

A DOUBLE-EDGED SWORD: STUDENT LOAN DEBT PROVIDES ACCESS TO A LAW DEGREE BUT MAY ULTIMATELY DENY A BAR LICENSE

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INTRODUCTION

“Misconception or not, lawyers are perceived as wealthy, well-to-do, educated professionals with the means to make their student loan payments.”¹ This perception, however, may not be consistent with reality. Consider the following hypothetical: Lauren, a twenty-six-year old woman and recent law school graduate, pursued a legal education after achieving academic success in her undergraduate studies. In deciding whether to attend law school, Lauren relied on statistical reports that described recent graduates’ employment and salary data, financial assistance, and ability to pursue a meaningful career upon graduation. Lauren decided to enroll at an American Bar Association (“ABA”) accredited law school that offered her a substantial merit-based scholarship based on both her Law School

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1. Terri Harris, *Student Loan Default Could Result in License Revocation*, TENN. BAR ASS’N (Jul. 21, 2010, 2:38 A.M.), <http://www.tba.org/journal/student-loan-default-could-result-in-license-revocation>.

Admission Test (“LSAT”) score, as well as her undergraduate academic record. Lauren’s scholarship covered seventy-five percent of her tuition expenses, and yearly renewal of Lauren’s scholarship was contingent upon her maintaining a minimum 3.0 grade point average. Lauren carried approximately \$100,000 of prior academic indebtedness into law school so she relied on the assistance of her scholarship to fund her legal education. After Lauren’s first year of law school, she was unable to maintain her scholarship so she subsequently had to take out private loans to offset her tuition and living expenses. Upon graduation from law school, Lauren’s academic indebtedness totaled approximately \$200,000 and remained at that amount when she sat for her state’s Bar Examination. After she passed that exam, the State Bar refused Lauren’s admission because the State Supreme Court had affirmed the State Bar Character & Fitness Committee’s determination that, because of her high debt load and the fact that she had no reasonable plan for paying off her student loan debt, Lauren was financially irresponsible. After following in the path of countless young professionals who accrue academic debt in the hope of deferred success, Lauren was left destitute and found unfit to practice law.

The Character and Fitness assessment has been criticized by bar applicants, bar members, and scholars because of its arbitrary and unpredictable admission standards.² Like many aspects of the legal profession, the Character and Fitness assessment has not evolved to reflect current economic and social trends, as student loans are an integral and pervasive tool for many to attend law school.³ Thus, basing the determination of an applicant’s character and fitness on the concept of financial irresponsibility is an antiquated approach; the process must evolve to accurately reflect the current legal market.⁴

Due to the increasing costs and grim financial prospects associated with the pursuit of a law degree, reform is necessary in each state’s perception of student debt as a factor in a Character and Fitness assessment, specifically the applicant’s financial irresponsibility determination.⁵ Since the 1980s, law school tuition has risen dramatically; from 1983 to 2008, for example, law school tuition rose at least two times faster than the inflation rate.⁶ Between 2001 and 2013, the number of established law schools in the

2. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491, 512–46 (1985).

3. *See infra* Part I.A.1–3.

4. *See infra* Part IV.B.

5. *Id.*

6. Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 *J. CONTEMP. LEGAL ISSUES* 3, 5 (2008). *See also* AM. BAR ASS’N COMM’N ON LOAN REPAYMENT AND FORGIVENESS, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE* 16 (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/lrap/lrapfinalrepor>

United States rose by nine percent.⁷ Moreover, in 2012, average tuition at private law schools was \$40,585 and the average in-state tuition for public law schools was \$23,590.⁸ This rise in price means that as of early 2013, the average law school graduate could expect to graduate with debt near or exceeding \$100,000, not including any debt that he or she accumulated as an undergraduate student.⁹ Lauren's story is not the exception—it is the frightening reality; many law students and law graduates may ultimately find themselves in a similar financial situation. The ABA recognizes that attending law school can be a financial burden for law students who fail to carefully consider “the financial implications of their decisions.”¹⁰

Part I of this Article evaluates the bar admissions process, with a specific focus on the Character and Fitness assessment and the considerations that are taken into account by a Character and Fitness Committee before it issues a finding of financial irresponsibility. Part II discusses the Loan Repayment Assistance Programs (“LRAPs”) that are in place at the state and federal, and which are also offered by many law schools. It argues that these programs are insufficient to address the large amounts of debt that law students can accumulate during the pursuit of a law degree. Part III further explores whether a legal education is a wise investment based on the abundance of misreported and misunderstood salary and employment statistics supplied by some law schools, student debt concerns, and the various tactics employed by some law schools to encourage prospective law students to obtain a law degree. Part IV analyzes the class action suits that law schools have faced because of the alleged misrepresentation in employment and salary data for former and current law students. Finally, Part V considers possible reforms that bar admissions boards should adopt to treat student loan debt separately from a determination of financial irresponsibility that adapts to meet the demands of twenty-first century lawyers.

t.authcheckdam.pdf.

7. Anna Stolley Persky, *Law School? Bag it, Bloggers Say*, A.B.A. J. (Feb. 1, 2011), http://www.abajournal.com/magazine/article/law_school_bag_it_bloggers_say/2011.

8. Debra Cassens Weiss, *Tuition and Fees at Private Law Schools Break the \$40K Mark, on Average*, A.B.A. J. (Aug. 20, 2012, 4:30 AM), http://www.abajournal.com/news/article/average_tuition_at_private_law_schools_breaks_40k_mark/; AM. BAR ASS'N COMM'N ON THE IMPACT OF THE ECON. CRISES ON THE PROFESSION AND LEGAL NEEDS, *THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL* (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/lsl/legaled/value.authcheckdam.pdf> [hereinafter *THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL*].

9. See Schwarzschild, *supra* note 6, at 6.

10. *THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL*, *supra* note 8. The ABA has stated, “[a] proper understanding of the economic cost of a legal education is vital for making an educated decision.” *Id.*

I. THE ECONOMIC ENVIRONMENT OF THE LEGAL EDUCATION

While many factors may influence a person's decision to attend law school, a proper understanding of the economic costs of a legal education is necessary to making a well-informed decision.¹¹ The direct and opportunity costs associated with attending law school should be considered contemporaneously with the possibility of obtaining remunerative law-related employment after graduation.¹²

A. Is a Law Degree Really Worth Pursuing?

The value of an education, specifically the dream of attending a college or university and potentially pursuing a graduate degree, has been ingrained into the visionary future of many members of society.¹³ Realization of this dream is predicated on the notion that "four years of higher education will translate into a better job, higher earnings, and a happier life."¹⁴ In support of this belief, the College Board has stated that the difference in lifetime earnings between college or university graduates and high-school graduates is approximately \$800,000.¹⁵ This figure is highly controversial as there are many factors that determine the lifetime earnings gap.¹⁶

This belief can also be applied to the decision to pursue a legal education and is readily applicable in the law school context.¹⁷ Professors Michael

11. *Id.*

12. *Id.*

13. This includes children, parents, and educators alike. *See* Jacques Steinberg, *Plan B: Skip College*, N.Y. TIMES, May 15, 2010, at WK1.

14. *Id.*

15. Mary Pilon, *What's a Degree Really Worth?*, WALL ST. J. (Feb. 2, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703822404575019082819966538.html>. "College Board is a not-for-profit membership association whose mission is to connect students to college success and opportunity." COLL. BD. ADVOCACY & POLICY CTR., TRENDS IN STUDENT AID 2010, at 2 (2010), *available at* http://trends.collegeboard.org/sites/default/files/SA_2010.pdf [hereinafter TRENDS IN STUDENT AID] ("The College Board & Advocacy Center was established to help transform education in America.").

16. Pilon, *supra* note 15. For example, there are a variety of factors that would likely increase or decrease the difference in lifetime earnings between the two graduates, such as the type of degree earned, the institution the degree is earned from, and the opportunity costs of attending a college or university, as well as the student loan debt accumulated from attending that school. *Id.* *See also* Kevin Carey, *That Old College Lie*, DEMOCRACY J. (Winter 2010), *available at* <http://www.democracyjournal.org/pdf/15/Carey.pdf>; Kate Zernike, *Making College 'Relevant'*, N.Y. TIMES, Jan. 3, 2010, at ED16. These factors may have an astounding effect on one's determination to attend college based on the gap in lifetime earnings between college and high-school graduates. *Id.*

17. Charlotte Allen, *Overselling Law School*, MINDING THE CAMPUS (Feb. 2, 2009), http://www.mindingthecampus.com/forum/2009/02/here_at_minding_the_campus.html.

Simkovic and Frank McIntyre released a study in April 2013 that used economics and statistics to evaluate whether or not a law degree is worth pursuing.¹⁸ The study focused on the difference in annual earnings and hourly wages between undergraduates and law graduates and accounted for unemployment and disability risk for both.¹⁹ The study's ultimate determination was that a law degree is still worth pursuing despite dismal job prospects because a law graduate's earning over one's lifetime is much higher than the earnings of a person with solely an undergraduate degree.²⁰ However, the major flaw with this study is that the study considers only the expense involved in attaining a law degree; it does not address the fact that many law students have already incurred debt while pursuing an undergraduate education.²¹ Furthermore, the ABA recognizes that "[f]ar 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 carefully consider the financial implications of their decision."²²

1. The Rising Costs of Law School Tuition

The economic downturn of 2007 through 2010 coincided with and contributed to tuition increases at some public and private law schools.²³ This tuition increase can be attributed to "[e]ndowment losses, declining state support, and difficulties in fundraising," causing numerous public law schools to raise tuition between ten percent and twenty-five percent per year during these three years.²⁴ Another reason tuition has increased is because of the addition of career services personnel and academic support services.²⁵

18. Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* (Apr. 13, 2013) (unpublished article with accompanying PowerPoint presentation), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

19. *Id.*

20. *Id.*

21. *Id.*

22. THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8.

23. The increase in private law school tuition costs amounts to a sixty percent increase in eight years. The average tuition at a private law school in 2000 was \$21,790, while the average tuition at a private law school in 2008 was \$34,298. John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 19 (2002). See also THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8. This does not take into account an eighty-six percent increase in tuition costs from 1990 to 2000. Sebert, *supra*. From 1990 to 2000, tuition at state law schools increased for residents by 141%, and for nonresidents by 113%. *Id.* From 2000 to 2008, in-state tuition increased by 116%. The average state resident's tuition was \$7,790 in 2000. *Id.* The average resident's tuition in 2008 was \$16,836. THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8.

24. THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8.

25. *Id.* Moreover, the increasingly sophisticated technological systems

Additionally, law schools rely on their reputations and rankings to attract prospective law students to apply and to enroll at the schools.²⁶ Elite reputations are expensive, especially considering that the law school rankings by *U.S. News & World Report* take into account the “expenditures per student for instruction, library, and supporting student services,” and the “expenditures per student for financial aid, indirect costs, and overhead.”²⁷ The irony is that “[i]f an innovative college found a way to become more efficient and charge less while maintaining academic quality, its *U.S. News [& World Report]* ranking would actually go down.”²⁸ In a counterintuitive reality, law schools have little to no short-run economic reason to decrease or attempt to control tuition but actually have a short-run economic incentive to increase yearly tuition.²⁹

2. The “Bait & Switch”—Merit-Based Scholarship Tactics

One way for law schools to move up in the rankings is to attract highly qualified candidates by offering merit-based scholarships. The availability of merit-based scholarships drastically increased between 2005 and 2010.³⁰ Accordingly, some students have argued that some law schools offering these significant merit-based scholarships are using a tactic known as “bait and switch,” to get top students in the door to improve the school’s rankings in *U.S. News & World Report*.³¹ The term “bait and switch” means that the schools in question extend a large number of scholarships to entering first year students, knowing that because of the rigid grading curve, a portion of these students will be unable to maintain the grade point average required to keep the scholarships.³²

The *New York Times* spotlighted the issue of “bait and switch” scholarship tactics in an April 2011 exposé about Golden Gate School of

incorporated into a law school’s education, such as research providers, new technology for use in the classroom, and the support staff needed to operate these technological advancements all increase operating costs at law schools, which must be passed on to the students through an increase in tuition. *Id.*

26. *Id.*

27. Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, ASS’N OF AM. L. SCH. (Feb. 18, 1998), <http://www.aals.org/reports/validity.html>.

28. Carey, *supra* note 16.

29. *Id.* However, law schools may attempt to control tuition costs to ensure that the school remains an attractive option for future law students who will pursue law degrees. *See* discussion *infra* Part I.D.

30. Bruce Buckley, *A Scholarship Bait and Switch?*, NAT’L JURIST, Sept. 2011, at 15.

31. *Id.* Namely, the amount of merit-based scholarships has increased by eighty percent since 2005, and law schools were able to extend more than \$522 million in scholarship aid in 2010. *Id.*

32. *Id.*

Law.³³ In the article, a student received a merit-based scholarship to Golden Gate and presumed that maintaining the requisite 3.0 grade point average would be possible, if not likely, given her academic achievements and reassurances from admissions officials.³⁴ However, the fulfillment of this presumption proved to be problematic as the number of students on scholarship, fifty-seven percent of Golden Gate's first-year students, exceeded the generosity of the curve for all first-year law students.³⁵

Law schools have a short-run, economic incentive to offer "bait and switch" scholarships because law schools are ranked based, in part, on the incoming year's LSAT scores and undergraduate grade point averages.³⁶ Merit-based scholarships target students who are likely to increase the school's entering student statistics.³⁷ Additionally, scholarships offered in the first year make it likely that the students who do not maintain the scholarship criteria will acquire student loans for the final two years to finance the remainder of their education.³⁸ For that reason, merit-based scholarship practice can function as a "discount" to lure the student to enroll at the institution.³⁹ The irony, however, is that the "discount" afforded to students receiving merit-based scholarship is usually funded at the expense of full-tuition students admitted to the school.⁴⁰ This "bait and switch" scholarship tactic has given some law students a false sense of

33. David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, Apr. 30, 2011, at BU1.

34. *Id.*

35. *Id.* The first-year curve mandates that twenty five percent of a class can receive A's, and thirty-five percent of a class can receive a B- or above. *Id.* In order to maintain a 3.0 grade point average, the student must maintain at least a solid B average. Based on the curve, sixty percent of the class can receive above a B-; however, a B- will not meet the scholarship retention criteria. *Id.* Thus, in order to maintain a scholarship with a 3.0 retention criteria, the student must score in the top fifty percent of his or her classes, if not higher depending on the professor's discretion in the curve's distribution. *Id.* See also, e.g., AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2011-2012 (2011), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2011_2012_standards_and_rules_complete_book.authcheckdam.pdf.

36. Segal, *supra* note 33. Many people affiliated with law schools take the *U.S. News & World Report* rankings very seriously. See Gregory S. Crespi, *Comparing United States and New Zealand Legal Education: Are U.S. Law Schools Too Good?*, 30 VAND. J. TRANSNAT'L L. 31, 38 (1997). This can be attributed to the "influence of such rankings upon prospective applicants." *Id.* "The strong correlation between the range of subsequent social and professional opportunities for law school graduates and the generally perceived status of their school is so clear as to be beyond reasonable doubt." *Id.*

37. Segal, *supra* note 33.

38. *Id.*

39. *Id.*

40. William D. Henderson & Andrew P. Morriss, *How the Rankings Arms Race has Undercut Morality*, NAT'L JURIST, Mar. 2011, at 8.

affordability in acquiring a legal education and has enticed some students to enroll in a costly education under the impression that their scholarships would be easily maintainable.⁴¹

3. Average Student Indebtedness

Each year nearly 50,000 people begin their pursuit of a legal education.⁴² However, “[o]ver the last twenty-five years, law school tuition has consistently risen two times as fast as inflation.”⁴³ Additionally, it has been estimated that approximately eighty percent of law students obtain some form of student loans to pay for law school.⁴⁴ Financial aid distributed to undergraduate and graduate students in 2009 and 2010 amounted to \$199.2 billion,⁴⁵ and the total amount of outstanding student debt exceeded \$1 trillion by late 2012.⁴⁶

41. Debra Cassens Weiss, *Bait and Switch? Law Schools Gain in US News with Merit Scholarships Conditioned on High Grades*, A.B.A. J. (May 2, 2011, 6:34 AM), http://www.abajournal.com/news/article/bait_and_switch_law_schools_gain_in_us_news_with_merit_scholarships_conditi/. Students contemplating a law school that offers scholarships should research the median grade point average for current students enrolled at the institution and the number of scholarships offered to entering first-year students. *Id.* Moreover, the student should consider and be prepared for the possibility that the scholarship will not be maintained and determine the potential financial burden of obtaining a legal education. *Id.* In support of this concept, the Law School Transparency Project has submitted a proposal to the ABA Section of Legal Education to require law schools to publish both the scholarship retention data as well as the number of scholarships offered to entering first-year students. *Id.* The Transparency Project is an organization that advocates for clearer and accurate employment and salary data. *Id.*

42. Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1, 5 (2012). *See also* Jennifer Liberto, *Obama to Offer Help for Students Buried in Debt*, CNNMONEY (Oct. 25, 2011, 6:32 PM), http://money.cnn.com/2011/10/25/news/economy/Obama_student_loan/index.htm (marking the highest unemployment rate since 1985 when the Labor Department began keeping records).

43. THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8.

44. Margaret Miceli, *Law School & Student Loans*, EHOW, http://www.ehow.com/about_6552941_law-school-student-loans.html (last visited Feb. 10, 2014). *See also* Brendalyn Burrell Jones, Comment, *Bar Applicants: Are Their Lives Open Books?*, 21 J. OF THE LEGAL PROF. 153 (1996). *See generally* *Financial Aid: An Overview*, LSAC, <http://www.lsac.org/jd/financing-law-school/financial-aid-overview> (last visited Feb. 10, 2014).

45. TRENDS IN STUDENT AID 2010, *supra* note 15, at 3.

46. Jean Chatzky, *Student Loan Debt Reached \$100 Billion Mark for First Time in History; Tips to Effectively Pay*, NYDAILYNEWS.COM (Oct. 26, 2011), <http://www.nydailynews.com/news/local/student-loan-debt-reached-100-billion-mark-time-history-tips-effectively-pay-article-1.968364>. By minimizing the quality of life while in school, students can accrue substantially less debt. President Barack Obama recently addressed the importance of concerns about student loan debt. On October 25, 2011, President Obama announced two measures that the Department of Education began offering in January 2012 to attempt to alleviate the burden of student loan debt. *See*

In 2011, the average public law student borrowed \$68,827 for law school, and the average private law student borrowed \$106,249.⁴⁷ Thus, many law students may acquire far more than \$100,000 in loans in pursuit of a law degree, not including any student loan debt carried over from their undergraduate or other graduate institutions.⁴⁸ Not surprisingly, the ABA reports an average of \$75,700 of aggregate debt (from both law school and undergraduate studies) for graduates from public law schools and approximately \$125,000 of debt for graduates from private law schools.⁴⁹

A study conducted by The Ohio State University may partially explain why students are willing to take on such large amounts of educational debt. Ironically, this study found a positive correlation between high debt levels and young adults' self-esteem and sense of mastery.⁵⁰ The study determined that in young adults aged eighteen to twenty-seven, the higher the amount of credit card and student loan debt, the higher the young adults' self-esteem because the young adults felt more in control of their lives.⁵¹ Unfortunately, the same cannot be said for individuals aged twenty-eight to thirty-four. The study found that this age group began to show signs of stress because of student loan and credit card debt.⁵² Researchers concluded that that debtors aged twenty-eight and older realized that they had overestimated their earning potential and that the debts are not as easy

Liberto, *supra* note 42. The first measure “push[es] up the start date for more favorable terms on a special loan repayment program based on income.” *Id.* See also Press Release, The White House Office of the Press Sec’y, FACT SHEET: Help Americans Manage Student Loan Debt (Oct. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt>. The second measure offers consolidation for graduates who have two or more types of federal loans, which would yield a small break from interest rates. Liberto, *supra* note 42. See also Press Release, The White House Office of the Press Sec’y, We Can’t Wait: Obama Administration to Lower Student Loan Payments for Millions of Borrowers (Oct. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/10/25/we-cant-wait-obama-administration-lower-student-loan-payments-millions-b>.

47. Debra Cassens Weiss, *Average Annual Law School Loan Jumped 50 Percent Since 2001*, A.B.A. J. (May 9, 2011 8:32 AM), http://www.abajournal.com/news/article/average_annual_law_school_loan_jumped_50_percent_since_2001.

48. *Id.*

49. Debra Cassens Weiss, *Average Debt of Private Law School Grads is \$125K; It’s Highest at These Five Schools*, A.B.A. J. (Mar 28, 2012 4:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m.

50. Rachel Dwyer, *What, Me Worry? Young Adults Get Self-Esteem Boost from Debt*, OHIO ST. RES. NEWS (Jun. 6, 2011), <http://researchnews.osu.edu/archive/youngdebt.htm>. “Sense of mastery” means that the debtors believed that they were in control of their lives, and that they had the ability to achieve their respective goals. *Id.*

51. *Id.* The young adults viewed debt in mostly positive terms, rather than as a potential burden. *Id.*

52. *Id.*

to pay off as originally hoped and planned.⁵³

There are two competing views generally invoked when discussing student loans and debt. First, some people believe that debt should be viewed positively because debt helps people invest in their future lives and careers.⁵⁴ The second view states that debt should be viewed negatively across all age classes because debt enables people to spend more money than they currently make.⁵⁵ Accumulating large amounts of debt can limit legal career choices, prevent employment in the public service sector of the legal market, and delay homeownership or marriage.⁵⁶

A. Employment and Salary Trends

Many prospective and current law students are aware of the expenses associated with obtaining a legal education; however, many of these prospective and current law students may have been unaware that these costs may exceed the expected return on investment in the legal job market.⁵⁷ To make matters worse, law school tuition increased 267% from 1990 to 2002 and has continued to increase since then.⁵⁸ Additionally, since 2007, law school tuition has increased more than the pay elevations at firms of all sizes across the nation.⁵⁹ Thus, while law school costs have increased rapidly, law firm associate compensation has not.⁶⁰ This statistic means that

53. *Id.*

54. *Id.*

55. *Id.*

56. THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8. On the other hand, the lack of financial return does not mean that a legal career is not worth pursuing. *Id.* Some lawyers “receive intrinsic benefits from a satisfying career that cannot easily be quantified.” *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* According to a Northwestern University Law study, approximately 15,000 attorney and legal-staff jobs at large law firms were terminated between 2008 and 2009. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1. The large-firm associates’ starting salaries ranged between \$130,000 and \$160,000, and many current and prospective law graduates expect to be able to earn a comparable salary. THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, *supra* note 8. This notion is called the bimodal salary curve and is quite unrealistic. *See, e.g., Salary Distribution Curve*, NALP, <http://www.nalp.org/salarydistrib> (last visited Feb. 6, 2014). In 2008, only twenty-three percent of the 2008 graduates started with a large-firm associate salary, and most of the graduates, approximately forty-two percent, began their legal careers with an annual salary of less than \$65,000. Weiss, *supra* note 8. The bimodal salary curve has two curves, a higher one and a lower one with clusters around certain monetary values that indicate the type of legal position attained based on the placement on the curve. *See, e.g., INSTAPUNDIT.COM* (July 25, 2010), <http://pjmedia.com/instapundit/103584/>. For instance, those individuals clustered in the higher salary grouping are likely to be those that have accepted positions at large law firms. *Id.*

newly-minted lawyers are carrying much greater debt amounts upon graduation than their predecessors did.⁶¹

Once they are fully employed after graduation, most newly minted lawyers need to make at least \$65,000 in order to meet their basic needs.⁶² Taking that into consideration, a graduate who has student loan debt of \$100,000 would need to make \$78,000 annually to repay the loan without enduring financial hardship, or he or she must earn \$52,000 annually to repay the debt with some financial difficulty.⁶³ The reality is that, due to the combination of rising costs of a legal education and a bleak job market, attending law school may not be financially possible, or reasonable, for many prospective law students.⁶⁴

There are many ways to minimize the amount of money that any one law student borrows. First, some lawyers have recommended that students defer entering law school for a few years after graduating from college so that they can work to pay for the undergraduate degree that they earned.⁶⁵ Another suggestion is for a student to attend law school on a part-time basis, allowing the student to work and attend law school simultaneously.⁶⁶ Alternatively, some law schools have imposed mandatory financial aid conferences on first-year and third-year law students and have regularly offered debt classes or seminars with financial professionals, like bankers or financial planners.⁶⁷ Additionally, some have recommended that all law students pay off consumer debt before entering their first year of law school.⁶⁸ While all of these suggestions would aid in limiting the borrower's need, they may not be feasible for many individuals.

B. Bankruptcy and Student Loans

Currently, the United States Bankruptcy Code states that student debt

61. *Id.*

62. The \$65,000 figure marks an important threshold: Many analysts argue that new lawyers must earn a salary of at least \$65,000 to afford the monthly student loan payments accumulated during law school and, possibly, from undergraduate studies as well. Jeffrey Mictabor, *Law School Graduates Awash in Student Loan Debt*, EZINE ARTICLES (Feb. 3, 2011), <http://ezinearticles.com/?Law-School-Graduates-Awash-in-Student-Loan-Debt&id=5815216>.

63. Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Improving Transparency in Employment Reporting at American Law Schools*, 32 PACE L. REV. 1, 4 at n.10 (2012). The obvious discrepancy between the \$65,000 figure and the \$52,000 figure is that most graduating law students have accumulated student loan debt in excess of \$100,000. *Id.*

64. Weiss, *supra* note 8. See also Sebert, *supra* note 23.

65. Rebecca Larsen, *How To Manage Your Debt*, NAT'L JURIST, Mar. 2011, at 18.

66. *Id.*

67. *Id.* at 19. For instance, Case Western Reserve University School of Law has implemented this idea. *Id.*

68. *Id.*

cannot be discharged in bankruptcy proceedings unless the student can prove undue hardship,⁶⁹ which is highly improbable and extremely difficult.⁷⁰ The difficulty in establishing undue hardship is that the debtor must not only demonstrate a current inability to fulfill the debtor's financial commitment but must also show that, in all likelihood, the debtor will be unable to pay the financial commitment in the future.⁷¹

Further complicating the task of discharging student debt in bankruptcy proceedings is the recommendation, made by the Commission on the Bankruptcy Laws of the United States, that to determine whether student loans may be discharged in bankruptcy, the debtor must satisfy a tripartite test.⁷² The first element requires the debtor to show that he or she would be unable to maintain a minimal standard of living, based on his or her current income and expenses, if required to repay the loans.⁷³ Second, the debtor must prove that additional circumstances exist proving that the debtor's current financial position is likely to remain as it is for a significant portion of the student loan repayment period.⁷⁴ Lastly, the debtor must prove that he or she has made good-faith efforts to repay the student loan debt.⁷⁵

Under these requirements a student loan borrower faces a nearly impossible battle to discharge his or her debts. In 2008, there were 72,000 federal student loan borrowers who filed for bankruptcy.⁷⁶ Of those, only twenty-nine of the 72,000 borrowers were able to get part or all of the debt discharged in bankruptcy proceedings by proving undue hardship.⁷⁷

69. 11 U.S.C. § 523(a)(8) (2012).

70. Rafael I. Pardo, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 184 (2009). See also Jennifer L. Frattini, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537 (2001).

71. See *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773 (7th Cir. 2002); *In re Frech*, 62 B.R. 235 (Bankr. D. Minn. 1986).

72. Andrew M. Campbell, Annotation, *Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under Sec. 523(a)(8)(B) of Bankruptcy Code of 1978 (11 U.S.C.A. § 523(a)(8)(B)) Discharge of Student Loans*, 144 A.L.R. Fed. 1, 30 (1998) (citing the three-part test enunciated in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)). Courts approach this test very conservatively, and place the burden of proof upon the debtor. James L. Fly & Michael Sjuggerud, *Student Loans in Bankruptcy: Policy Analysis and Portfolio Risk for Lenders*, 123 BANKING L.J. 530, 553 (2006). If all three parts of the test are not satisfied, then the debtor has not established an undue hardship posed by repayment of the student loans, and accordingly, the loans will not be dischargeable. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. AnnaMaria Andriotis, *Things Student Loan Companies Won't Say*, WALL ST. J. SMARTMONEY (Sept. 27, 2011), <http://finance.yahoo.com/loans/article/113573/things-student-laon-companies-wont-say-smartmoney>.

77. *Id.*

C. Financial Incentives of the *U.S. News & World Report* Rankings and the Accreditation Process

Law school rankings are extremely important; people in the legal profession and those seeking to become lawyers utilize these rankings in assessing the caliber of law schools.⁷⁸ *U.S. News & World Report* ranks law schools on a variety of factors, and these rankings receive considerable attention that may affect important decisions.⁷⁹ For instance, students may use these rankings in selecting which schools to attend, while hiring departments may use them in their hiring process.⁸⁰ These rankings are calculated using twelve measures of quality.⁸¹ One measure of quality that incentivizes law schools to increase tuition is called “expenditures per student.”⁸² This measure includes the yearly increase in the cost of tuition and thus, law schools are ranked, in part, based on the yearly increase of tuition.⁸³ This measure of quality incentivizes law schools to increase tuition, regardless of the school’s need.⁸⁴

The ABA continued to accredit new schools almost every year during the past decade, and as of 2013, there were over two hundred accredited law schools.⁸⁵ Between 2000 and 2013, sixteen law schools received full

78. Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, ASS’N OF AM. L. SCH. (Feb. 18, 1998), <http://www.aals.org/reports/validity.html>.

79. *Id.*

80. *Id.*

81. Robert Morse & Sam Flanigan, *Law School Rankings Methodology*, U.S. NEWS & WORLD REP. (Mar. 14, 2011), <http://www.usnews.com/education/best-graduate-schools/articles/2011/03/14/law-school-rankings-methodology-2012?PageNr=2>. These measures of quality include a peer assessment (25%), assessment scored by lawyers/judges (15%), selectivity (25%, which includes Median LSAT scores for 12.5%, Median Undergraduate GPA for 10%, and acceptance rate for 2.5%), placement success (20%, which includes the placement measured at graduation 4% and at nine-months from graduation for 16%), bar passage rate and faculty resources (15%, which includes expenditures per student for 11.25%, student/faculty ration for 3%, and library resources). *Id.*

82. *Id.*

83. For example, if a law school increases tuition by \$1,000, it can subsequently increase expenditures on “instruction, library, and supporting student services” by \$1,000 per student. *Id.* Thus, a school can improve its score under this metric by raising tuition.

84. *Id.* Additionally, the school has no short-run, economic incentive to help alleviate the financial plight of law student tuition, despite the dismal job market. *Id.*

85. *ABA-Approved Law Schools by Year, Section of Legal Education and Admissions to the Bar*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Feb. 11, 2014) [hereinafter *ABA-Approved Law Schools by Year*]. Further, the Department of Education (“DOE”) stipulates that the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar is the accrediting agency. AM. BAR ASS’N SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS

accreditation, and four schools received provisional approval.⁸⁶ It has been argued that the ABA's continual approval of new law schools is a disservice to the profession.⁸⁷

II. LOAN REPAYMENT ASSISTANCE PROGRAMS REMAIN INSUFFICIENT TO SUBSTANTIALLY REDUCE LAW STUDENT DEBT OBLIGATIONS

Law students who desire to pursue careers in public service may face particular difficulty paying their student loan debt because the salary for many public service jobs has not kept pace with the increase in education costs.⁸⁸ In response to these concerns, Loan Repayment Assistance Programs ("LRAPs") were created to "provide financial aid to law school graduates working in the public interest sector, government, or other low-paying legal fields."⁸⁹ To be eligible for most LRAP programs, a graduate must be employed by a public interest entity; for most LRAP participants, the benefits received from the program makes having a career in public interest law possible.⁹⁰ The main problem with LRAPs is that some of the programs may be insufficiently funded to meet the needs of the number of

3 (Aug. 2013), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_revised_accreditation_brochure_web.authcheckdam.pdf [hereinafter THE LAW SCHOOL ACCREDITATION PROCESS]. The ABA and the DOE require that each approved law school, provisionally approved law school, and law school not yet approved answer the ABA's annual questionnaire. McEntee & Lynch, *supra* note 42. The questionnaire inquires about facts relevant to compliance with accreditation standards and "elicits information and data regarding curriculum, faculty, facilities, fiscal and administrative capacity, technology resources, student profiles, administrative capacity, technology resources, student profiles, bar passage rates, and student placement data." THE LAW SCHOOL ACCREDITATION PROCESS, *supra*, at 8.

86. *ABA-Approved Law Schools by Year*, *supra* note 85.

87. Annie Lowrey, *When Law School Becomes a Bad Investment*, WASH. POST (October 30, 2010, 9:14 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/30/AR2010103004638.html>. This is caused by the fact that between 2000 and 2013, the number of awarded law degrees increased by eleven and a half percent. *Id.* The supply of new lawyers vastly outweighs demand in the job market. *Id.* Consider, by contrast, the law school process to that of the medical school structure. *Id.* The medical school process has been known to have "higher start-up costs," and medical schools have not typically been known as "money-makers." *Id.* The limited number of accredited medical schools allows only a relatively small number of students to receive medical degrees, and the demand far outweighs the supply. *Id.* The complete opposite is experienced in the legal market, as supply far outweighs demand. *Id.*

88. Philip G. Schrag & Charles W. Pruet, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583, 583 (2011).

89. *Law School Loan Repayment Assistance Programs*, EQUAL JUST. WORKS (Apr. 19, 2011), <http://www.equaljusticeworks.org/resources/student-debt-relief/law-school-loan-repayment-assistance-programs>.

90. HEATHER WELLS JARVIS, FINANCING THE FUTURE: RESPONSES TO THE RISING DEBT OF LAW STUDENTS 5 (2006), available at <http://www.equaljusticeworks.org/sites/default/files/financing-the-future2006.pdf>.

graduates needing this assistance, a number that is consistently growing larger with the increasing costs of obtaining a law degree and the scarcity of law-related jobs elsewhere in the economy.⁹¹

A. Federal Loan Repayment Assistance Program Under the College Cost Reduction and Access Act

The problem of high monthly repayment obligations for law students' educational debts has been a growing concern; accordingly, Congress responded in 2007 by passing the College Cost Reduction and Access Act ("CCRAA").⁹² "In two provisions of the CCRAA, Congress has significantly improved access to higher education . . . for persons who would like to have lower-paying public service careers but who will be saddled by high educational debts incurred to obtain the education that they need to serve the public."⁹³ These two provisions created a system of "income-based repayment" and established the federal Public Service Loan Forgiveness Program.⁹⁴

1. Income-Based Repayment—Applies to all Low-Income Earning Undergraduates and Graduates

In light of the economic conditions that prevailed in 2007, Congress expanded the LRAPs to offer all graduates a form of assistance in repaying student loan debt by creating a program of "income-based repayment" ("IBR").⁹⁵ This program does not condition participation on whether the borrower works in public service; rather, eligibility depends "on the source of the loan, the amount of the debt, and the borrower's income."⁹⁶ This program applies to graduates with federally-guaranteed or federally-extended loans and applies a formula to determine each person's payment.⁹⁷ The formula applied to attain the required monthly payment

91. Schrag & Pruett, *supra* note 88, at 583. Additionally, "the recession that began in 2008 caused private sector firms to reduce their hiring, prompting more student interest in public sector employment." *Id.* Additionally, forgiveness of a debt will typically give rise to income under the Internal Revenue Code. See I.R.C. § 61(a)(12) (2012). However, forgiveness under LRAP is tax-free according to IRS Revenue Ruling 2008-34. See Rev. Rul. 2008-34, 2008-28 I.R.B. 76.

92. Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 35 (2007).

93. *Id.* at 28.

94. Schrag & Pruett, *supra* note 88, at 590.

95. Compare College Cost Reduction and Access Act, Pub. L. No. 110-84, § 203, 121 Stat. 784 (2007) (listing eligibility requirements that do not include public service), with Higher Education Opportunity Act, Pub. L. No. 110-315, § 451(b)(1), 122 Stat. 3262 (2008) (defining a public service job requirement).

96. Schrag & Pruett, *supra* note 88, at 592.

97. *Id.* at 590-91.

equals fifteen percent of the borrower's discretionary income broken into twelve equal, monthly payments.⁹⁸ The amount typically determined by this formula yields an obligation of approximately ten percent of one's adjusted gross income.⁹⁹ If the borrower's income rises,

[T]he monthly repayment obligation increases as well, but it will never exceed more than about 10 percent of adjusted gross income. If it rises so much that the borrower would pay less per month under a ten-year repayment plan, the borrower will pay the ten-year payment amount until the loan is repaid or forgiven. IBR includes an element of loan forgiveness, in that if a borrower repays through the IBR plan for twenty-five years, any balance of principal or interest still owing at the end of that time is forgiven.¹⁰⁰

This is particularly important for lawyers in the private sector and has offered huge relief for many graduates as it has made it possible for the graduates to make affordable monthly payments while affording life's basic necessities and to avoid the possibility of defaulting on their student loans.¹⁰¹

2. Public Service Loan Forgiveness Program—A Ten-Year Commitment to Work at a Public Service Organization Will Eliminate One's Student Debt

For graduates entering the public interest sector, the CCRAA provides an alternative to the IBR program that offers more benefits than the IBR program (though these public service workers are eligible for either program).¹⁰² The Public Service Loan Forgiveness ("PSLF") Program allows the federal government to forgive an individual's remaining debt after ten years of public service.¹⁰³ The law defines public service work that is eligible under this LRAP very broadly and thus, "all [full-time]¹⁰⁴ employment by any level of American government (federal, state, local, or tribal) qualifies, as does employment by any organization that is tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code."¹⁰⁵

98. *Id.* The discretionary income is calculated based on "the borrower's adjusted gross income (AGI) minus [one-hundred and fifty] percent of the federal poverty level for a family that is the size of the borrower's family." *Id.* at 591. *See also* I.R.C. § 62 (2012) (defining adjusted gross income).

99. Schrag & Pruet, *supra* note 88, at 591.

100. *Id.* *See also* 20 U.S.C. § 1098e(b)(7) (2012) (directing Secretary to repay or cancel certain outstanding loans).

101. Schrag & Pruet, *supra* note 88, at 592.

102. *Id.*

103. *Id.*

104. 34 C.F.R. § 685.219(b)(1) (2013) (defining "full-time").

105. Schrag & Pruet, *supra* note 88, at 592. *See also* 20 U.S.C. §

The ten-year requirement for working in a public service organization does not need to be continuous, the law merely requires that 120 months of payments be made during the time the borrower was employed in a public service organization.¹⁰⁶

3. Additional Loan Assistance Programs and the Limited Funds Currently Available

In 2008, Congress created three additional loan forgiveness programs for certain categories of public interest lawyers, such as prosecutors, public defenders, and civil legal aid lawyers.¹⁰⁷ The John R. Justice Prosecutors and Defenders Incentive Act of 2008 “authorized the U.S. Department of Justice to make funds available to repay the student loan debt of prosecutors and defenders who agree to serve in those capacities for at least three years.”¹⁰⁸ The amount of funds available for this type of assistance under this law is up to \$10,000 a year per person in loan forgiveness, with a maximum of lifetime forgiveness of \$60,000.¹⁰⁹ Another program that Congress created was the Civil Legal Assistance Attorney Student Loan Repayment Program, which “authorizes the U.S. Department of Education to make forgiveness of up to \$6,000 a year available to civil legal aid lawyers, with a lifetime maximum of \$40,000.”¹¹⁰ For the 2010 fiscal year, Congress appropriated ten million dollars for the John R. Justice program and five million for the civil legal aid program; however, these funds were reduced to three and a half million dollars for both programs for the 2012 fiscal year.¹¹¹ The main problem with these programs is that, not only does Congress need to appropriate the money necessary for the loan assistance, but also, the number of lawyers that are applying for these funds may exceed the available appropriations.¹¹²

While the amount of assistance available under the LRAPs is certainly a great benefit to many graduates, it may not have a significant enough impact in the long-term. In some graduates’ lives, even the minimum payments required by the loans is a financial hardship, in light of the low salaries and high living costs.

1087e(m)(3)(B)(i) (2012) (defining a public service job requirement).

106. See 20 U.S.C. § 1087e(m)(1)(A) (2012) (omitting any continuity requirement as a condition for public service employment).

107. Schrag & Pruett, *supra* note 88, at 595.

108. *Id.* See also 42 U.S.C. § 3797cc-21 (2012) (authorizing loan repayment for prosecutors and defenders).

109. Schrag & Pruett, *supra* note 88, at 595.

110. *Id.*

111. *Id.* at 595–96. See also BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 2012 JOHN R. JUSTICE STUDENT LOAN REPAYMENT GRANT STATE AWARD AMOUNTS (2012), available at <https://www.bja.gov/Funding/12JRJAllocations.pdf>.

112. Schrag & Pruett, *supra* note 88, at 596.

B. State Loan Repayment Assistance Programs

LRAPs are currently available in twenty-four states; out of these, eight have been created since 2000.¹¹³ More states may soon enact similar legislation, as these programs are under consideration and development in at least seven additional states.¹¹⁴ The LRAPs are usually “[c]reated and administered by bar associations, bar foundations, independent nonprofit organizations and state education administrations,” as well as certain public and private law schools.”¹¹⁵

These programs are typically funded by Interest On Lawyer’s Trust Accounts (“IOLTA”) funds¹¹⁶ and from grants from other sponsoring organizations.¹¹⁷ Similar to the federal LRAPs, almost all state LRAPs require recipients to be practicing law in “qualifying employment” within the state.¹¹⁸ “Characteristics of state LRAPs vary, but definitions of ‘qualifying employment’ in all states include civil legal aid and in some states include public defense, prosecution, and other government and nonprofit legal organization work.”¹¹⁹

C. Law School Loan Repayment Assistance Programs

As of 2012, approximately 100 public and private law schools offer LRAPs.¹²⁰ A law school graduate can apply for and receive funds from these school-based LRAPs to help with his or her student loan repayment.¹²¹ Many schools receive the funding for LRAPs through large gifts from donors after the donors have been “educated about the debt burden faced by today’s graduates and the impact this debt burden has.”¹²²

113. JARVIS, *supra* note 90, at 21; *State Loan Repayment Assistance Programs, Standing Committee on Legal Aid & Indigent Defendants*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/loan_repayment_assistance_programs/state_loan_repayment_assistance_programs.html (last visited Apr. 7, 2014) [hereinafter *State Loan Repayment Assistance Programs*].

114. See JARVIS, *supra* note 90, at 21.; *State Loan Repayment Assistance Programs, supra* note 113.

115. JARVIS, *supra* note 90, at 6–9, 21.

116. IOLTAs are accounts into which a state’s bar association requires lawyers to place client fund money while awaiting its repayment or use towards the client’s legal fees. These accounts accrue interest, and the interest is then used to establish these LRAPs. *Id.* at 21 & n.22.

117. *Id.* at 21. A nonprofit loan provider, The Student Loan Program, funds and administers Kentucky’s LRAP using student loan interest and bonds. *Id.* Washington State’s program is funded primarily by an affinity relationship with a loan consolidation vendor. *Id.*

118. *Id.*

119. *Id.*

120. *State Loan Repayment Assistance Programs, supra* note 113.

121. JARVIS, *supra* note 90, at 5.

122. *Id.* at 8.

Funding may also be made available through the school's operating budget.¹²³

Ultimately, law school LRAPs help law schools improve society and the legal profession by making careers in public interest law possible as a financial matter. Due, however, to the limited number of law schools that offer LRAPs and the limited funds available to graduates through both state LRAPs and law school LRAPs, these programs are only a starting point to aiding graduates to pursue careers in public service.¹²⁴

III. SUE 'EM ALL: SCRUTINIZING LAW SCHOOL EMPLOYMENT AND SALARY REPORTING

Between August 2011 and July 2013, fifteen class action suits were filed against law schools by former law students. The complaints alleged a variety of claims, all of which centered on the issue of inadequate employment and salary data proffered by the law schools during the recruitment process.¹²⁵ These class action suits served as tools for social change: at their core, they sought a systematic transformation of the manner in which law schools market themselves to prospective law students.¹²⁶ Along with damages, these suits sought disaggregated information in order to hold law schools accountable and to restore rationality to the pursuit of a legal education.¹²⁷

In August 2011, the first three of the fifteen class action suits were filed on behalf of law school graduates who sued their former institutions for alleged distortions in employment and salary statistics.¹²⁸ By July of 2013,

123. *Id.* at 9.

124. *Compare ABA-Approved Law Schools by Year*, *supra* note 85 (stating that there are over 200 accredited law schools), with *State Loan Repayment Assistance Programs*, *supra* note 113 (stating that approximately 100 law schools offer LRAPs).

125. *12 More Law Schools Facing Class Actions*, L. SCH. TRANSPARENCY (Feb. 1, 2012), <http://www.lawschooltransparency.com/2012/02/breaking-12-more-law-schools-facing-class-actions/>.

126. *Class Action Suits Filed Against Cooley and NYLS*, L. SCH. TRANSPARENCY (Aug. 10, 2011), <http://www.lawschooltransparency.com/2011/08/breaking-class-action-suits-filed-against-cooley-and-nyls/>.

127. *Id.*

128. The first suit, *Alaburda v. Thomas Jefferson Sch. of Law* ("TJSL"), was brought by a former graduate, Anna Alaburda, who alleged that TJSL conducted unfair business practices, committed intentional fraud, and negligently misrepresented the institution to its students. *See* Complaint, *Alaburda v. Thomas Jefferson Sch. of Law*, 2012 WL 6039151 (Cal. Super. Ct. Nov. 29, 2012) (No. 37-2011-00091898-CU-FR-CTL) (filed May 26, 2011) [hereinafter *Thomas Jefferson Complaint*]. The second and third suits were brought against New York Law School ("NYLS") and Thomas M. Cooley Law School ("Cooley"). *See* Complaint, *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (N.Y. Sup. Ct. Mar. 21, 2012) (No. 652226/11) (filed May 26, 2011) [hereinafter *New York Law School Complaint*]; Complaint, *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F.Supp.2d 785 (W.D. Mich. 2012) (No. No. 1:11CV00831).

two of these suits had been dismissed. In defending the court's decision to dismiss the suit against New York Law School ("NYLS"), the court stated, "not every ailment afflicting society may be redressed by a lawsuit."¹²⁹ Since then, however, twelve more law schools have faced lawsuits alleging similar complaints of fraud.¹³⁰ Some courts have disagreed with conclusion reached by the court in the case against NYLS and have permitted these suits to go forward, indicating that, despite the lack of initial success, such complaints may have staying power.¹³¹

A. Analyzing the Complaints

The complaints in most of the fifteen cases alleged that the law schools in question had reported misleading employment statistics—*e.g.*, by not disclosing "the number of graduates who found full-time, permanent jobs for which bar passage was required."¹³² At the time at which defendant schools reported these statistics, the ABA permitted post-graduation jobs that did not require a law degree, part-time work, and non-permanent work

(filed Aug. 10, 2011) [hereinafter Cooley Complaint]. The same law firm represented the two classes using a boilerplate complaint and alleging the same injury but utilizing different facts relevant to the stated institution in support of the claim. *Compare* New York Law School Complaint, *supra*, with Cooley Complaint, *supra*. See also Patrick G. Lee, *Law Grads Sue Over Tuition*, WALL ST. J. (Aug. 11, 2011, 10:18 AM), <http://online.wsj.com/news/articles/SB10001424053111904823804576500694179259396>; Sophia Pearson, *New York Law School Sued by Students Over Claims about Graduates' Success*, BLOOMBERG NEWS (Aug. 10, 2011, 11:24 AM), <http://www.bloomberg.com/news/2011-08-10/new-york-law-school-sued-by-students-over-claims-about-graduates-success.html>; Sarah Mui, *Grads Sue New York Law School and Cooley Law, Saying They Inflated Job and Salary Stats*, AM. BAR ASS'N (Aug. 10, 2011, 11:36 AM), http://www.abajournal.com/news/article/grads_sue_new_york_law_school_and_cooley_law_saying_they_inflated_job_and_s/.

129. *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S. 2d 834, 854 (N.Y. Sup. Ct. 2012).

130. *12 More Law Schools Facing Class Actions*, *supra* note 125. In addition to the three original law suits, twelve more law schools were sued: Albany Law School, Brooklyn Law School, California Western School of Law, Chicago-Kent College of Law, DePaul University College of Law, Florida Coastal School of Law, Golden Gate University School of Law, Hofstra Law School, John Marshall School of Law, Southwestern Law School, University of San Francisco School of Law, and Widener University School of Law. *Id.* Editor's Note: At the time of publication, the lawsuits against Albany Law School, Brooklyn Law School, Chicago-Kent College of Law, DePaul University College of Law, and John Marshall School of Law had been dismissed.

131. See *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641, 651–652 (D.N.J. 2013) ("Here, an employment rate upwards of 90 percent plausibly gave false assurance to prospective students regarding their legal employment opportunities upon investment in and attainment of a Widener degree. While the thread of plausibility may be slight, it is still a thread. At this motion to dismiss stage . . . Plaintiffs have sufficiently pled an unlawful affirmative act under the NJCFA.").

132. *Id.*

to count towards a graduating class's employment statistics.¹³³ The complaints alleged that these employment reporting standards and statistics gave prospective law students a false sense of security that further encouraged prospective law students to buy-in to an "unwise investment decision."¹³⁴ However, before these complaints were filed, the ABA announced it would publish more information about employment and salary statistics in an attempt to avoid the reporting of skewed statistics that provide an unrealistic picture to prospective law students.¹³⁵ In June 2011, the ABA became aware of the reporting methods that had been used to portray an overly optimistic perspective on the financial benefits incident to attaining a legal education.¹³⁶ In January 2012, the ABA announced that it would promulgate a series of new regulations and impose severe penalties for law schools that misreport data.¹³⁷

All fifteen of the law schools targeted by class action lawsuits brought by former students are ABA-accredited law schools that have been sued for inflating employment and salary statistics.¹³⁸ This phenomenon is significant because the lawsuits sought a remedy for two serious problems in the legal education system: first, the cost of obtaining a legal education; and second, the reality of the changing market for the services of newly minted lawyers. The plaintiffs in these lawsuits alleged that both problems were exacerbated by the way in which the law schools in question reported their graduates' employment statistics.¹³⁹ Unemployed law school graduates filed this type of suit because the legal economy was struggling and because there was a nationwide job crisis in the legal sector.¹⁴⁰ The

133. Elizabeth Ewing, *Employment Transparency Battle Heats Up*, NAT'L JURIST, Sept. 2011, at 6, 8. See *infra* Part III.C. These statistics skew prospective law students' perception of post-graduate employment. *Id.* See also Scott Jaschik, *New Scrutiny on Law School Data*, INSIDE HIGHER ED. (Oct. 6, 2011), http://www.insidehighered.com/news/2011/10/06/plans_announced_to_sue_15_law_schools_over_placement_data.

134. Kyle McEntee & Patrick J. Lynch, *Do Law Schools Defraud Students?*, N.Y. POST (Oct. 11, 2011, 4:00 AM), <http://nypost.com/2011/10/12/do-law-schools-defraud-students/>.

135. Ewing, *supra* note 133, at 6, 8.

136. See *id.* at 8.

137. *Bar Admissions, Section of Legal Education and Admissions to the Bar*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/bar_admissions.html (last visited Feb. 8, 2014); Tierney Plumb, *Consumer Data Will Be 'More Accurate, Timely and Complete'*, NAT'L JURIST, Jan. 2012, at 8. Additionally, the ABA has faced intense scrutiny because of its acknowledgement that some law schools reported inflated LSAT and GPA data. *Id.*

138. See *ABA-Approved Law Schools by Year*, *supra* note 85.

139. See, e.g., *NEW YORK LAW SCHOOL COMPLAINT*, *supra* note 129, at 3.

140. McEntee & Lynch, *supra* note 134. See also *LAW SCH. TRANSPARENCY, WINTER 2012 TRANSPARENCY INDEX REPORT* (Jan. 2012), available at http://www.lawschooltransparency.com/documents/Winter2012/Winter_2012_Index_Report.pdf. This Report analyzes the class of 2010 employment information available

class actions alleged that the defendant law schools had provided information designed to “mislead, deceive, and prompt consumers” to attend law school with the overly optimistic expectation of achieving financial stability upon graduation.¹⁴¹

B. Potential Effects of the Complaints

Not surprisingly, the first three lawsuits alleged that the defendant law schools had published false employment and salary statistics.¹⁴² These class action suits faced formidable challenges despite the obvious disconnect between the reality of the job market and the employment and salary data reported by the law schools.¹⁴³ Even the Dean of TJSL, Rudy Hasl, admitted in 2012 that “it is likely that more law schools will be sued over [their] employment numbers;” he added, however, that “only schools that tinkered with their numbers are at risk of losing such a suit.”¹⁴⁴ At least one expert agreed with Dean Hasl, believing that it would be difficult for these plaintiffs to win in these cases.¹⁴⁵ Not only would a complainant have to prove that “there was reasonable reliance on [the] employment [and salary] statistics provided by the school when the student made the decision to attend law school,” but he or she would also have to establish that the class as a whole shared the same reliance.¹⁴⁶ This litigation hurdle is very difficult to clear because this determination is individualized and would need to be examined on a case-by-case basis.¹⁴⁷

Moreover, the proof required to prevail in this type of a lawsuit dealing with fraud and misrepresentation was simply not present.¹⁴⁸ The complaints accused the law schools of misrepresenting employment and salary statistics to law students; however, the representatives of the class had to prove that it was reasonable for them to rely on the numbers reported by the law school.¹⁴⁹ Without proof of the reasonableness of their reliance on

from ABA-approved law school websites and found that there is a “continued pattern of consumer-disoriented activity.” *Id.* at 2.

141. McEntee & Lynch, *supra* note 134. Law schools know from experience that applicants are optimistic about their future prospects and rarely consider that they may fall below the median for any data point. *Id.*

142. *Id.*

143. *See, e.g., id.* (“In the 2003 edition of the ‘ABA-LSAC Official Guide to Law Schools,’ the school reported an 88.8 percent employment rate and only a 42 percent bar pass rate.”).

144. Jack Crittenden & Elizabeth Ewing, *Fraud or Defamation?*, NAT’L JURIST, Sept. 2011, at 10.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*; Thomas Jefferson Complaint, *supra* note 128.

149. Crittenden & Ewing, *supra* note 144, at 10. This proposition relies on the assumption that the prospective law student was not obligated to do further research

those representations, the fraud claims were bound to fail. It was no secret that after the spring of 2007, law school applicants and administrators were aware, or should have been aware, that there was a downturn in employment for newly-minted lawyers, and thus, it would have been unreasonable for the applicants to believe or rely on any excessively optimistic predictions stemming from employment or salary statistics offered by the law schools at that time. Further, as Cooley President Don LeDuc said of his law school, it never “makes any promise or commitment about jobs for graduates, other than to say, [the school] provides placement counseling and assistance to graduates seeking to get jobs. And, of course, all who pass the bar are equipped with the necessary skills to begin a solo practice.”¹⁵⁰

C. Application on a Grander Scale

In 2004, four years before the onset of the recession, Richard Matasar, the former Dean of the New York Law School, made an unnerving observation about the future of American law schools:

The great success of American legal education has been buoyed by cheap money, a perception that there are not many viable alternatives, a sense that a legal education is an excellent long-term investment, students’ belief that they are the exception to any negative trends, and the historically accurate belief that the legal profession is so robust that it will always outrun the debt that students take to become lawyers. In the years to come, each of these trends will change substantially and jeopardize the legal academy.¹⁵¹

By 2011, it had become clear that for many law school graduates, outrunning the debt that they had taken on to become lawyers was unlikely to occur.¹⁵² Many law students at that time had accumulated large amounts of debt to obtain a law degree under the impression that the employment

and determine the meaning of the actual reported numbers. *Id.*

150. *Id.* at 9.

151. Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL’Y 67, 117–18 (2010) (quoting Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 494 (2004)).

152. See discussion *supra* Part I.A.2. Additionally, it has been recognized that an “obvious effect” of the unnecessarily high “U.S. [law school] tuitions is to disproportionately screen out academically qualified potential applicants from less wealthy social backgrounds, except to the extent that these applicants can obtain sufficient scholarship assistance or are willing and able to draw heavily upon public or private sources of loan assistance.” Crespi, *supra* note 36, at 37.

and salary data proffered by the law schools was accurate.¹⁵³ The class action suits that have been dismissed thus far all stand for the same premise—that the proof required to win a case based on perception and alleged misrepresentations is extremely difficult to generate. However, these lawsuits all shed light on a very serious issue that will be faced by former, current, and future law students—a dismal job market combined with increasing levels of debt.

IV. STUDENT LOAN DEBT PROVIDES ACCESS TO A LAW DEGREE, BUT MAY DENY A BAR LICENSE

For many students, loans are the primary means of access to a legal education.¹⁵⁴ Unfortunately, those same loans can, under certain circumstances, deny graduates admission to the practice of law.¹⁵⁵ Graduating from law school and gaining admission to a state bar is not a right but a privilege hedged in by a variety of conditions.¹⁵⁶ The practice of law is limited to those individuals whom a state bar determines to be truly qualified based upon education and certain moral characteristics.¹⁵⁷ All fifty states and the District of Columbia mandate some form of character qualifications as a precondition for admission to the practice of law.¹⁵⁸

After graduating from law school, most law graduates apply for bar admission through at least one state's board of bar examiners.¹⁵⁹ Each state bar sets its own qualifications for attaining bar admission and licensing involves a demonstration of competence, a passing score on the bar examination, and an inquiry into the applicant's character and fitness.¹⁶⁰

153. See discussion *supra* Part I.C.

154. See discussion *supra* Part I.

155. See discussion *infra* Part IV.B.

156. Elizabeth Gepford McCulley, Note, *School of Sharks? Bar Fitness Requirements and the Role of Law Schools*, 14 GEO. J. LEGAL ETHICS 839, 841–42 (2001). Graduation from an ABA-accredited law school is a prerequisite to sitting for the bar in most states. *Frequently Asked Questions, Section of Legal Education and Admissions to the Bar*, AM. BAR ASS'N, http://www.americanbarassociation.org/groups/legal_education/resources/frequently_asked_questions.html (last visited Feb. 11, 2014).

157. Justice Felix Frankfurter once observed, “all the interests of [humanity] that are comprised under the constitutional guarantee given to ‘life, liberty and property’ are in the professional keeping of lawyers.” Jones, *supra* note 44, at 153.

158. *Id.* at 154.

159. For many states, the board of bar examiners is often “an agency of the highest state court in the jurisdiction, but occasionally the board is connected more closely to the state's bar association.” *Basic Overview, Section of Legal Education and Admissions to the Bar*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html (last visited Feb. 8, 2014) [hereinafter *Basic Overview*].

160. *Id.* In establishing one's qualifications to pass the character and fitness assessment, the burden is on the applicant. 7 C.J.S. *Attorney & Client* § 11 (2013).

The first requirement is to achieve a certain educational status, commonly a law degree from an ABA-accredited law school.¹⁶¹ Having earned that degree establishes competence sufficient to satisfy bar standards.¹⁶² The second requirement is the successful completion of a testing regimen consisting of two to three days of examinations.¹⁶³ Receiving a passing score on a state bar exam is another indication of legal competence.

The final requirement is a subjective analysis by the board of bar examiners, which seeks background information about each applicant that is deemed relevant to that applicant's receipt of a license to practice law.¹⁶⁴ The rationale behind this is that the purpose of the practice of law is to serve the public and that the harm that could potentially be inflicted on the public by an unscrupulous lawyer is a substantial concern that the board of bar examiners addresses through the character and fitness inquiry.¹⁶⁵ The applicant is required to disclose certain facts that pertain to his or her qualifications and any other facts that would notify the board of bar examiners of any potentially problematic aspects of the applicant's past.¹⁶⁶ In most states, the applicant's qualifications for character and fitness will typically be submitted to a board of bar examiners, whose findings on the applicant are merely advisory.¹⁶⁷ This advisory opinion is submitted to the state's court system, which has discretion to confirm or deny the board's assessment of an applicant's character and fitness.¹⁶⁸

A. Character and Fitness Assessment and Law School Debt

Moral character as a professional credential for practicing law has had increasing importance in the legal profession over the last three centuries.¹⁶⁹ In eighteenth century England, the fitness standards for practicing law were based upon one's wealth and social standing.¹⁷⁰ The expenses involved in obtaining a legal education and in establishing a legal practice restricted access to the legal profession to those of a higher social

161. Thirty-eight out of fifty-one jurisdictions do not require a J.D. degree from an accredited law school. AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2014, at 8–9 (2014), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2014_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf.

162. *Basic Overview*, *supra* note 159.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. McCulley, *supra* note 156, at 842.

168. *Id.*

169. *See generally* Rhode, *supra* note 2, at 493.

170. *Id.* at 494.

class.¹⁷¹ Over time, those standards changed as Parliament passed a statute that required five years of an apprenticeship and a judicial examination of fitness and capacity before practice in the legal field.¹⁷²

During the formative years of the American Bar, the well-established British Bar gave little meaning to the concept of character and fitness as a professional credential to the practice of law.¹⁷³ In the American Bar, the moral requirement remained a staple in an otherwise unsettled admission process.¹⁷⁴ So, while educational standards have been changed and redefined over the years, the moral character requirement to practice law remains elusively undefined.¹⁷⁵

1. Defining “Good Moral Character”

In 1957, Justice Hugo Black observed that “good moral character” is a term that is “unusually ambiguous” because of the limitless definitions that directly reflect the “attitudes, experiences, and prejudices of the definer,” and that it is a qualification that is “easily adapted to fit personal views and predilections, [which] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.”¹⁷⁶ Good moral character has often been approached with Justice Potter Stewart’s “I know it when I see it” attitude because the Bar Examiner’s Handbook recognizes that there is no formal definition of good moral character.¹⁷⁷

Appropriately, good moral character is often defined negatively in terms of an absence of a proven act or attribute that is generally considered to prove moral turpitude.¹⁷⁸ It is also often defined positively by an applicant’s “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process.”¹⁷⁹ Additional factors that courts may take into consideration in determining an applicant’s character and fitness include

171. *Id.*

172. *Id.* at 495. Eventually, a Society of Gentlemen Practisers was organized to improve the standards and admission of lawyers to the legal profession. *Id.* at 496.

173. *Id.* at 496.

174. *Id.*

175. *See, e.g., id.* at 497 (discussing the disinterest of state bar associations in using moral character standards, except to withhold admission to the bar from women).

176. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262–63 (1957) (Black, J., dissenting); Aaron M. Clemens, *Facing the Kleig Lights: Understanding the “Good Moral Character” Examination for Bar Applicants*, 40 AKRON L. REV. 255, 268 (2007).

177. Clemens, *supra* note 176, at 256–57 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

178. *Id.* at 280.

179. 7 C.J.S. *Attorney & Client* § 16 (2013).

reliability, integrity, candor in dealing with licensing authorities, mental and emotional stability, strong family ties, and a good support system.¹⁸⁰ Moreover, a lack of fiscal responsibility, failure to be truthful to the board, and false or misleading statements are reasons for which a character and fitness application may be denied.¹⁸¹

There are numerous justifications for requiring an evaluation of an applicant's good moral character.¹⁸² Some of the modern justifications rely on the relationship between an attorney and client, and the responsibility inherent in protecting the rights of the attorney's clients.¹⁸³ This justification relies on the understanding that the board of bar examiners certifies individuals who are capable of representing their clients honestly and competently, and that the board must feel confident in allowing the public to trust these individuals with their personal legal affairs.¹⁸⁴ The board should seek to define a more clear process or set of guidelines to determine the individuals who are capable of handling this responsibility so that applicants who seem likely to injure the public are rejected from admission to the bar and from the practice of law.¹⁸⁵

2. The "Rational Relationship" Test

The United States Supreme Court has determined that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."¹⁸⁶ Thus, in order to satisfy the Due Process Clause of the Fourteenth Amendment, a state may not utilize a factor to determine an applicant's good moral character, unless the factor has a "rational connection" to one's role as a lawyer.¹⁸⁷ The underlying concept is that an attorney, acting as an advisor, has a duty to treat the

180. Larry Craddock, "Good Moral Character" as a Licensing Standard, 9 TEX. TECH. ADMIN. L. J. 221, 232-33 (2008).

181. *Id.*

182. Clemens, *supra* note 176, at 267-68.

183. *Id.*

184. *Id.* Additionally, lawyers commonly deal with highly sensitive issues and information. *Id.*

185. *Id.* at 268.

186. *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957).

187. *Id.* For instance, under this rule, the Court has found that, despite substantial doubts about an applicant's use of aliases and past records of arrests (none of which resulted in convictions), those issues were unrelated to the applicant's ability to practice law. *Id.* The applicant's exemplary conduct in law school proved that he was a well-suited candidate for bar admission. *Id.* Furthermore, it has been determined that although an applicant's "living arrangement may be unorthodox and unacceptable to some segments of society, [the] conduct bears no rational connection to [the applicant's] fitness to practice law." *Cord v. Gibb*, 254 S.E.2d 71, 73 (Va. 1979).

responsibilities entrusted to him or her with care. One way to determine a person's ability to manage this endeavor is to analyze one's ability to be financially responsible, which is thought to be rationally related to the practice of law.¹⁸⁸

B. Reasonableness of Student Loan Debt in Conjunction with the Dismal Legal Economy

There was a point in time, between 2007 and early 2010, during which it was reasonable for entering law students to believe that they were likely to earn enough money as lawyers to pay off six-figure debts. However, that time span of reasonableness has ended. It is no secret that the current legal job market is anything but dismal for a significant fraction of each year's law school graduate cohort. It is unreasonable to believe that the current class of entering law students and future law students have the same beliefs about job prospects as those who have already entered the legal market or law school. It is the fact of membership among the previous cohort of law students (who entered school at a time when it was reasonable to believe that their anticipated debt burden would be manageable, given their expectation of lucrative employment) that should entitle applicants to forbearance during the character and fitness phase of the bar admission process, so long as these applicants can show that, upon admission to the bar, their plan for paying off their debt is feasible.

C. Exploring Determinations of Financial Irresponsibility

Many law students accumulate large amounts of debt in pursuit of a law degree, and some of them may not consider the future implications of that decision.¹⁸⁹ Not only does the current market for legal services create a formidable challenge to paying off student loan debt, but it could also prevent some individuals from gaining admission to the bar.¹⁹⁰ Accordingly, it has been suggested that the board of bar examiners of each state should reassess the Character and Fitness inquiry of the bar admission process.¹⁹¹ Specifically, some have found that “[q]uestions regarding an applicant's . . . financial condition shed very little, if any, light on one's ability to practice law, and therefore should be eliminated from bar

188. Bd. of Law Examiners v. Stevens, 868 S.W.2d 773 (Tex. 1994).

189. Susanna Kim, *Ohio Supreme Court Denies Law License for Grad with \$170,000 in Student Loans*, ABC NEWS (Jan. 18, 2011), <http://abcnews.go.com/Business/ohio-supreme-court-denies-law-license-law-grad/story?id=12632984>. See discussion *supra* Part I.A.1.

190. *Id.*

191. Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331 (1995).

applications.”¹⁹²

At least seventy-seven percent of all state boards inquire into an applicant’s financial condition in the character and fitness evaluation.¹⁹³ Since 1836, a core concern of the legal profession has been whether an applicant could deal properly with client monies.¹⁹⁴ For that reason, an applicant who is unable to handle his or her own finances is typically viewed as “risky.”¹⁹⁵ Court rulings on character deficiency that stem from financial irresponsibility have varied widely, as there are numerous ways that one might run afoul of that determination.¹⁹⁶ The standard that courts typically use in evaluating an applicant’s financial responsibility is to determine if he or she has failed to make a “genuine effort to meet one’s [financial] responsibilities.”¹⁹⁷ Failure to do so “can establish ‘a lack of the character and integrity expected and required of one who seeks to become a member of the bar.’”¹⁹⁸

For instance, in 2011, the New Hampshire Supreme Court gave equal weight to an applicant’s debt of \$138,000 and his history of criminal acts in deciding to disqualify him for admission to the bar.¹⁹⁹ The court rejected the applicant’s argument that the only way to pay the student loan debt would be to gain employment as a lawyer, which would arguably allow the applicant to earn sufficient income.²⁰⁰ The court acted on the premise that attorneys have a responsibility to their future clients to properly handle the client’s money, saying that the fact that the applicant was unable “to recognize the significance of his own financial responsibilities does not engender confidence in his ability” to be an attorney.²⁰¹ This conclusion echoes the sentiment of a Florida court twenty years ago, which found that a “lawyer who is constantly in debt is more likely to succumb to

192. *Id.* at 347.

193. *Id.* at 348.

194. Clemens, *supra* note 176, at 271. In 1836, David Hoffman published *Resolutions In Regard to Professional Department*, arguing that attorneys should not underbid other attorneys’ legal fees; it is this sentiment that indicates “trade protectionism concerns” and other concerns involving the appropriate handling of clients’ money. *Id.* at 271 (citing Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1428 (2004)).

195. *Id.* at 275. This concern has remained prevalent in the legal profession as many attorneys are disciplined for mishandling client funds and other financial misdeeds, like not paying child support, defaulting on student loans, and filing for bankruptcy. *Id.*

196. *Id.*

197. *Id.* (quoting George L. Blum, Annotation, *Failure to Pay Creditors as Affecting Applicant’s Moral Character for Purposes of Admission to the Bar*, 108 A.L.R. 5th 289, § 2(b) (2003)).

198. *Id.*

199. *In re G.W.*, 13 A.3d 194 (N.H. 2011).

200. *Id.* at 199.

201. *Id.* at 200.

temptations to the detriment of his or her clients or the public.”²⁰²

Typically, debt level alone is not a completely disqualifying factor.²⁰³ There have been numerous cases that stand for the proposition that the level of an applicant’s debt can disqualify that individual from admission to the bar, but only if he or she lacks a feasible plan for the future repayment of that same debt.²⁰⁴ For instance, a 2008 law school graduate who thrice failed the Ohio Bar Exam, Hassan Jonathan Griffin, was denied permission to retake the Ohio Bar Exam because his student loan debt totaled \$170,000 and he had no established plan as a means of repaying such a large debt.²⁰⁵ The court found that filing for bankruptcy was not a sufficient plan because this solution would only alleviate his consumer debts of \$16,500, not his student loan debt of \$170,000.²⁰⁶ Thus, Mr. Griffin would gain no significant debt relief by declaring bankruptcy.²⁰⁷

Mr. Griffin’s situation was similar to that of another law school graduate, Robert Bowman, who was denied admission to the New York Bar because of his student loan debt, totaling \$430,000, and because he did not have a realistic plan for paying off that debt.²⁰⁸ Robert Bowman’s story is a cautionary tale that illustrates just how quickly student loan debt can increase. When Mr. Bowman graduated from law school, the amount of student loans he had encumbered totaled \$270,000.²⁰⁹ It was not until his loans were transferred from Sallie Mae that the collection agencies tacked on an additional \$100,000 in fees, leaving Mr. Bowman with approximately \$370,000 in student loans while his application for

202. *In re S.M.D.*, 609 So. 2d 1309, 1311 (Fla. 1992).

203. *Id.*

204. *See, e.g., In re Anonymous*, 875 N.Y.S.2d 925 (N.Y. App. Div. 2009); *In re Griffin*, 943 N.E.2d 1008 (Ohio 2011); *In re Kline*, 877 N.E.2d 654 (Ohio 2007); *Santulli v. Tex. Bd. of Law Examiners*, No. 03-06-00392-CV, 2009 WL 961568 (Tex. Ct. App. Apr. 10, 2009).

205. *Griffin*, 943 N.E.2d at 1009. *See also* Rebecca Larson, *Law Grad Refused Bar Admission for Debt*, NAT’L JURIST (Feb. 14, 2011, 10:09 AM), <http://www.nationaljurist.com/content/breaking-news/law-grad-refused-bar-admission-debt>.

206. *Griffin*, 943 N.E.2d at 1008.

207. *Id.* at 1008–09. Mr. Griffin had failed the Ohio bar exam three times before the board’s disqualification for bar admission based on his character and fitness assessment. *Id.* Mr. Griffin, in his forties at the time in question, graduated from The Ohio State University Moritz College of Law with \$150,000 of student loan debt and an additional \$20,000 from his undergraduate studies at Arizona State University. *Id.* Mr. Griffin also owed \$16,500 on credit cards, but was working part time at a Public Defender’s Office earning twelve dollars an hour. *Id.* *See supra* discussion Part I.C.

208. STATE OF N.Y. SUPREME COURT, APPELLATE DIV., THIRD JUD. DEP’T, SUBCOMM. ON CHARACTER AND FITNESS, RPT. ON ROBERT A. BOWMAN (2009), *available at* <http://documents.nytimes.com/report-on-robert-a-bowman-s-application-for-admission-to-the-new-york-state-bar> [hereinafter BOWMAN FITNESS REPORT].

209. *Id.*

admission to the bar was pending.²¹⁰ Mr. Bowman made contact with the student loan companies and was negotiating with Sallie Mae and the New York State Higher Education Services Corporation, both of which acknowledged that Mr. Bowman deserved some forbearance for his troubles with the companies.²¹¹

The subcommittee that evaluated Mr. Bowman's application concluded that he had "exceptional character, with exceptional perseverance, tenacity, and humility," and ultimately recommended him for admission to the bar.²¹² However, the Appellate Division of the New York Supreme Court overruled the subcommittee's determination and found that Mr. Bowman was financially irresponsible.²¹³ The court made this determination knowing that Mr. Bowman's employment in the legal field was contingent upon admission to the bar and that the salary he would make as a lawyer would be enough to make substantial payments on his loan balance.²¹⁴ Nevertheless, the court reasoned that Mr. Bowman's student loan debt was too large and his efforts to repay them too meager for him to be a lawyer.²¹⁵ This approach to analyzing a candidate's financial irresponsibility has been criticized as "punishing anticipatory conduct rather than actual wrongdoing."²¹⁶

V. MOVING FORWARD: CHANGING THE BOARD OF BAR EXAMINERS' FINANCIAL IRRESPONSIBILITY ANALYSIS AT THE CHARACTER AND FITNESS STAGE OF THE BAR APPLICATION

Each state's board of bar examiners should seek to remedy the injustices caused when the court punishes anticipatory conduct, rather than actual wrong-doing, in a multitude of ways. The first, and perhaps the simplest, way to fix the problem would be for each state to change the way its board of bar examiners analyzes bar applicants at the character and fitness stage, specifically dealing with the question of financial irresponsibility.²¹⁷ As

210. *Id.* Sallie Mae overcharged Mr. Bowman, imposed hefty, unjustified fees, and kept Mr. Bowman from deferring his payments when he was legally entitled to do so. Jonathon D. Glater, *Finding Debt a Bigger Hurdle than Bar Exam*, N.Y. TIMES, July 2, 2009, at A1. Additionally, when Mr. Bowman contacted Sallie Mae for a medical deferment, the company transferred his private student loans to a collection agency, which tacked on an additional twenty-five percent fee. *Id.* The collection agency then transferred the loan again and that agency tacked on an additional twenty-five percent fee. *Id.* Mr. Bowman then found himself in a situation where his loans rapidly increased from \$230,000 to \$435,000. *Id.*

211. *Id.*

212. BOWMAN FITNESS REPORT, *supra* note 208.

213. *Id.*

214. *Id.*

215. *Id.*

216. Harris, *supra* note 1.

217. See discussion *supra* Part IV.

student loan debt continues to be a serious concern for law students, more prospective lawyers may be unable to gain admission to the legal profession because of the student loan debt encumbered during their educational endeavors, combined with the lack of realistic options for repaying that debt.²¹⁸ While it has been argued that the legal educational process and the legal profession as a whole needs a makeover,²¹⁹ one way for states to evolve and adapt to the changing legal climate is to change their treatment of student loan debt.

A. Student Loan Indebtedness Has No Rational Relation to One's Ability to Practice Law

The typical standard of good moral character is antiquated and has not evolved to adapt to economic change in the legal profession, specifically in the financial analysis portion of a candidate's application.²²⁰ Law students, like many other Americans, have become accustomed to accumulating large amounts of debt as they prepare themselves for employment.²²¹ This reliance is unlikely to change unless the economy and the legal market, improve dramatically. As tuitions for both undergraduate institutions and law schools continue to increase in a struggling economy, it is likely that future law students rely even more heavily on student loans; consequently, more students will accumulate greater amounts of debt.²²²

The Supreme Court has acknowledged that a state bar may require applicants for admission to the bar to possess certain qualifying character traits, as long as those qualifications have a "rational connection" to the applicant's "fitness or capacity to practice law."²²³ While financial questioning is rationally related to the practice of law because of the sensitive nature of dealing with client funds and in billing client hours, student loan indebtedness is typically not encumbered because of a person's irresponsibility.²²⁴ In fact, student loans have been consistently viewed in a positive manner as a way to attain a better quality of life by

218. See discussion *supra* Part IV.B.

219. In a recent online symposium at the Legal Ethics Forum, Professor Ray Campbell said that "[l]aw school as most of us know it is doomed." Ray Campbell, *The End of Law Schools*, LEGAL ETHICS FORUM (Feb. 8, 2012), <http://www.legalethicsforum.com/blog/2012/02/the-end-of-law-schools.html>.

220. *Id.*

221. There is a growing trend in reliance on debt to finance many facets of American lives. See, e.g., *U.S. National Debt Clock*, BABLYONTODAY.COM, http://www.babylontoday.com/national_debt_clock.htm (last visited Feb. 07, 2014).

222. See discussion *supra* Part I.A.

223. *Schwabe v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957).

224. Past mishandling of client or organization funds, failing to make child support payments, student loan default, and bankruptcy filing are relevant to financial questioning because each of them evidence a form of irresponsibility that suggests poor moral character. *Id.*

investing in a student's future.²²⁵ Credit card debt, on the other hand, is often encumbered from a variety of habits, generally linked to personal choice and not positively viewed.²²⁶ Given such differences, student loan debt should not be treated the same as other varieties of debt or financial management problems in the eyes of a state board of bar examiners.

B. Financial Questions by Each State's Board of Bar Examiners
Unjustly Burden Applicants with Significant Student Loan Debt at
the Character and Fitness Stage of the Bar Application

In light of the increasing costs associated with attending an undergraduate college or university as well as law school, situations such as those faced by Mr. Bowman and Mr. Griffin may become relatively common.²²⁷ Rising tuition costs increase the debt loads of many students who, in attending law school, are attempting to provide for a more secure future.²²⁸ An anonymous student at Boston College Law School famously and poignantly observed in 2010 that "a J.D. seems to be more of a liability than an asset."²²⁹ Unsurprisingly, the number of students who choosing to pursue a law degree began to decline that year and has continued to fall through the entering class of 2013.²³⁰

C. Treating Student Loan Debt Separately from Other Forms of Debt

Even if student loan debt proves to be a relevant consideration in analyzing a person's character, student loan debt and the repayment plan should be treated separately from the other forms of financial management. For instance, a person who neglects to pay child support, fails to file taxes, or writes bad checks has made a conscious decision to perform an action evident of poor moral character. On the other hand, a person who has accumulated student loans has not had the opportunity to display either the ability or inability to meet his or her financial obligations. Thus, student loan debt and a student's lack of a repayment plan should not give rise to an automatic determination of financial irresponsibility without giving the applicant the benefit of beginning his or her legal career and potentially

225. Dwyer, *supra* note 50. *See also* discussion *supra* Part I.A.2.

226. Dwyer, *supra* note 50.

227. *See* discussion *supra* Part IV.A.

228. *See* discussion *supra* Part I.A.2.

229. Annie Lowrey, *A Case of Supply v. Demand*, SLATE.COM (Oct. 27, 2010, 4: 14 PM), http://www.slate.com/articles/business/moneybox/2010/10/a_case_of_supply_v_demand.single.html. In 2011, 87,900 candidates applied for law school, and 78,900 applied for admission in 2012. William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, 98 A.B.A. J. 30 (2012).

230. Lowrey, *supra* note 229; Henderson & Zahorsky, *supra* note 229.

having the ability to make payments on that debt.²³¹ The applicants, similar to current lawyers, should be given the time and opportunity to handle their financial affairs responsibly.²³² Additionally, because student loan debt is typically not dischargeable in bankruptcy, a person who fails to meet the qualifications for admission to the bar because of a large debt load and the lack of a realistic plan for repayment has no real way to rectify the situation.²³³ To complicate repayment further, it is estimated that approximately sixty-nine percent of all law students attain undergraduate degrees in two of the lowest-paying fields: humanities and social sciences.²³⁴

If student loan debt were treated separately from other forms of debt, the legal system would retain the power to discipline lawyers who fail to meet their financial obligations through disciplinary proceedings conducted by the relevant state bar. Furthermore, very large amounts of student debt may still lead to a determination of financial irresponsibility. However, that determination should be made after the individual in question has defaulted on his or her student loan payments and is incapable of honoring his or her own financial obligations, not merely because the applicant lacks a plan for repayment. This treatment of student loan debt through disbarment or other disciplinary consequences would demonstrate good faith on behalf of the board of bar examiners and would give applicants the benefit of the doubt until an irresponsible action has occurred that necessitates discipline.²³⁵

CONCLUSION

The class action suits against allegedly deceptive law schools have all been based thus far on the same premise: the proof required to win a case based on perception and alleged misrepresentations is nearly impossible. Regardless of the success of these lawsuits, one thing is clear: they shed light on a very serious issue that will be faced by former, current, and future law students—a dismal job market combined with increasing levels of debt. Those suits also prove that change is crucial because “[s]ix figures

231. Dwyer, *supra* note 50.

232. *Id.*

233. This assumes that the applicant would be unable to attain employment in a position that would enable him or her to substantially reduce the debt. The promise of a position upon admission to the Bar has proven an ineffective plan for repayment. *See In re Anonymous*, 875 N.Y.S.2d 925 (N.Y. App. Div. 2009). *See also* discussion *supra* Part I.C.

234. Michael Simkovic & Frank McIntyre, The Economic Value of a Law Degree, at Slide 22 (Apr. 13, 2013) (unpublished article with accompanying PowerPoint presentation), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585 (Sept. 2013).

235. The board should follow the criminal law approach in which one is presumed innocent until proven guilty.

of debt, a heavy interest burden and poor job prospects” are “no way to begin a legal career.”²³⁶ This change must occur to meet “the challenge to compete in a global economy [which] requires a higher education policy that honestly addresses issues of access, cost containment, and national interest.”²³⁷

The treatment of financial questions by various state boards of bar examiners unjustly punishes applicants with significant student loan debt at the character and fitness stage of the bar application. A finding of financial irresponsibility based on an applicant’s student loan debt and the absence of a good plan for repaying that debt is a determination that seeks to eliminate a future problem without the possibility of allowing the applicant to display financially responsible behavior. Numerous reform options exist that might allow law students to enjoy the prospect of a legal career. The solution proposed here recognizes that a difference exists between people who merely have significant debt obligations and who lack a realistic plan for meeting those obligations, and people who have demonstrated financial irresponsibility through actions such as defaulting on their student loans, failing to pay child support, and neglecting to file taxes.

236. Henderson & Zahorsky, *supra* note 230, at 35.

237. *Id.*