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ENDING THE HIGHER EDUCATION SUCKER SALE: TOWARD AN EXPANDED THEORY OF TORT LIABILITY FOR RECRUITMENT DECEPTION

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Abstract

Admissions officers live a dual, often conflicted, existence. In one sense, they are counselors responsible for advising prospective students. In another sense, they are salespeople with obligations to meet enrollment goals. The pressures fostered by these roles sometimes prompt unscrupulous individuals to use misrepresentations and other forms of deception to induce students to enroll. Unfortunately, students who are induced to enroll based on recruitment deception are afforded few options for redress. The purpose of this Article is to conceptualize a tort-based solution to this utter inequity. The Article proposes a broadening of negligent misrepresentation to encompass a new tort—negligent educational recruitment. This tort would employ approaches to determining duty and causation that account for the distinctive nature of the educational process, and, thus, overcome the concerns that often doom negligent misrepresentation lawsuits in the higher education context.

I. INTRODUCTION

The used car salesman is held out to be the ultimate swindler. He has been stylized as a polyester-clad, cigar-chomping figure, with a shifty manner of speech and a gaudy approach to accessorizing. In popular parlance, the addition of "like a used car salesman" can turn an innocuous subject-verb statement into an insult. Next to politicians and lawyers, there is likely no more popular target of half-witted jokes and generalized scorn than the peddlers of preowned vehicles.

The very nature of the car selling business nurtures these unflattering perceptions. The commission-based pay structure provides clear incentives for advantage taking and outright dishonesty by sellers. Salespeople are trained to use tactics premised on tipping the negotiation (to the extent that there is one) and any

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eventual sale in their favor. Buyers often approach the sale with little information and no training or experience in negotiating. The most successful salespeople are those who are able to extract the best deal by compounding their tactical strengths with the buyer's weaknesses.

The potential for a sucker sale is particularly acute on car lots, where sale prices and finance terms are subject to manipulation and product defects are easily hidden. The untrained and uninformed buyer is little match for the astute seller whose paycheck depends on closing the deal. As a result, and for good reason, buyers tend to be suspicious of car salespeople, and it is plausible that in some cases that suspicion yields a better deal for the buyer. But imagine a setting where sellers have all the advantages afforded their peers in the car business, but they also enjoy an advantage of which most car salespeople could only dream—the buyer's trust. Colleges and universities provide such settings, and admissions officers all too often take advantage by using deception to induce students to enroll.

Unfortunately, students who are induced to enroll based on deception are afforded few options for redress. The fundamental relationship between a student and her higher education institution is contractual in nature; therefore, victims of recruitment deception often bring breach of contract claims.[1] But in order to be successful, a plaintiff's allegations must pertain to specific unfulfilled promises.[2] An assurance made to a prospective student that she would have "no problem" finding a job with a particular degree lacks the specificity needed to be actionable in a breach of contract suit, even though it could serve as a functional promise.

Victims of recruitment deception often bring tort claims as well. Fraudulent misrepresentation, negligent misrepresentation, and educational malpractice are common tort theories. Unfortunately, none of these claims provide a viable path for students victimized by slick higher education sales tactics. Fraudulent misrepresentation requires a showing of scienter, or intent to deceive, which is difficult to prove.[3] In addition, allegations of fraud must be alleged with a level of specificity that is often difficult to present.[4] Negligence claims, including misrepresentation and malpractice, tend to fail because courts have found it "extremely difficult, if not nearly impossible," to determine educational duty.[5]

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[1] *E.g.*, Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992).

[2] *Id.* at 417.

[3] *E.g.*, Hunter v. Bd. of Educ. of Montgomery Cnty., 439 A.2d 582, 587 (Md. 1982) ("[C]laimant will usually face a formidable burden in attempting to produce adequate evidence to establish the intent requirement of the tort . . . .").

[4] *E.g.*, Jamieson v. Vatterott Educ. Ctr., Inc., 473 F. Supp. 2d 1153, 1156 (D. Kan. 2007) ("To survive a motion to dismiss, an allegation of fraud must 'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" (quoting Schwartz v. Celestial Seasonings, Inc., 124 F.3d 1246, 1252 (10th Cir. 1997))).

[5] *E.g.*, Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 121 (Iowa 2001).

Courts have also fashioned a host of "policy" justifications for dismissing educational malpractice claims.[6]

The end result is that admissions officers are allowed to make deliberate and convincing misrepresentations with virtual impunity. Applicants, many of whom lack higher education insight and are unaware that their supposed admissions counselor is actually a salesperson, are left to be victimized, with insult added by the lack of redress for their injuries.

The purpose of this Article is to conceptualize a tort-based solution to this utter inequity. The Article proposes a broadening of negligent misrepresentation to encompass a new tort—negligent educational recruitment. This tort would employ approaches to determining duty and causation that account for the distinctive nature of the educational process, and, thus, conceivably overcome the concerns that often doom negligence lawsuits.

A tort-based solution is needed because contractual liability is determined based on assumptions that are sometimes unsuitable for application to the higher education context. Contract law assumes arms-length transactions.[7] In the context of higher education, however, information asymmetries place admissions officers and prospective students on unequal footing, allowing the former to exercise undue influence upon the latter.[8] Contract law also assumes morally indifferent parties.[9] But our enduring (though increasingly skeptical) societal encouragement of educational pursuits is based on a value-laden "public good" premise.[10] Recognizing

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[6] An education malpractice claim in this context could encompass allegations that the education received by a student was of lower quality than what was promised by an admissions officer. In addition to the professed absence of a duty of care, courts have cited uncertainty in determining causation and damages, the potential flood of litigation burdening schools, and the judicial deference historically afforded educational institutions. *E.g.*, *id.*

[7] *See* Michael H. Cohen, Comment, *Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort*, 73 CALIF. L. REV. 1291, 1306 (1985) ("In contract the parties voluntarily assume duties and allocate risks.").

[8] U.S. SENATE, HEALTH, EDUC., LABOR & PENSIONS COMM., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 43–67 (2012) [hereinafter HELP REPORT], *available at* http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf, *archived at* http://perma.cc/76FA-34EW (providing extensive documentation of various unscrupulous tactics used by for-profit admissions officers in inducing enrollment); David D. Dill, *Allowing the Market to Rule: The Case of the United States*, 57 HIGHER EDUC. Q. 136, 147 (2003) ("[B]ecause higher education in the US is an industry in which consumers cannot objectively evaluate the quality of the service before they purchase it, an information asymmetry can exist in which institutions may take advantage of consumers.").

[9] Cohen, *supra* note 7, at 1313 ("Contract law presumes that parties are indifferent between performance or breach, that breach is morally neutral, and that expectation damages are adequate to make the injured party whole.").

[10] WALTER W. MCMAHON, TIAA-CREF INST., THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION: THE EVIDENCE, THEIR VALUE, AND POLICY IMPLICATIONS 2 (2010), *available at* http://www1.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_tcp_docs/

the shortcomings of contract law, the tort theory conceptualized in this Article acknowledges both the special relationship between admissions officers and prospective students and the need for strong deterrents that transcend the limits of contract law.

The discussion will be illustrated with a primary focus on for-profit higher education. This orientation is not meant to suggest that the not-for-profit sector is free of improprieties. Schools in all sectors of higher education face similar pressures to generate income through student enrollments, and allegations of unscrupulous practices transcend sectors.[11] But as a general proposition, the pressure to increase enrollments is greater among for-profit schools due to their profit motive and the absence of alternative sources of revenue, such as public appropriations and endowments.[12] As a result, for-profit schools have been targets of a disproportionate number of allegations of unscrupulous recruitment behavior, especially allegations of unlawful compensation arrangements for admissions officers.[13] The distinctive

documents/document/tiaa02029326.pdf, *archived at* http://perma.cc/MU7Q-G9HQ ("Beyond the private benefits . . . of higher education[,] . . . [t]here are contributions to democratic institutions, human rights, political stability, lower state welfare costs, lower health costs, lower public incarceration costs, contributions to social capital, to the generation of new ideas, and so forth."); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Education] is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship.").

[11] In recent years, various colleges and universities have admitted to inflating entering student credentials in order to increase rankings and make their classes appear more competitive. *E.g.*, Beckie Supiano, *Emory U. Intentionally Misreported Admissions Data, Investigation Finds*, CHRON. HIGHER EDUC. (Aug. 17, 2012), http://chronicle.com/blogs/headcount/emory-u-intentionally-misreported-admissions-data-investigation-finds/31215, *archived at* http://perma.cc/U4WE-BM52. Additionally, law schools have been the target of a series of lawsuits alleging, among other things, misrepresentation of outcomes data. *E.g.*, Paul Barrett, *Glut Leads Lawyers to (Surprise) Sue Law Schools*, BLOOMBERG BUS. (Mar. 23, 2012), http://www.businessweek.com/articles/2012-03-23/glut-leads-lawyers-to-surprise-sue-law-schools, *archived at* http://perma.cc/62XD-5U42.

[12] Associate's and certificate level for-profit schools receive 89% of their total revenue from tuition and fees, compared to 16% for public and 58% for private institutions. At the bachelor's degree level, 91% of for-profit revenue comes from tuition and fees, compared to 19% among public and 33% among private institutions. SUSAN AUD ET AL., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2012, at 102–03 (2012), *available at* http://nces.ed.gov/pubs2012/2012045.pdf, *archived at* http://perma.cc/CCJ2-CPDH; HELP REPORT, *supra* note 8, at 49 ("The pressure to recruit as many students as possible starts at the top of the for-profit education business model. Investors . . . demand revenue growth. Revenue growth requires enrolling a steady stream of students.").

[13] For-profit entities were the target of forty-two of the forty-five most recent federal False Claims Act lawsuits filed against education entities. GIBSON DUNN, LIST OF *QUI TAM* EDUCATIONAL CASES (2013), *available at* http://www.gibsondunn.com/publications/Documents/QuiTamEducationalCases.pdf, *archived at* http://perma.cc/NRQ4-U8MA (providing a list of cases).

aspects of the sector and the vibrancy of the critical attention it attracts make it particularly amenable to illustrative focus.

In making the case for a tort path to redress for victims of recruitment deception, the Article will begin, in Part II, with a discussion of how conflicting roles can prompt admissions officers to engage in deceptive behavior. Part III describes the market in which higher education institutions operate and the role of marketing and recruitment. Part IV focuses on for-profit school marketing and recruitment practices. Part V explains the limited paths to redress afforded victims of recruitment deception. Part VI presents the negligent educational recruitment theory. Part VII concludes.

II. CONFLICTING ROLES OF ADMISSIONS OFFICERS

The business of higher education ensures that admissions officers live a dual, often conflicted, existence. In one sense, they are counselors responsible for advising prospective students. In another sense, they are salespeople with obligations to meet institutional and individual enrollment goals. The roles are understandable. The admissions office is often the first point of contact for the public, particularly prospective students. Therefore, admissions officers serve as critical sources of information and guidance. The admissions office is also a major, if not principal, revenue center. When prospective students become actual students, they also become sources of revenue.[14] Schools need students in order to survive and thrive, financially and otherwise. And it is the admissions office that fosters the process of renewal that takes place at the beginning of each enrollment period.

A review of recent admissions job announcements illustrates this duality. For example, Florida Southern College, a Methodist Church affiliated institution[15] that sits on a picturesque campus[16] designed by renowned architect Frank Lloyd Wright,[17] posted an announcement for an admissions counselor.[18] The first sentence

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[14] SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATES, AND HIGHER EDUCATION 2 (2004) (discussing how, upon enrollment, students become sources of funds, in addition to university services and trademarked goods).

[15] *About FSC*, *History*, FLA. S. COLL., http://www.flsouthern.edu/about.aspx, *archived at* http://perma.cc/S5NZ-XCDH (last visited Sept. 6, 2014).

[16] *Florida Southern College is the "Most Beautiful Campus" for the Second Year in a Row*, FLA. S. COLL., http://archive-edu.com/page/1144011/2013-01-14/http://www.flsouthern.edu/news.asp?ACTION=view&ID=1038, *archived at* http://perma.cc/7X3W-YVEP (last visited Feb. 5, 2015) ("For an unprecedented second consecutive year, Florida Southern College has been named the No. 1 Most Beautiful Campus in America by the prestigious Princeton Review.").

[17] *Welcome!*, FLA. S. COLL., http://www.flsouthern.edu/fllw-visitors.aspx, *archived at* http://perma.cc/3TMB-GE7S (last visited Sept. 6, 2014) (highlighting that Florida Southern College is the only college campus in the world designed by Wright).

[18] *Admissions Counselor*, HIGHEREDJOBS, http://www.higheredjobs.com/admin/details.cfm?JobCode=175732749&Title=Admissions%20Counselor, *archived at* http://perma.cc/V7Q6-SU3R (last visited Sept. 7, 2014) [hereinafter *FSC Admissions Counselor Position*].

of the announcement states that the incumbent is "responsible for meeting or exceeding the freshman recruitment goal."[19] While recruitment goals can pertain to different objectives, including student credentials and demographics, these goals commonly center on sheer numbers of students enrolled.[20] So, immediately, the announcement makes clear that job responsibilities and therefore job performance is premised on getting the proverbial "asses in classes."[21] But the announcement also highlights the incumbent's counseling responsibilities—specifically, articulating "the mission and values of the College" and advising "prospective students and their parents through all phases of the admissions and financial aid processes."[22] In one role, the admissions officer has a personal interest in successfully inducing prospects to enroll. But in her other role, she must serve the interests of these same prospects by communicating accurate, honest, and helpful information.

Becker College, a private not-for-profit institution that caters to nontraditional students (as well as a traditional-aged population) also recently sought an admissions counselor. The announcement initially highlights the position's counseling responsibilities, specifically, "pre-admission advising."[23] But the tone of the announcement shifts quickly to the sales responsibilities. The incumbent would be responsible for telemarketing and managing corporate relationships, with the goal of increasing enrollment.[24] Unsurprisingly, experience in lead generation, sales, or marketing is desired.[25]

In the for-profit higher education sector, where ever-growing enrollment is central to profitability, the sales role tends to take prominence over the counseling role. A recent announcement seeking "goal-oriented" admissions recruiters at The Art Institute of York—Pennsylvania highlights this prominence.[26] The goal orientation is made clear when the announcement expresses a desire for applicants with experience selling timeshares, insurance, financial services, and, unsurprisingly, automobiles.[27] While the announcement mentions that recruiters guide prospective students through the admissions and enrollment processes, the

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[19] *Id.*

[20] *See* HELP REPORT, *supra* note 8, at 4, 46–49.

[21] U.S. DEP'T OF EDUC., PROGRAM REVIEW REPORT PRCN 200340922254 UNIVERSITY OF PHOENIX, OPEID 020988 00 SITE VISIT OF 8/18/2003–8/22/2003, at 10 (2004) [hereinafter UOP PROGRAM REVIEW REPORT], *available at* http://s3.amazonaws.com/pro publica/assets/higher-ed/doe_report_uop.pdf, *archived at* http://perma.cc/448M-VAZJ (identifying "asses in classes" and "butts in seats" as the premises underlying University of Phoenix's recruiter compensation plans).

[22] *FSC Admissions Counselor Position*, *supra* note 18.

[23] *Admissions Counselor*, HIGHEREDJOBS, http://www.higheredjobs.com/admin/details .cfm?JobCode=175732689&Title=Admissions%20Counselor, *archived at* http://perma.cc/E 6UU-BBJX (last visited Sept. 7, 2014).

[24] *Id.*

[25] *See id.*

[26] *Admissions Recruiter*, HIGHEREDJOBS, http://www.higheredjobs.com/admin/details .cfm?JobCode=175731650&Title=Admissions%20Recruiter, *archived at* http:/perma.cc/4 GBV-PBBA (last visited Sept. 7, 2014).

[27] *Id.*

tone of the announcement strongly suggests that this guidance is another form of selling—akin to a used car salesman "counseling" a customer into the "right" car.[28]

Conflation of the sales and counseling roles is dangerous, especially in the higher education setting. As highlighted earlier, while most people are suspicious of a used car salesman's counsel, most are willing to trust the guidance offered by an admissions officer. This leaves the targets of recruitment deception in a defenseless mindset and, therefore, ripe for a sucker sale. The risks are illustrated in a lawsuit against The Art Institute of York—Pennsylvania, its peer institutions, and its parent company, Education Management Corporation (EDMC).

A. United States v. Education Management Corp.

The suit, *United States v. Education Management Corp.*,[29] was originally filed in 2007 by two former EDMC employees who alleged that EDMC and its subsidiaries operated unlawful compensation schemes where admissions officers were paid based on the number of students they induced to enroll.[30] The suit was brought pursuant to the federal False Claims Act,[31] which allows private individuals with personal knowledge of fraud against the federal government to bring suit against alleged defrauders in the name of the government and share in any recovery.[32] The bases of the alleged fraud were various certifications that EDMC submitted to the Department of Education (ED) declaring their compliance with relevant statutory and regulatory provisions, including the ban on incentive compensation for admissions officers.[33] These certifications are required in order for

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[28] *See id.*

[29] 871 F. Supp. 2d 433 (W.D. Pa. 2012).

[30] In 1992, Congress banned the use of incentive compensation for recruiters "based on its concern that schools were creating incentives for recruiters to enroll students who could not graduate or could not find employment after graduating." Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 436 (D.C. Cir. 2012). In 2002, twelve "safe harbors" or exceptions to the ban were enacted. *Id.* at 437–38. These exceptions, however, were eliminated from the regulations in 2010 based on a determination by the Department of Education (ED) that "'unscrupulous' institutions used the safe harbor for salary adjustments to 'circumvent the intent' of the Higher Education Act (HEA) and to avoid detection and sanction for engaging in unlawful compensation practices." *Id.* at 445. The relevant facts in this case occurred while the safe harbors were still in effect.

[31] 31 U.S.C. §§ 3729–3733 (2012).

[32] Through the Act, violators are liable for civil penalties between $5,500 and $11,000 for each false claim and triple the amount of actual damages to the government. Relators (the persons who initiate the action) are entitled to receive 15% to 30% of the amount recovered. *See, e.g.*, U.S. DEP'T OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER (2011), *available at* http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf, *archived at* http://perma.cc/MU99-YDN9.

[33] Joint Complaint in Intervention by The United States of America, and the States of California, Florida, Illinois, and Indiana at 22, U.S. v. Educ. Mgmt. Corp., 871 F. Supp. 2d 433 (W.D. Pa. 2012) (Civil Action No. 07-461) [hereinafter Joint Complaint] ("EDMC knowingly made false statements, certifications, and claims regarding compliance with the

institutions to become, and remain, eligible to collect federal student aid funds.[34] In 2011, the U.S. Department of Justice (DOJ) intervened in the case (an uncommon occurrence that was likely a sign that the allegations appear provable[35]) along with several states that disbursed student aid in reliance on similar certifications.[36] In total, the lawsuit alleges that EDMC fraudulently received more than $11 billion in federal funds[37] and more than $138 million from the intervening states.[38]

Within EDMC-owned schools, the lawsuit describes a "boiler room" sales culture in which recruiting and enrolling new students was the "relentless and exclusive focus."[39] Unlawful compensation schemes, where an admissions officer's pay and advancement hinged on the numbers of students he induced to enroll, were the alleged outgrowth of this culture.[40] Admissions officers were required to approve students, irrespective of their qualifications or life circumstances.[41] For example, applicants without personal computers were allegedly recruited for online programs.[42]

Admission officers were also trained in high-pressure sales techniques. They were encouraged to identify and exploit an applicant's vulnerabilities—a technique known as "finding the pain."[43] The "pain" often took the form of a deep-seated, unattained goal.[44] So if an applicant expressed a desire for a better life, admissions officers were instructed to use this goal as a means of inducing the applicant to enroll, even if enrollment would offer little prospect of achieving the goal (or

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Incentive Compensation Ban in order to become and remain eligible to receive Title IV funding."); *see also id.* at 52 ("Every request for a federal grant, every request for a [federal student] loan, . . . every interest payment on a subsidized Stafford Loan, and every government payment on a [student] loan . . . constitutes a separate false claim.").

[34] Initial eligibility requires an institution to enter into a program participation agreement with the ED; subsequent eligibility requires institutions to submit annual required management assertions. *Id.* at 15–17 (discussing program participation agreement and required management assertions).

[35] DOJ has intervened in seven of the forty-five most recent federal False Claims Act lawsuits filed against education entities. GIBSON DUNN, *supra* note 13. Settlements were reached in four of the cases; the other three are pending. *Id.*

[36] The intervening states were California, Florida, Illinois, and Indiana. Joint Complaint, *supra* note 33, at 4–7, 9–12.

[37] *Id.* at 24.

[38] The following are the amounts the intervening states are alleging EDMC received through fraudulent means: California, $93 million; Illinois, $27.5 million; Indiana, $12.3 million; and Florida, $5.2 million. *See id.* at 56, 66, 83, 85–106.

[39] *Id.* at 27.

[40] *Id.*; *see also id.* at 27–28 (providing overview of alleged compensation arrangement).

[41] *Id.* at 32. According to the lawsuit, admissions officers were instructed to enroll students even if they lacked basic skills, such as the ability to write, or even if they seemed to be under the influence of drugs. *Id.*

[42] *Id.*

[43] *Id.* at 33.

[44] *See id.*

alleviating the "pain").[45] The objective was to overcome an applicant's reluctance or skepticism by appealing to his emotions—and, if necessary, by offering deception.[46] The pressure applied by admissions officers onto prospects[47] reflected the top-down pressure to increase enrollments.[48] The incentives built into their compensation structure, even if legal, rendered EDMC admissions officers nothing more than salespeople masquerading as counselors—proverbial wolves in sheep's clothing.

III. THE HIGHER EDUCATION MARKET

The aftermath of World War II saw the creation of a favorable market for higher education in the United States. The GI Bill,[49] passed in 1944, prompted an unprecedented influx of students into the nation's colleges and universities.[50] Lawmakers were concerned about the prospect of millions of returning veterans flooding the job market.[51] So incentives were created for veterans to undertake higher education instead of potentially damaging the fragile post-Depression recovery. When the original bill ended in 1956, almost eight million veterans had taken advantage of its higher education benefits, and at its peak in 1947, veterans

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[45] *Id.*

[46] *See id.* at 32–33; HELP REPORT, *supra* note 8, at 16 ("Recruiters are encouraged to search for and exploit potential students' emotional vulnerabilities by finding a 'pain point' . . . .").

[47] Joint Complaint, *supra* note 33, at 33–34 (alleging that admissions officers were expected to engage in various high pressure tactics in order to ensure that applicants completed their enrollment).

[48] *Id.* at 41–44 (quoting emails sent to admissions officers from their supervisors stressing the importance of hitting enrollment targets).

[49] Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), ch. 268, 58 Stat. 284 (1944) (codified as amended at 38 U.S.C. § 3701 (2012)). Through the GI Bill, veterans who served more than ninety days were granted education benefits, including tuition grants and stipends. The tuition grants were generous enough to cover expenses at some of the most expensive schools. The stipends are estimated to have covered 50–70% of the opportunity costs of not working. *See, e.g.*, John Bound & Sarah Turner, *Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans?* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 7452, 1999), *available at* http://www.nber.org/papers/w7452.pdf?new_window=1, *archived at* http://perma.cc/YT5Y-AW4Y. *But see* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 114 (2005) (discussing the discriminatory nature in which GI Bill benefits were distributed).

[50] *History and Timeline*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.gibill.va.gov/benefits/history_timeline/, *archived at* http://perma.cc/99U2-C4MK (last visited Sept. 7, 2014) [hereinafter *The GI Bill's History*] (characterizing higher education as an "unreachable dream[] for the average American" prior to the GI Bill).

[51] ROBERT ZEMSKY ET AL., REMAKING THE AMERICAN UNIVERSITY: MARKET-SMART AND MISSION-CENTERED 190 (2005) ("The original impetus for giving veterans tuition benefits was to keep them out of the labor market at least for a while.").

accounted for half of the admissions applications submitted to colleges and universities.[52]

The GI Bill, while a boon for institutions,[53] set the stage for the competitive market pressures that we see today. Unlike other federal investments in higher education, which provided aid directly to institutions, GI Bill aid was provided directly to the student.[54] This novel approach allowed beneficiaries to ostensibly vote with their feet, and take their aid with them. The GI Bill's approach to student aid served as a blueprint for the wholesale transition to "mobile" aid that took place in 1972. That year, Congress amended the Higher Education Act (HEA) to award federal grants and loans directly to students, preparing the seedbed from which the student-consumer mindset would sprout.[55]

A. In Search of Tangibility

The rising cost of higher education,[56] along with an increasing belief that higher education was a private "economic necessity,"[57] solidified the student-consumer mindset. This transition presented a new challenge for institutions—how to frame themselves to a population increasingly perceiving education as a consumable product. Colleges and universities are part of the "trust economy" because buyers have to trust that they will get the "product" for which they are paying.[58] Building this trust requires tangibility; but education itself is intangible.[59] Schools, however,

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[52] *The GI Bill's History*, *supra* note 50.

[53] ZEMSKY ET AL., *supra* note 51, at 190 (asserting that the influx of veterans helped "restart" many colleges and universities whose programs had been reduced during the war).

[54] *See, e.g.*, Martin Trow, *Federalism in American Higher Education*, *in* HIGHER LEARNING IN AMERICA 1980-2000, at 39, 58–59 (Arthur Levine ed., 1993).

[55] SLAUGHTER & RHOADES, *supra* note 14, at 35.

[56] *See id.* at 283 (explaining the state-level shift from providing subsidies to institutions to requiring students to foot a larger portion of their costs of attendance); ZEMSKY ET AL., *supra* note 51, at 166 (describing the increasing prominence of students loans and the "truly awesome levels of personal indebtedness" students were incurring in order to fund their higher education).

[57] ZEMSKY ET AL., *supra* note 51, at 11 ("During the last fifty years a college education has come to be perceived as an economic necessity pursued by the many, rather than a privilege reserved for the few."); *see also* CONG. BUDGET OFFICE, THE CONG. OF THE U.S., PRIVATE AND PUBLIC CONTRIBUTIONS TO FINANCING COLLEGE EDUCATION 4 (2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/49xx/doc4984/01-23-education.pdf, *archived at* http://perma.cc/S283-TNPU (concluding that the financial payoff of higher education has engendered an investment mindset among students).

[58] ERIC J. ANCTIL, SELLING HIGHER EDUCATION: MARKETING AND ADVERTISING AMERICA'S COLLEGES AND UNIVERSITIES 9 (2008) (citing Gordon C. Winston, *Subsidies, Hierarchy and Peers: The Awkward Economics of Higher Education*, 13 J. ECON. PERSP. 13, 14–15 (1999)).

[59] *Id.* at 6 ("Much of what is 'for sale' in higher education are the intangibles such as learning and lived experiences.").

have traditionally sought to create tangibility by highlighting factors such as academic quality, buildings and amenities, and athletics.[60]

Academics are often touted using favorable showings on ranking lists compiled by outside entities, such as *U.S. News and World Report*.[61] In spite of their dubious value,[62] these lists are popular with students and parents because they ostensibly add a degree of simplicity to the complicated process of measuring and comparing academic quality. Put differently, they "[fuse] education with consumption" by suggesting that one educational product is superior (or inferior) to another,[63] akin to a *Consumer Reports* review of washing machines.

The buildings dotting a school's campus and the amenities offered can make or break a student's enrollment decision.[64] In fact, for some students, amenities are more important than perceived academic quality.[65] This reality has fueled physical expansion and a marketing emphasis on things such as plush dormitories,[66] lavish

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[60] *Id.* at 53.

[61] SLAUGHTER & RHOADES, *supra* note 14, at 23.

[62] *See, e.g.*, Bill Destler, *The Ultimate Absurdity of College Rankings*, HUFFPOST (May 5, 2013, 11:34 AM), http://www.huffingtonpost.com/bill-destler/the-ultimate-absurdity-of_b_3247841.html?utm_hp_ref=tw, *archived at* http://perma.cc/CU4P-XVX4.

[63] SLAUGHTER & RHOADES, *supra* note 14, at 23.

[64] *See* Brian Jacob et al., College as Country Club: Do Colleges Cater to Students' Preferences for Consumption?, 29 (Jan. 17, 2013) (unpublished manuscript), *available at* http://www.freakonomics.com/media/CollegeConsumptionJan2013.pdf, *archived at* http://perma.cc/C7R-ZTYB ("We have documented a substantial enrollment response to spending on student services and auxiliary enterprises, which we interpret as reflective of the importance of consumption considerations in students' decisions.").

[65] *See id.* at 37 ("Less selective schools (particularly privates) . . . have a greater incentive to focus on consumption amenities, since this is what their marginal students value.").

[66] For example, Princeton describes its palatial and much ballyhooed Whitman College dormitory as follows:

> Walls of hand-set stone rise from 20 feet to as high as 100 feet to make up the complex of residential, social and academic buildings that sweep upward above terraced courtyards. Bluestone walkways criss-cross at the feet of dorms and communal buildings, which include a large gabled dining hall and a great tower that announces the entry into the college near the south end of Princeton's campus.

Cass Cliatt, *Princeton's Whitman College Marks Revival of Traditional Architecture* (Sept. 24, 2007, 5:00 PM), http://www.princeton.edu/main/news/archive/S19/04/10O93/?section=featured, *archived at* http://perma.cc/4JV4-6XTQ.

student centers,[67] and restaurant quality meal options.[68] Similar to the lists purporting to measure academic quality, lists assessing things like "The 25 Most Amazing Campus Student Recreation Centers" have a pervasive presence online.[69]

Athletics can provide another measure of perceived tangibility to a higher education product.[70] A winning sports team can have a "halo effect" upon every aspect of the institution (e.g., If the football team is this good, the engineering program must be good too.).[71] Therefore, many schools spend inordinate amounts of money, running significant deficits,[72] attempting to build winning athletic programs that will rally their fans and thrust their school onto national television and atop the major polls (i.e., athletic rankings).[73]

The 1990s brought another form of tangibility: outcomes. Higher education was caught up in what has been described as "the third wave of accountability."[74] The first two waves took place the decade before and focused on corporate America[75]

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[67] The University of Missouri boasts that students "won't find a better facility in the world than what we've got right here at Mizzou." *MizzouRec Services and Facilities*, LINKEDIN, https://www.linkedin.com/company/mizzourec, *archived at* http://perma.cc/JPV6-8QAG (last visited Jan. 14, 2015). With a rock wall, a grotto, and a "beach club" (which has been described as an indoor beach), the boasting is probably warranted. *MizzouRec: Facilities*, MIZZOUREC, http://www.mizzourec.com/facilities/, *archived at* http://perma.cc/K3H3-H3RJ (last visited Jan. 23, 2015).

[68] High Point University runs a steakhouse, 1924 PRIME, where students can purchase meals through the university's meal plan. *1924 Prime*, HIGHPOINT U., http://1924prime.highpoint.edu/, *archived at* http://perma.cc/9BQU-Z24K (last visited Sept. 7, 2014).

[69] *See, e.g.*, *The 25 Most Amazing Campus Student Recreation Centers*, BEST COLL. REVS., http://www.bestcollegereviews.org/features/the-25-most-amazing-campus-student-recreation-centers/, *archived at* http://perma.cc/96SR-6UJH (last visited Sept. 14, 2014) ("In an era when students are more . . . discerning than ever, university officials have gone on a major building boom that has seen designer dorms, stunning libraries, and amazing recreation centers . . . .").

[70] *See* ANCTIL, *supra* note 58, at 61 ("Advocates of big-time [athletic] programs argue that a successful athletic program is a strong weapon in a university's P.R. arsenal . . . .").

[71] *Id.* at 60.

[72] DONNA M. DESROCHERS, DELTA COST PROJECT AT AMERICAN INSTS. FOR RESEARCH, ACADEMIC SPENDING VERSUS ATHLETIC SPENDING: WHO WINS? 10 (2013), *available at* http://www.deltacostproject.org/sites/default/files/products/DeltaCostAIR_AthleticAcademic_Spending_IssueBrief.pdf, *archived at* http://perma.cc/DV2W-969P ("Fewer than one in four of the 97 public FBS [Football Bowl Subdivision] athletic departments generated more money than they spent in any given year between 2005 and 2010 . . . .").

[73] *See* ANCTIL, *supra* note 58, at 63 (explaining that a "visible" athletic program gives supporters something tangible to rally around, adds to the relevance and value of the school's brand, and provides free advertising).

[74] RICHARD S. RUCH, HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY 6 (2001).

[75] *Id.* (explaining that "massive layoffs and restructuring" were the impetuses behind this wave).

and "big government"[76] respectively. The third wave, which brought scrutiny upon higher education, was largely the result of fiscal pressures that prompted many to question the value of higher education.[77] Specifically, did the tangible outcomes produced by the nation's colleges and universities justify the costs, particularly the public cost, of supporting these institutions? For institutions, this question was not readily answerable. Access had previously been the touchstone by which higher education was judged.[78] That focus was an outgrowth of the civil rights and War on Poverty eras when higher education was seen as a cure to the nation's racial and economic ills. Focusing on outcomes (the end results) presented a novel perspective from which to judge educational effectiveness, especially when the vast diversity of institutions, their missions, and their students were considered.[79]

B. Emergence of For-Profit Colleges

Accompanying the "third wave" was another trend that would affect higher education—the emergence of for-profit education providers. These institutions have a long history dating back to colonial times;[80] but it was during the 1990s that the industry experienced immense growth and corporatization. The sector evolved from being primarily composed of mom-and-pop operations awarding vocational certificates to being dominated by large publicly traded or private equity owned corporations awarding academic degrees as well.[81] The sector's emergence was made possible in 1972 when Congress allowed students attending for-profit schools to receive the newly mobile federal aid.[82] The block grants previously awarded to schools for student aid flowed only to not-for-profit institutions.[83] Congress saw expanding aid to students attending for-profit schools as a means of increasing

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[76] *Id.* (citing "government spending and the national deficit" as impetuses behind the second wave).

[77] ZEMSKY ET AL., *supra* note 51, at 190 ("When the economy stalls or inflation takes off or the unemployment rate rises, colleges and universities are viewed with the same crankiness as other major entities . . . .").

[78] Sandra R. Baum, *Financial Aid to Low-Income College Students: Its History and Prospects* 5 (Inst. for Research on Poverty, Discussion Paper No. 846-87, 1987), *available at* http://www.irp.wisc.edu/publications/dps/pdfs/dp84687.pdf, *archived at* http://perma.cc/98JX-WV55 (discussing the influence that the "rising concern for the disadvantaged in the quest for higher education" had on financial aid policy).

[79] ZEMSKY ET AL., *supra* note 51, at 143–45.

[80] RUCH, *supra* note 74, at 52.

[81] *See* HELP REPORT, *supra* note 8, at 31 (chronicling the corporatization of for-profit higher education). The ten largest for-profit education corporations, all publicly traded, enroll approximately 1,406,875 students, with Apollo Group, parent company of University of Phoenix, accounting for 470,800 of that number. *Id.* at 20.

[82] SLAUGHTER & RHOADES, *supra* note 14, at 35.

[83] *Id.*; U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-104, PROPRIETARY SCHOOLS: MILLIONS SPENT TO TRAIN STUDENTS FOR OVERSUPPLIED OCCUPATIONS 5 (1997), *available at* http://www.gao.gov/archive/1997/he97104.pdf, *archived at* http://perma.cc/9U4M-TBMM.

higher education access,[84] and also as a means of encouraging competition among institutions.[85] There was a hope that this increased competition would drive down costs of attendance—a laughable proposition in hindsight. For-profit institutions rightfully viewed this expansion as a "bonanza."[86] Additionally, the 1998 revisions of the HEA brought further legal and financial legitimacy to for-profit schools. They were added to the "Definition of Institution of Higher Education for Purposes of Title IV Programs," which formally put them on equal footing with not-for-profit schools.[87]

For-profit schools benefitted from the larger rhetorical context, in that they spoke the language of commoditization: education was a product, students were consumers, and learning could be tangible. They fully embraced "The Three Cs"—competition, commodification, and commercialism[88]—notions that many viewed as an affront, if not a threat, to traditional, mission-driven higher education.[89] So while Congress had essentially deemed all schools identical, irrespective of whether they were driven by mission or profit, those divergent aims fostered fundamental differences in how schools viewed themselves and presented themselves to the public. The tangibility of outcomes was readily embraced by for-profit schools, and they brought a classic business approach to marketing and recruitment. The larger climate, typified by The Three Cs, would eventually force many not-for-profits to take the same approach.

Today, most schools engage in some form of strategic self-promotion. The overarching purpose of these efforts is to shape public perceptions of the institutions and their programs. Favorable perceptions can attract strong students and faculty, as well as garner broader financial and political support. The best promotional efforts seek to build and nurture brands aligned with the institutional mission and goals.[90] A brand is intangible—an image or perception.[91] A brand is not specifically about products, but a favorable brand can confer added value, or "brand equity," upon

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[84] U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 5.

[85] SLAUGHTER & RHOADES, *supra* note 14, at 42 ("Federal legislation supported marketlike competition for students among higher education institutions on the grounds that greater efficiency would lead to cost reductions.").

[86] *See* RUCH, *supra* note 74, at 51–55; SLAUGHTER & RHOADES, *supra* note 14, at 36 (chronicling the corruption among for-profit schools that took place in the aftermath of the 1972 revisions).

[87] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 103, 112 Stat. 1581, 1586–89 (1998) (codified at 20 U.S.C. § 1002 (2012)).

[88] ZEMSKY ET AL., *supra* note 51, at 86.

[89] It is commonly asserted and largely accepted that the commoditization of education is a relatively new phenomenon; but some argue that education has always been driven by commercial interests, having started as a commercial endeavor and evolved into a mission-driven one. *Id.* at 52; *see also* SLAUGHTER & RHOADES, *supra* note 14, at 12 ("[C]olleges and universities . . . [are] actors initiating academic capitalism, not just . . . players being 'corporatized.'").

[90] ANCTIL, *supra* note 58, at 27.

[91] *Id.* at 35 ("Branding is about asking, When a person hears our name, what does he or she think about?").

products.[92] In fact, strong brand equity can create demand for a weak product.[93] In some ways, this phenomenon is similar to the halo effect discussed earlier. But the broad relevance of brands does not render products unimportant. Companies must still create awareness of their products.[94] Indeed it is often awareness that differentiates similar products, not necessarily product quality or distinctiveness.[95] In order to encourage product awareness, a company must identify potential consumers and communicate with them via an effective marketing strategy.[96]

C. The Student Consumer

The most prominent consumers of higher education are students.[97] But students are more than passive purchasers of a product; they actually contribute to the product's quality. For example, strong students improve the overall educational experience.[98] This introduces another distinctive element into the higher education consumer-provider relationship: selectivity. Given the manner in which students influence the educational experience, most schools do not accept every applicant (or prospective consumer) who is willing to pay the tuition (or cost of the educational

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[92] *Id.*

[93] SLAUGHTER & RHOADES, *supra* note 14, at 260 ("[A]lthough corporations manufacture products, what consumers actually buy are brands . . . ."). For example, when Phillip Morris bought Kraft in 1988, Kraft was worth only one-sixth of what Phillip Morris paid for the company—on paper. The $12.6 billion price tag was largely for the Kraft *brand*, not merely the traditional measure of company assets. *Id.* McDonald's provides an example of this phenomenon. McDonald's food is often considered low quality, yet it has dominated the fast-food industry for decades through strong brand equity. *See, e.g.*, Ron Ruggless, *KFC, McDonald's Most Powerful Brands in China*, NATION'S RESTAURANT NEWS (July 7, 2013), http://nrn.com/international/kfc-mcdonalds-among-most-powerful-brands-china, *archived at* http://perma.cc/ZT73-VVPZ; *McDonald's Burgers Named Worst in America in Consumer Reports' New Fast-Food Survey*, CONSUMERREPORTS.ORG (July 2, 2014), http://pressroom.consumerreports.org/pressroom/2014/07/my-entry-1.html, *archived at* http://perma.cc/WBD8-PSUS.

[94] ANCTIL, *supra* note 58, at 51.

[95] *Id.*

[96] *See, e.g.*, *id.* at 14 (describing the Elaboration Likelihood Model, which is a theory of the process by which marketing communication prompts a customer to purchase a product or service).

[97] Higher education institutions cater to other consumers as well, including donors and sponsors of research. But students are the dominant consumers of higher education. *See, e.g.*, Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition* 20 (Nat'l Bureau of Econ. Research, Working Paper No. 6323, 1997), *available at* http://www.nber.org/papers/w6323.pdf, *archived at* http://perma.cc/53AY-85QZ.

[98] *See, e.g.*, MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION 113 (1998) ("[M]ixing weak and strong students raises the overall performance of the student population as the gains of the weak students exceed the losses of the strong students.").

product).[99] Selective schools often choose among large pools of prospective consumers in determining which it finds meritorious enough to acquire access to the product, akin to a doorman outside of a trendy South Beach nightclub. Even nonselective schools tend to turn down some willing buyers.

This selectivity is typically the result of high student demand relative to the supply of seats.[100] Selectivity can serve as a proxy, albeit a flawed one, for quality. Knowing this, schools often engage in efforts to manipulate selectivity indicators.[101] They strategically deflate their admit rates by encouraging applications from prospective students with little chance of gaining admission.[102] Some schools also deny the admission of strong applicants based on a belief that these applicants consider the schools only as a fallback or "safety" choice.[103] In the worst cases, schools misrepresent student credentials in order to make their entering classes appear stronger.[104] But there is another, possibly more legitimate, motivation for selectivity, and that is when students leave the institution, they become representations of their educational experiences and of the institution itself.[105] Put differently, they become products of the product. So their successes or failures can be compelling reflections of the educational products they purchased.

Federal policy has helped encourage a highly stratified system of higher education in the United States. The Morrill Acts,[106] initially passed in 1862 and extended in 1890,[107] greatly expanded public higher education, allowing these institutions to join a landscape already populated by private, mostly religious-affiliated institutions.[108] These newly created public institutions tended to focus on

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[99] ANCTIL, *supra* note 58, at 13 ("Rather than selling to any willing and able buyer, colleges and universities have a vested interest to ensure that who buys from them is a person they want integrated into their largest input pool.").

[100] Eric Hoover, *Application Inflation: Bigger Numbers Mean Better Students, Colleges Say. But When Is Enough Enough?*, CHRON. HIGHER EDUC. (Nov. 5, 2010), http://chronicle.com/article/Application-Inflation/125277/, *archived at* http://perma.cc/66FZ-XEE9.

[101] SLAUGHTER & RHOADES, *supra* note 14, at 290.

[102] Hoover, *supra* note 100 ("Some deans and guidance counselors . . . question the ethics of intense recruitment by colleges that reject the overwhelming majority of applicants.").

[103] SLAUGHTER & RHOADES, *supra* note 14, at 290.

[104] *See, e.g.*, Supiano, *supra* note 11.

[105] *See, e.g.*, SLAUGHTER & RHOADES, *supra* note 14, at 44.

[106] 7 U.S.C §§ 301–305, 307–309 (2012) (originally enacted as Morill Acts of July 2, 1862, ch. 130, 12 Stat. 503).

[107] The federal government granted states thirty thousand acres of land per member of Congress. States were free to dispose of the land as they wished, but were required to use the proceeds to establish agricultural and mechanic arts education. *See, e.g.*, Trow, *supra* note 54, at 57–58.

[108] *See, e.g.*, Lawrence E. Gladieux & Jacqueline E. King, *The Federal Government and Higher Education*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 152, 152–57 (Philip G. Altbach et al. eds., 1999).

the development of skills in a way the older schools had not.[109] In addition, federal financial aid policy combined with other factors, such as deregulated (and cheaper) travel and communication costs, fostered increased student mobility.[110] The result was a higher education market where within-college homogeneity rose and between-college homogeneity fell.[111] In other words, the individuals making up a particular student body became more similar while the student bodies became more different than others. This stratification led to the formation of niches. Much of this process was the outcome of institutional competition.[112] But the most strategic institutions developed marketing strategies tailored to existing or aspirational niches. And while these efforts were not limited to the for-profit sector, the sector embraced such efforts as fundamental to its success.[113]

IV. FOR-PROFIT COLLEGE MARKETING AND RECRUITMENT

For-profit schools spend large amounts of money building brands and generating awareness about their educational products. In 2009, the fifteen publicly traded for-profit education corporations spent an average of $248 million each on marketing and recruitment,[114] which accounted for almost a quarter of their collective total revenue.[115] A couple of them spent almost a third of total revenue.[116] This trend held industry wide, with the thirty for-profit education corporations (publicly traded and privately held) dedicating 22.7% of revenue, or $4.2 billion, to marketing and recruitment.[117] By comparison, it has been estimated that not-for-

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[109] *See, e.g.*, CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 154 (2006) (explaining how the goal of the Morrill Act was "to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life").

[110] Hoxby, *supra* note 97, at 46–48 (providing a detailed review of student mobility trends and their causes).

[111] *Id.* at 2 ("In the geographically integrated market, students . . . are sorted more thoroughly among colleges based on their demand for education and ability to contribute to education production.").

[112] *Id.* at 15 ("If students have heterogeneous demands for college quality, the result is a market in which colleges produce education service at a number of different quality levels.").

[113] ANCTIL, *supra* note 58, at 23 ("Commercial higher education's profitability depends largely on the staggering amount each institution spends on marketing and advertising."); *see also* ZEMSKY ET AL., *supra* note 51, at 187 ("Being purely market-driven, for-profit education targeted only those parts of the postsecondary education market that offered the promise of greatest financial return.").

[114] This figure includes all expenses relating to marketing and recruitment, including salaries for recruitment staff. HELP REPORT, *supra* note 8, at 81.

[115] *Id.*

[116] Grand Canyon University spent 32.6% of its total revenue on marketing and recruitment; Bridgepoint Education spent 32.1%. *Id.*

[117] *Id.*

profit schools spend less than 5% of total revenue on these activities.[118] On average, for-profit schools spent more per student on marketing and recruitment than they did on instruction—$2,622 versus $2,050.[119] Apollo Group, the parent corporation of University of Phoenix, spent two-and-a-half times more on seeking students than it did on instructing them.[120]

For-profit schools spend so much on marketing and recruitment because their very existence depends on a steady, robust stream of new students. A U.S. Senate report provides a compelling illustration:

> Corinthian Colleges, Inc.[121] began 2010 with 86,066 students and ended with 110,550, a growth of 24,484 students. But, in the same period, 113,317 students left the company (some by graduating or completing programs), requiring Corinthian to enroll 137,831 new students to achieve that growth. In other words, to achieve net enrollment growth, Corinthian has to enroll the equivalent of its entire student body each year.[122]

Counteracting this churn requires a widely disseminated message tailored effectively to the audience for whom it is intended. The for-profit college audience, or niche, tends to comprise practical-minded individuals who are largely unconcerned with prestige or the ancillary trappings of "college life."[123] They tend

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[118] ANCTIL, *supra* note 58, at 23 (citing a study, but warning that the estimate was made without the benefit of firm numbers). While precise data on marketing and recruitment spending among not-for-profit schools is hard to come by, it is safe to assume that it pales in comparison to the for-profit sector, especially when compared to instructional spending. Advertising and marketing expenditures are often classified as "institutional support" expenses, along with other broad expenditures, including administrative staff salaries. *See* DONNA M. DESROCHERS & JANE V. WELLMAN, DELTA COST PROJECT, TRENDS IN COLLEGE SPENDING 1999-2000: WHERE DOES THE MONEY COME FROM? WHERE DOES IT GO? WHAT DOES IT BUY? 21 (2011), *available at* http://deltacostproject.org/sites/default/files/products/Trends2011_Final_090711.pdf, *archived at* http://perma.cc/R28D-HFQH. Given this breadth, it can be assumed that advertising and marketing comprise only a small portion of the overall institutional support expense category. A 2011 study of higher education spending found that instructional expenditures were higher than institutional support expenditures across all types of not-for-profit colleges and universities. *Id.* at 50–55.

[119] *Compare* HELP REPORT, *supra* note 8, at 81 (providing per student marketing expenditures), *with* HELP REPORT, *supra* note 8, at 87 (providing per student instructional expenses).

[120] *Id.* at 87.

[121] Corinthian Colleges, Inc. is a publicly traded corporation with the fifth largest enrollment—113,800 students in fall 2010. *Id.* at 20.

[122] *Id.* at 77.

[123] *See, e.g.*, ANCTIL, *supra* note 58, at 22.

to be older than so-called traditional students,[124] with familial obligations;[125] therefore, convenience is important.[126] Fundamentally, what they are seeking is "a no-nonsense academic experience tied to a practical outcome."[127] Knowing its niche, for-profit institutions root their marketing pitch, and indeed their brand, in outcomes-based tangibility. Unsurprisingly, they promote things such as career preparation, comprehensive student services, and financial payoff. And they find the pain.

A. Deceptive Marketing

ITT Technical Institutes[128] markets its educational products with compelling first-person ads featuring satisfied alumni. Below is a testimonial offered in a recent ITT ad:

> I was working 60, 70, 80 hours a week before I went to ITT Tech. I was at work one day alone, and some people came into the restaurant through a back entrance and robbed me at gunpoint. That was the final straw—and that was when I found ITT Tech. It offers the ability to keep my job, to spend time with my family . . . and I discovered that I could work and go to school and progress all at the same time and get to where I wanted to be—which is where I'm at now.[129]

The testimonial touches on major themes that a typical for-profit student would find important: job preparation that allows for the maintenance of employment and familial commitments, and that results in personal and professional advancement—and much alleviated pain.

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[124] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 7 (2009), *available at* http://www.gao.gov/new.items/d09600.pdf, *archived at* http://perma.cc/HN66-EBXG.

[125] *Enforcement of Federal Anti-Fraud Laws in For-Profit Education: Hearing Before the H. Comm. on Educ. and the Workforce*, 109th Cong. 43 (2005) (statement of Nick Glakas, President, Career College Association) [hereinafter *Anti-Fraud Hearing*] (stating that proprietary schools enroll a large percentage of single mothers).

[126] *Id.* at 46 ("Students choose to attend for-profit colleges because these delivery methods meet their time and geographical needs, allowing them to achieve their postsecondary education goals while continuing to meet the demands of their everyday lives.").

[127] RUCH, *supra* note 74, at 134.

[128] ITT Educational Services, Inc., the parent company of ITT Technical Institutes, is a publicly traded corporation with the seventh largest enrollment—eighty-eight thousand as of fall 2010. *See, e.g.*, HELP REPORT, *supra* note 8, at 21.

[129] ITT Technical Inst., *Russell Allred*, YOUTUBE (Apr. 8, 2013), http://www.youtube.com/watch?v=0OFAKH3nJNY, *archived at* http:/perma.cc/U8VF-NWNG.

Corinthian marketed its Everest brand of colleges with a focus on academic and student support. One commercial in particular is probably familiar to anyone who watches daytime or late-night television. It featured an actor uttering a monologue, as if speaking to a person from whose point of view the commercial is being filmed.[130] The actor speaks in an edgy tone that evinces the emotion of a "tough love" speech.[131] The commercial became an Internet meme, spawning hundreds, if not thousands, of parodies.[132] But humor aside, the commercial is another example of how for-profit schools often market their programs:

> You're sitting on the couch, you're watching TV, and your life is passing you by. [You] keep procrastinating over and over, 'Well maybe I'll go to school next year, maybe next semester,' No, do it right now! They'll work with you after work or you can go before work. You can do whatever you need to do to graduate. Go talk to somebody right now; [they're] out to help you. You spend all day on the phone anyhow! Why don't you make a phone call that is going to help you in your future?! All you gotta do is pick up the phone and make the call. Why are you making it complicated? It's easy![133]

The tone of the commercial is pain and shame. The actor's ridiculing tone is meant to intensify discontent a viewer might be feeling about being unemployed or underemployed. In fact, the very viewing of the commercial is basically used as a shaming tactic. But the goal of the commercial is clear: Corinthian wants to induce the viewer to "pick up the phone" and reach out to one of Everest's "helpful" admissions officers, who of course are actually salespeople.

Both commercials are effective; they frame the educational product in terms that their target audience would find attractive, if not compelling. They are proof that even products that many consider inferior can be marketed successfully.[134] Unfortunately, both ads are also misleading. The alumnus in the ITT ad speaks authentically about the benefits he gained from the degree he earned. The commercial, however, fails to make clear that the experience of the featured alumnus is, by far, an atypical one. The graduation rate at the Greenville, South Carolina,

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[130] *See* Babablunte, *Original*, YOUTUBE (Mar. 30, 2010), https://www.youtube.com/watch?v=3bbFmZIdlBw, *archived at* https://perma.cc/K2T2-77W5 (user posting of original monologue).

[131] *See id.*

[132] "Everest college parody" is actually an automatically populated search term on YouTube. *E.g.*, WhiteWoodEnt, *Everest Commercial Parody*, YOUTUBE (Feb. 5, 2008), http://www.youtube.com/watch?v=ZbclWQY8S78, *archived at* http://perma.cc/W7BR-D6NE.

[133] Babablunte, *supra* note 130.

[134] ANCTIL, *supra* note 58, at 23 ("[M]arketing and advertising . . . may not lead to a better product or a better experience for the consumer, but it does lead to better awareness and usually great purchasing volume.").

campus the alumnus attended is only 38%.[135] In other words, the vast majority of students who undertake studies at that ITT campus (or most any other[136]) leave before obtaining the credential they sought. Thus, it seems safe to assume that, if asked, the "typical" ITT alumnus would not offer such a glowing endorsement of his former institution.

Companies have a First Amendment right to market their products.[137] And they are allowed to use consumer testimonials to promote atypical product outcomes, as long as a disclaimer is provided.[138] The purpose of the disclaimer is to prevent deception; therefore, it must inform the reader or viewer of a testimonial's atypical nature. For obvious reasons, the disclaimer must be conspicuous and easy to understand. For example, the Federal Trade Commission once ordered La Salle University to cure deception in the manner in which it advertised its unaccredited law degree program with disclaimers "in type the same size and appearance as the advertising claims."[139]

The Everest commercial is particularly egregious in its methods. It fully embraces the "university as car dealer" posture that represents an extreme conception of how some institutions comport themselves within the higher education market.[140] In addition to the inherent deception that comes with suggesting that education and career success are "easy," the commercial exudes a pushiness that would be akin to an accosting if done in person. And like the ITT ad, the Everest commercial displays no disclaimer warning the viewer of the school's low completion rates[141] or any of the other negative outcomes.[142]

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[135] *College Navigator*, *ITT Technical Institute-Greenville*, U.S. DEPT. OF EDUC. NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/collegenavigator/?q=itt+tech&s=SC&id=413866, *archived at* http://perma.cc/NF98-P45M (last visited Sept. 7, 2014) (listing various statistics for the campus).

[136] Fifty-two percent of ITT students who enrolled during the 2008–09 school year withdrew by 2010. HELP REPORT, *supra* note 8, at 532.

[137] Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.").

[138] *See* 16 C.F.R. § 255.2(c) (2014) (requiring a conspicuous disclosure of typical results when an atypical testimonial is offered).

[139] The commission found that La Salle had misrepresented the program's accreditation—a common complaint against for-profit schools as well. *In re* La Salle Extension Univ., 78 F.T.C. 1272, 1279–81 (1971).

[140] ZEMSKY ET AL., *supra* note 51, at 61 ("From the car dealer perspective, universities wheel and deal in the marketplace . . . .").

[141] Corinthian Colleges, Inc., Everest's parent company, has an overall student withdrawal rate of 66% from its Associate's degree programs and 59% among its much smaller Bachelor's degree enrollment. Both of these rates are above average for the industry as a whole. HELP REPORT, *supra* note 8, at 74.

[142] For example, more than 36% of students at Corinthian-owned schools who entered student loan repayment in 2005 defaulted within three years—a rate more than three times higher than the average for all institutions. *Id.* at 116.

B. Deceptive Recruitment

The methods employed in these commercials, particularly the methods used by Everest, align closely with the methods used by for-profit college admissions officers. This coordination is intentional, as the individual components of any effective marketing plan are integrated in furtherance of the same goal.[143] The Senate investigation of the industry confirmed many of the allegations made in the suit against EDMC. Boiler-room environments engender the use of aggressive and deceptive sales tactics.[144] New student enrollment goals flow down the administrative chain "from [the] CEO to newly-hired junior recruiters."[145] And even when unlawful incentive compensation plans are not in place, job security throughout the company hinges on attaining enrollment growth goals.[146]

At many for-profit schools, everything about an admissions officer's job rests within sales culture. They are not only expected to hit enrollment goals, but as precursors, they are also expected to make a certain number of recruitment phone calls, schedule a certain number of prospect appointments, and generate a certain number of admissions applications.[147] Each admission officer's progress is meticulously tracked, with perks and punishments awarded accordingly.[148] Unsurprisingly, employment turnover is high among admissions officers.[149] Also unsurprising is the use of deceptive and aggressive sales tactics. The foundation of the success of these tactics, and indeed the entire sales strategy, is trust. Admissions officers—often salespeople posing as counselors—are directed to build trust with prospective students from the very first call.[150] This is when the admissions officer frames herself as a counselor, while actually seeking to do whatever it takes to get the prospective student to sign an enrollment contract.[151]

Deceptive tactics often take the form of misrepresentations about program costs, program length, graduation rates, transferability of credits, and job placement and salary data. Sometimes admissions officers flat-out lie (e.g., understating

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[143] ANCTIL, *supra* note 58, at 27 (discussing the importance of aligning an institution's marketing plan with its strategic plan).

[144] HELP REPORT, *supra* note 8, at 47 ("At many [for-profit] schools . . . misleading students to secure enrollment contracts appeared to be a common practice rather than an exception.").

[145] *Id.* at 50.

[146] *Id.*

[147] *Id.* at 51.

[148] *Id.* (explaining the discipline process used by ITT for admissions officers who failed to meet recruitment-related goals); *see also* Joint Complaint, *supra* note 33, at 28–29 (describing the EDMC Guide to the Admissions Performance Plan).

[149] HELP REPORT, *supra* note 8, at 52; *see also* Joint Complaint, *supra* note 33, at 38 (alleging a desire by an EDMC executive to increase the proportion of admissions officers who were fired for failure to meet enrollment targets from 17% to 25%).

[150] HELP REPORT, *supra* note 8, at 48.

[151] *Id.* at 54.

program costs).[152] Other times, they use savvier methods. For example, the Senate investigation found that admissions officers were instructed to quote program costs per term, rather than per year.[153] Such a tactic was expected to result in prospects understating program costs, based on an assumption that the school offered the standard number of two to three enrollment terms per year, rather than the five it actually offered.[154] Some admissions officers were instructed to deflect questions about costs, even flatly refusing to answer them, if necessary.[155]

Minimum, or "best-case," program lengths are expressed in "worst-case" terms.[156] Low graduation rates are inflated or described using vague terms, such as "good."[157] Prospects are not told that credits earned from for-profit schools are unlikely to be accepted by other institutions.[158] And job placement and salary data are inflated[159] or otherwise characterized using puffery and intentional vagueness.

These admissions officers are trained in advanced techniques of closing the deal. They are trained to take information disclosed to them by prospects, likely under a delusion of trust, and use it to induce the prospect to enroll. This is how the pain is found and, when necessary, poked.[160] When prospects show reluctance, officers employ tactics such as hypothetical imagery (e.g., "Imagine your life with a degree.") and false urgency (e.g., "We only have a few seats left in the class.").[161] And of course, throughout the process, admissions officers are expected to remain in close contact with prospective students—selling, cajoling, and pressuring. A federal investigator posing as a prospective student received over 180 phone calls within a month of expressing interest in a for-profit academic program.[162]

In creating product awareness, for-profit schools target individuals they believe will be most receptive to their message. There is nothing inherently wrong with this tactic; in fact, consumer targeting is essential to any effective marketing plan. For-profit schools, however, often target individuals based on their susceptibility to

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[152] *Id.* (providing an example where an admissions counselor told a prospect that a program cost $9,500 per year, when the actual cost was $12,000).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] For example, four-year programs were described as if the timeframe was a functional maximum instead of the functional minimum. *Id.*

[157] *Id.* at 55 (recounting an incident when an admissions counselor described his school's 25% graduation rate as "good").

[158] *Id.* at 56 ("Too often, students do not learn that their credits will not transfer until after they leave school.").

[159] An admissions counselor described the elements of her deceptive pitch as: "We are telling you that you are going to have a 95 percent change [sic] [of getting] . . . a job paying $35,000 to $40,000 a year by the time you are done in 18 months.'' *Anti-Fraud Hearing*, *supra* note 125, at 8–9.

[160] HELP REPORT, *supra* note 8, at 60–61 (showing how "poking the pain" by "remind[ing] [prospective students] what things will be like if they don't continue forward and earn their degrees" has been explained in for-profit school sales training manuals).

[161] *Id.* at 63–64.

[162] *Id.* at 67.

being victimized by slick, if not shady, marketing and recruitment tactics. A Vatterott College[163] training manual listed the following targeted demographics: "Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experienced a Recent Death. Physically/Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future."[164]

A compelling argument could be made that members of disadvantaged and vulnerable populations should be targeted for higher education opportunity. That is the underlying premise of our long-held access goals. However, exploitation masquerading as opportunity does more harm than good, resulting in educational failure and increased pain, often in the form of increased student loan debt.

C. Educational Failure

Recruitment deception contributes to bad educational matches, and bad educational matches lead to educational failure.[165] The most salient form of higher education failure is the noncompletion of a degree or certification program after having acquired student loan debt. This form of failure is observed in all sectors of higher education, but it is particularly endemic to the for-profit sector.

In programs of two years or less,[166] the for-profit sector leads all others with a 60% completion rate.[167] Among private and public institutions, the rate was 51% and 20% respectively.[168] At the bachelor's degree level, however, the for-profit sector had, by far, the lowest completion rate—28%, compared to 65% for private institutions and 56% for public.[169] Attainment trends reflect in some part the type of student an institution serves. Disparities along racial and ethnic as well as socioeconomic lines have been observed throughout higher education.[170] So an argument could be made that the comparatively woeful bachelor's completion rates within the for-profit sector are a reflection of the type of student it targets. In fact,

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[163] Vatterott Education Holdings, Inc. is a private equity owned corporation with an enrollment of 11,200 in fall 2010. *Id.* at 23.

[164] *Id.* at 58.

[165] Brian A. Jacob & Tamara Wilder, *Educational Expectations and Attainment* 18 (Nat'l Bureau of Econ. Research, Working Paper No. 15683, 2010) ("The fact that most students attain less education than they expect . . . suggests that misinformation is the cause of the gap.").

[166] These programs typically award associate's degrees and vocational certificates.

[167] AUD ET AL., *supra* note 12, at 108 (listing overall rate of 30%); *see also id.* ("The graduation rate was calculated as the total number of students who completed a degree within 150 percent of the normal time to degree attainment . . . .").

[168] *Id.*

[169] *Id.* (listing the overall rate of 58%).

[170] For example, students of Asian/Pacific Islander descent have a bachelor's degree graduation rate of 69% (the highest rate) while black students and Native American students graduate at a rate of 39% each. *Id.*; *see also, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-103, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL STUDENT AID 3 (1997) (documenting a negative association between reliance on federal financial aid and completion rates).

public institutions with open admission policies, similar to those used by for-profit schools, have a comparably low average graduation rate of 29%.[171] So the outcomes observed among for-profit colleges are, in part, the result of larger factors that affect higher education overall.

The effects of higher education failure, however, are more debilitating for students who attend for-profit institutions. These schools tend to be relatively expensive, especially when compared to public schools, and reliance on student loans is greater among their students. At $28,805, the average cost of attendance for a for-profit associate's or certificate program is the highest among all institution types, almost double the public (in-state) average.[172] For bachelor's degree programs, for-profit schools are more expensive than public schools, but less expensive than private nonprofits.[173] These trends, once again, reflect the lower levels of revenue diversification within the for-profit sector, particularly the absence of public appropriations and endowment income.

Cost trends among for-profit schools collide with the socioeconomic demographics of their students—and the result is the highest average student loan debt in higher education. For starters, students at for-profit institutions take out student loans at a higher proportion than students at any other type of school. Eighty-six percent of full-time for-profit bachelor's degree students borrowed money for school, compared to 63% and 50% of students at private and public schools respectively.[174] Other data that includes part-time students and all program types assert a whopping 96% borrowing rate for students at for-profit schools.[175] Unscrupulous admission officers contribute to this trend by using various unseemly tactics, including offering prospective students misleading or evasive information about loans.[176]

Students at for-profit schools also borrow the most money—on average, $8,035 per year for associate's degree and certificate students and $9,641 for bachelor's degree students.[177] Unsurprisingly, graduates of for-profit schools are most likely to be "high debt borrowers," defined as having debt loads exceeding $30,000.[178] A

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[171] AUD ET AL., *supra* note 12, at 108 (highlighting the association between institutional selectivity and graduation rates).

[172] The in-state average among public institutions is $15,278; the private school average is $25,773. *Id.* at 99. These figures assume that the student is living off campus and not with family members. *Id.*

[173] At $40,148, private institutions have the highest average bachelor's degree cost of attendance. *Id.* The costs at for-profit and public institutions are $29,114 and $21,665 respectively. These figures assume that the student is living off campus and not with family members. *Id.*

[174] *Id.* at 100.

[175] Based on this data, borrowing rates were 57% and 48% among bachelor's degree students at private and public institutions, respectively, and 13% among community college students. HELP REPORT, *supra* note 8, at 112.

[176] *Id.* at 63–70.

[177] AUD ET AL., *supra* note 12, at 101.

[178] REBECCA HINZE-PIFER & RICHARD FRY, PEW RESEARCH CTR., THE RISE OF COLLEGE STUDENT BORROWING 6 (2010), *available at* http://pewsocialtrends.org/files/2010

majority (54%) of for-profit bachelor's degree holders graduated at the high-debt level, compared to a quarter of degree holders from private institutions and just 12% from public institutions.[179] The trend held at the associate's level as well.[180] But the real fallout occurs when students borrow money for school, but fail to complete the program.

A recent study concluded that 86% of for-profit program noncompleters acquired federal student loan debt.[181] For 31% of that number, their debt was equal to or exceeded their income.[182] In other words, out of every one hundred for-profit school noncompleters, eighty-six left with federal loans, and, for twenty-seven, that debt was at least as high as their income. These figures are highest among all institution types.[183] For-profit noncompleters also borrowed more per credit than all other students, including other noncompleters.[184] Noncompleters tend to make less money and have higher unemployment rates,[185] with both trends affecting their ability to repay their loans. According to the latest data, 19.1% of former for-profit students (including completers) defaulted on federal loans within three years of

/11/social-trends-2010-student-borrowing.pdf, *archived at* http://perma.cc/KAN2-F65U.

[179] *Id.*

[180] At the associate's level, 17% of graduates of for-profits schools were high-debt borrowers, compared to 12% and 2% among private and public institution graduates respectively. *Id.*

[181] Among public institutions, 25% of students who failed to complete a two-year program took out federal loans; the rate was 54% among students who left four-year schools. For private schools, the rate was 66%. CHRISTINA CHANG WEI & LAURA HORN, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., FEDERAL STUDENT LOAN DEBT BURDEN OF NONCOMPLETERS 7 (2013), *available at* http://nces.ed.gov/pubs2013/2013155.pdf, *archived at* http://perma.cc/5SGZ-MUAM.

[182] Among public institutions, 7% of students who failed to complete a two-year program had federal student loan debt that exceeded their income; the rate was 13% among students who left four-year schools. *Id.* at 12. For private schools, the rate was 21%. *Id.*

[183] *Id.* at 7, 11–12.

[184] Noncompleters across all institution types borrowed more per credit than completers, with for-profit noncompleters far exceeding all others having borrowed $350 per credit. *Id.* at 9. Among public institutions, noncompleters of two-year programs borrowed $80 per credit and four-year program noncompleters borrowed $130 per credit. Private school noncompleters borrowed $190 per credit. *Id.*

[185] *See, e.g.*, *id.* at 10 (finding higher unemployment rates among noncompleters across all institution types when compared to completers, as well as lower annual income for noncompleters, except among those who left for-profit schools, who were found to make slightly more than completers); MARY NGUYEN, EDUC. SECTOR, DEGREELESS IN DEBT: WHAT HAPPENS TO BORROWERS WHO DROP OUT 4–5 (2012), *available at* http://www.educationsector.org/sites/default/files/publications/DegreelessDebt_CYCT_RELEASE.pdf, *archived at* http://perma.cc/KB23-ULJL (finding that certificate program completers had higher unemployment rates than noncompleters overall, but for-profit noncompleters had the highest unemployment rate).

entering repayment, compared to 12.9% and 7.2% of former students from public and private schools respectively.[186]

As guarantors of federal student loans, taxpayers are collectively responsible for covering these defaults. In fact, when you consider the total of investment of taxpayer money in higher education, including grant programs, it becomes clear that "American taxpayers are the single biggest investor in for-profit colleges,"[187] as well as significant investors in higher education overall.[188] Therefore, there is significant need for the discouragement of higher education recruitment deception, given its contributions to higher education failure and the resulting public costs.

V. LIMITED PATHS TO REDRESS

Financial penalties can be effective at discouraging unscrupulous behavior. Unfortunately, the potential penalties for deception in higher education recruitment lack any real discouraging effect. As mentioned earlier, paths to redress for victims of this deception are largely unviable. And even though attempts have been made to strengthen administrative and regulatory oversight, penalties for unscrupulous behavior remain weak. Financial penalties can be effective at discouraging unscrupulous behavior. Unfortunately, the potential penalties for higher education recruitment deception lack any real discouraging effect. Accrediting agencies and state and federal governments have not adequately addressed these concerns. And even though attempts have been made to strengthen administrative and regulatory oversight, penalties for unscrupulous behavior remain weak. The False Claims Act, which allows individuals to bring claims against those allegedly defrauding the federal government, additionally does not adequately address this issue. Paths to redress, such as tort and contract claims for victims of this deception, are largely unviable.

A. The Triad

The regulatory framework governing institutions eligible to collect federal financial aid funds is often referred to as "the triad."[189] The components of the triad—accrediting agencies, states, and the federal government—are charged with

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[186] FED. STUDENT AID, U.S. DEP'T OF EDUC., FY 2011 3-YEAR OFFICIAL NATIONAL COHORT DEFAULT RATES (2014), *available at* http://www.ifap.ed.gov/eannouncements/attachments/2014OfficialFY20113YRCDRBriefing.pdf, *archived at* http://perma.cc/S5H8-WHSW.

[187] HELP REPORT, *supra* note 8, at 15 ("For-profit colleges now collect almost 25 percent of total Federal student aid money . . . over a third of GI bill education benefits to veterans, and half of all active duty servicemember tuition assistance dollars.").

[188] *Id.* at 24 (noting that during the 2009–10 school year, the federal government disbursed more than $130 billion in higher education loans and grants, with the for-profit sector collecting $32 billion of that total).

[189] *See, e.g.*, *id.* at 122.

ensuring that "schools are meeting basic guarantees of academic quality and fiscal soundness, and that they are complying with pertinent state and federal laws."[190]

1. Accrediting Agencies

In order to collect federal financial aid funds, schools must typically be accredited by an organization recognized by the ED to perform academic and fiscal assessments of higher education institutions.[191] These private, not-for-profit agencies "develop evaluation criteria and conduct peer evaluations to assess whether or not those criteria are met."[192] Given their function, these agencies essentially serve as "gatekeepers" to the federal financial aid system.[193] Their seals of approval can mean the difference between viability and death for institutions.

Unfortunately, these agencies have historically done little to protect students from recruitment deception. Federal law grants institutions wide latitude in defining their own missions and, as a result, dictating the standards by which they are judged.[194] This latitude is a reflection of the vast diversity of institutions and the resulting infeasibility of most one-size-fits-all approaches. Thus, a school with dismal outcomes, exacerbated by unscrupulous admissions practices, is at little risk of facing significant accreditation sanctions.[195]

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[190] *Id.*

[191] Private regional and national accrediting organizations provide the bulk of higher education accreditation; however, the ED also recognizes state agencies for purposes of accrediting public vocational education programs. 34 C.F.R. § 603 (2014). Preaccredited not-for-profit institutions, those deemed by an accrediting agency to be making timely progress towards accreditation, are allowed to collect federal financial aid funds as well. *See, e.g.*, 34 C.F.R. § 600.4 (2014); *see also Administrators / Financial Aid for Postsecondary Students: Accreditation in the United States*, U.S. DEP'T OF EDUC., *available at* http://www2.ed.gov/admins/finaid/accred/index.html, *archived at* http://perma.cc/9CFA-WBBP (last modified Jan. 13, 2015) [hereinafter U.S. Accreditation] (follow "Accrediting Agencies Recognized for Title IV Purposes" hyperlink to view list of agencies recognized to accredit institutions for purposes of federal financial aid).

[192] U.S. Accreditation, *supra* note 191 (follow "Overview of Accreditation" hyperlink).

[193] HELP REPORT, *supra* note 8, at 122.

[194] 20 U.S.C. § 1099b(a)(5)(A) (2012) (requiring accreditation agencies to assess an institution's "student achievement in relation to the institution's mission" and allowing the imposition of "different standards for different institutions or programs.").

[195] *See, e.g.*, HELP REPORT, *supra* note 8, at 127–28 (illustrating how a school with rapid growth and dismal retention rates, characteristics of a "churn and burn" admissions operation, could nonetheless receive a favorable accreditation assessment). *But see* Allison Sherry, *Westwood College's Main Denver Campus Placed on Probation by National Accrediting Body*, DENVER POST (Sept. 21, 2010, 1:00 AM), http://www.denverpost.com/news/ci_16129512, *archived at* http://perma.cc/3HJA-94DH (giving an example that a college "campus has been put on probation by its national accrediting body because of concerns about the private, for-profit's student achievement, recruitment techniques and management").

Agencies are engaging in new attempts at holding schools accountable for student outcomes. As the president of the Western Association of Schools and Colleges (WASC)[196] recently remarked, "Accreditation needs to be more responsive . . . to the public's demands for more accountability. . . . The times have changed. People need to know more."[197] Motivated by the changing times, WASC has imposed new standards, premised on making published data more useful and transparent. For example, WASC now requires schools to disaggregate outcomes data by "racial, ethnic, gender, age, economic status, disability, and other categories, as appropriate," so as to highlight demographic disparities.[198] But, hamstrung by federal law, the standards still allow institutions to benchmark their outcomes "against [their] own aspirations as well as the rates of peer institutions."[199]

The Accrediting Council for Independent Colleges and Schools (ACICS)[200] has revamped its standards many times in recent years to reflect the national trend toward outcomes-based assessment. It measures institutional effectiveness along six outcomes-based indicators, including retention, placement, graduate satisfaction, employer satisfaction, learning objectives, and graduation rates.[201] But again, no tangible standards around those outcomes are imposed.

Critics of the accreditation framework assert that agencies face an inherent conflict of interest, given that their existence is financed by the very schools they are responsible for assessing.[202] Worsening matters is a competitive accreditation market where schools are sometimes free to cherry pick agencies with the laxest

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[196] WASC is one of the six regional accrediting agencies. The agency accredits institutions in California and Hawaii, the territories of Guam, American Samoa, Federated States of Micronesia, Republic of Palau, Commonwealth of the Northern Marianas Islands, the Pacific Basin, and areas of the Pacific and East Asia. *Institutions*, WASC: SENIOR COLL. & UNIV. COMM'N, http://www.wascsenior.org/institutions, *archived at* http://perma.cc/5XF2-XEVD (last visited Feb. 14, 2015).

[197] Eric Kelderman, *Accreditors Examine Their Flaws as Calls for Change Intensify*, CHRON. HIGHER EDUC. (Nov. 13, 2011), http://chronicle.com/article/Accreditors-Examine-Their/129765/, *archived at* http://perma.cc/97TZ-52BR.

[198] W. ASS'N OF SCHS. & COLLS., 2013 HANDBOOK OF ACCREDITATION 14 (2013), *available at* http://www.wascsenior.org/files/penultimatedrafthandbookv2.1.pdf, *archived at* http://perma.cc/U769-SDGQ.

[199] *Id.*

[200] ACICS bills itself as "the largest national accrediting organization of degree granting institutions." It accredits professional, technical, and occupational programs. *About ACICS*, ACCREDITING COUNCIL FOR INDEP. COLLS. & SCHS., http://www.acics.org/, *archived at* http://perma.cc/7M77-3JWY (last visited Feb. 14, 2015).

[201] ACCREDITING COUNCIL FOR INDEP. COLLS. & SCHS., ACCREDITATION CRITERIA: POLICIES, PROCEDURES, AND STANDARDS 38 (2014), *available at* http://www.acics.org/accreditation/content.aspx?id=3822, *archived at* http://perma.cc/WM3Y-K4U2 (follow "Accreditation Criteria (PDF)" hyperlink).

[202] HELP REPORT, *supra* note 8, at 124 (likening the fee arrangements under which accreditation agencies operate to those of "Wall Street credit ratings agencies that rubber-stamped mortgage-backed securities and other instruments that later incurred large losses").

standards, thereby disincentivizing accreditation rigor.[203] Whatever the reason, accrediting agencies provide little protection for students.

2. States

State oversight can take many forms. States are required by the HEA to legally authorize the colleges and universities within their borders,[204] and most do so through a public agency.[205] These agencies are required to have "a process to review and appropriately act on complaints concerning the institution."[206] States also have consumer protections statutes and related agencies that can serve as complaint portals for victims of recruitment deception.

States have made some attempts at protecting students. Keiser College[207] recently entered into an Assurance of Voluntary Compliance (AVC) with the State of Florida after the attorney general filed suit accusing the school of various violations of the state's consumer protection laws.[208] Pursuant to the AVC, the school agreed to comply with various disclosure directives, including disclosing information "clearly and conspicuously" to prospective students.[209] The Colorado attorney general recently settled a consumer protection suit against Westwood College[210] for $4.5 million. The suit alleged that Westwood had "mis[led]

[203] *Id.* ("[I]f a particular accrediting agency gets a reputation for being too tough, schools can opt for other, more lenient accreditors.").

[204] *See, e.g.*, *id.* at 130.

[205] *See, e.g.*, *SHEEO Members*, STATE HIGHER EDUC. EXEC. OFFICERS ASS'N, http://www.sheeo.org/our-members, *archived at* http://perma.cc/S9MB-2JR9 (last visited Feb. 15, 2015) (providing links to state higher education oversight agencies).

[206] 34 C.F.R. § 600.9(a)(1) (2014); *see also* STATE HIGHER EDUC. EXEC. OFFICERS ASS'N., SHEEO STATE AUTHORIZATION SURVEY: STUDENT COMPLAINT INFORMATION BY STATE AND AGENCY (2012), *available at* http://www.sheeo.org/sites/default/files/Complaint%20Process%20Links%2012-2012.pdf, *archived at* http:/perma.cc/ZF7J-3E78 (providing links to student complaint portals for almost every state higher education oversight agency).

[207] Keiser was a for-profit institution before becoming a nonprofit institution in 2011, after being purchased by Everglades University, a Florida-based nonprofit institution. Scott Travis, *Keiser University Celebrates 35th Year by Becoming a Nonprofit,* SUN SENTINEL (Sept. 12, 2011), http://articles.sun-sentinel.com/2011-09-12/news/fl-keiser-anniversary-20110912_1_keiser-university-scholarship-fund-evelyn-keiser, *archived at* http://perma.cc/V3VQ-9YJ2.

[208] DEP'T OF LEGAL AFFAIRS, STATE OF FLA. OFFICE OF THE ATT'Y GEN., IN THE INVESTIGATION OF KEISER UNIVERSITY, ET AL., No. L10-3-1201, at 1–2 (2012), *available at* http://myfloridalegal.com/webfiles.nsf/WF/JMEE-8ZLPRT/$file/KeiserUniversity.pdf, *archived at* http:/perma.cc/GGZ6-QVYB ("The Department has investigated allegations that Respondents made certain misrepresentations, misleading statements or otherwise omitted or failed to disclose material information . . . .").

[209] *Id.* at 4.

[210] Alta Colleges, Inc., Westwood's parent company, had an enrollment of 19,190 in fall 2010. HELP REPORT, *supra* note 8, at 164. In 2009, Alta Colleges had an overall student withdrawal rate of 58% from its Associate's degree programs and 57% among its Bachelor's degree enrollment. *Id.* at 74–75.

prospective students, engag[ed] in deceptive advertising and fail[ed] to comply with Colorado's consumer lending laws."[211] Kentucky[212] and Illinois[213] have also filed consumer protection suits against schools arising out of alleged recruitment and marketing improprieties.

The problem with state oversight, however, is that it is often inconsistent and sometimes "anemic."[214] Budget cuts and seeming conflicts of interests have significantly reduced the investigative and enforcement power of some state oversight agencies.[215] There has been much concern on the part of the ED that states have deferred to accrediting agencies on issues of oversight, thereby lessening the effectiveness of the triad.[216] Consumer protection statutes provide private rights to sue, which could be useful to victims of recruitment deception. But formidable standards of proof (discussed in more detail later) often forestall any real prospect of redress.

3. Federal Government

The HEA gives the ED broad responsibility in regulating higher education. The ED's primary higher education functions are to certify and regulate accrediting agencies, administer the disbursal of federal financial aid,[217] determine institutional

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[211] Press Release, Cynthia Coffman, Att'y Gen., Colo. Dep't Law, Attorney General Announces $4.5 Million Settlement with Westwood College to Address Deceptive Business Practices (Mar. 14, 2012), *available at* http://www.coloradoattorneygeneral.gov/press/news/2012/03/14/attorney_general_announces_45_million_settlement_westwood_college_address_dece, *archived at* http:/perma.cc/J4Q5-QCUN.

[212] *See, e.g.*, Press Release, Office of Att'y Gen., Attorney General Conway Files Suit Against Daymar College (July 27, 2011), *available at* http://migration.kentucky.gov/newsroom/ag/daymarsuit, *archived at* http://perma.cc/FW9C-YQD6.

[213] *See, e.g.*, Press Release, Lisa Madigan, Ill. Att'y Gen., Madigan Sues National For-Profit College (Jan. 18, 2012), *available at* http://www.ag.state.il.us/pressroom/2012_01/20120118.html, *archived at* http://perma.cc/VMB3-SDAQ.

[214] Benjamin Lesser & Greg B. Smith, *As Complaints Mount, Anemic State Agency Overwhelmed by Job of Policing For-Profit Schools*, NY DAILY NEWS (Jan. 18, 2011, 4:00 AM), http://www.nydailynews.com/new-york/complaints-mount-anemic-state-agency-overwhelmed-job-policing-for-profit-schools-article-1.149897, *archived at* http://perma.cc/PU89-ZZ97.

[215] HELP REPORT, *supra* note 8, at 130.

[216] Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 460 (D.C. Cir. 2012).

[217] 34 C.F.R. § 602.1 (2014).

eligibility to collect federal financial aid,[218] serve as a source of information for the public,[219] and promote federal priorities.[220]

The ED requires institutions to "make available" certain data to prospective and enrolled students.[221] Among the data required to be disclosed are retention and completion data,[222] job placement rates,[223] and costs of attendance.[224] The premise of these requirements is clear: to help students make better educational choices. But a recent report found many colleges to be out of compliance with the requirements.[225] The report also criticized the statute, arguing that "flaws in the way the statute was written . . . ha[s] rendered much of the information all but useless . . . ."[226] For example, almost 20% of sampled institutions failed to publish or otherwise provide placement data, and even among institutions that were in compliance, variable presentation formats (allowed by "loose" federal mandates) rendered much of the information unhelpful, if not misleading.[227]

The ED regulations ban the use of "substantial" misrepresentations by institutions collecting federal financial aid.[228] Misrepresentation is defined as "[a]ny false, erroneous or misleading statement" made by an institution or the institution's representative.[229] A misrepresentation is rendered "substantial" when "the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to

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[218] For example, the ED calculates student loan default rates in determining whether schools remain eligible to collect federal student aid, irrespective of whether they remain accredited. *See* FED. STUDENT AID, U.S. DEP'T OF EDUC., COHORT DEFAULT RATE EFFECTS: SANCTIONS AND BENEFITS 2.4-2 (2012), http://ifap.ed.gov/DefaultManagement/guide/attachments/CDRGuideCh2Pt4CDREffects.pdf, *archived at* http://perma.cc/GQ6R-WXNY.

[219] For example, the ED publishes an array of data about educational institutions that collect federal financial aid. Inst. of Educ. Scis., *Integrated Postsecondary Education Data System*, U.S. DEP'T OF EDUC., http://nces.ed.gov/ipeds/, *archived at* http://perma.cc/6XBK-VTD7 (last visited Sept. 7, 2014).

[220] *See, e.g.*, U.S. DEP'T OF EDUC., STRATEGIC PLAN FOR FISCAL YEARS 2011–2014, at 7 (2011), *available at* http://www2.ed.gov/about/reports/strat/plan2011-14/plan-2011.pdf, *archived at* http://perma.cc/Q57Q-6UT9 ("This [Strategic] Plan lays out a strategy that ties the day-to-day work of the Department to accomplishing the President's 2020 Goal.").

[221] 34 C.F.R. § 668.41(d) (2014).

[222] *Id.* § 668.41(d)(3) to (4).

[223] *Id.* § 668.41(d)(5).

[224] *Id.* § 668.43(a)(1) (2014) (including tuition and fees, books and supplies, room and board, transportation, and other relevant costs).

[225] *See* KEVIN CAREY & ANDREW P. KELLY, EDUC. SECTOR, THE TRUTH BEHIND HIGHER EDUCATION DISCLOSURE LAWS 1 (2011), *available at* http://www.educationsector.org/sites/default/files/publications/HigherEdDisclosure_RELEASE.pdf, *archived at* http://perma.cc/GJ8P-ZP46.

[226] *Id.*

[227] *Id.* at 8 ("[D]isclosure requirements for 'placement in employment' are loose enough to allow . . . institutions of all types . . . to promote success stories and hide the areas where they fall short.").

[228] 34 C.F.R. § 668.71(a) (2014).

[229] *Id.* § 668.71(c).

that person's detriment."[230] The ban applies to "marketing, advertising, recruiting or admissions services"[231] and covers misrepresentations made regarding "the nature of [an institution's] educational program, its financial charges, or the employability of its graduates."[232] A school that violates the ban can have its financial aid eligibility restricted or suspended or be fined up to $27,500 per violation.[233]

To facilitate the reporting of recruitment deception and other improprieties, the ED provides an online form through which anyone can lodge a complaint.[234] Unfortunately, the investigation of recruitment deception does not appear to be a priority.[235] The following quote sums up the shortcomings of the ED's oversight in this area:

> For schools, there are few disincentives to engage in deceptive or fraudulent behavior when enrolling students. The maximum fine imposed by the ED for a "substantial" misrepresentation is . . . a nominal amount in the grand scheme of things. ED can strip a school of its federal financial aid eligibility, but is reluctant to pursue such sanctions, even when appropriate. Making matters worse, [a Government Accountability Office] study found the ED's methods of detecting some forms of noncompliance with financial aid rules to be inadequate.[236]

There is also some question about whether the savviest acts of deception would even fall under the purview of the ban. Does attempting to understate program costs by quoting tuition rates on a per term basis amount to a substantial misrepresentation if the quoted rate is accurate? Such a statement may be seen as misleading, but that conclusion would certainly be debatable in a legal context. And because misrepresentations take the form of statements, the ban does not apply to a refusal to quote a tuition rate at all, even if the intent is to deceive by omission.

The ED has recognized that its regulations are "too lax," and in recent years has attempted to broaden provisions and clear up ambiguities in ways that it believes will aid enforcement.[237] The ED sought to implement "gainful employment"

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[230] *Id.*

[231] *Id.*

[232] *Id.* § 668.71(b).

[233] *See Id.* §§ 668.84–.86.

[234] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF EDUC., COMPLAINT FORM, *available at* http://www2.ed.gov/about/offices/list/oig/oighotline.pdf, *archived at* http://perma.cc/B9KN-FH3P (last visited Feb. 16, 2015).

[235] *Anti-Fraud Hearing, supra* note 125, at 23 ("[T]he Department does not investigate charges made by students regarding misrepresentations made to influence students to enroll . . . .").

[236] Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 214–15 (2012).

[237] Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 434 (D.C. Cir. 2012).

standards;[238] broaden the definition of "misrepresentation"; eliminate all safe harbors, or exceptions, to the incentive compensation ban; and require states to have a process for handling complaints against schools as part of their authorization responsibilities.[239] These new regulations were challenged in two court cases brought by the Association of Private Sector Colleges and Universities (APSCU)—an association of for-profit education providers.

(a) Defining Gainful Employment

Federal law requires that all educational programs offered by for-profit institutions and vocational programs offered by not-for-profit institutions "prepare students for gainful employment in a recognized occupation."[240] Congress, however, failed to define or explain the hallmarks of gainful employment.[241] So in 2010, the ED attempted to add an element of specificity to the concept.[242] Specifically, the ED sought to impose three regulations;[243] the most significant promulgated two tests—one that used debt-to-income ratios and another that used student loan repayment rates—to measure whether a program was in compliance with the gainful employment requirement.[244] If, after application of these tests, a program was deemed out of compliance with gainful employment dictates, it could have its financial aid eligibility restricted or revoked, and it could be required to provide disclaimers to students.[245]

Pursuant to APSCU's challenge, the student loan repayment test was vacated after the court concluded the ED employed an arbitrary eligibility threshold.[246] This conclusion prompted the court to also vacate the otherwise appropriate debt-to-income test (and the entire regulation), due to its lack of severability from the student

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[238] *See, e.g.*, Ass'n of Private Sector Colls. & Univs. v. Duncan, 930 F. Supp. 2d 210 (D.D.C. 2013) (explaining ED's attempts to impose gainful employment standards).

[239] *See, e.g.*, *Ass'n of Private Sector Colls. & Univs.*, 681 F.3d at 434 (explaining the ED's attempts to broaden the definition of "misrepresentation," eliminate safe harbors, and require state grievance processes).

[240] 34 C.F.R. § 668.8 (2014).

[241] *See* Ass'n of Private Sector Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 145 (D.D.C. 2012).

[242] *Id.* at 146 ("The means of determining whether a program 'prepares students for gainful employment in a recognized occupation' is a considerable gap, which the Department has promulgated rules to fill.").

[243] One regulation sought to measure whether a program was providing gainful employment to former students; the second created the mandate for schools to report income and debt statistics to the ED; the final measure required schools to submit new programs to the ED for approval based on gainful employment dictates. *Id.* at 143.

[244] *Id.* at 141–42, 153–54 (providing a detailed explanation of both tests).

[245] *Id.* at 142–43.

[246] *Id.* at 154 ("Because the Department has not provided a reasonable explanation [for the student loan repayment eligibility threshold], the court must conclude that it was chosen arbitrarily.").

loan repayment test.[247] This decision forestalled a significant attempt by the ED to ensure that programs were showing some form of payoff for students. Fortunately, the ED has taken steps to promulgate new regulations that would pass judicial review.[248]

(b) Broadening Misrepresentation

The ED sought to change the definition of misrepresentation in a way that would encompass any statement pertaining to an institution, rather than only those pertaining to an educational program, its financial charges, the employability of graduates, and a fourth topic that the ED added—"[the] institution's relationship with [ED]."[249] Pursuant to APSCU's challenge, the revision was deemed overly broad, encompassing misrepresentations not covered by the HEA.[250] Similarly, the ED sought to broaden the definition of misrepresentation to encompass confusing statements,[251] such as per term tuition quotes. Once again, a court held that the change "exceed[ed] the HEA's limits"[252] and raised First Amendment concerns.[253]

(c) Eliminating Safe Harbors

The ED's decision to eliminate the incentive compensation safe harbors was mostly upheld. Pursuant to APSCU's challenge, a court requested clarifications regarding two issues prompted by the eliminations, but stopped short of halting their imposition.[254] The court also upheld the ED's requirement that states establish a complaint grievance process as part of their responsibility to authorize schools

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[247] *Id.* ("[T]he tests are obviously 'intertwined'—and so the court cannot sever one from the others.").

[248] Public Hearings, 78 Fed. Reg. 22,467 (Apr. 16, 2013) (announcing the intent to inform a negotiated rulemaking committee that will attempt to draft new gainful employment regulations).

[249] Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 451 (D.C. Cir. 2012).

[250] *Id.*

[251] *See id.* at 434.

[252] *Id.* at 449–54.

[253] *Id.* at 453; *see also id.* at 454–57 (affirming the constitutionality of the ED's proscription of misrepresentations made in the form of commercial speech).

[254] One of the eliminated safe harbors allowed admissions officers to be paid based on the number of students who completed their educational programs or who were successfully retained beyond the first academic year of enrollment. *Id.* at 438. The court found the ED's justification for its elimination lacking. *Id.* at 448. The court was also dissatisfied with the ED's response to a question regarding the effect of the elimination on diversity outreach. *Id.* at 448–49. Without better explanations, the ED's elimination of the safe harbors would be "arbitrary and capricious." *Id.* However, the court did not foresee the ED having a difficult time meeting the burden of explanation. *Id.*

within their borders.[255] There is some reason for optimism regarding the extent to which these new regulations will remove some, though not all, incentives to recruitment deception.

Irrespective of attempts at improving the effectiveness of the triad, the regulatory system provides few disincentives to unscrupulous behavior in the admissions process and virtually no paths to redress for victims of this behavior. And, unfortunately, when victims bring lawsuits, they find that courtroom relief is fleeting as well.

B. False Claims Act

As mentioned earlier, the federal False Claims Act[256] allows private individuals with personal knowledge of fraud against the federal government to bring suit against alleged defrauders in the name of the government. The purpose of the Act is to incentivize whistleblowing by allowing whistleblowers to share in any monetary recovery they secure.[257] Twenty-nine states, the District of Columbia, and a handful of municipalities have similar statutes on the books, though many of these laws are applicable only to Medicaid fraud.[258]

Individuals bringing false claims suits against educational institutions have had some success winning monetary recoveries.[259] Most notably, the University of Phoenix agreed to pay the federal government $67.5 million to settle a false claims case alleging violations very similar to those made in *United States v. Education Management Corp*.[260] The whistleblowers in that case received $19 million for their efforts.[261]

But while the False Claims Act seems to provide potent deterrents to fraudulent behavior by schools, they still represent a relatively novel way of disincentivizing this behavior. In the last fourteen years, less than fifty of these cases have been filed in federal court.[262] But more significantly, false claims statutes do little to empower the nongovernmental, private victims of fraudulent behavior. When a monetary recovery is secured, it is the defrauded governmental entity and the individuals

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[255] *Id.* at 460 (citing the ED's concern about "the historical lack of state oversight"); *see also id.* at 462–63 (vacating new requirements for state authorization on online programs, due to the ED's failure to follow rulemaking procedure).

[256] 31 U.S.C. §§3729–3733 (2012).

[257] *Id.* at § 3730(d)(1) (allowing for award to qui tam plaintiff for 15–25% of the proceeds of the action or settlement of the claim).

[258] *States with False Claims Acts*, TAXPAYERS AGAINST FRAUD EDUC. FUND, http://www.taf.org/states-false-claims-acts, *archived at* http://perma.cc/95GW-D9WM (last visited Sept. 7, 2014).

[259] *See* GIBSON DUNN, *supra* note 13 (providing a list of false claims cases filed since 1999).

[260] Press Release, U.S. Dep't of Justice, *University of Phoenix Settles False Claims Act Lawsuit for $67.5 Million* (Dec. 15, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-civ-1345.html, *archived at* http://perma.cc/MX9A-MMDL.

[261] *Id.*

[262] *See* GIBSON DUNN, *supra* note 13.

bringing the case (who in many cases aided the fraud) who benefit. Private victims do not share in that windfall.

C. Contract Law

Students have a contractual relationship with their higher education institutions.[263] Promises made by school officials and rights and responsibilities embodied in school policies can form the basis of the legal relationship[264] if they are sufficiently specific.[265] If an admissions officer promises a prospective student a particular educational outcome (e.g., employment upon graduation), and in reliance upon that promise the student enrolls, the student would have a viable breach of contract claim if the promise is unfulfilled.

The viability of a breach of contract action turns on an alleged promise's specificity. If the student can "point to an identifiable contractual promise that the defendant failed to honor," her claim will be heard on the merits and possibly be successful.[266] Claims based on promises that are less than "reasonably certain" would likely be dismissed for failing to "provide a basis for determining the existence of a breach and for giving an appropriate remedy."[267] Allegations about program quality are typically not actionable in a breach of contract suit,[268] even though admissions officers often base their pitch on quality-based assertions.

This judicial posture leaves much room for unscrupulous admissions officers to operate. Vague assurances do not carry the same legal consequences, even though they can have the same inducing effect on the prospective student. Similarly, claims based on puffery are likely to be dismissed.[269]

Contract law assumes arms-length parties; therefore, there is typically no duty to disclose between parties. However, courts have found such a duty in several types of instances, including when the disclosure is required by law, regulation, or longstanding precedent; when a party intentionally conceals information; when a party makes a partial, but not complete, disclosure; when a party makes a statement

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[263] *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992).

[264] *Id.* ("The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract." (quoting Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972))).

[265] Key v. Coryell, 185 S.W.3d 98, 105 (Ark. Ct. App. 2004) (finding that the terms of a student handbook "were so vague and general that they are not enforceable").

[266] *Ross*, 957 F.2d at 417.

[267] *Key*, 185 S.W.3d at 103.

[268] *Ross*, 957 F.2d at 416–17 ("To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough.").

[269] For example, if an admissions officer promises that their school provides extensive career assistance to students, a plaintiff alleging that the services fell short of the promise would have to identify specific services that the school promised but completely failed to provide. Allegations of inadequate quality are typically not actionable. The result is that an admissions officer can extol with impunity nonexistent virtues to prospective students, as long as her assertions remain just vague enough to avoid legal responsibility. *See, e.g.*, *id.* at 417.

that she later finds out is untrue; and when there is a fiduciary or confidential relationship between the parties.[270]

Some of these exceptions could form the theoretical basis of a contract claim by a victim of recruitment deception. However, the judicial precedent in this area is abundantly inconsistent, rendering it very difficult to assess when a duty of disclosure exists.[271] And when the defendant is an educational institution, courts do not appear to be amenable to departing from the general rule.

D. Tort Law

The common tort theories—fraudulent misrepresentation and two negligence actions: negligent misrepresentation and educational malpractice—fail to provide much of a path to relief for victims of recruitment deception.

1. Fraudulent Misrepresentation

In order to successfully claim fraudulent misrepresentation, a plaintiff must prove, at minimum, that the defendant knowingly made a false or baseless representation regarding a material fact, on which the plaintiff reasonably relied to his detriment.[272] Proving scienter—or intent to deceive—is difficult.[273] Savvy deceivers rarely document their nefarious actions in ways that are amenable to legal liability. In addition, allegations of fraud must be alleged with a level of specificity that is often difficult to present.[274] Lastly, because opinions and puffery typically cannot form the basis of a misrepresentation claim,[275] a plaintiff is unlikely to prove fraudulent misrepresentation based on the type of vague assurances often used by admissions officers to induce enrollment.

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[270] JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 348–52 (5th ed. 2003).

[271] Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1797 (2005) ("Courts repeatedly reach divergent results in similar, or even seemingly identical, cases and have failed to articulate a coherent or generally accepted rule as to when they will impose a duty of candor on contracting parties.").

[272] *See, e.g.*, Brug v. Enstar Grp., Inc., 755 F. Supp. 1247, 1253 (D. Del. 1991) (listing elements of fraud).

[273] Hunter v. Bd. of Educ. of Montgomery Cnty., 439 A.2d 582, 587 (Md. 1982).

[274] *See, e.g.*, Jamieson v. Vatterott Educ. Ctr., Inc., 473 F. Supp. 2d 1153, 1157–58 (D. Kan. 2007) (holding that plaintiffs failed to sufficiently allege the content, time, place, or maker of the alleged fraudulent misrepresentations).

[275] *See, e.g.*, Gagne v. Bertran, 275 P.2d 15, 21 (Cal. 1954) (asserting that an opinion can become actionable as deceit only if "[d]efendant held himself out as an expert, plaintiffs hired him to supply information concerning matters of which they were ignorant, and his unequivocal statement necessarily implied that he knew facts that justified his statement").

Reasonable reliance can be difficult to prove in the higher education context due to the availability of relevant information.[276] The ED publishes various types of data about institutions that collect federal financial aid funds and accrediting agencies and other entities also publish relevant data.[277] This information can be relevant to the enrollment decision, but the information is underutilized, largely due to lack of awareness of its existence and lack of insight about how to interpret it.[278] This information is unlikely to be helpful to many of the students who for-profit schools target; but its availability could nonetheless weaken a claim of reasonable reliance.

2. Negligence

Causes of action based in negligence often fail due to the reluctance of courts to impose a duty of care upon educational institutions. This reluctance forestalls most claims where a plaintiff alleges that his school is liable for his not attaining a certain educational outcome, such as employment upon graduation.[279] The following illustrates one of the primary reasons courts have declined to impose this duty:

> Since education is a collaborative and subjective process whose success is largely reliant on the student, and since the existence of such outside factors as a student's attitude and abilities render it impossible to establish any quality or curriculum deficiencies as a proximate cause to any injuries, we rule that there is no workable standard of care here and defendant would face an undue burden if forced to litigate its selection of curriculum and teaching methods.[280]

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[276] *See, e.g.*, Gomez-Jimenez v. N.Y. Law Sch., 956 N.Y.S.2d 54, 60 (App. Div. 2012) (holding that plaintiffs failed to act as reasonable consumers in not considering data other than that which was presented by the law school).

[277] For example, in the realm of legal education, the American Bar Association (ABA) and the Law School Admission Council jointly host a searchable database featuring data about every ABA accredited law school in the country. *Official Guide to ABA-Approved Law Schools: State Map*, LAW SCH. ADMISSION COUNCIL, https://officialguide.lsac.org/Release/Maps/Maps.aspx, *archived at* http://perma.cc/6RKF-WMXB (last visited Sept. 7, 2014).

[278] BRIDGET TERRY LONG, CTR. FOR AM. PROGRESS & HAMILTON PROJECT, GRADING HIGHER EDUCATION: GIVING CONSUMERS THE INFORMATION THEY NEED 1 (2010), *available at* http://www.brookings.edu/~/media/research/files/papers/2010/12/higher%20ed%20long/12_higher_ed_long.pdf, *archived at* http://perma.cc/5ENN-Z7VL ("[T]he process of college choice involves simultaneously ranking options in multiple ways, relying on incomplete and uncertain information, and receiving little or no support for interpreting the facts that are available.").

[279] *See, e.g.*, *Jamieson*, 473 F. Supp. 2d at 1161 ("An inability to obtain suitable employment is not necessarily the result of poor education . . . . [E]fforts of an educational institution only go so far to ensure the success of its students." (citing Finstad v. Washburn Univ. of Topeka, 845 P.2d 685, 692 (Kan. 1993))).

[280] Tolman v. CenCor Career Colls., Inc., 851 P.2d 203, 205 (Colo. App. 1992).

Therefore, if an admissions officer induces a prospective student to enroll based on puffery about the quality or career and financial benefits of an academic program, a negligence claim could succeed only if the representations took the form of a guarantee. Any assertion short of that would be protected from legal liability by the "collaborative and subjective" nature of education and its outcomes.

The absence of a duty of care is not the only reason why negligent misrepresentation and educational malpractice claims tend to fail. Negligent misrepresentation claims suffer from essentially the same issues as those brought in fraud,[281] including the nonactionable nature of opinions and puffery and the effect of available information on the reasonableness of reliance. In addition, a host of espoused public policy reasons prevent educational malpractice claims from surviving dismissal. Reasons include the "inherent uncertainties" in determining causation and damages, the potential flood of litigation that could overburden schools, and the traditional deference afforded schools to carry out their internal operations.[282]

VI. CONCEPTUALIZED TORT

The inadequacies of the regulatory framework and the inequities of judicial treatment necessitate new approaches to protecting students from higher education recruitment deception. Other articles have proposed new administrative and regulatory frameworks[283] and new ways of conceptualizing contract law,[284] but there is a dearth of discussion relating to tort law. This Article seeks to fill that void by conceptualizing a negligence theory that would protect students and disincentivize unscrupulous behavior in higher education admissions and recruitment.

The theory, negligent educational recruitment, is an extension of negligent misrepresentation and, semantically, is based on the tort of information negligently supplied for the guidance of others.[285] Negligent educational recruitment is premised

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[281] The fundamental difference between fraudulent misrepresentation and negligent misrepresentation is that the former requires intent to deceive or utter a baseless statement while the latter requires no intent, but requires a duty to communicate accurate information. The intent requirement is essentially replaced by the duty of care.

[282] *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 414–15 (7th Cir. 1992).

[283] *See, e.g.*, Aaron N. Taylor, *"Your Results May Vary": Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 770 (2010).

[284] *See, e.g.*, Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing,* 59 MD. L. REV. 183, 184–85 (2000) ("[T]he implied obligations of good faith and fair dealing[] hold the potential to define and to police the student-university relationship while avoiding the pitfalls of judicially second-guessing and intruding into the management of the institution or into its academic freedoms.").

[285] RESTATEMENT (SECOND) OF TORTS § 552 (1977). Information negligently supplied for the guidance of others does not require privity between the individual who provides the false information and those who receive it. But given that courts in some states have resisted the liberalization of privity requirements in negligence cases, I will argue that privity nonetheless exists between admissions officers and prospective students in the negligent

on the view that the core function of an admissions officer is that of counselor, and, therefore, the use of certain sales tactics and deception invokes potential legal liability. Lastly, even though this discussion centers on admissions officers, the tort would potentially apply to any employee or contractor hired by an educational institution to recruit or enroll students. Financial aid officers and even athletic team coaches would be examples.

The fundamental purpose of torts is to "deter socially unreasonable conduct."[286] The determent is actualized by requiring tortfeasors to compensate victims of the tortfeasor's wrongdoings, thereby increasing the costs of tortious behavior.[287] This understanding of tort law aligns with the corrective justice theory, which is based on the following premise: "[A]s a matter of individual justice between the plaintiff and the defendant, the defendant who has caused an injury to the plaintiff in violation of his rights in his person or property must compensate him for such injury . . . ."[288]

In essence, a fair and effective system of corrective justice can be boiled down to three elements: (1) the consistent assignment of liability that is aligned with "moral norms of responsibility"; (2) the just compensation of victims of tortious behavior; and (3) an "internal" system of finance where the costs of compensation are borne by tortfeasors.[289] The theory offered in this Part aligns liability for recruitment deception with norms underlying fairness, and seeks just compensation of victims of this deception by the institutions that perpetrate it.

A. Negligent Educational Recruitment

Negligent conduct is that "which falls below the standard established by law for the protection of others."[290] Negligence is an expansive concept that encompasses a wide range of human endeavors,[291] including the provision of information to others. The tort of negligent misrepresentation imposes a duty upon professional suppliers of information to communicate that information accurately. The following quote explains the premise:

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educational recruitment context. *See, e.g.*, Ann T. Hester & James D. Ferrucci, The Architect as a Source of Salvage (Sept. 30, 2004) (unpublished manuscript), *available at* http://www.forcon.com/userfiles/file/nesfcc/2004/02b.Ferrucci.pdf, *archived at* http://perma.cc/DR2S-NGR4.

[286] Cohen, *supra* note 7, at 1307.

[287] *Id.* at 1326 ("[T]ort damages provide both specific and general deterrence by motivating injurers to incorporate the cost of consequential losses into their behavioral decisions.").

[288] Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 435 (1985).

[289] Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 450 (1990).

[290] RESTATEMENT (SECOND) OF TORTS § 282 (1977).

[291] Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 122 (Iowa 2001) ("[A] cause of action for negligence may find support in most any conduct.").

> [A] person in the profession of supplying information for the guidance of others acts in an advisory capacity and is manifestly aware of the use that the information will be put, and intends to supply it for that purpose. Such a person is also in a position to weigh the use for the information against the magnitude and probability of the loss that might attend the use of the information if it is incorrect.[292]

The conceptualized tort—negligent educational recruitment—is based heavily on the wording of the tort of information negligently supplied for the guidance of others, a form of negligent misrepresentation, which dictates:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[293]

Information negligently supplied for the guidance of others has four essential elements: (1) the communication of false or inaccurate information, (2) by a person who is paid to supply information, (3) upon which the hearer of the information justifiably relies, (4) to her financial detriment. In a nutshell, the tort protects hearers (in this case, third parties) of false or inaccurate representations made by people who should know what they are talking about. These elements align with the three basic elements of negligence: duty, breach, and causation. The duty arises out of the tortfeasor's pecuniary interest in providing information. The breach occurs when the tortfeasor communicates false information she should have known was false. And the reasonable, detrimental reliance accounts for the causation.

1. Duty of Care

The nature of the relationship between parties determines the existence of a duty of care. Such duty is commonly found when created by contract, "where there is a relationship of 'peculiar trust and confidence,'" or when a relationship is typified by asymmetrical bargaining power or access to information.[294] A "special relationship" is formed through these interactions, from which the duty arises. The nature of the relationship between admissions officers and prospective students is indeed "special" in that it is very often based on peculiar trust and confidence and is typified by unequal bargaining power and access to information.

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[292] *Id.* at 124–25 (citations omitted).

[293] RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

[294] Ellen Byers, *Addressing the Consumer's Worst Nightmare: Toward a More Expansive Development of the Law of Tortious Fraud and Deceptive Practices in Kansas*, 38 WASHBURN L.J. 455, 469 (1999) (citing Lindholm v. Nelson, 264 P. 50, 50 (Kan. 1928)).

The provision of information is one of the major functions of an admissions officer. Each of the announcements described earlier placed an onus on the officer to be a source of information about program content and requirements, as well as the admissions process. Put differently, admissions officers are paid to provide information. Numerous courts have held that a pecuniary interest in providing information solidifies the special nature of a commercial relationship.[295] In the education context, one court held that a high school counselor was "in the profession of supplying information to others" and, therefore, reasoned that the counselor had a duty to communicate accurate information to students.[296]

In addition to relying on admissions officers for information, prospective students disclose personal information to these individuals. The scope of the information is broad, encompassing past and present experiences and future aspirations. The information is sometimes closely held by the applicant, making disclosure to the admissions officer even more significant. It is not uncommon for a prospective student to disclose how a difficult, if not painful, life experience motivates her to pursue the educational endeavor for which she is applying. Some disclosures are required; others are motivated by the perception that the admissions officer is a counselor serving the applicant's best interests. Because of their significance, the disclosures are typically protected by institutional privacy policies.[297] Therefore, the relationship between admissions counselor and prospective student is clearly peculiar in the extent to which prospects place their trust and confidence in admissions officers.[298]

The relationship is also often typified by unequal access to information and unequal bargaining power. Various forms of institutional information are publicly available, though it is underutilized and often inscrutable to many applicants. But in spite of this access, admissions officers nonetheless maintain information advantages that give them the ability to exercise undue influence. An example is how admissions officers can exaggerate the scarcity of space in an entering class, knowing that prospective students have no means of verification. The bargaining disparity is made worse by the sales training that some admissions officers receive,

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[295] *See, e.g.*, *Sain*, 626 N.W.2d at 126.

[296] *Id.*

[297] *See, e.g.*, BLOOMFIELD COLL., UNDERGRADUATE APPLICATION FOR ADMISSION 5, *available at* http://www.bloomfield.edu/sites/default/files/common/Undergraduate_Degree_Application.pdf, *archived at* http://perma.cc/5LC3-JEDG ("Bloomfield College's policy is to protect the privacy of applicants."); LAW SCH. ADMISSION COUNCIL, INC., LSAC STATEMENT OF GOOD ADMISSION AND FINANCIAL AID PRACTICES—JD PROGRAMS 3 (2014), *available at* http://www.lsac.org/docs/default-source/publications-(lsac-resources)/statementofgoodadm.pdf, *archived at* http://perma.cc/TT8P-7EXS (recommending that law schools "be scrupulous in maintaining the privacy of applicants").

[298] *See, e.g.*, Lewis v. Rosenfeld, 138 F. Supp. 2d 466, 481 (S.D.N.Y. 2001) ("[A] commercial relationship may become a 'special relationship' where 'the parties . . . enjoy a relationship of trust and reliance closer . . . than that of the ordinary buyer and seller.'") (quoting Polycast Tech. Corp. v. Uniroyal, Inc., No. 87 CIV. 3297 (JMW), 1988 WL 96586, at *10 (S.D.N.Y. Aug. 31, 1988)).

which is intensified through excessive contact. This dynamic allows for advantage taking by unscrupulous admissions officers whose predominant focus is closing the deal. And while such a result may be acceptable on a car lot, the stakes involved in the higher education context justifies imposing a duty of care.

2. Breach

Behavior is deemed tortious by legislative or judicial action. Both methods of deeming are typically the result of "social and moral requirements" that arise.[299] Thus, behaviors that once carried no potential for legal liability are now considered tortious based on shifting societal norms.[300] Judicial deeming serves as a flexible gap filler in the absence of relevant legislative action. Judges see unaddressed legal harms and fashion common law remedies.[301] But irrespective of the method, societal norms necessitate that certain behaviors be deemed tortious within the context of higher education admissions.

As argued earlier, contemporary pressures put admissions officers in the conflicting posture of having to serve as counselors while having to sell a product. But given the wide-ranging stakes involved in a prospective student's decision to pursue higher education,[302] admissions officers must fully embrace their counseling responsibility, to the exclusion of their sales role. Therefore, many behaviors endemic to sales culture should be considered tortious in the higher education context.

The general rule in misrepresentation cases is that "a person cannot misrepresent his own opinion"; therefore, only factual assertions are typically actionable.[303] Some courts, however, have deemed opinions actionable when they are "'not a causal expression of belief' but a 'deliberate affirmation of the matters stated.'"[304] The negligent educational recruitment tort would embrace this approach. The communication of not only false statements, but also opinions, puffery, or forward-looking statements would be considered potentially tortious. Doing so would attach legal responsibility to the baseless, but legally vague assurances that admissions officers often use to induce enrollment. Officers would think twice

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[299] Cohen, *supra* note 7, at 1292.

[300] *See, e.g.*, Seth E. Lipner & Lisa A. Catalano, *The Tort of Giving Negligent Investment Advice*, 39 U. MEM. L. REV. 663, 668 (2009) (documenting the advent of the tort of negligent investment advice in response to the increased prominence of the investment industry).

[301] Cohen, *supra* note 7, at 1292 ("[T]he creation of affirmative duties may reflect ad hoc moral judgments about what behavior warrants punishment even though it is unaddressed in the law.").

[302] Stakes relate to actual and opportunity costs, chances of completion, chances of employment, and ability to repay student loans. Some of these stakes are personal to the prospective student, but many of them have broader relevance.

[303] Darst v. Ill. Farmers Ins. Co., 716 N.E.2d 579, 584 n.6 (Ind. Ct. App. 1999).

[304] Bily v. Arthur Young & Co., 834 P.2d 745, 768 (Cal. 1992) (quoting Gagne v. Bertran, 275 P.2d 15, 21 (Cal. 1954) (en banc)).

before assuring an applicant that he would have "no problem" achieving a certain outcome if such an assertion came with potential legal consequences.

The Senate investigation found that for-profit schools also employ elaborate tactics and procedures for dealing with reluctance or hesitance.[305] The danger of these tactics is that the applicant's best interests are irrelevant. Therefore, finding (and poking) the pain, inundating skeptical prospective students with contact, exaggerating the scarcity of space in the entering class, and other hard-sell tactics should be considered tortious. In fact, in situations where a prospect has expressed a desire to no longer be considered for enrollment, any further contact should be considered tortious. Such limitations already exist in the higher education context.

The NCAA restricts the amount of contact school representatives can have with prospective athletes. In addition to being subject to a broad definition of "contact,"[306] these individuals are subject to an elaborate scheme of restrictions "designed in part to protect prospective student-athletes from undue pressures that may interfere with their scholastic or athletics interest."[307]

Such restrictions exist in other realms as well. The American Bar Association (ABA) Model Rules of Professional Conduct forbid lawyers from soliciting prospective clients after they have "made known to the lawyer a desire not to be solicited."[308] The rule applies not only to situations where the prospect expressly makes her desire known, but also to situations where the client is unresponsive to the lawyer's outreach.[309] Therefore, a lawyer who continues to contact a prospective client, even after receiving no response to earlier attempts, is potentially in violation of the ban.

The rule is intended to safeguard against the risk of abuse inherent in these interactions. The asymmetric dynamic in the prospective attorney-client relationship is similar to the dynamic in the prospective admissions officer-student relationship. And the following recitation of the rule's premise could easily be applied to the higher education setting:

> The person . . . may find it difficult fully to evaluate all available alternatives [for legal services] with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.[310]

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[305] *See* HELP REPORT, *supra* note 8, at 63.

[306] The NCAA defines contact as: "[A]ny face-to-face encounter between a prospective student-athlete or the prospective student-athlete's parents, relatives or legal guardians and an institutional staff member or athletics representative during which any dialogue occurs in excess of an exchange of a greeting." NAT'L COLLEGIATE ATHLETIC ASS'N, 2012–13 NCAA DIVISION I MANUAL § 13.02.4, at 77 (2012), *available at* http://www.ncaapublications.com/productdownloads/D113.pdf, *archived at* http://perma.cc/P493-UUNK.

[307] Crue v. Aiken, 370 F.3d 668, 675 (7th Cir. 2004).

[308] MODEL RULES OF PROF'L CONDUCT R. 7.3(b)(1) (2013).

[309] *Id.* at cmt. 6.

[310] *Id.* at cmt. 2.

Hard-sell tactics place students at risk in much of the same way they place legal clients at risk. Therefore, deeming these tactics to be tortious in the higher education context would prompt admissions officers to embrace their counselor role in a manner that would better serve students and taxpayers. In alleging that tortious behavior has occurred, plaintiffs could provide documented evidence, such as telephone records and emails, as well as recitations of conversations. Admissions training manuals, misleading commercials and marketing materials, internal emails, and other institutional documents could be used to bolster allegations as well.

The level of detail required in pleadings is important because it greatly influences the odds of a plaintiff's case surviving dismissal. In pleading breach under the negligent educational recruitment theory, plaintiffs would be required to provide "a short and plain statement of the claim showing that [they are] entitled to relief."[311] This pleading standard stops short of the more stringent "with particularity" standard that is applied in intentional misrepresentation cases and even some negligent misrepresentation cases.[312] The purpose of imposing the lower standard is to protect students by broadening paths to redress.

3. Causation

The causation analysis is framed around the question, "Did the tortious aspect of the defendant's conduct contribute to an injury to the plaintiff's person or property?"[313] This analysis is "backward-looking, individualized, and factual."[314] The empirical nature of causation[315] can make it difficult to determine, especially when there are many potential causes.[316] This point is particularly salient in the

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[311] *See, e.g.*, Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP, 475 F.3d 824, 838–39 (7th Cir. 2007) (holding that in order to state a claim for negligent misrepresentation, plaintiff "must set forth 'a short and plain statement of the claim showing that the [plaintiff] is entitled to relief'" (quoting FED. R. CIV. P. 8)).

[312] There is a split among the judicial circuits regarding the level of detail required for plaintiffs to plead negligent misrepresentation. For example, the Seventh Circuit imposes the lower "short and plain statement" requirement while the Eighth Circuit requires plaintiffs to "state with particularity the circumstances constituting fraud or mistake." *Compare id.*, *with* Trooien v. Mansour, 608 F.3d 1020, 1028 (8th Cir. 2010) ("[A]ny allegation of misrepresentation, whether labeled as a claim of fraudulent misrepresentation or negligent misrepresentation, is considered an allegation of fraud which must be pled with particularity.").

[313] Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1004 (1988) [hereinafter Wright, *Bramble Bush*].

[314] Wright, *supra* note 288, at 437.

[315] Richard W. Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, *in* PERSPECTIVES ON CAUSATION 285, 286 (Richard Goldberg ed., 2011).

[316] *See, e.g.*, Benjamin Shmueli & Yuval Sinai, *Liability Under Uncertain Causation? Four Talmudic Answers to a Contemporary Tort Dilemma*, 30 B.U. INT'L L.J. 449, 453 (2012).

education context. As courts have noted, education is a collaborative process, with outcomes being influenced by a range of factors related and unrelated to the actual education received. The nature of the process makes determining causation difficult and serves as a justification for the narrow paths to redress discussed earlier.

In creating a tort path, a test of causation must be identified that accounts for causal uncertainty in a manner that serves the fundamental purpose of discouraging socially unreasonable behavior. The necessary element of a sufficient set (NESS) test of causation best serves this purpose. NESS is based on the following premise: "[A] particular condition was a cause of a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence."[317]

Therefore, pursuant to NESS, causation would be proven if a plaintiff could show that an admissions officer's tortious conduct (a particular condition) was a cause of the plaintiff incurring expenses in an educational program in which he experienced an unfavorable outcome (specific consequence), because the plaintiff would not have enrolled in the program but for the tortious conduct (necessary element). It is immaterial that other factors, such as family circumstances or lack of ability, also could have contributed to the undesirable outcome. Causation is proven as long as the admissions officer's tortious conduct was a "necessary element" among the "set of antecedent actual conditions" that led to the "specific consequence" of the undesirable outcome. If the plaintiff would have enrolled in the program anyway, even in the absence of any tortious conduct, then no causation would be found.[318]

A plaintiff's reliance on the tortious conduct must be reasonable in order for causation to be found. In the financial advising context, where the tort of information negligently supplied for the guidance of others has been deemed actionable, the "sophistication of [the] plaintiff[], the existence of disclaimers, and a defendant's possession of unique or special expertise" are relevant to the reasonableness assessment.[319] Sophisticated investors are held to a higher standard of

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[317] Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1774 (1985) [hereinafter Wright, *Causation in Tort Law*]. NESS is described as "a test of weak necessity or strong sufficiency . . . ." Wright, *Bramble Bush*, *supra* note 313, at 1020. In determining causation, such tests require that a condition be a necessary element of a set of actual or existing conditions necessary for the occurrence of the consequence. *Id.* In contrast, strict necessity tests require that the condition be necessary for the occurrence of the consequence, each time it occurs. *Id.* The most common tests of necessity are based on a strong-necessity premise that requires the condition be necessary for the occurrence of the consequence on that particular occasion. *Id.* at 1021. The but-for test is a strong-necessity test. *Id.* In terms of sufficiency, weak-sufficiency tests require only that a condition be a part of some set of existing conditions that was sufficient to cause the consequence. *Id.* at 1020.

[318] Wright, *Bramble Bush*, *supra* note 313, at 1041 (explaining that the "obvious . . . way" to determine causation using NESS is to eliminate the tortious conduct from the set of conditions and surmise whether the specific consequence would have nonetheless occurred).

[319] King Cnty. Washington v. IKB Deutsche Industriebank AG, 863 F. Supp. 2d 288, 312 (S.D.N.Y. 2012).

reasonableness pursuant to an "enhanced duty to obtain material information."[320] Similar standards have been applied in the educational context.

In dismissing misrepresentation claims against New York Law School (NYLS), one court characterized prospective law students as "a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their post-college options."[321] The court opined further, "In these new and troubling times, the reasonable consumer of legal education must realize that . . . omnipresent realities . . . obviously trump any allegedly overly optimistic claims in their law school's marketing materials."[322] Because "[m]easuring reasonableness is done in the context of circumstances,"[323] the court's conclusion could have been different had the plaintiffs been for-profit school dropouts, instead of law school graduates.

In applying these dictates to the tort of negligent educational recruitment, courts could consider a range of factors. One such factor is the type and extent of the tortious behavior. Exposure to a range of different or particularly sharp tactics could bolster a plaintiff's case. In addition, the plaintiff's insight into higher education could be considered. Put differently, was it reasonable for the plaintiff to be influenced by the tortious conduct? A plaintiff with no higher education experience when exposed to the tortious conduct would have a stronger case than a plaintiff who already possessed a degree. A plaintiff who was a first-generation college student would have a relatively strong case as well. In addition, the institutional role of the person making the negligent representation would be important, as it is more reasonable to rely on the representations of, say, an admissions dean than it is a student recruiter.

Length of enrollment in the program could be a factor as well, and indeed an effective limiting principle, with shorter periods of enrollment bolstering the plaintiff's case. A plaintiff who dropped out during his initial enrollment period would have a stronger argument for causation than a plaintiff who also enrolled in subsequent periods. Similarly, the length of time between the plaintiff's exposure to the tortious behavior and the plaintiff's enrollment would be relevant. A plaintiff who enrolled immediately after (or during) exposure would have a stronger case than a plaintiff who enrolled later.

The availability of institutional information would be relevant, but plaintiffs would be allowed to rely on the representations of admissions officers regarding matters that are "peculiarly within [the officers'] knowledge," without conducting investigations of their own.[324] For example, students should not have to verify completion or employment data provided by admissions counselors. This allowance

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[320] Maverick Fund, L.D.C. v. Comverse Tech., Inc., 801 F. Supp. 2d 41, 57 (E.D.N.Y. 2011).

[321] Gomez-Jimenez v. N.Y. Law Sch., 943 N.Y.S.2d 834, 843–44 (Sup. Ct. 2012), *aff'd*, 956 N.Y.S.2d 54 (App. Div. 2012).

[322] *Id.* at 851.

[323] *Id.* at 853.

[324] *Maverick Fund, L.D.C.*, 801 F. Supp. 2d at 57 (citing Mallis v. Bankers Trust Co., 615 F.2d 68, 80 (2d Cir. 1980)) (applying this standard in the investment context).

is, once again, premised on the view that admissions officers must completely embrace their counseling responsibilities, especially in dealings with disadvantaged or vulnerable populations.

NESS is a derivative of the seminal but-for test of causation.[325] But implicit in NESS is an appreciation of the complex nature of the human existence[326] and a desire to discourage tortious behavior, even if the behavior was not the sole or predominant cause of an injury.[327] NESS prevents tortious actors who cause, or contribute to, harm from using other potential causes to shield themselves from legal liability. Such shielding not only leads to irrational outcomes,[328] but also encourages tortious behavior by allowing it to go unpunished. Applying NESS to recruitment deception would increase the chances that schools would be held accountable for tortious behavior and, as a result, incidences of deception would likely decrease.

B. Damages

In the context of tort law, a corrective system of justice requires that victims of tortious injuries be restored to their "pre-injury position" through compensation from the tortfeasor.[329] Put simply, "if A appropriates X from B, corrective justice

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[325] The but-for test dictates that: "an act (omission, condition, etc.) was a cause of an injury if an only if, but for the act, the injury would not have occurred. That is, the act must have been a necessary condition for the occurrence of the injury." Wright, *Causation in Tort Law*, *supra* note 317, at 1775; *see also id.* at 1802–03 (explaining that when there is only one tortious cause of the injury, NESS test becomes a but-for test).

[326] *Id.* at 1823–24 ("It is unnecessary, even if it were possible, to explain a particular occurrence by detailing all the antecedent conditions . . . . As the precision and detail of the description of all the antecedent conditions increases, our ability to predict the effect improves. Beyond a certain point, however, the explanatory force of the description does not improve, but rather lessens as it increasingly becomes a description of a unique event rather than an instance of some broad generalization . . . .").

[327] *See* Wright, *Bramble Bush*, *supra* note 313, at 1037. "[A] condition can be a cause under the NESS test . . . even if it was neither necessary nor independently sufficient" to cause the specific injury. *Id.* at 1035.

[328] A weakness of the but-for test is that it often results in scenarios where no causation is found even though a particular tortious act was a cause of a specific injury. *See* Wright, *Causation in Tort Law*, *supra* note 317, at 1775. Two types of scenarios are termed preemptive causation and duplicative causation. *Id.* An example of preemptive causation is if D shoots and kills P just as P was about to drink a cup of tea poisoned by C. *Id.* D would not be liable for P's death because P would have died from the poisoned tea in the absence of D's act. *Id.* The but-for test assigns causation "if and only if" the injury (death, in this case) would not have occurred "but for" the tortious act. In duplicative causation scenarios, if C and D independently start separate fires, each sufficient to destroy P's house, and the fires converge together and burn down the house, neither C nor D would be held liable because the other's fire could have destroyed the house. *Id.* at 1775–76. Duplicative causation scenarios are particularly relevant to the educational context where many factors are potential causes of a bad outcome.

[329] John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1033 (2003).

requires that he return or replace that commodity X."[330] Therefore, a means of determining damages in financial terms is essential.

The intangible and collaborative nature of the educational process makes computing damages difficult. How do you determine the financial harm done to a student who enrolled based on an admissions officer's tortious deception, and who had access to courses but failed to complete the program? What if the student earns the credential, but finds that the market demand for it is much less robust than the admissions officer tortiously represented? On one end, the current practice of foreclosing recovery results in the complete undercompensation of plaintiffs. But on the other end, full reimbursement of expenses would likely amount to overcompensation.[331] Short of absolute deprivation, it is difficult to determine in financial terms the difference between the educational experience promised and the educational experience obtained. But difficulty should not be confused with impossibility, and the prospect of imprecision should not be allowed to leave victims without paths to redressing their harms.

1. Determining Education Value

In order to determine damages caused by negligent educational recruitment, a value would be assigned to the education that the victim actually received. Courts have been reluctant to engage in this exercise. In dismissing the suit against NYLS, the court stated the following:

> "[P]laintiff's theory of damages, that is, an award of the difference between what they paid for their law degree and an amount representing its ostensibly lesser intrinsic worth . . . is entirely too speculative and remote to be quantified as a remedy under the law."[332]

This reluctance fits the theme of hostility many courts have shown when asked to consider the actual value of education. But the hostility is largely misplaced. The lack of absolute certainty is not an automatic bar to an award of damages. Courts often award damages based on assumptions and valuations that are less than concrete.[333]

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[330] *Id.* at 1070.

[331] Even in incidences where students are induced to enroll based on tortious conduct, the student nonetheless had access to the educational product and has potentially benefited from that exposure. Complete reimbursement would seem appropriate only in instances of complete failure to deliver the educational product.

[332] Gomez-Jimenez v. N.Y. Law Sch., 943 N.Y.S.2d 834, 857 (Sup. Ct. 2012), *aff'd*, 956 N.Y.S.2d 54 (App. Div. 2012).

[333] *See, e.g.*, Patrick G. Dunleavy, *When Are Lost Profits Calculations Considered Speculative? An Expert's Perspective*, FED. BAR ASS'N NEWSLETTER, Spring 2006, at 5, 5–7, *available at* http://www.fbamich.org/LinkClick.aspx?fileticket=mehvhLOA5xE%3D&tabid=739, *archived at* http://perma.cc/X9HX-M6LW (describing how the process of calculating lost profits is based on forecasts and assumptions).

The plaintiffs suing NYLS sought "restitution and disgorgement of all tuition monies remitted to NYLS."[334] But given that the plaintiffs left NYLS with a credential that allowed each of them to qualify for bar admission,[335] such a prayer for relief is excessive. A better theory of damages would have acknowledged that the education the plaintiffs received had some value, even if less than what was promised. In a compensatory system of justice, overcompensation is no better than undercompensation.

So in order to ensure that plaintiffs are compensated for damages arising from negligent educational recruitment, a proxy for educational value needs to be identified. The most useful proxy would be the least expensive tuition rate among a pool of comparable programs. Any tuition (and fees) paid above this baseline would represent the plaintiff's damages.

The tuition charged by schools is the result of a range of strategic considerations. Schools consider their own costs, student demand, as well as tuition charged by competitor schools. Therefore, tuition rates, by their very nature, are measures of market value in much of the same way as automobile sticker prices. Additionally, it is safe to assume that most students seek out educational value—the best education possible for the lowest price possible—when choosing among programs. Therefore, using the lowest price among a pool of comparable programs serves as a useful, though admittedly imperfect, proxy for educational value.

Price differences among comparable programs can be very significant, especially when for-profit schools are compared to public institutions. The Senate investigation found the following examples:

> The Medical Assistant diploma program at Corinthian's Heald College in Fresno, CA, costs $22,275. A comparable program at Fresno City College costs $1,650. An Associate degree in paralegal studies at Corinthian-Owned Everest College in Ontario, CA, costs $41,149, compared to $2,392 for the same degree at Santa Ana College. Everest College charges $82,280 for a Bachelor's Degree in Business. The same degree is available at the University of California – Irvine for $55,880.[336]

Using the above findings, a student who was induced by tortious behavior to enroll in Everest's paralegal associate's degree program could qualify for up to $38,757 in damages—the difference between Everest and the presumably lowest priced Santa Ana College.

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[334] *Gomez-Jimenez*, 943 N.Y.S.2d at 847.

[335] Of the nine named plaintiffs, six were members of the New York bar and two were awaiting membership. *Id.* at 838. The remaining plaintiff was a member of the Louisiana bar and also awaiting membership to the New York bar. *Id.*

[336] HELP REPORT, *supra* note 8, at 385.

2. Determining Pool of Comparable Programs

A critical aspect of this process would be determining the programs that will make up the pool from which the proxy will be determined. The composition of the pool would likely be a topic of contention between the parties, with the trier of fact making the final determination. The approach to determining the pool of programs would be different based on the selectivity of the program that is the focus of the lawsuit. In cases where the plaintiff was place bound and applied to nonselective programs,[337] all comparable nonselective programs within a certain determined radius (e.g., twenty miles) of the plaintiff's home would make up the pool, even if the plaintiff did not apply to all of them. In cases where a plaintiff enrolled in an online program, all comparable online programs offered within the plaintiff's state of residence could make up the pool.

This approach is based on a presumption that place-bound students who attend nonselective programs could have just as easily attended another, comparable program in the area. The defendant could rebut this presumption by showing that a particular program was not a practical option for the plaintiff due to its scheduling format, course delivery method, or some other issue that would have prevented the plaintiff from attending. A plaintiff could also attempt to add programs to the pool by showing that she applied and gained admission. Such efforts could pertain to adding programs outside of the radius or programs with different course delivery methods than the one in which the plaintiff enrolled. The focus of all these efforts would be on the lowest-priced programs. Plaintiffs would seek to lower the proxy tuition rate, while defendants would seek to raise it.

In cases where a plaintiff enrolled in a selective program, the pool would be determined based on where the plaintiff applied and gained admission. The basis for this approach is that a selective program cannot be considered "comparable" if admission was impossible, either because the plaintiff did not apply or because the school denied the plaintiff's admission. For example, for each plaintiff in the NYLS case, the proxy for the value of the NYLS education would have been the lowest priced law school to which the plaintiff gained admission.

Once the pool of comparable programs is determined and the lowest priced proxy is identified, the process of determining damages would entail simply calculating the difference between the tuition paid at the institution attended from the tuition at the lowest priced institutions in the pool. Fee differences would be

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[337] The College Board classifies schools based on four levels of selectivity: very selective, selective, somewhat selective, and nonselective. The classifications apply only to undergraduate academic programs. For some programs, it would be necessary to assess the school's admission rate and the nature of its admission process to determine whether it is selective. MICHAEL HURWITZ ET AL., COLL. BD. ADVOCACY & POLICY CTR., THE ROLE OF HIGH SCHOOLS IN STUDENTS' POSTSECONDARY CHOICES 4 (2012), *available at* http://media.collegeboard.com/digitalServices/pdf/nosca/research-role-high-schools-students-postsecondary-choices.pdf, *archived at* http://perma.cc/S7DH-TCH5 (explaining the classifications).

added to the total, though books and other expenses would not. Scholarships, grants, and other financial aid that does not have to be repaid would be subtracted.

C. Concerns

Creating a tort path to financial recovery could fundamentally change the manner in which many admissions officers approach their work and the manner in which institutions promote themselves. Put simply, this new path to redress could change the business of higher education. Such changes would inevitably come with concerns and potential downsides.

The principal concern relates to the potentially limited extent to which plaintiffs would be able to retain legal representation. Generally, plaintiffs with the strongest cases would have dropped out of their programs relatively soon after being induced to enroll by the tortious conduct. Therefore, the extent of their damages would be limited. As a result, many lawyers would be reluctant to expend time and energy taking on these cases without requiring plaintiffs to pay fees upfront.

In order to remedy this concern, the award of attorney's fees would be very important. This would incentivize lawyers to take cases on behalf of plaintiffs unable to pay legal fees—a population arguably most likely to be victimized. Absent a potential award of attorney's fees, plaintiffs could bring actions in small claims court, though the process of gathering evidence may be formidable for many pro se plaintiffs. Class actions could also make these cases financially worthwhile.

Paradoxically, critics might argue that the proposed tort would prompt disgruntled students to inundate schools with frivolous cases. This criticism would be overblown. These cases would not be easy to prove. Plaintiffs would carry burdens of proving tortious behavior and causation. It stands to reason that given these evidentiary burdens and relatively small damages, few lawyers would agree to bring frivolous cases.

Critics might also assert that the scope of tortious behaviors limits the constitutional rights of schools to promote themselves and their programs. This criticism would be misplaced, as the proposed torts would only restrict false, baseless, and misleading assertions and other unscrupulous behavior.

Finally, critics might argue that schools would be reluctant to enroll marginal or at-risk students out of fear that they would present lawsuit risks. A simple retort would be that there will always be higher education options for students with financial aid eligibility. But if the empowering of victims of recruitment deception prompted schools to consider their programs and services in light of a prospective student's needs and goals, or better yet, if schools were prompted to actually adapt their programs and services to fit those needs and goals, those would be positive outcomes.

VII. CONCLUSION

Admissions officers are counselors, not used car salespeople. Therefore, the use of certain sales and recruitment tactics should be considered tortious in the higher

education context. Providing a path to redress through tort law would disincentivize these unscrupulous tactics and, in the process, help protect students from a higher education sucker sale.