gomez-Jimenez (one of the named plaintiffs in the case against NYLS) eventually secured a full-time legal position and now has a "thriving" immigration practice at her own firm in Manhattan.[198] Consequently, one could debate whether Ms. Gomez-Jimenez has been injured at all. For someone who went to the eighth-best law school[199] in the most saturated legal employment market in

(citation omitted).

194. TAMANAHA, *supra* note 2, at 74.

195. *See* Order Overruling Golden Gate's Demurrer, *supra* note 155, at 2; Order Overruling Univ. S.F.'s Demurrer, *supra* note 155, at 2.

196. Order Overruling Golden Gate's Demurrer, *supra* note 155, at 2; Order Overruling Univ. S.F.'s Demurrer, *supra* note 155, at 2.

197. *See, e.g.*, Case Management Statement, Attachment, at 1, Arring v. Golden Gate Univ., No. CGC-12-517837 (Cal. Super. Ct. June 21, 2012) ("[A]s individual issues of fact and law predominate over any common issues, Plaintiffs' claims are inappropriate for class treatment."); *id.* at 4 ("[Golden Gate] will oppose Plaintiffs' Petition [to Coordinate] as there is no reason to coordinate these matters. There are four separate groups of plaintiffs alleging separate and independent harm against four unrelated law schools. There is no overlap of facts or witnesses in the cases, and they should each be litigated in their respective forums.").

198. *See* NYLS Complaint, *supra* note 32, at 8–9.

199. Based on the current *U.S. News* rankings of the New York City area law schools, that is. *See Best Law Schools: New York Law Schools*, *supra* note 130.

the country[200] and still managed to find a job in a terrible entry-level legal employment market[201] despite not being particularly aggressive in her job search, she seems to have done pretty well for herself. To be sure, some of the named plaintiffs in the lawsuits are more sympathetic figures than Ms. Gomez-Jimenez,[202] but some of the plaintiffs may not seem particularly deserving of damages at all.

To avoid this problem, the plaintiffs suggest that the correct measure of their damages is the "difference between a degree where a high-paying, full-time, permanent job was highly likely and a degree where full-time permanent legal employment at any salary, let alone a high salary, is scarce."[203] While such a valuation may be inherently speculative,[204] using it is especially problematic in light of the fact that most of the named plaintiffs in the lawsuits graduated during or immediately after the Great Recession, which decimated the entry-level legal employment market.[205] Thus, even if the law schools had not made any misrepresentations regarding their employment statistics, many of these students likely would have been disappointed with the bleak employment prospects awaiting them at graduation.[206]

For these reasons, Judge Melvin Schweitzer, the judge hearing the case against NYLS declined to "engage in [the] naked speculation" required to adopt the plaintiff's proposed measure of damages.[207] Although it is certainly possible that other judges will disagree with Judge Schweitzer's opinion that the damages alleged by plaintiffs in similar lawsuits are too remote and speculative to justify relief, Judge Schwitzer's opinion does "exemplify the adage that not every ailment afflicting society may be redressed by a lawsuit."[208] It also suggests that plaintiffs in other lawsuits may want to try to offer a more concrete method for valuating their damages. Otherwise, there is a good chance that other judges will look to Judge Schwitzer's opinion as persuasive authority on this issue.[209]

IV. THE EFFECT OF THE LAWSUITS ON THE LAW SCHOOL TRANSPARENCY PROBLEM

The most obvious result these cases have had is to increase interest in this type of litigation, as the relatively quick proliferation of these lawsuits demonstrates. If just one of the early cases is able to avoid summary disposition, the specter of such litigation would become a very real threat to other vulnerable law schools, and one

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200. *See* Rampell, *supra* note 7.

201. *See supra* note 12 and accompanying text.

202. For example, despite passing the New York Bar Exam and graduating in the top-15% of her class, Chloe Gilgan had to work as a saleswoman at a department store while she was unable to find legal employment for fourteen months. She then found work as a legal secretary, but does not currently work as an attorney. *See* NYLS Complaint, *supra* note 32, at 16–17.

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

204. *See id.* at 850.

205. *See id.* at 851.

206. *See id.*

207. *Id.*

208. *Id.* at 854.

209. *See supra* notes 167–69 and accompanying text.

would expect interest in additional litigation against law schools to increase significantly.[210] Because law school administrators would obviously like to avoid having their schools literally put on trial, the lawsuits could provide law schools with a powerful incentive to increase transparency voluntarily. True, elite and state-run law schools may not have as much reason to fear being sued by dissatisfied alumni as lower-ranked and for-profit law schools do, but the lawsuits have probably contributed to some law schools' decisions to heed the calls for increased transparency.

Even if a law school need not fear a lawsuit, the lawsuits have demonstrated that there is a strong demand for better information about the employment outcomes of recent law school graduates. Like the *New York Times* articles by David Segal and the advocacy efforts of Law School Transparency, the lawsuits have helped raise awareness among prospective law students about the declining value proposition of attending law school, especially the value proposition of attending the law schools that have been sued or targeted for lawsuits.[211] It is now virtually impossible for prospective law students who do any amount of research about these law schools to avoid stumbling upon information about the lawsuits,[212] and if the knowledge that dissatisfied graduates have sued a particular law school because of their bleak employment prospects does not make prospective students think twice about borrowing tens or hundreds of thousands of dollars to attend that school, what will?

Because the lawsuits have tarnished the reputations of the schools that have been targeted by lawsuits, the lawsuits may have a negative effect on the financial stability of those schools. For example, in January 2012, Moody's Investors Service revised its outlook for NYLS from "stable" to "negative," citing "recent enrollment volatility and uncertainty surrounding the outcome of a recent lawsuit and its potential impact on the school's market position and longer-term student demand."[213] The following month, Moody's issued a report characterizing such

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210. *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 528 (2007).

211. For example, due to declining interest from prospective students, Cooley's 2011 entering class was almost 27% smaller than its entering class the previous year, while its 2012 class was about 15% smaller than its 2011 class. *See* Matthew Miller, *Cooley Law Enrollment Falls Amid Skepticism*, LANSING ST. J. (Aug. 19, 2012, 12:59 AM), http://www.lansingstatejournal.com/interactive/article/20120819/NEWS01/308190102/Cooley-Law-enrollment-falls-amid-skepticism?nclick_check=1.

212. For example, a Google search for the phrase "Thomas Jefferson School of Law" produces an article about the lawsuits within the first page of search results. Similarly, because law schools have felt compelled to explain to prospective students and others why they believe the suits do not have merit, some schools have even posted information about the lawsuits on their websites. *See, e.g.*, *Career Development at IIT Chicago-Kent: Frequently Asked Questions*, IIT CHICAGO-KENT C. OF L. (2012), http:www.kentlaw.iit.edu/career-preparation/career-services/prospective-students/career-development-faq; *New York Law School Files Motion to Dismiss Lawsuit*, N.Y. L. SCH. (Oct. 13, 2011), http://www.nyls.edu/news_and_events/motion_to_dismiss_lawsuit. Consequently, even prospective law students who receive all of their information about the schools from the schools themselves can still discover that the schools have been sued.

213. Faiza Mawjee, *Moody's Affirms A3 Underlying Rating on New York Law School's Series 2006A, B-1 and B-2 Bonds; Outlook Revised to Negative from Stable*, MOODY'S

lawsuits as "credit negative."[214] Moody's, which "maintains credit ratings for eight of the fifteen schools that had been sued" as of February 2012, noted that "standalone" law schools "are more likely to suffer negative effects from the lawsuits than [are law schools] that are a part of . . . larger universit[ies].[215] Interestingly, even though the lawsuit against NYLS has been dismissed, Moody's has not been quick to revise its outlook for the law school.[216] Despite NYLS's victory in court, it is too early to tell what impact the negative publicity generated by the lawsuits have had on longer-term student demand. Thus, even if other schools succeed in having the cases that have been filed against them dismissed relatively quickly, the reputational harm inflicted by the lawsuits may far outlast the lawsuits themselves.

Perhaps the most important effect the lawsuits have had is to convince the ABA and law schools to take the law school transparency movement seriously.[217] Anna Alaburda's groundbreaking lawsuit preceded both recent ABA reforms[218] and decision of many law schools to voluntarily disclose their NALP data.[219] Of course, the lawsuit was filed during a time in which the legal education industry was being heavily criticized by mainstream media[220] and several U.S. Senators.[221] No doubt this criticism also played a role in helping convince the ABA and individual law schools to do something about the law school transparency problem. However, the prospect of additional litigation certainly gave legal educators a strong incentive to take steps towards solving the law school transparency problem sooner rather than later.

INVESTOR SERVICE (Jan 27, 2012), http://www.moodys.com/research/MOODYS-AFFIRMS-A3-UNDERLYING-RATING-ON-NEW-YORK-LAW-SCHOOLS--PR_236275. This change in outlook presumably came as a great disappointment to NYLS, which seems to care a great deal about its credit rating. For example, NYLS administrators had the school's credit rating in mind when they chose to increase the size of NYLS's 2009 class by 30% over the previous year (compared to the national average of 6%). *See* Segal, *Law School Economics*, *supra* note 1. The decision came just a few months after Moody's had changed its outlook on the law school's bonds from "stable" to "negative," noting that applications to the law school were down 28% over the previous year. *Id.* In response to this "particularly large" class size, Moody's again revised its outlook on NYLS' bonds—this time changing it back to "stable." *Id.*

214. Moira Herbst, *Fraud Suits Against Law Schools "Credit Negative": Moody's*, THOMSON REUTERS (Feb. 10, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/02_-_February/Fraud_suits_against_law_schools__credit_negative___Moody_s/.

215. *Id.*

216. NYLS' Motion to Dismiss was granted on March 21, 2012, *see* Gomez-Jimenez v. New York Law Sch., 943 N.Y.S.2d 834, 857 (N.Y. Sup. Ct. 2012), but as of November 13, 2012, Moody's had not revised its outlook for the law school.

217. *See id.* at 855.

218. *See supra* notes 52–58, 103–05 and accompanying text.

219. *See supra* notes 94–95, 103–05 and accompanying text.

220. *See supra* notes 1–3 and accompanying text.

221. *See supra* note 97 and accompanying text.

CONCLUSION

Whether or not law schools are to blame for the precarious financial position in which many recent law school graduates find themselves, it is getting harder and harder to deny that the value proposition of attending law school has declined significantly in recent years.[222] Prospective students now have more information than ever to use in deciding whether attending a particular law school is a good choice for them, yet law schools could certainly do more to ensure that prospective students are fully informed about the costs and risks of investing in a legal education. Given the high cost of pursuing a legal education today, it is particularly important that prospective law students have access to reliable, school-specific information about the salaries earned by recent graduates.

Some law schools have started to voluntarily provide more comprehensive and reliable employment statistics, but many law schools are unlikely to follow their lead unless they are pressured to do so. One potential source of such pressure is the specter of class-action lawsuits. Even if such lawsuits are unlikely to result in large awards for plaintiffs, defending such lawsuits can be expensive, and will necessarily tarnish a law school's reputation. This will in turn hinder the law school's ability to attract new students, and may even endanger the law school's financial stability.

Furthermore, unlike exclusively forward-looking methods for resolving the law school transparency problem, class-action lawsuits can also be used to punish law schools for their prior bad acts and to compensate the victims of those acts. Thus, even if the ABA takes immediate, sweeping action in response to calls for additional reforms to the way law schools report their employment statistics, the threat many law schools face from this new type of class-action litigation will not dissipate entirely until any applicable statutes of limitation run their courses. While the likelihood of future lawsuits will depend in no small part on how early cases are resolved, law school administrators would be wise to take immediate preventative measures to make sure their schools are not targeted for lawsuits next. If a small decline in a law school's *U.S. News* ranking is enough to send the school into a "death spiral of rapidly departing employers, students and faculty,"[223] what effect might the prospect—even the faint prospect—of being forced to settle an eight figure lawsuit have on the future of a law school?

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222. Lat, *supra* note 1 ("With every new lawsuit filed against a school, every new newspaper article or blog post about the dangers of going to law school, and every new call by a senator for an investigation into law school employment reporting, it becomes that much harder for a law student entering the system today to claim that she was duped about the value proposition of legal education.").

223. *See supra* notes 73 and accompanying text.