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The drafting and enforcement of faculty disciplinary policies pose numerous challenges. This article discusses the use of discipline in nonacademic organizations, the development of standards for higher education faculty conduct, and litigation by faculty members who have undergone some form of formal discipline (short of dismissal). It suggests a series of considerations for faculty members and administrators, including crafting and implementing disciplinary policies, using informal resolution and alternative dispute resolution mechanisms, and drafting strategies for such policies.

International education program providers are subject to tort liability under a variety of theories, including negligence, misrepresentation, and breach of fiduciary duty. However, the application of American law to such claims may depend upon the validity and scope of contractual choice-of-law, choice-of-arbitration, or choice-of-forum provisions. This article examines those issues, as well as the serious risk that program providers may enlarge their scope of potential liability by inadvertently assuming duties that would not otherwise exist.

Judicial decisions and legislative trends are heightening interest in whether transgendered individuals are protected from discrimination under current law. College and university attorneys should understand the legal status of the issues and trends, to plan appropriately and to provide sound advice

FACULTY DISCIPLINE: LEGAL AND POLICY ISSUES IN DEALING WITH FACULTY MISCONDUCT*

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INTRODUCTION

The vast majority of U.S. college and university faculty are hard-working professionals who take their responsibilities seriously. Occasionally, however, a college or university must deal with a faculty member whose behavior is problematic. Serious misconduct, such as plagiarism, falsification of credentials, or sexual harassment of students or colleagues, may justify dismissal of a tenured faculty member. Misconduct that is less serious, but that falls short of the standards of conduct expected of a faculty member, may require some form of discipline short of dismissal. Although some colleges and universities have explicit policies concerning the discipline of faculty short of termination, many institutional policies are silent on this issue, and address only the termination of a tenured appointment.

This issue is particularly problematic in the case of a tenured faculty member who engages in a pattern of misconduct, or commits one serious transgression, that needs to be addressed by the institution. Whether the faculty member is employed at a public institution, where constitutional due process protections attach,[1] or at a

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1. For a discussion of the due process rights of faculty employed at public institutions, see WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION, 280–96 (3d ed. 1995).

private institution, where policies and procedures may have contractual status,[2] faculty disciplinary procedures must comply with these standards. At most institutions where faculty have a role in governance, faculty expect to participate in the creation or modification of faculty codes of conduct and disciplinary policies and procedures, as well as their implementation.

This article discusses the function of discipline in business and academic organizations and the development of standards of professional conduct for faculty. It reviews litigation challenging various forms of faculty discipline and suggests a set of issues for faculty members and administrators to consider before developing and implementing a policy on faculty discipline. Finally, the article discusses a variety of design issues for faculty disciplinary policies,[3] including the allocation of responsibilities in implementing such policies, the use of informal resolution and alternative dispute resolution (ADR) mechanisms, and drafting strategies for encouraging judicial deference to internal decision-making regarding disciplinary decisions.

I. PROGRESSIVE DISCIPLINE

"Progressive discipline has long been a hallmark of enlightened employee relations."[4] It requires that employers impose "progressively more severe penalties for successive violations" of employment rules and regulations.[5] Dismissal is viewed "as a last resort."[6] Progressive discipline may be embodied in faculty

2. For a discussion of the procedural rights of faculty employed at private institutions, see *id.* at 296–98.

3. A Google search was performed in order to locate faculty discipline policies. Only those policies that specifically addressed faculty discipline short of dismissal were included in the policy review. Twenty-five such policies were identified through this web-based search. It is very likely that additional institutions have adopted the American Association of University Professors (AAUP) policy statements on minor and major sanctions less than dismissal. For a discussion of this issue, see *infra* text accompanying notes 72–78.

4. McClaskey v. U.S. Dep't of Energy, 720 F.2d 583, 592 (9th Cir. 1983) (Reinhardt, J., dissenting). *See generally* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 966 (Alan Miles Ruben ed., 6th ed. 2003) (noting that arbitrators prefer to apply progressive discipline "when there are mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe or that the employer lacks, or has failed to follow, progressive discipline procedures"). *See also* BUREAU OF NAT'L AFFAIRS, PERSONNEL POLICIES FORUM SURVEY NO. 139: EMPLOYEE DISCIPLINE AND DISCHARGE 10–11 (1985) (finding that 94% of unionized and 93% of nonunionized employers require progressive discipline).

5. Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, 671 F.2d 797, 799 (4th Cir. 1982). *See also* NLRB v. Gen. Warehouse Corp., 643 F.2d 965, 970 n.18 (3d Cir. 1981) (noting that the purpose of progressive discipline is to make "employees more secure in their jobs"); Capital Airlines, Inc. v. International Association of Machinists, Airline Division, 25 Lab. Arb. Rep. (BNA) 13, 16 (1955) (Stowe, Arb.) (observing in the labor arbitration context that it is "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense").

6. Am. Thread Co. v. NLRB, 631 F.2d 316, 319 n.3 (4th Cir. 1983). *See generally* Sanford M. Jacoby, *Progressive Discipline in American Industry: Its Origins, Development, and Consequences*, *in* 3 ADVANCES IN INDUSTRIAL & LABOR RELATIONS 213, 224 (D. Lipsky & D. Lewin eds., 1986).

personnel policies, whether or not the faculty is unionized.[7]

According to one scholar, "'discipline' is what an employer does to an employee to force a change in, or to control, behavior or performance."[8] Traditionally, employee discipline has had several purposes: 1) to punish the employee for violating an employer's rule or for other forms of misconduct; 2) to educate the employee as to the proper standards of conduct to avoid future transgressions; and 3) to demonstrate to co-workers the consequences of misconduct.[9] A "common law of discipline" has developed in the non-academic workplace, particularly in businesses where employees are represented by unions.[10] This common law of discipline typically involves "progressive discipline," in which a relatively minor form of discipline (such as a formal warning) is imposed for a first offense, and the discipline becomes progressively more severe for subsequent offenses.[11]

This industrial model of progressive discipline may not transfer directly to the discipline of faculty; in fact, progressive discipline of faculty is unusual.[12] Many of the transgressions for which employees in business organizations are disciplined, such as tardiness, insubordination, or excessive absences, may not translate to the academic workplace or may be tolerated, at least for a period of time. Nevertheless, a disciplinary system of progressively more serious sanctions for repeated instances of misconduct appears helpful to faculty and administration: it provides important protections for faculty in both public and private institutions by building in additional safeguards of academic due process and an opportunity to deal with inappropriate conduct before it escalates.

Systems of progressive discipline in business organizations typically begin with an oral warning to the employee after the first violation, a written warning after the second violation, a suspension without pay for the third violation, and termination

7. For an example in a collective bargaining agreement, see SAN FRANCISCO STATE UNIV., PROGRESSIVE DISCIPLINE GUIDELINES, *available at* http://www.sfsu.edu/~hrwww/directives/p206.htm (last visited Jan. 23, 2006), which states that "[p]rogressive discipline establishes a process of clear, timely, consistent, and documented communications with an employee designed to ensure an understanding of job expectations, provide an opportunity to correct behavior, improve performance, and assure 'due process.'" For an example in a faculty handbook for nonunionized faculty, see VANDERBILT UNIV., FACULTY MANUAL, DISCIPLINARY ACTIONS, *available at* http://www.vanderbilt.edu/facman/actions.htm (last visited Jan. 23, 2006). *See also* MASS. INST. OF TECH., FACULTY APPOINTMENT, PROMOTION, AND TENURE GUIDELINES, *available at* http://web.mit.edu/policies/3.3.html (last visited Jan. 23, 2006).

8. JAMES R. REDEKER, EMPLOYEE DISCIPLINE: POLICIES AND PRACTICES 4 (1989) (paraphrasing LAWRENCE STESSIN, EMPLOYEE DISCIPLNE viii (1960)).

9. *Id.*

10. *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594 (1985).

11. REDEKER, *supra* note 8, at 51.

12. Ann H. Franke, *Faculty Misconduct, Discipline, and Dismissal* at 5 (presented at the CLE Conference of the National Association of College and University Attorneys, Mar. 22, 2002), *available at* www.nacua.org.

for the fourth violation.[13] If the violation is particularly serious, the employee may be suspended or terminated without the institution following the progressive discipline process.[14] Under the industrial model of progressive discipline, the decision-maker, often an arbitrator interpreting a collective bargaining agreement, will review the employee's history of discipline and will take that into consideration in determining whether the discipline at issue is appropriate.[15] The employer's failure to follow progressive discipline standards, or failure to warn an employee about performance or behavior problems before imposing discipline, may persuade an arbitrator to reduce or reject the proposed discipline.[16]

Progressive discipline also provides due process protections to employees in that they receive notice of the problematic behavior and have an opportunity to correct that behavior before severe sanctions are applied. Using progressive discipline also establishes a "paper trail" of the employer's attempts to resolve the problem without dismissing the employee. Given the appropriately extensive processes required to terminate the appointment of a tenured faculty member, institutions—administration and faculty—may wish to consider sanctions short of dismissal when they are faced with a faculty member who engages in misconduct. Furthermore, having sanctions available that are less severe than dismissal may enable faculty members and administrators to respond early to problematic faculty behavior, whereas they are hesitant, and rightfully so, to impose the ultimate sanction of dismissal for anything but the most serious misconduct.

The institution may also consider using discipline short of dismissal when dealing with a faculty member with a history of neglect of teaching, research, or service obligations, or mild but repeated inappropriate behavior with staff or students, as a way of establishing a record of the individual's misconduct and the institution's response in the event that a later decision is made to dismiss a tenured faculty member if the problematic behavior persists. Although each faculty dismissal case is *sui generic*, and though faculty use a variety of legal theories to challenge discipline, it is difficult for an institution to defend against a claim of lack of notice to a faculty member regarding the infraction. Institutions that have tolerated the misconduct of a faculty member for years may find it difficult to persuade a court that the individual's due process rights were protected if misconduct that they had long tolerated suddenly becomes grounds for dismissal.[17] The institutional shift often occurs with the arrival of new administrators. Prompt attention to misconduct that interferes with the institution's ability to carry out its mission, followed by progressive discipline, may have the happy outcome of "rehabilitating" a problematic faculty member, or it may lay the groundwork for eventual dismissal. In either case, intervention before the misconduct escalates

13. *Id.* at 53. *See also* ROBERT COULSON, THE TERMINATION HANDBOOK 122 (1981).

14. ELKOURI & ELKOURI, *supra* note 4, at 965–66.

15. *Id.* at 945.

16. *Id.* at 966.

17. *See, e.g.*, Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996) (ruling that the college's sexual harassment policy was too vague to put the faculty member on notice that his classroom conduct in which he had engaged for many years violated that policy).

into a serious problem for the faculty member and the institution is a wise course of action.

While written progressive discipline policies are not commonplace in academe, examples exist. In *Trimble v. West Virginia Board of Directors*,[18] the Supreme Court of Appeals of West Virginia ruled that the administration "should not have fired [a tenured professor for insubordination] before resorting to other progressive disciplinary measures" under West Virginia's constitution because the tenured professor had a constitutionally protected property interest in his position.[19] George Trimble, a professor of English who was a leader in the teachers' labor union, was in conflict with the college president, who wanted to implement a computer-based program to write course syllabi.[20] The administration established mandatory meetings to discuss implementation of the new computer program which the professor refused to attend.[21] Trimble, who had consistently received "favorable evaluations," was ultimately dismissed because the college president considered the unexcused absences to be insubordination.[22] The board of directors upheld the dismissal and Trimble appealed to a state appellate court, which upheld the board's decision.[23] The Supreme Court of Appeals of West Virginia reversed, ruling that the West Virginia Constitution guarantees procedural safeguards against state action that affects a property interest.[24] The court found that Trimble had a protected property interest in his tenured faculty position.[25] While the court found Trimble to have been insubordinate on some occasions, the court reasoned that the gravity of the harm caused by the insubordination failed to justify the dismissal of a professor who had an "unblemished record."[26] Under these circumstances, the court found that due process requires "the educational institution to impose progressive disciplinary sanctions in an attempt to correct the teacher's insubordinate conduct before it may resort to termination."[27]

In an older case, *Garrett v. Mathews*,[28] Bert D. Garrett, a tenured professor of mathematics at the University of Alabama, challenged the ability of a faculty

18. 549 S.E.2d 294 (W. Va. 2001).
19. *Id.* at 301.
20. *Id.* at 297.
21. *Id.*
22. *Id.* at 297–98.
23. *Id.* at 298.
24. *Id.* at 302.
25. *Id.*
26. *Id.* at 304.
27. *Id.* In a sharply worded dissent, Justice Maynard opined that the majority was acting like a "super board of directors" and was "micro-manag[ing] higher education employment and disciplinary decisions." *Id.* at 305. The dissent opined:

> [T]he majority sends an unmistakable message to State college and university administrations that even the most recalcitrant, inflexible, and uncooperative tenured teachers cannot be fired absent a protracted, and most likely futile, effort to bring them into line. . . . It thus robs administrators of the ability to take quick and decisive action.

Id.
28. 474 F. Supp. 594 (N.D. Ala. 1979), *aff'd*, 625 F.2d 658 (5th Cir. 1980).

committee to impose a lesser sanction than dismissal when the faculty handbook provided for dismissal only.[29] The administration had accused Garrett of insubordination for eight infractions, which included his refusal to assign proper grades and his failure to cover required course material.[30] The administration sought the professor's dismissal, but a faculty hearing committee found sufficient evidence to support only three of the eight charges: Garrett's failure to comply with an administrative request to provide a list of publications, his failure to open mail from the department chair, and his failure to post and keep office hours.[31] Accordingly, the faculty committee recommended that Garrett not be dismissed, but that his tenure be revoked and that his status be reconsidered at the end of one year.[32] Eventually, the administration chose to dismiss Garrett because it viewed the lesser sanctions as outside the authority of the faculty committee.[33] Ironically *both* parties argued to the district court that the faculty committee did not have the power to revoke Garrett's tenure because the faculty handbook provided for dismissal only, not lesser sanctions.[34] The district court disagreed, reasoning: "The only discipline dealt with by the Faculty Handbook is termination. That document neither permits nor prohibits tenure revocation. The handbook is not on its face so complete in other respects as to create the presumption that the omission of tenure revocation was intentional."[35] The court observed that the power to revoke tenure need not be delineated in the faculty handbook, just like "not showing up for class naked is not a written job requirement . . . . Some things go without saying."[36]

On appeal to the Fifth Circuit, the professor challenged "the university's power to impose any sanction other than dismissal."[37] The University of Alabama changed its argument on appeal, contending "that lesser sanctions such as loss of tenure, demotion, suspension, probation, or reprimand are necessarily included in the sanction of dismissal."[38] The appellate court ruled that not every departure from the university's rules rose to the level of a constitutional violation.[39] While the court did not hold that "failure to inform an individual of the sanctions he faces is never a violation of due process," in this case, the imposition of a sanction less severe than those listed in the handbook was not constitutionally impermissible.[40]

29. *Id.* at 600.
30. *Id.* at 597.
31. *Id.*
32. *Id.*
33. *Id.* at 598.
34. *Id.* at 600.
35. *Id*.
36. *Id*. at 599.
37. Garrett v. Mathews, 625 F.2d 658, 660 (5th Cir. 1980).
38. *Id*.
39. *Id.*
40. *Id*.

II. STANDARDS FOR FACULTY CONDUCT

Under what circumstances might an institution choose to impose a lesser discipline than dismissal upon a faculty member? Although each case would be fact-specific and would thus afford no basis for generalizing, situations may exist where the institutional response should be a sanction short of dismissal. On the one hand, certain forms of academic misconduct may not be serious enough to warrant dismissal, or the facts may suggest that a sanction short of dismissal, such as suspension or a prohibition against working with student research assistants for a period of time, is more appropriate. On the other hand, sexual or racial harassment of students, faculty, or staff, or criminal misconduct, such as embezzlement or physical violence, might lead the institution to commence dismissal proceedings.

Although an institution cannot anticipate every form of faculty misconduct that may occur, developing a policy to deal with such issues before they arise will help to remind faculty of the general standards of professional behavior, allow the institution to respond promptly, provide guidelines for appropriate investigation and determination of whether misconduct occurred, and facilitate decisions as to what sanction, if any, is appropriate. The faculty should play a primary role in the development of policy, as well as in its implementation in particular cases.[41]

The American Association of University Professors' (AAUP) *Statement on Professional Ethics* provides a helpful starting place for a discussion of the grounds for disciplining a faculty member for misconduct.[42] The statement says:

> 1. Professors, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and to state the truth as they see it. To this end professors devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty. Although professors may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.

41. *See* AAUP, *Statement on Government of Colleges and Universities*, *in* POLICY DOCUMENTS & REPORTS 217, 221 (9th ed. 2001), *available at* http://www.aaup.org/statements/Redbook/Govern.htm [hereinafter *Statement on Colleges and Universities*] ("Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. . . . Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in the other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.").

42. AAUP, *Statement on Professional Ethics*, *in* POLICY DOCUMENTS & REPORTS 133, 133–34 (9th ed. 2001) [hereinafter *Statement on Professional Ethics*].

2. As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students. They acknowledge significant academic or scholarly assistance from them. They protect their academic freedom.
3. As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.
4. As members of an academic institution, professors seek above all to be effective teachers and scholars. Although professors observe the stated regulations of the institution, provided the regulations do not contravene academic freedom, they maintain their right to criticize and seek revision. Professors give due regard to their paramount responsibilities within their institution in determining the amount and character of work done outside it. When considering the interruption or termination of their service, professors recognize the effect of their decision upon the program of the institution and give due notice of their intentions.
5. As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Hundreds of colleges and universities have incorporated the *Statement on*

Professional Ethics in their faculty handbooks and collective bargaining agreements.[43] Courts have upheld sanctions imposed upon tenured faculty members, up to and including dismissal, based upon the statement.[44]

In recent years, scholars have attempted to elaborate more fully articulated set of behavioral norms for college and university faculty. In some cases, these authors have relied on their own experience and their sense of what the academic community expects of learned professionals.[45] In others, scholars have surveyed their peers to develop a set of widely-recognized norms. For example, Braxton and Bayer surveyed faculty in four academic disciplines (biology, mathematics, psychology, and history) at research universities, liberal arts colleges, and community colleges throughout the United States.[46] The respondents identified what the authors call "inviolable norms" that required "strong sanctions" for faculty who ignore them.[47] The seven "inviolable norms" identified are: "condescending negativism, inattentive planning, moral turpitude, particularistic

43. *See, e.g.*, Barham v. Univ. of N. Colo., 964 P.2d 545, 549 (Colo. Ct. App. 1997); AAUP, *Academic Freedom and Tenure: The University of California at Los Angeles*, 57 AAUP BULL. 382, 388, 391 (Autumn 1971) (noting the university's incorporation of the AAUP's *Statement on Professional Ethics* into the university's code); AAUP, *Academic Freedom and Tenure: Camden County College*, 59 AAUP BULL. 356, 357 (Autumn 1973) (noting that collective-bargaining agreement incorporated the AAUP's *Statement on Professional Ethics*).

44. *See, e.g.*, San Filippo v. Bongiovani, 961 F.2d 1125, 1128–32 (3d Cir. 1992) (upholding dismissal by Rutgers University of a tenured chemistry professor, relying in part on the university's adoption of the AAUP's *Statement on Professional Ethics* to find the professor had "exploited, threatened and been abusive" to "visiting Chinese scholars brought to the University to work with him on research projects"); Keen v. Penson, 970 F.2d 252, 256 (7th Cir. 1992) (stating that the faculty hearing committee found that tenured professor violated standards for treatment of students established by the *Statement on Professional Ethics*, which was incorporated into the faculty handbook, when professor gave student an unjustified failing grade, demanded that she write letter of apology to him, and failed to treat her with respect); Korf v. Ball State Univ., 726 F.2d 1222, 1227 (7th Cir. 1984) (endorsing the governing board's interpretation of *Statement on Professional Ethics*—which was incorporated into Ball State University's handbook and prohibits sexual exploitation—and which led to dismissal of a tenured faculty member who engaged in sexual relations with numerous students); Earnhardt v. Univ. of New England, No. 95-229-P-H, 1996 WL 400455, at *2 (D. Me. July 3, 1996) (ruling that tenured professor's conduct violated University of New England's sexual harassment policy as well the AAUP's *Statement on Professional Ethics*); Starsky v. Williams, 353 F. Supp. 900, 912 (D. Ariz. 1972) (finding that tenured Arizona State University professor's actions in supporting student take-over of administration building did not violate the AAUP's *Statement on Professional Ethics*); *see also* AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 64 (Spring 1976) (finding that tenured professor did not do anything "contrary" to the professional ethics statement); AAUP, *Academic Freedom and Tenure: University of Judaism (California)*, 74 ACADEME 34, 39 (May–June 1988) (concluding that anonymous evaluating committee, "by its misleading treatment of presumably anonymous outside references" in its report on tenure-and-promotion candidate, "acted questionably" under the AAUP's *Statement on Professional Ethics*).

45. *See, e.g.*, STEVEN M. CAHN, SAINTS AND SCAMPS: ETHICS IN ACADEMIA (1986).

46. JOHN M. BRAXTON & ALAN E. BAYER, FACULTY MISCONDUCT IN COLLEGIATE TEACHING 7–20 (1999).

47. *Id.* at 21.

grading, personal disregard, uncommunicated course details, and uncooperative cynicism."[48] Although the research focused primarily on standards of conduct in teaching rather than in research,[49] many of the standards include conduct toward a faculty member's peers and administrators. The authors also identified nine additional "admonitory norms," which they defined as norms that "evoke less indignation [among the survey respondents] when violated," but which garnered sufficient support to justify their inclusion: "advisement negligence, authoritarian classroom, inadequate communication, inadequate course design, inconvenience avoidance, instructional narrowness, insufficient syllabus, teaching secrecy, and undermining colleagues."[50]

Scholarly organizations also have developed codes of conduct for their members, many of which embody the principles of the AAUP's *Statement on Professional Ethics*. For example, *The Chemist's Code of Conduct* from the American Chemical Society states, among other requirements, that chemists "should remain current with developments in their field" and "should regard the tutelage of students as a trust conferred by society for the promotion of the student's learning and professional development. Each student should be treated respectfully and without exploitation."[51] The code of conduct for the American Psychological Association states that psychologists who teach must ensure that course syllabi are accurate, present psychological information accurately, and refrain from engaging in sexual relationships with students whom they supervise in class or at internships.[52] The *Code of Ethics* for the National Association of Social Workers instructs social workers to "treat colleagues with respect and [] represent accurately and fairly the qualifications, views, and obligations of colleagues."[53] Some colleges and universities have incorporated into their faculty codes of conduct explicit statements faculty are expected to comply with the standards of practice of their professional organization as well as with the institution's own code of conduct and that failure to remain in good standing with one's profession may be grounds for discipline by the institution.[54]

Institutional practice varies with respect to codes of conduct for faculty, although codes of conduct for students appear to be ubiquitous.[55] Some

48. *Id.*

49. For a discussion of standards of conduct in research, see PERSPECTIVES ON SCHOLARLY MISCONDUCT IN THE SCIENCES (John M. Braxton ed., 1999).

50. BRAXTON & BAYER, *supra* note 48, at 42. The authors also provide examples of conduct that violates each norm.

51. THE CHEMIST'S CODE OF CONDUCT, *available at* http://www.chemistry.org/portal/a/c/s/1/acsdisplay.html?DOC=membership%5Cconduct.html (last visited Jan. 23, 2006).

52. AM. PSYCHOL. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, *available at* http://www.apa.org/ethics/code2002.html (last visited Jan. 23, 2006).

53. NAT'L ASS'N OF SOCIAL WORKERS, CODE OF ETHICS, *available at* http://www.socialworkers.org/pubs/code/code.asp (last visited Jan. 23, 2006).

54. *See, e.g.*, IOWA STATE UNIV., FACULTY CONDUCT POLICY, FACULTY HANDBOOK § 7.2.2.5.6, *available at* http://www.provost.iastate.edu/faculty/handbook/section7.html (last visited Jan. 23, 2006).

55. *See, e.g.*, STUDENT DISCIPLINARY ISSUES (Janet Faulkner & Nancy Tribbensee eds., 3d

institutions do not attempt to define the types of misconduct for which sanctions may apply, choosing instead to rely on a more general statement that faculty are expected to behave in a professional manner; for example, Vanderbilt University's *Standards of Conduct* states:

> Standards for faculty conduct are derived from tradition and evolve with contemporary practice. Accordingly, grounds for discipline for members of the faculty of a University are usually not made the subject of precise statement; when commonly held standards of conduct are broken, however, disciplinary action must be taken if the community is to be sustained.[56]

Other institutions, such as Smith College and Middlebury College, have general codes of conduct for all employees, including faculty, that provide general guidance on conflicts of interest, the use of the institution's property and financial resources, and compliance with legal requirements.[57] Still other institutions, as noted earlier, have adopted the AAUP's *Statement on Professional Ethics*, in whole or in part, but do not elaborate on the kind of misconduct that will result in discipline.[58]

The University of California system's *Faculty Code of Conduct* was first promulgated in 1971 and it has since been amended by the Assembly of the Academic Senate and the Regents several times.[59] The code first recognizes the university's commitment to academic freedom and the faculty's right to participate in university governance.[60] It also sets forth "ethical principles" drawn from the AAUP's *Statement on Professional Ethics*, and then lists types of unacceptable faculty conduct in the areas of teaching, scholarship, membership in the university community, and relationships with colleagues.[61] The code also states that faculty may be disciplined for conduct that is not specifically mentioned in the document if such conduct contravenes the standards of unacceptable faculty behavior.[62] Iowa State University's *Faculty Conduct Policy* also incorporates the AAUP's *Statement on Professional Ethics* and then specifies several types of misconduct that will be considered violations of the policy, such as conflicts of interest, harassment,

ed. 2005); *see also* THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT, ORGANIZATION, AND COMMUNITY ISSUES (Brent G. Paterson & William L. Kibler eds., 1998).

56. VANDERBILT UNIV., STANDARDS OF CONDUCT, *available at* http://www.vanderbilt.edu/facman/actions.htm (last visited Jan. 23, 2006).

57. MIDDLEBURY COLL., CODE OF CONDUCT FOR EMPLOYEES, *available at* http://www.middlebury.edu/about/handbook/general/misc/Code+of+Conduct+for+Employees.hm (last visited Jan. 23, 2006); SMITH COLL., CODE OF CONDUCT, *available at* http://www.smith.edu/codeofconduct/ (last visited Jan. 23, 2006).

58. *See, e.g.*, S. ILL. UNIV. AT EDWARDSVILLE, FACULTY CODE OF ETHICS AND CONDUCT, *available at* http://www.siue.edu/POLICIES/1q1.html (last visited Jan. 23, 2006).

59. UNIV. OF CAL., GENERAL UNIVERSITY POLICY REGARDING ACADEMIC APPOINTEES: THE FACULTY CODE OF CONDUCT (APM-015), *available at* http://www.ucop.edu/acadadv/acadpers/apm/apm-015.pdf (last visited Jan. 23, 2006).

60. *Id.*

61. *Id.*

62. *Id.*

abandonment of the faculty member's position, and breaches of professional ethics.[63]

Some institutions may include personal as well as professional misconduct as potential grounds for discipline. For example, Calvin College, a private, religiously-affiliated college in Michigan, lists spousal or alcohol abuse, "immoderate anger," and "persistently profane or obscene language" as possible grounds for discipline of faculty.[64] Other institutions, however, state that a faculty member may be charged with misconduct "only for actions taken in association with the faculty member's academic duties and responsibilities."[65] Another institution's policy states, "A faculty member's activities that fall outside the scope of employment shall constitute misconduct only if such activities adversely affect the legitimate interests of the University."[66]

Drafters of faculty codes of conduct often walk a fine line between providing too little detail concerning the behavior expected of a faculty member (resulting in potential claims of lack of notice, a due process violation) and too much detail (potentially omitting serious forms of misconduct for which discipline should be meted out, but about which the code of conduct may be silent). The AAUP's *Statement on Professional Ethics*, having been vetted by federal courts as providing sufficient detail to establish a basis for providing notice of the type of conduct expected of a professor, appears to be a sound basis for a faculty code of conduct.[67] The statement may be incorporated into institutional policy as written, or modified to suit the institution's culture and mission.[68]

III. SANCTIONS LESS THAN DISMISSAL IN THE ACADEMY

As noted, sanctions less severe than dismissal may be appropriate in dealing with particular faculty matters that do not rise to just cause. The Commission on Academic Tenure observed in 1973 that it was

63. IOWA STATE UNIV., *supra* note 54. For other institutional policies that specifically set out types of misconduct that will violate the institution's code of conduct, see ARIZ. STATE UNIV., FACULTY CODE OF ETHICS, *available at* http://www.asu.edu/aad/manuals/acd/acd204-01.html (last visited Jan. 23, 2006); STEPHEN F. AUSTIN STATE UNIV., FACULTY CODE OF CONDUCT, *available at* http://www.sfasu.edu/upp/pap/personnel_services/faculty_code_of_conduct.html (last visited Jan. 23, 2006); and UNIV. OF NEW ORLEANS, UNIV. POLICY ON FACULTY CONDUCT, *available at* http://www.uno.edu/~acaf/forms/Policy%20on%20Faculty%20Conduct.pdf (last visited July 22, 2005).

64. CALVIN COLL., HANDBOOK FOR TEACHING FACULTY, PROCEDURES FOR ADDRESSING ALLEGATIONS OF MISCONDUCT, *available at* http://www.calvin.edu/admin/provost/fac_hb/ chap_6/6_1.htm (last visited Jan. 23, 2006).

65. *See, e.g.*, STANFORD UNIV., FACULTY HANDBOOK, *available at* http://facultyhandbook.stanford.edu/ch4.html (last visited Jan. 23, 2006).

66. UNIV. OF N. TEX., UNIT FACULTY DISCIPLINE POLICY, UNIVERSITY OF NORTH TEXAS POLICY MANUAL, *available at* http://www.unt.edu/policy/UNT_Policy/volume3/15_1_33.html (last visited Jan. 23, 2006).

67. *See* San Filippo v. Bongiovanni, 961 F.2d 1125 (3d Cir. 1992).

68. Statements that the code of conduct is illustrative but not comprehensive may provide notice to faculty that not all transgressions may be listed.

> manifestly insufficient to have a disciplinary system which assumes that only those offenses which warrant dismissal should be considered seriously. Faculty members are from time to time guilty of offenses of lesser gravity. There should be a way of recognizing these and imposing appropriate sanctions. And it is equally insufficient to make do only with disciplinary procedures designed for capital offenses. Simpler procedures—though assuring due process in the particular context—are obviously required for offenses for which sanctions short of dismissal are contemplated.[69]

Accordingly, the Commission recommended

> that each institution develop and adopt an enumeration of sanctions short of dismissal that may be applied in cases of demonstrated irresponsibility or professional misconduct for which some penalty short of dismissal should be imposed. These sanctions and the due-process procedures for complaint, hearing, judgment, and appeal should be developed initially by joint faculty-administrative action.[70]

In 1971, a special joint subcommittee of the AAUP considered the question of sanctions short of dismissal, and enumerated the following lesser sanctions:

> (1) oral reprimand, (2) written reprimand, (3) a recorded reprimand, (4) restitution (for instance, payment for damage done to individuals or to the institution), (5) loss of prospective benefits for a stated period (for instance, suspension of "regular" or "merit" increase in salary or suspension of promotion eligibility), (6) a fine, (7) reduction in salary for a stated period, (8) suspension from service for a stated period, without other prejudice.[71]

Regulation 7 of the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* (RIR), distinguishes between "major" and "minor"

69. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 75–76 (William R. Keast ed., 1973).

70. *Id.* at 76–77.

71. *Id.* at 76. This list is not exhaustive. For example, some administrations have sought to impose the "discipline" of tenure revocation. In one case, Herbert Benjamin, a tenured faculty member, was notified of the termination of his appointment after a complaint of sexual harassment had been filed against him by a female student. AAUP, *Academic Freedom and Tenure: Philander Smith College (Arkansas*), 90 ACADEME 57, 64 (Jan.–Feb. 2004). According to the AAUP investigating committee, he was offered a number of "disciplinary choices" by the college president, "all but one of which, 'tenure removal with mandatory counseling and two years of probation,' would have resulted in his separation from the college." *Id.* Benjamin accepted the tenure removal option. *Id.* The AAUP explained that the tenure revocation disciplinary option was inappropriate because "[t]enure, once bestowed, continues as long as the professor continues as a full-time member of the faculty. The only exception would be a demonstrated flaw in the initial granting of tenure." *Id.* Other administrations have imposed as discipline the requirement of an apology. *See, e.g.*, Silva v. Univ. of N.H., 888 F. Supp. 293 (D.N.H. 1994) (stating that faculty hearing panel recommended that professor apologize in writing to female students who accused him of sexual harassment, but internal appeals committee declined to endorse this discipline).

sanctions, categorizing suspension as major and reprimand as minor.[72] Regulations 5 and 7 provide that major sanctions should not be imposed until after a hearing in which the same procedures apply as in a dismissal case.[73] These procedures include written notice of the charges, a hearing before a faculty committee in which the administration bears the burden of proof, right to counsel, cross-examination of adverse witnesses, a record of the hearing, and a written decision.[74] Immediate suspension with pay, pending a hearing, is appropriate under AAUP policy if an individual poses a threat of immediate harm to himself or herself or others.[75] Moreover, regulation 5(c)(1) provides that the administration,

72. AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure* (1999), *in* POLICY DOCUMENTS & REPORTS 23, 27–28 (9th ed. 2001), *available at* http://www.aaup.org/statements/Redbook/Rbrir.htm (last visited Jan. 23, 2006) [hereinafter *Regulations on Academic Freedom and Tenure*]. Regulation 7 provides:

> (a) If the administration believes that the conduct of a faculty member, although not constituting adequate cause for dismissal, is sufficiently grave to justify imposition of a severe sanction, such as suspension from service for a stated period, the administration may institute a proceeding to impose such a severe sanction; the procedures outlined in regulation 5 will govern such a proceeding.
>
> (b) If the administration believes that the conduct of a faculty member justifies imposition of a minor sanction, such as a reprimand, it will notify the faculty member of the basis of the proposed sanction and provide the faculty member with an opportunity to persuade the administration that the proposed sanction should not be imposed. A faculty member who believes that a major sanction has been incorrectly imposed under this paragraph, or that a minor sanction has been unjustly imposed, may, pursuant to Regulation 15, petition the faculty grievance committee for such action as may be appropriate.

Id. See, e.g., AAUP, *Academic Freedom and Tenure: The College of Osteopathic Medicine and Surgery (Iowa)*, 63 AAUP BULL. 82, 86 (Spring 1977) (finding that suspension and salary reduction of tenured faculty member were "severe sanctions" requiring due process similar to that called for by dismissal); AAUP, *Academic Freedom and Tenure: Macomb County Community College (Michigan): A Report on Disciplinary Suspension*, 62 AAUP BULL. 369, 374–75 (Winter 1976) (concluding that while professor exercised "poor judgment in canceling his classes without the permission of his supervisor," "some sanctions less severe than a long-term [unpaid] suspension might have been properly imposed" and that "the penalty assessed . . . [was] harsh even by industrial standards," which in "monetary terms . . . cost [the professor] over $10,000"); AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 65 (Spring 1976) (discussing discipline of antiwar professor who was active in Socialist Workers' Party who canceled class to speak at rally and "the proposed letters of censure . . . as minor sanctions that are not altogether unjustified").

73. *Regulations of Academic Freedom and Tenure*, *supra* note 72, at 27.

74. *Id.*

75. AAUP, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, *in* POLICY DOCUMENTS & REPORTS 1, 11–12 (9th ed. 2001), *available at* http://www.aaup.org/statements/Redbook/Rbfacdis.htm [hereinafter *Statement on Procedural Standards in Faculty Dismissal Proceedings*]. The 1958 statement provides:

> Pending a final decision by the hearing committee, the faculty member will be suspended, or assigned to other duties in lieu of suspension, only if immediate harm to the faculty member or others is threatened by continuance. Before suspending a faculty member, pending an ultimate determination of the faculty member's status through the institution's hearing procedures, the administration will consult with the Faculty Committee on

before suspending a faculty member, will consult with an appropriate faculty committee concerning the "propriety, the length, and other conditions of the suspension."[76]

The AAUP regulations further provide that an institution may impose a minor sanction after providing the individual notice, and that the individual professor has the right to seek review by a faculty committee if he or she believes that a sanction was unjustly imposed.[77] In the end, however, the governing board will make a final decision about the appropriateness of more serious sanctions.[78]

IV. FACULTY LITIGATION CHALLENGING DISCIPLINE

Sanctions short of dismissal exist and should be considered for less significant transgressions with the potential for escalation as required. At most institutions, "there will be many checkpoints along the path of graduated employee discipline."[79] That does not mean that such progressive discipline will escape faculty challenge. Litigation arising from the imposition of sanctions flows from a number of legal sources, including constitutional law for public institutions, contractual obligations at private and public institutions (faculty handbooks, letters

> Academic Freedom and Tenure [or whatever other title it may have] concerning the propriety, the length, and the other conditions of the suspension. A suspension which is intended to be final is a dismissal, and will be treated as such. Salary will continue during the period of the suspension.

Id. at 11. The statement continues that "[u]nless legal considerations forbid, any such suspension should be with pay." *Id.* at 12.

76. *Regulations on Academic Freedom and Tenure*, *supra* note 72, at 26.

77. *Id.* at 28.

78. Regulation 6 provides that the governing board will sustain or return a case to the appropriate faculty committee "with specific objections. The committee will then reconsider, taking into account the stated objections and reviewing new evidence if necessary. The governing board will make a final decision only after study of the committee's reconsideration." *Id.* at 27. Often internal review bodies disagree about the appropriateness of a disciplinary sanction. *See, e.g.*, Yu v. Peterson, 13 F.3d 1413 (10th Cir. 1993) (noting that the faculty committee recommended a one-year suspension for a professor accused of plagiarism and the council, to whom the professor appealed, remanded the matter to the faculty committee with the outcome being the more severe sanction of dismissal); Samaan v. Trs. of the Cal. State Univ. & Colls., 197 Cal. Rptr. 856, 859 (Ct. App. 1983) (discussing a scenario where faculty committee recommended the imposition of a written reprimand for "casual bookkeeping" of tenured psychology professor who pled guilty to criminal charges for having submitted false bills to state insurance program and the president disagreed with that faculty committee's recommendation).

79. STEVEN G. POSKANZER, HIGHER EDUCATION LAW: THE FACULTY 201 (2002) (noting that "faculty conduct that warrants institutional discipline may take an infinite variety of forms"). Poskanzer describes the "[t]ypical steps" with "increasing severity" in the academic workplace as follows:

> (1) an informal conversation between faculty member and the chair or dean; (2) a lower-than-normal (or even zero) salary increase; (3) loss of perquisites or privileges (i.e., premium office space, discretionary funds, research assistantships); (4) a formal warning or reprimand, which might be placed in the faculty member's personnel file; (5) being put on probation; and (6) being put on involuntary leave.

Id. at 201–02.

of appointment, collective bargaining agreements), and regulations and statutes (internal and external).

A. Warning or Reprimand

Warnings or reprimands tend to be the most minor sanction imposed upon faculty.[80] Often such warnings or reprimands—sometimes oral, sometimes written—are issued in response to first time offenses that are not so serious as to trigger major sanctions.[81] Generally courts uphold the imposition of warnings and reprimands as appropriate discipline so long as such minor sanctions are not imposed for discriminatory or unconstitutional reasons.

Courts generally rule that letters of reprimand do not constitute adverse employment actions under federal discrimination laws.[82] In *Nelson v. University*

80. *See, e.g.*, UNIV. OF GA., COOPERATIVE EXTENSION PROGRAM, *available at* http://www.extension.caes.uga.edu/cec/forms/progdisc.pdf (last visited Jan. 23, 2006) ("Oral reprimands and written warnings are warning procedures and are the least harsh of the several types of disciplinary actions. They are usually the first two steps in the progressive discipline sequence.").

81. *See* AAUP, *Academic Freedom and Tenure: Tulane University*, 56 AAUP BULL. 424, 430 (Winter 1970) (acknowledging as proper faculty committee's recommendation for reprimand as opposed to dismissal for professor's interference with on-campus ROTC drill); AAUP, *Academic Freedom and Tenure: The University of Illinois*, 49 AAUP BULL. 25, 41 (Spring 1963) (reviewing faculty senate's reprimand of professor who wrote controversial letter-to-the-editor to campus newspaper that identified his faculty title, but deciding that the "crucial" issue was that unanimous agreement existed among internal review bodies that the professor should not have been discharged). *But see* AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 65 (Spring 1976) (discussing, in a case involving an antiwar professor who was active in the Socialist Workers' Party and canceled class to speak at a rally, how two letters of reprimand "insofar as they referred or might have referred to the class dismissal, were out of line with a previous response to a similar class dismissal").

82. Federal antidiscrimination statutes, such as Title VII of the Civil Rights Act, offer some protection to victims of "adverse employment actions." *See generally* 42 U.S.C. § 1983 (2000). The Seventh Circuit described the term "adverse employment action" as "judicial shorthand . . . for the fact that these statutes require the plaintiff to prove that the employer's action of which he is complaining altered the terms or conditions of his employment." Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000). *See, e.g.*, Welsh v. Derwinski, No. 90-10950-Z, 1993 WL 90168, at *4 (D. Mass. Mar. 12, 1993) (holding reprimand of employee not adverse employment action under the Age Discrimination in Employment Act); Coney v. Dept. of Human Res. of State of Ga., 787 F. Supp. 1434, 1442 (M.D. Ga. 1992) (holding "that a nonthreatening written reprimand, which is later removed from an employee's personnel file, is not an adverse employment action" under Title VII); Rivers v. Balt. Dep't of Recreation & Parks, No. R-87-3315, 1990 WL 112429, at *10 (D. Md. Jan. 9, 1990) (noting that "[a] letter being placed in a personnel file does not, by itself, constitute an adverse employment action . . . because . . . [s]uch a claim is far too speculative to constitute an adverse employment action" under Title VII). *Cf.* Roberts v. Roadway Exp., Inc., 149 F.3d 1098, 1104 (10th Cir. 1998) (holding that written warnings constitute adverse employment action where evidence established that the more warnings received by employee, the more likely employee was to be terminated for future infraction). *But see* Armstrong v. City of Dallas, 829 F. Supp. 875, 880 (N.D. Tex. 1992) (holding a letter of reprimand constitutes an adverse employment action); Columbus Educ. Ass'n v. Columbus City Sch. Dist., 623 F.2d 1155 (6th Cir. 1980) (concluding that a letter of reprimand in teacher's personnel file constituted

of Maine Systems,[83] the federal district court granted the university's motion for summary judgment, thereby denying the claim of Edward Jessiman, a professor who alleged that letters of reprimand constituted retaliatory action against him based on allegations of sexual harassment.[84] Jessiman specifically claimed that the university engaged in an adverse employment action when the president placed a letter of reprimand in his personnel file based on the sexual harassment review.[85] The court observed that the professor "continues to teach all the classes he himself has chosen, and remains free to pursue outside activities as well. Furthermore [he] has not provided evidence to show that the University has threatened him with future adverse action."[86]

Sometimes letters of reprimand trigger allegations of due process violations.[87] In *Hall v. Board of Trustees of State Institutions of Higher Learning*,[88] the University of Mississippi Medical Center (UMC) issued a written reprimand to Terrence J. Hall, a nontenured professor of medicine, after an investigation of an anonymous sexual harassment complaint.[89] The investigation concluded that while the university's sexual harassment policy had not been violated, the professor's

adverse employment action in retaliation for exercise of free speech).

83. 923 F. Supp. 275 (D. Me. 1996).

84. *Id.* at 281–84.

85. *Id.* at 281.

86. *Id.* at 282. *See also* Cuenca v. Univ. of Kan., 265 F. Supp. 2d 1191, 1204, 1209 (D. Kan. 2003), *aff'd*, 101 F. App'x 782 (10th Cir. 2004) (ruling that "sanction of warning" to an assistant professor for his "'egregious' failure to meet his academic responsibilities, related to his cancellation of certain classes" did not constitute an adverse action because the letter failed to have "any negative effect on his employment").

87. The Due Process Clause of the Fourteenth Amendment "provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). To succeed on a procedural due process claim, a public employee, including a professor at a public institution, must establish a property or liberty interest in employment as a professor and that the opposing party, acting under state law, deprived the faculty member of that interest without due process. *Id.* at 538. "'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" Perry v. Sindermann, 408 U.S. 593, 601 (1972) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972)). A person's liberty interests are implicated when the individual's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Roth*, 408 U.S. at 573 (internal citations omitted). Such liberty interests may be violated when sanctions imposed "might seriously damage [a faculty member's] standing and associations in his community." *Id.* And so, when a state university "decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." NCAA v. Tarkanian, 488 U.S. 179, 192 (1988). At the same time, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). One commentator has opined that "in an academic environment where both custom and comity frown on public disparagement of disciplined or departing colleagues, losses of property will be much more common than infringements of liberty." POSKANZER, *supra* note 79, at 243.

88. 712 So. 2d 312 (Miss. 1998).

89. *Id.* at 313.

touching a female student's breast in responding to her question about interpreting mammograms constituted "inappropriate behavior."[90] The letter of reprimand, which was placed in Hall's personnel file along with the "raw investigatory materials,"[91] included a memorandum from the chair of the department of surgery, informing Hall "of the consequences of possible immediate termination if any further conduct or action that could be perceived as sexual harassment or improper conduct took place."[92] The professor challenged the letter of reprimand before faculty bodies, which upheld the discipline.[93] Hall then appealed to UMC's board of trustees, which affirmed the findings of the faculty committees.[94]

Hall then sought review in state court, arguing that the university had violated his substantive due process rights, which "bar[] outright 'certain government actions regardless of the fairness of the procedures used to implement them.'"[95] The Mississippi Supreme Court ruled that the written reprimand did not violate the professor's substantive due process rights, but required that the letter be maintained in a separate file.[96] The court reasoned that Hall had no property interest in the fourth year of his non-tenured position because he had no "legitimate expectation of, nor entitlement to, continued employment at UMC," and "thus, he is not entitled to substantive protection under the due process clause as the result of the arbitrary deprivation by government action of a protected property interest."[97]

At the same time, the court found that Hall's liberty interest was implicated because his personnel file "contains statements made in connection with the investigation that amount to nothing more than free reign being given to students and co-workers to express their opinions about Dr. Hall's professional conduct which in no way were connected to the anonymous complaint of sexual harassment made against Dr. Hall."[98] Accordingly, the court found that the inclusion of the "raw investigatory materials" in Dr. Hall's personnel file created "a false and defamatory impression which stigmatizes and forecloses him from other employment opportunities," and constituted a "badge of infamy" that had the potential to "continuously har[m]" Dr. Hall's "future employment opportunities."[99]

90. *Id.* at 313, 315.

91. *Id.* at 323.

92. *Id.* at 316.

93. *Id.* at 316–17.

94. *Id.* at 317.

95. *Id.* at 318 (quoting Brennan v. Stewart, 834 F.2d 1248, 1255 (5th Cir. 1988)).

96. *Id.* at 326–27. *See also* Meyer v. Univ. of Wash., 719 P.2d 98, 103 (Wash. 1986) (rejecting professor's due process claims because he did not have valid property interests, but instead had "expectations rather than entitlements").

97. *Hall*, 712 So. 2d at 320.

98. *Id.* at 323.

99. *Id.* (internal citations omitted). The court opined:

> [F]or another institution to employ Dr. Hall they will run the risk of having a sexual harassment charge filed against the respective institution. In today's society with the already existing hysteria for employers to be subjected to liability for a charge of sexual harassment by one of its employees, UMC's actions and the Board's actions of allowing all materials of the investigation which resulted in no finding of sexual

However, because Hall could not establish that the confidential file would ever be made public, the court ultimately found no violation of his liberty interest in reputation.[100]

In the end, the court found UMC's decision to include the investigatory materials in Hall's personnel file to be arbitrary and capricious under the state's administrative law, and ordered those materials to "be returned to and stored in the confidential investigation file maintained by the campus police who conducted the investigation."[101] The court concluded that UMC was required "to place in the personnel file of Dr. Hall only a statement regarding the conduct, the findings of the investigation, and a statement regarding the disciplinary action taken against Dr. Hall."[102]

From time to time, faculty members challenge reprimands as violating their free speech and academic freedom.[103] The competing First Amendment claims may compound when reprimands are imposed on individual faculty members by departmental colleagues. In *Meyer v. University of Washington*,[104] Carl Beat Meyer, a tenured professor of chemistry, challenged as improper his department's imposition on him of a reprimand.[105] In a closed executive session of the chemistry department faculty, his colleagues approved a motion (twenty-two in favor, two opposed, and one abstention) to reprimand Meyer "for inappropriate responses to interdepartmental activities."[106] After a grievance committee rejected Meyer's defamation claim, he sued his colleagues in state court asserting a number of claims, including violation of his First Amendment right to academic freedom.[107] The lower court granted summary judgment for the defendants, and the professor appealed.[108] The Supreme Court of Washington upheld the trial court's ruling, specifically rejecting Meyer's argument that the reprimand "chilled" his speech.[109] The court reasoned that the reprimand was very limited in its impact: "the intent of the reprimand was only as a warning to plaintiff and is not to

> harassment to remain in Dr. Hall's personnel file wrongly attaches to Dr. Hall's reputation the stigma of being a potential sexual harasser.

Id.

100. *Id.* at 324.

101. *Id.* at 326.

102. *Id.* A dissent, which was joined by several judges, opined that that the majority "goes too far in ordering the investigatory materials to be removed from his personnel files and placed in a confidential UMC campus police file." *Id*. at 327.

103. *See, e.g.*, AAUP, *Northwestern University: A Case of Denial of Tenure*, 74 ACADEME 55, 58, 69 (May–June 1988) (rejecting professor's claim that her academic freedom was violated by issuance of a "letter of severe reprimand and warning," included its placement in her tenure dossier, for "willfully" disrupting a speech by a Nicaraguan "contra").

104. 719 P.2d 98 (Wash. 1986).

105. *Id.* at 100.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 101.

be used to his detriment."[110] Moreover, the court noted, "Far from having his own right of free speech 'chill[ed]', plaintiff appears to be attempting to chill his colleagues [sic] right to express their views by claiming his First Amendment rights were violated."[111]

That is not to say that all letters of reprimand are ruled permissible. In *Butts v. Shepherd College*,[112] Joy Butts, an associate professor at Shepherd College, challenged her reprimand, which was issued for "insubordination" when she refused her supervisor's order to release student grades to the supervisor.[113] The state appellate court noted that the professor's "refusal to obey a superior's order, based on a good faith belief that the order violated a law, regulation, or policy, was not a willful refusal to obey and was not insubordination."[114] The court directed the administration to expunge the reprimand letter from Butts' personnel file.[115]

B. Censure

The next step up the discipline ladder is censure.[116] While letters of reprimand

110. *Id.*

111. *Id.* at 101–02. The Washington Supreme Court also rejected Meyer's defamation claim because he failed to introduce admissible evidence. *Id.* at 103–04. The court relied on the faculty grievance committee's findings that not only was there no direct evidence that Meyer was defamed, but Meyer "himself came very close to being guilty of defaming his colleagues." *Id.* at 103.

112. 569 S.E.2d 456 (W. Va. 2002).

113. *Id.* at 456–57. Other faculty cases and controversies involving letters of reprimand exist. *See, e.g.*, Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999) (involving placing a letter of reprimand in professor's personnel file for engaging in a consensual relationship with a student). *See also* Elizabeth F. Farrell, *UNLV Backs Down in Dispute With Professor Accused of Making Homophobic Comments in Class*, CHRON. HIGHER EDUC. (Feb. 21, 2005), http://chronicle.com/daily/2005/02/2005022103n.htm (reporting that college president reversed faculty committee's recommendation that an economics professor should serve one-week unpaid suspension and receive a letter of reprimand because student's discrimination claim violated professor's academic freedom).

114. *Butts*, 569 S.E.2d at 460.

115. *Id.* The dissenting judge in this case argued that the majority was inappropriately "insist[ing] . . . on managing higher education disciplinary decisions. Decisions such as this make it nearly impossible for the people who run our higher institutions of learning to do their jobs." *Id.* at 461 (Maynard, J., dissenting).

116. *See, e.g.*, AAUP, *Academic Freedom and Tenure: Arizona State University,* 62 AAUP BULL. 55, 65 (Spring 1976) (discussing proposed sanctions of antiwar professor who was active in Socialist Workers' Party and who canceled class to speak at a rally, and opining that "the proposed letters of censure" for the professor's missed class were "minor sanctions that are not altogether unjustified"). Apparently the line between "censor" and "censure" is not always clear. In *Speers v. Univ. of Akron*, 196 F. Supp. 2d 551 (N.D. Ohio 2002), in which the court declined to grant the University of Akron's summary judgment motion because factual disputes existed regarding whether the administration reprimanded a female professor for speaking out on a campus matter, the university objected to the judge's decision to exclude the professor's reference "to 'censure' because of possible confusion with 'censor.'" *Id.* at 557. The court opined:

> With respect to the difference between 'censure' and 'censor,' the [university] states that it was prejudiced because the jury incorrectly associated the [university's]

tend to be issued by administrators against faculty members in private, censure is frequently imposed by faculty colleagues against a professor in public. Cases involving challenges to such censures, which often arise in sexual harassment litigation, tend to trigger legal claims of due process, defamation, and First Amendment academic freedom. A heavily litigated procedural issue in such cases is the extent to which votes supporting the imposition of public censure by departments and faculty senates are official sanctions (or actions) of the institution.

In *Powell v. Ross*,[117] William Powell, a tenured professor of social work at the University of Wisconsin-Whitewater, sued numerous faculty members and academic administrators alleging that they violated his due process rights by censuring him for having sexually harassed a female student.[118] The censure Powell challenged included a "strong letter of reprimand" in his personnel file, a requirement that he and his department undergo sexual harassment training, an order that Powell keep his door open when meeting with students, and the warning that additional complaints would result "in 'more serious measures.'"[119]

The Seventh Circuit found that "internal discipline without further adverse employment consequences does not implicate a protected property interest."[120] Furthermore, the court rejected Powell's assertion that the censure compromised his property interest in "his earnings and earning capacity as a professor."[121] The court ruled that "where a censured employee retains his job and does not suffer any loss of pay or rank, any alleged harm to his stature or earnings prospects is purely speculative."[122]

The appellate court also rejected Powell's claim that his liberty interest had been harmed. Powell contended that if he "ever were to lose his current employment it is highly unlikely that he would be able to get a job anywhere else given these allegations."[123] The court reasoned that no liberty interest exists "in reputation alone," and because the censure had not "distinctly altered or

> attempt to censure Speers for her actions as an attempt to censor her speech. The Court disagrees. The [university] has not produced a legitimate reason that the jury will not understand the difference between the two words. Furthermore, the [university] first used the word 'censure' in its own documents. The University of Akron cannot now claim that the use of a word it introduced is unfairly prejudicial.

Id.

117. No. 04-1819, 2004 U.S. Dist. LEXIS 3601 (W.D. Wis. Feb. 27, 2004), *aff'd sub nom.* Powell v. Fujimoto, 119 F. App'x 803 (7th Cir. 2004).

118. *Id.* at *1.

119. *Powell*, 119 F. App'x at 804.

120. *Id.* at 805. The court also rejected Powell's claim to a property interest in the expense of defending himself in the sexual harassment proceedings. *Id*. at 806.

121. *Id.* at 807. Powell asserted that it was "reasonable to infer" that the censure imposed upon him for sexual harassment might in the future cause him to lose "merit pay, extra class assignments normally to be expected such as summer school, promotion and increased pay, publishing opportunities, paid speaking opportunities, paid sabbaticals, research grants, and the like." *Id.*

122. *Id.*

123. *Id.*

extinguished" Powell's employment status so as to trigger due process protections, this claim also failed.[124] The court concluded that it could find no "authority stating that a formal reprimand alone infringes a liberty interest."[125]

Some courts, however, have found the imposition of a public censure by department colleagues as violating the free speech of the affected faculty member. In *Booher v. Northern Kentucky University Board of Regents*,[126] Kevin Booher, a tenured professor of art, sued the university's board of trustees and his department colleagues for a number of claims, including the "faculty censure" his department colleagues imposed upon him for his published remarks about a controversial art exhibit, "Immaculate Misconceptions."[127] One department colleague of Booher had proposed censure of Booher because of Booher's comments about the art display.[128] At the next department meeting, the faculty discussed and voted for censure.[129] The department chair then notified Booher in writing of the sanction.[130] Booher sued his colleagues in federal district court, claiming that in censuring him, his colleagues violated his property interest in his tenured position and his liberty interest in his professional reputation.[131] He also asserted a First Amendment retaliation claim.[132]

First, the court found that the department faculty were acting "under color of state law," because the actions were undertaken "by state employees acting

124. *Id.* at 808.

125. *Id.*

126. No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998), *aff'd*, 163 F.3d 395 (6th Cir. 1998).

127. *Id.* at *8. The Kentucky Post article, which was excerpted in the opinion, stated: "In fact, Booher said he is Catholic and found the title 'Immaculate Misconceptions' offensive, partly because he thought the title was selected to stir reaction. 'It's like yelling, "Fire!" in a crowded theater,' he said." *Id.*

128. The memorandum proposing censure included the following passage:

> This request for a vote of censure is instigated by the most recent activity of Mr. Booher, i.e., his interview with the Post which, in my opinion, exacerbated an already volatile state of affairs between this department, the university, and the community. . . . Faculty have the right to express any opinions, e.g., in ads, letters to the editor, etc., but Mr. Booher chose a manner which, in my opinion, was inflammatory and compromised this department and its faculty.

Id. at *10–11.

129. In explaining the potential affect of the censure during the department deliberations, the chair stated that the censure vote had

> no legal ramifications . . . I do think that it will make a difference in committee appointments. . . . In the matter of our RPT (Reappointment, Promotion and Tenure), the people on the faculty who are not tenured have a right to request that somebody is not on the tenure committee, and I think that that is [a] wise thing for them to consider. So those kinds of things will make a difference.

Id. at *13.

130. *Id.*

131. *Id.* at *36.

132. *Id.* at *41.

collectively as a departmental faculty" at a "formal meeting" of the department.[133] While the department faculty argued that "they were merely exercising their own opinions regarding the plaintiff's conduct,"[134] the court disagreed:

> [W]hen, acting as a departmental faculty of a state university, they voted to censure the plaintiff, reduced their feelings of displeasure to writing, and circulated the written proof of their action, they stepped from the safe haven where individuals may exercise their own protected freedom of speech and into the hazardous area where consequences may result from ill-advised action.[135]

Accordingly, the court ruled that the department faculty were not entitled to qualified immunity.[136]

Next, the court found that Booher suffered harm from the imposition of the censure by his department colleagues.[137] The defendants had argued that Booher suffered no harm because "the censure was not a disciplinary action, did not affect the plaintiff's status as a tenured professor, did not reduce the plaintiff's compensation, and was not recorded in the plaintiff's university personnel file."[138] The court framed the inquiry as "whether the censure, or threat of censure, would tend to encourage employees to conform their speech to the departmental orthodoxy."[139] It ruled that the department's censure provided a basis for the professor's First Amendment retaliation claim, because the censure could affect the professor's "ability to engage in the department's system of governance; . . . [to] participat[e] in departmental decision-making; and [to select] . . . his teaching assignments."[140]

The court next found Booher's comments to the newspaper about the controversial art exhibit to be a matter of public concern, because the exhibit was an event that "had stirred widespread public concern; the debate was not just within the university or within the art department. His comments were directed at the issues of the debate: whether the title of the exhibit was offensive and whether artistic freedom was allowed at the university."[141] Furthermore, the court found that Booher's remarks failed to "disrupt[] the university's teaching in classroom or studio," and any other disruptions caused by him were "relatively minor."[142] Accordingly, Booher's First Amendment right to express himself outweighed Northern Kentucky University's interest in an efficient workplace.[143] The court

133. *Id.* at *36–38.
134. *Id.* at *41 n.22.
135. *Id.* at *46–47.
136. *Id.* at *47.
137. *Id.* at *40.
138. *Id.* at *38.
139. *Id.* at *40.
140. *Id.* at *40 n.21.
141. *Id.* at *42–43.
142. *Id.* at *43–44.
143. *Id.* at *44.

thus denied the university's motion for summary judgment, because a "question of fact [existed] regarding the factors that motivated the censure vote."[144]

A different conclusion based on the censure imposed by a department upon a faculty member was reached in connection with a similar First Amendment claim in an earlier case, *Wineman v. Wayne State University*.[145] A tenured professor of social work sued the university and others for having violated his free speech rights when it "censured" him for co-authoring an article in the school's newspaper in which he "strongly criticized" the department's new graduate student dismissal procedures, the educational model used by one of the schools, and the competence of one of his colleagues.[146] The Sixth Circuit affirmed the district court's ruling against Wineman, because the censure was undertaken by the faculty members in exercising their free speech rights.[147] The court concluded that the faculty's action was not that of the university itself.[148]

Not only faculty departments, but also faculty senates censure actions of individual faculty members.[149] In *Aldridge v. De Los Santos*,[150] professors in the School of Business Administration at the University of Texas-Pan American who had been censured by the faculty sued thirty-seven colleagues, many of whom were members of the faculty senate, claiming defamation, tortious interference with their contracts, and negligent infliction of emotional distress.[151]

The suing professors served on a committee to review the business school's merit pay system and, in that service, recommended that two tenured professors, who allegedly exaggerated their publication records, be dismissed for "moral turpitude."[152] Eventually the matter was brought to the faculty senate for consideration and, after investigation, the senate voted to censure the faculty members serving on the committee for having failed to act in a "fair and collegial manner."[153] The local newspaper reported the censure action.[154]

144. *Id.* at *45. The court, however, rejected Booher's procedural due process claim arising from the censure action, because Booher "lost neither his tenured position nor pay as a result of the censure." *Id.* at *47–48.

145. 667 F.2d 1029, No. 79-1659, 1981 U.S. App. LEXIS 16514 (6th Cir. Oct. 29, 1981) (unpublished table decision).

146. *Wineman*, 1981 U.S. App. LEXIS 16514, at *1.

147. *Id.* at *2.

148. *Id.* The court wrote: "The professors who censured Wineman also had first amendment rights, which they exercised when they censured Wineman." *Id.*

149. *Cf.* Stern v. Shouldice, 706 F.2d 742, 745 (6th Cir. 1983) (stating that complying with an administrator's request, the faculty senate replaced a professor serving as the senate's faculty representative following the publication in the school newspaper of what was considered a controversial statement).

150. 878 S.W.2d 288 (Tex. App. 1994).

151. *Id.* at 291.

152. *Id.*

153. *Id.* at 292. The Faculty Senate censured its colleagues for

> [f]ailing to treat their colleagues in a fair and collegial manner during the [committee's] investigation. [Additionally, the Faculty Senate concluded that the committee] exceeded the limits of its legitimate functions, failed to allow a tenured full professor

The faculty members argued that their service on the faculty senate was part of their official responsibilities as faculty members and, therefore, within the scope of their authority.[155] They further asserted that they took the censure vote in good faith.[156] The suing professors argued otherwise, based in part on a memorandum to the faculty senate from the college president in which he had written that while "[t]he Faculty Senate has censured and reprimanded several individuals on this campus. . . . [T]he Faculty Senate is not authorized to take such disciplinary action."[157] In the end, the appellate court upheld the lower court's denial of the faculty senate members' motion for summary judgment, finding that questions of fact existed regarding the authority of faculty senate members to vote for censure, which was key in determining whether the sued faculty senate members were entitled to qualified immunity.[158]

C. Departmental Reassignment

On occasion an institution decides to transfer a faculty member from one academic department to another as a form of discipline, especially where significant problems exist in the former department. In challenging such transfers, some faculty members have claimed that the reassignment violated their due process and First Amendment rights. Generally, courts have ruled that the transfer of tenured faculty from one department to another, without loss of compensation or rank, is not illegal, unless such reassignment is in retaliation for the exercise of free speech, is discriminatory, or violates a contractual obligation.

In *Huang v. The Board of Governors of the University of North Carolina*,[159] the Fourth Circuit ruled that when North Carolina State University transferred Dr. Barney Huang, a tenured professor, from the Department of Biological and Agricultural Engineering (BAE) to the Division of University Studies due to

> sufficient time to prepare his defense against a recommendation for termination, and imposed its interpretation of unwritten academic standards on the proceedings. In so doing, the [committee] displayed a lack of collegiality and fundamental fairness.

Id.

154. *Id.*

155. *Id.*

156. *Id*. at 295.

157. *Id*. at 295 n.5.

158. *Id.* at 297. For other cases involving censures of faculty members, see *Newman v. Burgin*, 930 F.2d 955, 962 (1st Cir. 1991), where the court upheld the public censure of a faculty member for plagiarism by the University of Massachusetts at Boston administration after an investigation and hearing by a faculty committee, despite the professor's contention that to make her censure public was a "substantial departure from academic norms"; *Meister v. Regents of University of California*, 78 Cal. Rptr. 2d 913 (Ct. App. 1998), where the arbitrator found that the professor's reputation had been injured by the circulation of a letter of censure, which was recommended by a campus committee, for the professor's unauthorized circulation of a confidential planning document; *Fong v. Purdue University*, 692 F. Supp. 930 (N.D. Ind. 1988), where the court reviewed the university committee's action subjecting a disruptive colleague to censure and dismissal.

159. 902 F.2d 1134 (4th Cir. 1990).

"performance and productivity" concerns, Huang was not denied due process, nor were his First Amendment rights violated.[160] Although Huang had originally suggested the possibility of a transfer after relations with his departmental colleagues soured, when the chancellor followed up on the transfer option, Huang decided to grieve the matter before his faculty peers.[161] The faculty committee ruled that "Dr. Huang's transfer from BAE was in the interests of Dr. Huang and the department."[162]

Dr. Huang took his challenge to district court, which granted summary judgment for the university.[163] On appeal, the Fourth Circuit ruled that Huang's First Amendment rights had not been violated by his transfer.[164] The court found that Huang's claim failed on the "but for" requirement, since "some six years prior to his transfer, he 'blew the whistle' about an improper business arrangement between two [department] members involving state funds."[165] The appellate court also rejected Huang's procedural due process claim, finding that he remained "a tenured full professor . . . at the same or effectively greater salary," and that he "received all the process he was due and more," including meetings with the chancellor and a nine-day hearing before a faculty body.[166] In so reasoning, the court rejected Huang's argument that he had a property interest in his particular position within the BAE department, finding "[n]o authority . . . that a property interest in the continued expectation of public employment includes the right to physically possess a job, in defiance of the stated desire of the employer."[167] The court also noted that the transfer failed to constitute a "serious sanction" under the University of North Carolina's handbook.[168]

Similarly, in *Maples v. Martin*,[169] the Eleventh Circuit ruled that professors' due process and First Amendment rights were not violated when they were transferred from the Agricultural Engineering Department to the Department of Agriculture at Auburn University.[170] In reviewing the case law on due process, the court concluded that "[t]ransfers and reassignments have generally not been held to implicate a property interest."[171] Neither the faculty handbook nor the state law protected professors from involuntary transfers and, therefore, the court found that

160. *Id.* at 1136.
161. *Id.* at 1137.
162. *Id.* at 1138.
163. *Id.* at 1137.
164. *Id.*
165. *Id.* at 1140.
166. *Id.* at 1141.
167. *Id.* (quoting Royster v. Bd. of Trs., 774 F.2d 618, 621 (4th Cir. 1985)).
168. *Id. See also* Farkas v. Ross-Lee, 727 F. Supp. 1098, 1104 (W.D. Mich. 1989), *aff'd without opinion*, 891 F.2d 290 (6th Cir. 1989) (finding that a professor had no property interest to remain in a given department, and recognizing that "transfers may be especially appropriate as a matter of practical internal college administration").
169. 858 F.2d 1546 (11th Cir. 1988).
170. *Id.* at 1548–49.
171. *Id.* at 1550.

transfer decisions appeared to be at the administration's discretion.[172] The court also rejected the professors' liberty interest claim, finding that they had not suffered loss of rank or salary, still had the opportunity to teach in their specialized areas, and could not establish that a stigma resulted from the transfers that damaged their reputations or foreclosed other employment opportunities.[173]

The court further found no First Amendment violation.[174] One of the professors, Dr. John Turner, alleged that his transfer was in retaliation for his participation in the preparation of a report reviewing the seemingly dysfunctional academic department.[175] While the court recognized that some aspects of the departmental review, such as the status of the department's accreditation, were matters of public concern,[176] the court concluded that the report's "interference with the efficient operation of the [department] was sufficient to justify the transfer" of Turner.[177] The court opined that "[b]y subjecting internal administrative policies to public scrutiny, it distracted both students and faculty from the primary academic tasks of education and research."[178]

But some contracts specifically protect faculty against such reassignments. In *Hulen v. Yates*,[179] the Tenth Circuit ruled that Myron Hulen, a tenured professor in the accounting and taxation department at Colorado State University, "had a property interest in his departmental assignment based upon the terms and conditions of his appointment," and therefore basic due process attached to his involuntary transfer from one academic department to another.[180] The dean imposed Hulen's transfer "after learning of the more than six years of divisiveness and dysfunction" within the original department.[181] Hulen alleged that he was involuntarily transferred from his home department to the management department after he and others had spoken out in support of the revocation of a department colleague's tenure because of alleged plagiarism and copyright violations, emotional abuse of students, and misuse of state funds.[182] The faculty handbook at issue provided that alterations to a tenured position required "mutual agreement between a faculty member and the appropriate administrative officers."[183] The college president acknowledged in his testimony that during his twenty-seven

172. *Id.* at 1550–51.

173. *Id.* at 1550–51 & n.5. For another case involving a departmental transfer, see *Johnson v. Savannah College of Art and Design, Inc.*, 460 S.E.2d 308 (Ga. Ct. App. 1995), where the court upheld the transfer of a video professor by the administration upon the request of the professor's original department members.

174. *Maples*, 858 F.2d at 1552–55.

175. *Id.* at 1552.

176. *Id.* at 1553.

177. *Id.* at 1554.

178. *Id.*

179. 322 F.3d 1229 (10th Cir. 2003).

180. *Id.* at 1243.

181. *Id.* at 1233.

182. *Id.*

183. *Id.* at 1241.

years on the faculty, he was unaware of any involuntary transfers.[184] In the end, however, the court found that Hulen had received more than adequate pre-transfer due process protections.[185]

D. Modified Teaching Assignments and Removal from the Classroom

Some institutions have sought to modify teaching assignments as a form of discipline. A few others have attempted to remove professors from the classroom entirely. Many, but not all, of the cases arise in the sexual harassment context, where modified teaching assignments or removal from the classroom are employed as ways to discipline the faculty member and to avoid future potential problems with students. Generally, courts have ruled that professors have no property interest in the teaching of particular courses and so have found reassignment and removal permissible, absent evidence that the discipline is based on impermissible motives or contrary to contractual terms of the professor's employment.[186]

In *McClennan v. Board of Regents of the State University*,[187] Powell McClennan, a twenty-two year tenured faculty member in the Department of Health, Physical Education, and Recreation at Middle Tennessee State University, challenged, under the state's administrative procedures law, a sexual harassment investigation in which he was found to have violated the university's sexual harassment policy when he touched a female student's breasts while teaching how to use electrocardiograms.[188] A hearing committee found against McClennan, ruling in part that "Dr. McClennan not be allowed to teach the only section of a required course offered for three years and that course substitutions be allowed for students."[189] McClennan challenged the committee's findings, including the

184. *Id.* at 1243.

185. *Id.* at 1244. The court opined: "Dr. Hulen received as much process as would have been due had he been fired, and the transfer of an employee certainly requires no more procedural safeguards than a termination." *Id.* In so concluding, the court rejected Hulen's contention that he was "entitled to a formal hearing—an evidentiary hearing—before being laterally transferred. It would be remarkable if such a hearing were constitutionally required, since the Constitution does not even require such a hearing before an employee is *fired*." *Id*. at 1247 (emphasis in original). In this case, Hulen "was able to meet with the decisionmaker twice, lodged repeated written complaints, and engaged the services of an attorney in an attempt to avoid the transfer. . . . [I]t is apparent that Dr. Hulen received all the pre-transfer process he was due." *Id.* at 1248.

186. *See, e.g.*, Wagner v. Tex. A&M Univ., 939 F. Supp. 1297, 1312 (S.D. Tex. 1996) (finding that where there was no "contractual provision limiting the University's right to reassign Wagner," no property interest existed in teaching a particular course or, in fact, teaching at all); Davis v. Mann, 882 F.2d 967, 973 (5th Cir. 1989) (establishing that a dentist participating in a residency program lacked a property interest in the non-economic benefits of his position when, in the contract, they were inextricably linked to his academic performance); Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985) (concluding that a change in duties that prevented professor from teaching specific courses did not constitute constructive discharge); Johnson v. S. Univ., 803 So. 2d 1140 (La. Ct. App. 2001) (upholding administrative directive limiting professor to multi-section classes only, after four students challenged his teaching, testing, and grading methods).

187. 921 S.W.2d 684 (Tenn. 1996).

188. *Id.* at 684.

189. *Id.* at 686–87.

"severity of the sanctions," but the college's president upheld the committee's findings.[190] McClennan then sought judicial redress, but two lower courts specifically rejected McClennan's assertion that "the sanctions imposed were unconstitutional in that they unlawfully restrict the terms and conditions of employment."[191] The appellate court concluded that the faculty committee's findings were supported by "substantial and material evidence," thereby upholding the three-year course moratorium.[192]

From time to time administrators have removed faculty members from classrooms and assigned them non-class work or no work as a form of discipline.[193] One court referred to such "make work" as "the academic equivalent of the rubber gun squad."[194] In *Wozniak v. Conry*,[195] Louis Wozniak, a tenured engineering professor who had taught at the University of Illinois at Urbana-Champaign for twenty-eight years, became a "rebel" by repeatedly refusing to turn over his grading materials as required under a new policy to ensure uniformity among sections on a prescribed curve.[196] In response, Wozniak claimed that the dean of the engineering school barred him from teaching, cancelled his research funds, and reassigned him as webmaster of the engineering faculty's official web page.[197] Wozniak's title and salary remained the same.[198] Wozniak claimed that this modification of his duties violated his right to free speech and due process.[199]

The district court granted the University of Illinois' motion for summary

190. *Id.* at 687.

191. *Id.*

192. *Id.* at 693.

193. *See, e.g.*, Edwards v. Cal. State Univ. of Pa., 156 F.3d 488, 492 (3d Cir. 1998) (noting that while the professor's "temporary removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment," and therefore did not implicate his liberty interest). The AAUP has found in some cases that summary removal from teaching responsibilities violates faculty rights. In a 1966 report involving St. John's University in New York, the AAUP investigating committee opined:

> The administration's view that it had discharged its obligation with the payment of salary also excluded from consideration a principle crucial to the profession. . . . To deny a faculty member this opportunity [to teach] without adequate cause, regardless of monetary compensation, is to deny him his basic professional rights. . . . One has only to think of the famous teachers of the past, beginning with Socrates, to realize what a serious injury it would have been to these men to have been denied the right to teach.

AAUP, *Academic Freedom and Tenure: St. John's University (N.Y.)*, 52 AAUP BULL. 12, 18–19 (1966).

194. Shub v. Hankin, 869 F. Supp. 213, 215 (S.D.N.Y. 1994) (observing that removal of tenured professor from teaching to "several curriculum/syllabus projects" as "the academic equivalent of the rubber gun squad," which is "[p]olice jargon for officers deprived of gun and badge and assigned to limited duty").

195. 236 F.3d 888 (7th Cir. 2001).

196. *Id.* at 889.

197. *Id.*

198. *Id.*

199. *Id.*

judgment, and the Seventh Circuit upheld the lower court's ruling.[200] The appellate court recognized that

> [i]f Wozniak is describing events correctly, he lost more than his dignity and the opportunity to influence students. He lost all prospects of promotion to full professor . . . and, because he lost research support, future scholarly publications, recognition within the profession, and the chance of obtaining private consulting work, all bit the dust.[201]

Wozniak had "tenure *as a faculty member* and not just an all-purpose employee equally suited to the classroom and the janitorial staff."[202] Nevertheless, because Wozniak was given at least three opportunities to explain himself but refused to do so, the Seventh Circuit found no due process violation.[203] The court further found that Wozniak's reassignment was not in retaliation for opposing the grading policy: "[a] violation of an employer's lawful rules does not become an improper basis for decision just because the employee makes his position known to the public."[204] Accordingly, the university's reassignment of Wozniak "must be understood as a reaction to Wozniak's behavior, not as a penalty for his speech about that behavior."[205]

However, not all such removals are proper. In *McCartney v. May*,[206] a state appellate court ruled that the dean of the medical school was not immune from suit by Donald R. May, a tenured professor who was removed as chair of the Department of Ophthalmology at Texas Tech Health Sciences Center.[207] The dean had instructed May to refrain from speaking to the faculty or staff of the department, which in practical terms suspended the faculty member from his clinical privileges.[208] The court examined May's claim "concerning his faculty status and clinical privileges on the basis that he was precluded from interacting with department faculty or staff."[209] The court concluded that the lower court had properly denied the university's claim for immunity regarding the denial of May's

200. *Id.* at 889, 891.

201. *Id.* at 890.

202. *Id.*

203. *Id.*

204. *Id.* at 891.

205. *Id.* From time to time, faculty members have successfully argued in court that their reassignments are so dramatic that they have been constructively discharged from their positions. *See, e.g.*, Patterson v. Portch, 853 F.2d 1399, 1407 (7th Cir. 1988) (ruling that state college's reassignment of tenured geography professor to non-teaching duties was constructive discharge and, therefore, the college had violated professor's due process by not providing pre-termination hearing, but refusing to order reinstatement because of professor's admitted mental state as "emotional basket case"); Levenstein v. Salafsky, 164 F.3d 345, 351 (7th Cir. 1998) (ruling that professor adequately alleged constructive discharge when the University of Illinois reassigned him, "a physician whose reputation spanned several continents," to "reviewing old medical training videos" after sexual harassment complaint was filed against professor by student).

206. 50 S.W.3d 599 (Tex. App. 2001).

207. *Id.* at 603, 609.

208. *Id.* at 608.

209. *Id.*

clinical privileges, because the court found those privileges to be a protectable property interest and so May was entitled to a hearing.[210]

E. Removal from Particular Committees and Programs

Sometimes faculty are removed from particular committees and programs as a form of discipline. In *Ganesan v. Northern Illinois University Board of Trustees*,[211] Sengoda Ganesan, a tenured professor of mechanical engineering, was disciplined for "confrontations with other faculty members."[212] As part of the discipline, the professor was directed to attend human resource workshops and, after a "no confidence" vote by department faculty, he was removed from his positions as a member and chair of the university's personnel committee.[213] The professor challenged the discipline on various grounds, including that the committee removals violated his due process and First Amendment rights.[214] The federal district court rejected Ganesan's claims: "While plaintiff may have a property interest in his employment as a tenured faculty member, his property interest does not extend to participation in personnel decisions, membership on committees, or avoiding workshop attendance."[215]

Suspension of other perquisites might be appropriate as well, so long as they are imposed for permissible reasons and do not violate a contractual provision providing otherwise. During the pendency of a sexual harassment investigation, for example, a faculty member might be denied permission to attend an out-of-state conference especially when the complainant is scheduled to attend the gathering.[216] Depending on the facts and circumstances, other potential actions might include

210. *Id.* at 607–08. *See also Levenstein*, 164 F.3d at 351 (ruling tenured professor at the University of Illinois was "effectively deprived of a property interest in a job" by administration's decision to forbid him from seeing patients and assigning him to review of old medical files); Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971) (recognizing that Woodbury had property rights in his former position, and noting that until there was a hearing satisfying the "minimum" procedural due process requirements, he was entitled to reappointment); Greenwood v. N.Y. Office of Mental Health, 163 F.3d 119, 122 (2d Cir. 1998) (acknowledging that Greenwood's clinical privileges were an entitlement under state law, subject to certain procedural safeguards, and finding that the privileges were property rights for due process purposes).

211. No. 02-C-50498, 2003 U.S. Dist. LEXIS 21721 (N.D. Ill. Dec. 2, 2003).

212. *Id.* at *2.

213. *Id.*

214. *Id.* at *1.

215. *Id.* at *3. The court also rejected the professor's First Amendment claim, finding that his speech was "not as an interested citizen or an academic communicator of protected ideas." *Id.* at *6 (internal citations omitted). *See also* Radolf v. Univ. of Conn., 364 F. Supp. 2d 204, 219–22 (D. Conn. 2005) (concluding that Radolf's participation in a grant proposal was not a "protectable property right," and thus did not warrant procedural due process protection); Hollister v. Tuttle, 210 F.3d 1033, 1036 (9th Cir. 2000) ("[A] place on a college search committee is not property, nor is denial of it generally a demotion."); Mahaffey v. Kan. Bd. of Regents, 562 F. Supp. 887 (D. Kan. 1983) (finding no property interest implicated where professor was denied merit increases, stripped of specific committee assignments, moved to smaller office, reduced from a twelve-month contract to a nine-month contract, and ceased to direct equipment).

216. *See, e.g.*, Simonson v. Iowa State Univ., 603 N.W.2d 557, 559 (Iowa 1999).

suspending a professor from working with graduate students, or declaring a professor ineligible for a period of time to receive internal research funds or sabbaticals**.**

F. Salary Actions for Disciplinary Reasons

1. Denial of Salary Increases

The denial of salary increases—short term and long term—are sometimes considered as disciplinary sanctions against faculty.[217]

In *Harrington v. Harris*,[218] the Fifth Circuit considered whether the application of a merit pay plan in the law school of Texas Southern University, a public historically black institution, violated the legal rights of three tenured white professors.[219] The professors claimed that they received lower-than-expected merit increases in retaliation for exercising their free speech rights, which included writing to various Texas Southern University officials seeking the dismissal of a law school dean, participating in a "no confidence" vote to remove the dean, and complaining to the American Bar Association about the university's refusal to dismiss the dean.[220]

The court rejected the professors' First Amendment retaliation claim, finding the case merely a "dispute over the quantum of pay increases."[221] The court noted

217. In *Academic Freedom and Tenure: Arizona State University*, 61 AAUP BULL. 65 (Spring 1976), the AAUP investigating committee examined a matter involving an antiwar professor who was active in the Socialist Workers' Party who canceled class to speak at a rally. The committee found as not supported by the evidence the imposition by the administration of "sanctions . . . [that] involve financial penalties, which the investigating committee considers severe individually, and which become very severe when lumped together and recommended 'for an indefinite period' in the President's report." *Id*. at 65. The financial sanctions included the denial of a salary increase for one year and "any raise" for the following year, and the recommendation of the issuance of a letter of censure for "five other penalties [to] be imposed 'for an indefinite period . . . (1) No merit salary increases (2) No summer teaching . . . (3) No promotions . . . (4) No leaves . . . with pay (5) No travel at University expense.'" *Id. See also* AAUP, *Academic Freedom and Tenure: University of Missouri, Columbia*, 59 AAUP BULL. 34, 41–42, 45 & n.2 (Spring 1973) (finding that while sanction of a salary reduction of "one or two days of pay, running from $40 to $110" for six faculty members who cancelled classes for two days in support of protests "fueled by the tragedies at Kent State University and Jackson State College" was "relatively light," more severe sanctions, including the denial of "salary increments," were more "severe"); AAUP, *Academic Freedom and Tenure: The College of Osteopathic Medicine and Surgery (Iowa)*, 63 AAUP BULL. 82, 86 (April 1977) (finding as "major sanctions" the imposition of suspension and salary reduction).

218. 118 F.3d 359 (5th Cir.).

219. *Id.* at 359. S*ee also* Ghirardo v. Univ. of S. Cal., No. 94-55430, 2005 U.S. App. LEXIS 26573 (9th Cir. Dec. 2, 2005) (involving the University of Southern California which rebutted female professor's sex discrimination claim by demonstrating that refusal to give her a salary increase was in response to a grievance panel's finding that she had engaged in misconduct).

220. *Harrington*, 118 F.3d at 364.

221. *Id.* at 366. As the court opined:

"Adverse employment actions are discharges, demotions, refusals to hire, refusals

that the professors had not "suffered a reduction in pay" and "are among the law school's top earners."[222] However, the court observed that "[i]f Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion."[223]

Other courts, however, have found as impermissible discipline the denial of a one-time salary increase. In *Power v. Summers*,[224] the Seventh Circuit ruled that the plaintiffs had an actionable claim against the administration of Vincennes University—a two-year public institution in Indiana which allegedly retaliated against three professors by awarding them low merit increases because they had spoken out on issues of faculty salaries, thereby implicating the First Amendment.[225] The faculty members asserted that they were awarded merit increases of only $400, compared with an average increase of $1,000, despite strong performance evaluations, because they were outspoken.[226] The professors sought a judicial injunction commanding Vincennes University to raise their base salaries to reflect the merit increases they would otherwise have been awarded.[227] In this unusual case, the university "concede[d] that these so-called 'merit' raises were actually used to reward faculty who were combating 'dissension' and 'divisiveness.'"[228] The court calculated that the lower merit increase

> not only reduced the fringe benefits [the professors] would have received had they gotten a higher raise, but will reduce their future salaries; for by being added to the base salary the amount of the merit raise will be paid in all future years to those faculty who were granted

to promote, and reprimands." Actions such as "decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures," while extremely important to the person who has dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation.

Id. at 365 (quoting Doresett v. Bd. of Trs. For State Colls. & Univs., 940 F.2d 121, 123 (5th Cir. 1991)). *See also Dorsett*, 940 F.3d at 121 (finding no constitutional violation in limiting salary increase for professor who did not speak out on a matter of public concern).

222. *Harrington*, 118 F.3d at 366. The court framed the professors' claim as "we were not awarded merit pay increases in the same amount as others or in the amount to which we think we were entitled." *Id.*

223. *Id.* At the same time, the court accepted the law professors' argument that the jury could have reasonably concluded that the professors' low merit increases constituted race discrimination, because the faculty members presented evidence that the administration "failed to give white professors equal credit and consideration" for their work, which caused "black professors to receive higher merit pay increases than those received by their white counterparts." *Id.* at 368. Similarly, the court found that a jury could have concluded that the administration violated the professors' substantive due process rights by acting in an arbitrary and capricious manner in conducting the merit pay evaluations. *Id.*

224. 226 F.3d 815 (7th Cir. 2000).

225. *Id.* at 821. The court described the university as follows: "Vincennes University, which despite its grand name is only a two-year college, pays low salaries to its faculty . . . ." *Id.*

226. *Id.* at 819.

227. *Id.* at 817–18.

228. *Id.* at 819.

it.[229]

In allowing the case to proceed to trial, the court concluded that it could not say "that denying a raise of several hundred dollars as punishment for speaking out is unlikely to deter the exercise of free speech; a tenure system does not select for boldness."[230]

Other courts have upheld as permissible discipline the denial of a merit increase. In *Wirsing v. Board of Regents of University of Colorado*,[231] the Tenth Circuit upheld the district court's summary judgment ruling in favor of the University of Colorado, finding no illegality when it denied Marie Wirsing, a tenured professor of education, a merit increase when she refused to distribute "standardized" teacher evaluation forms to her class.[232] She argued that the requirement violated her academic freedom as protected by the First and Fourteenth Amendments.[233] The system-wide teacher evaluation policy was the basis upon which annual merit salary increases were awarded.[234] Wirsing's position was "that teaching and learning cannot be evaluated by any standardized approach,"[235] and the evaluations were "contrary to her theory of education."[236] The administration argued that Wirsing's refusal to comply with the teacher evaluation requirement was not protected from sanction.[237] While a faculty committee and division director gave Wirsing high teaching ratings in two consecutive years, the dean denied her merit increases for her refusal to administer the evaluation form.[238] The court reasoned that the evaluation form did not interfere with Wirsing's academic freedom, because the forms were "unrelated to course content."[239] Accordingly, the court ruled that the university could require the professor to use its evaluation forms and that "it may withhold merit pay increases for her refusal to do so."[240]

A longer-term denial of a salary increase may raise greater judicial concerns. In

229. *Id.* at 820. In so reasoning, the court opined on the difference between a bonus and a raise: "Bonuses generally are sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer, while raises are normal and expected, if only to offset inflation, which while mild in the United States today is not negligible." *Id*. at 821.

230. *Id.*

231. 739 F. Supp. 551 (D. Colo. 1990), *aff'd*, 945 F.2d 412 (10th Cir. 1991) (unpublished table decision).

232. *Id.* at 554.

233. *Id.* at 552.

234. *Id.*

235. *Id.*

236. *Id.* at 553.

237. *Id.* at 552.

238. *Id.*

239. *Id.* at 554.

240. *Id. See also* Shaw v. Bd. of Trs., 396 F. Supp. 872, 886–87 (D. Md. 1975), *aff'd*, 549 F.2d 929 (4th Cir. 1976) (concluding that faculty member's refusal to participate in commencement exercises as a means of protesting administrative policies was a violation of their conditions of employment and unprotected by the First Amendment).

Vaughn v. Sibley,[241] an Alabama appellate court ruled that the University of Alabama at Birmingham violated the rights of Leo Vaughn, a tenured professor of mathematics, by denying him any salary increase from 1982 through at least 1994.[242] Vaughn sued the administration, seeking the enforcement of its salary policy that each faculty member was to be paid within an approved salary range unless the college president filed an annual exception to the range with required documentation.[243] The administration admitted to the facts alleged by Vaughn, but argued it was immune from such suit under the state constitution.[244] The state appellate court reversed part of the lower court's summary judgment for the university, reasoning that the administration either had to follow its salary policy and pay the professor the minimum salary, or had to file an exception to exclude him from the established salary range.[245]

In the end, then, a denial of a salary increase generally will be upheld unless it is imposed for impermissible reasons, such as retaliation for the exercise of First Amendment rights or race discrimination, or it violates a contractual obligation.

2. Salary Reduction

Salary reductions, as opposed to denials of salary increases, tend to be imposed infrequently and significantly ratchet up the severity of the discipline.[246] In *Williams v. Texas Tech University Health Sciences Center*,[247] Charles Williams, a tenured professor of anesthesiology research, sued the university's medical school

241. 709 So. 2d 482 (Ala. Civ. App. 1997).

242. *Id.* at 484, 487. It is unclear whether the denial of salary increases continued up until 1997, the date of the court decision. Vaughn asserted that from 1982 through 1994, his salary varied from the minimum approved salary range anywhere from $587 to $12,787. *Id.* at 484.

243. *Id.*

244. *Id.*

245. *Id.* at 485.

246. From time to time controversies erupt when outspoken faculty members trigger the outrage of particular state legislators who then seek to reduce individual professors' salaries through college or university appropriations. *See, e.g.*, Olivier Uyttebrouck, *UNM Prof's Wages Stay in Budget*, ALBUQUERQUE J., Jan. 29, 2002 (reporting that legislator sought to delete professor's salary from university appropriation because of his controversial statement about the September 11 terrorist attacks); Elizabeth F. Farrell, *Book on Childhood Sexuality Arouses Controversy*, CHRON. HIGHER EDUC., Apr. 19, 2002, at A21 (reviewing involvement of majority leader of state house of representatives who threatened to remove financial support for the university press); *Missouri Lawmakers Get Mad and Get Even*, CHRON. HIGHER EDUC., May 31, 2002, at A19 (reporting that state legislators "cut $100,000 more from the university's budget after Harris G. Mirkin, a professor on the Kansas City campus, continued doing research on pedophilia despite their objections"). *See also* Starsky v. Williams, 353 F. Supp. 900, 915 (D. Ariz. 1972) (expressing concern of Arizona State University that state legislature might penalize the university in state appropriations because of the outspoken views of a Marxist professor). *See generally* Mark F. Smith, *Improper Activities*, 88 ACADEME 85 (Nov.–Dec. 2002) (reviewing appropriations rider in the North Carolina legislature targeting controversial university summer reading programs and the University of Missouri controversy).

247. 6 F.3d 290 (5th Cir. 1993).

claiming that the administration violated his due process rights by failing to provide him with a hearing before the medical school reduced his compensation from $68,000 to $46,500.[248] The administration allegedly reduced the professor's salary because he had not generated enough grant income.[249] The Fifth Circuit disagreed with the professor, granting Texas Tech University's summary judgment motion.[250] It ruled that the professor received sufficient due process—six months notice and the opportunity to seek additional funding—and that his interest in a specific salary did not outweigh the state's interest in administering its budget.[251] In so reasoning, the court found that Williams did not have a property interest in his particular salary because the tenure regulations in place allowed for annual adjustments to the professor's salary and that augmentations were not guaranteed.[252]

State laws may restrict salary reduction for public employees, including faculty at state institutions. For example, a New Jersey statute provides that no tenured professor in a public college or university may be "subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause."[253] By requiring a showing of just cause, the law appears to preclude salary

248. *Id.* at 292.

249. *Id.*

250. *Id.* at 294.

251. *Id.*

252. *Id.* at 292, 294. Courts generally rule that faculty members do not have a property interest in a specific salary. *See, e.g.*, Swartz v. Scruton, 964 F.2d 607, 610 (7th Cir. 1992). *See also* Tavolini v. Mount Sinai Med. Ctr., 26 F. Supp. 2d 678, 682 (S.D.N.Y. 1998) (dismissing breach-of-contract action by tenured professor whose salary was reduced to under the minimum for his rank, but above the minimum salary set forth in the faculty handbook, which the parties agreed constituted a contract between them); Means v. State Bd. of Educ., 267 P.2d 981 (Mont. 1954) (ruling that reduction of tenured professor's salary is breach of tenure agreement). *See generally* Donna R. Euben, *Doctors in Court: Salary Reduction Litigation*, 85 ACADEME 87 (Nov.–Dec. 1999), *available at* http://www.aaup.org/publications/Academe/1999/99nd/ND99LgWa.htm (last visited Jan. 23, 2006). An AAUP investigating committee commented on the notice issued by a college administration proposing a substantial reduction of salary to a tenured faculty member. AAUP, *Academic Freedom and Tenure: The College of Osteopathic Medicine and Surgery (Iowa)*, 63 AAUP BULL. 82 (Apr. 1977). Dr. David Robert Celander was offered a contract reducing his salary by 30%, and later was suspended and then dismissed for incompetence by the college president. *Id.* at 83–84. The AAUP committee found that the suspension and salary reduction were imposed unilaterally with no academic due process. *Id.* at 86. The committee further found the salary reduction and suspension to be "major sanctions" requiring due process similar to that called for by dismissal. *Id.*

253. N.J. STAT. ANN. § 18A:6-18 (West 1999). *See, e.g.*, Williams v. Red Bank Bd. of Educ., 662 F.2d 1008, 1017 (3d Cir. 1981) (citing the New Jersey law as one of several statutes supporting the general proposition that "a teacher who fails to live up to the required standards may be disciplined or even removed from tenure"). For examples of other states' statutes, see KY. REV. STAT. ANN. §§ 164.360, 164.365 (West, Westlaw through end of 2005 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 73, § 4B (West, Westlaw through 2005 1st Annual Sess. and through Ch. 10 of the 2006 2d Annual Sess.); N.M. STAT. ANN. § 21-1-7.1 (West, Westlaw through Ch. 3 of the First Special Session of the 47th Legislature (2005) (including Constitutional Amendments 1 and 2)); TENN. CODE ANN. §§ 49-8-302 to 49-8-304 (West, Westlaw through end of 2005 First Reg. Sess.).

reduction as a sanction except where dismissal would be permissible.

G. Fines or Restitution

An exceedingly rare action is for an administration, as a form of discipline, to seek reimbursement, restitution, or a fine from a faculty member.[254] The Fair Labor Standards Act regulations provide that:

> Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment.[255]

H. Suspension

There are a variety of suspensions, including paid suspensions, unpaid suspensions, and immediate (paid and unpaid) suspensions.[256] AAUP policy provides that a suspension pending a faculty hearing should be with pay.[257] If an administration, instead of moving to dismiss a faculty member, intends to impose a suspension as a form of sanction, AAUP policy recommends that such action should be preceded by a hearing with the same procedural protections as afforded in a dismissal case.[258]

I. Paid Suspensions

Faculty members who have been suspended with pay occasionally seek legal redress. Courts generally rule that suspensions with pay do not trigger constitutional due process concerns at public institutions.[259]

254. *See, e.g.*, Hughes v. Univ. of Me., 652 A.2d 97 (Me. 1995) (suspending a tenured professor without pay for six and one-half days after advancing him $10,000 and disallowing him a portion of his claimed expenses to make up the equivalent of the amount in dispute).

255. 29 C.F.R. § 541.602(b)(5) (2005). The Secretary of Labor has posited that employees whose pay is docked in small amounts for disciplinary reasons "do not deserve exempt status because as a general matter true 'executive, administrative, or professional' employees are not 'disciplined' by piecemeal deductions from their pay, but are terminated, demoted, or given restricted assignments." Auer v. Robbins, 519 U.S. 452, 456 (1997).

256. *See generally* Ann H. Franke, *Suspending a Faculty Member*, 83 ACADEME 52 (July–Aug. 1997).

257. *See Statement on Procedural Standards in Faculty Dismissal Proceedings*, *supra* note 75.

258. *See Regulations on Academic Freedom and Tenure*, *supra* note 72.

259. Goss v. Lopez, 419 U.S. 565 (1975) (noting that *de minimis* property interests do not trigger procedural due process protections). *See, e.g.*, Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d Cir. 1998) (holding that while tenured professor was being investigated for the use of inappropriate language in the classroom, his suspension with pay did not violate his constitutional

In *Simonson v. Iowa State University*,[260] the Iowa Supreme Court ruled that placing Michael Simonson, a tenured professor, on "paid administrative leave" during a sexual harassment investigation did not trigger due process protections under the state and federal constitutions because he was "not deprived of any economic benefits."[261] After receiving a student complaint alleging sexual harassment, the dean placed Simonson on paid administrative leave pending the outcome of the investigation.[262] Simonson appealed the dean's decision, but the provost denied the appeal.[263] Simonson then sought review of the provost's decision by a faculty senate committee, which recommended reinstatement of Simonson, and its recommendation was forwarded to the president.[264] The president rejected the faculty senate's recommendation that Simonson "be taken off administrative leave pending the completion of the investigation."[265]

Simonson sued in state court, seeking reinstatement to his teaching duties, arguing that his placement on administrative leave violated his due process rights under the state and federal constitutions.[266] The court ruled in the professor's favor, and Iowa State University appealed the court's requirement that it provide Simonson "a full, evidentiary-type hearing prior to placing him on paid administrative leave."[267]

The central issue before the state supreme court was whether Simonson was entitled to a hearing before being placed on paid administrative leave.[268] The court thought it helpful to "clarify that Simonson was not suspended, but rather was placed on paid administrative leave pending the investigation of the sexual

rights even though his "temporary removal from class duties may have further stigmatized him"); Roberts v. Bd. of Trs. of the Minn. State Colls. & Univs., Nos. A03-528, A03-1053, 2004 Minn. App. LEXIS 306, *23 (Minn. Ct. App. Apr. 6, 2004) (rejecting aviation professor's claim that his due process rights were violated by a sixty-day paid suspension, which was imposed pending an auditor's report examining an allegation that he misappropriated funds, because "a suspension with pay does not invoke the protection of the Due Process Clause") (internal citations omitted); Victor v. Brickley, 476 F. Supp. 888, 895–96 (E.D. Mich. 1979) (finding that suspension of nontenured faculty member during sexual harassment investigation did not trigger "pre-deprivation" due process protections). *See also* Pitts v. Bd. of Educ. of U.S.D. 305, 869 F.2d 555, 556 (10th Cir. 1989) (ruling that two-day suspension with pay failed to involve a "measurable property interest"); Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 9 (1st Cir. 2003) (declining to extend due process protection to suspensions with pay and noting that the Supreme Court reached a unanimous decision declining to extend due process to situations where suspension was *unpaid* (citing Gilbert v. Homar, 520 U.S. 924, 929–30 (1997))). For a more in-depth discussion of *Gilbert*, see *infra* text accompanying notes 300–309.

260. 603 N.W.2d 557 (Iowa 1999).

261. *Id.* at 562.

262. *Id.* at 559.

263. *Id.* at 560.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

harassment complaint filed against him."[269] The court reasoned that "to determine whether a public employee has a property interest in continued employment, we look to state law and any contractual rights Simonson may have."[270] Accordingly, the court looked to the university's faculty handbook provisions on the imposition of sanctions.[271] The lower court had found his contract with Iowa State University and the university's administrative code that guaranteed Simonson's property interest in continued employment as a tenured professor.[272] The state supreme court disagreed. It noted that the administrative code defined suspension as when one "shall receive no salary," and that the sanctions requiring "appropriate hearings" were only for "suspension, expulsion, or dismissal."[273] Because the code referred to suspension without pay as a sanction, but not paid suspension, the court concluded that "a faculty member who is placed on administrative leave *with pay* is not suspended as that term is defined in the University's personnel policies."[274] Thus Simonson did not have a property interest entitling him to a hearing before the imposition of the paid suspension.[275] In reversing the lower court, the state supreme court opined that "[p]lacing Simonson on paid administrative leave was a way the University could protect students, while at the same time ensuring that Simonson continued to receive the economic benefits of his position."[276]

Professors at private institutions have challenged paid suspensions as breach-of-contract actions. In *Earnhardt v. University of New England*,[277] John Earnhardt, an untenured professor who was dismissed for alleged sexual misconduct and harassment, sued the private university for breach of contract and negligence.[278] Earnhardt admitted that he had had relationships with the complaining students, but he contended that they were consensual.[279] During the University of New England's investigation into the complaints, the university suspended him with pay.[280] In the end, the investigation found that he had violated the university's sexual harassment and conflict-of-interest policies, as well as the AAUP *Statement on Professional Ethics*, which was incorporated into the university's policies.[281] The president concluded that Earnhardt should be dismissed and notified him

269. *Id.* at 561.

270. *Id.* at 562.

271. *Id.* at 563.

272. *Id.*

273. *Id.* at 563 (emphasis omitted).

274. *Id.* (emphasis in original).

275. *Id.* The court assumed "without deciding that the University's procedural rules concerning suspension [without pay] create a property interest in employment which entitles a professor to an 'appropriate hearing' prior to suspension." *Id.*

276. *Id.* at 565.

277. No. 95-219-P-H, 1996 U.S. Dist. LEXIS 10030 (D. Me. July 3, 1996).

278. *Id.* at *5.

279. *Id.* at *9.

280. *Id.* at *10.

281. *Id.* For a discussion of the AAUP's *Statement on Professional Ethics*, see *supra* notes 42–44 and accompanying text.

accordingly.[282] Earnhardt sought review by the faculty grievance committee of his suspension and dismissal, and the committee concluded that Earnhart's suspension and dismissal were justified.[283]

In court, Earnhardt argued specifically that the University of New England "breached his contract by suspending him without reason to believe his continued presence on campus would threaten harm to himself or others."[284] The court rejected the professor's contention and granted the university's motion for summary judgment.[285] The court found no language in his appointment letter or the university's faculty handbook that required that "a faculty member's . . . presence on campus threaten harm to himself or to others before he could be suspended."[286]

J. Unpaid Suspensions

Depending on the severity of the deprivation, some courts have found unpaid suspensions to violate faculty members' due process rights.[287]

282. *Earnhardt*, 1996 U.S. Dist. LEXIS 10030, at *10.

283. *Id.* at *11.

284. *Id.* at *16.

285. *Id.* at *1.

286. *Id.* at *19.

287. *See, e.g.*, Bonnell v. Lorenzo, 241 F.3d 800, 806–08 (6th Cir. 2000) (noting that Macomb Community College professor who was initially put on "Disciplinary Suspension" (leave without pay) for four months while sexual harassment investigation was pending, was later put on indefinite leave with pay); Peacock v. Bd. of Regents, 510 F.2d 1324, 1327 (9th Cir. 1975) (concluding that no pre-suspension hearing was required when professor was suspended and then immediately given post-suspension hearing); Shub v. Hankin, 869 F. Supp. 213 (S.D.N.Y. 1994) (removing professor from teaching pending resolution of internal sexual harassment investigation); Frye v. La. State Univ. Med. Ctr. in New Orleans, 584 So. 2d 259, 261–62 (La. Ct. App. 1991) (ruling that one-day suspension without pay did not require pre-suspension hearing); Hughes v. Univ. of Me., 652 A.2d 97 (Me. 1994) (ruling that six and one-half day unpaid suspension of tenured professor, which the administration imposed for his refusal to return a portion of his claimed conference expenses and that was "equivalent to the amount Hughes allegedly owed to the University," was properly dismissed because the professor failed to exhaust his administrative remedies); Stephens v. Roane State Cmty. Coll., No. M1998-00125-COA-R3-CV, 2000 WL 192577 (Tenn. Ct. App. Feb. 18, 2000) (remanding case for procedural and substantive review under state statute providing for "suspension for cause" that involved tenured professor's six month unpaid suspension for violating institutional sexual harassment policies). *See also* AAUP, *Academic Freedom and Tenure: Macomb County Community College (Michigan): A Report on a Disciplinary Suspension*, 62 AAUP BULL. 369, 373 (Winter 1976) (finding that denial of one week's salary to professor for missing six days of class to attend a professional conference (and two days "for other reasons not specified in the record") and later suspension of one-semester without pay was "far too severe" because "[i]n monetary terms the suspension cost [the professor] over $10,000"); AAUP, *Academic Freedom and Tenure: University of Missouri, Columbia*, 59 AAUP BULL. 34, 43 (Spring 1973) (finding that "[t]he tangible effect upon [a professor] of the official suspension from June 2 to 12 was that he received no salary for that span of time" and finding that penalty to be significant). Fair Labor Standards Act (FLSA) concerns may be triggered by the unpaid suspension of a faculty member. *See supra* text accompanying note 255.

In *Silva v. The University of New Hampshire*,[288] the district court ruled that the unpaid suspension of Donald Silva, a tenured professor of English, violated his due process rights.[289] The court reviewed the disciplinary sanctions imposed upon Silva, which included the creation of shadow sections of his course, a letter of reprimand, a "suspension" or removal from teaching classes with pay, and a suspension without pay for a year.[290] The district court found the disciplinary sanctions "in the aggregate" to have created more than a "de minimis" deprivation of Silva's due process rights and that he was entitled to due process protections before the university "significantly altered his employment status."[291] In so reasoning, the court ruled that the unpaid suspension formed an "independent basis" for issuing a preliminary injunction on the grounds that Silva had been and continued to be irreparably harmed.[292]

Sometimes contracts, such as collective bargaining agreements, modify the constitutional due process protections triggered by suspensions without pay. In *Victor v. Brickley*,[293] an untenured professor at Eastern Michigan University was suspended without pay pending an investigation into an allegation that he had had sex with some of his female students and had attempted to do so with others.[294] After the investigation was complete and the professor had filed grievances protesting the suspension, he was reinstated with back pay.[295] The professor filed suit against the administrators, claiming that he had been deprived of due process when he was suspended without pay before a hearing.[296] The court disagreed, ruling that the procedures followed were sufficient because he was untenured so he had no "expectation of continued employment," he was only temporarily suspended until the university proved the charges, and the collective bargaining agreement he had signed explicitly provided for suspension without pay and without a pre-suspension hearing.[297] The court cited the university's strong "obligation to avoid even the appearance of what might be characterized as sexual blackmail of students, at worst, and unprofessional conduct, at best," in suspending him without pay before a hearing.[298]

288. 888 F. Supp. 293 (D.N.H. 1994)

289. *Id.* at 317.

290. *Id.*

291. *Id.* at 317–18.

292. *Id.* at 326. *See also* AAUP, *Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME 70, 76 (Nov.–Dec. 1994) (noting that suspension without pay for an initial time period that was ultimately withdrawn still constituted a "severe sanction" that was "imposed without having afforded Professor Silva requisite protections of academic due process").

293. 476 F. Supp. 888 (E.D. Mich. 1979).

294. *Id.* at 890.

295. *Id.*

296. *Id.* at 894.

297. *Id.* at 895.

298. *Id. See also* Narumanchi v. Bd. of Trs., 850 F.2d 70, 71 (2d Cir. 1988) (ruling that no due process violation existed when accounting professor at Southern Connecticut State University was suspended without pay for two weeks because of his "refusal to permit a formal classroom

The U.S. Supreme Court directly addressed the due process rights of a tenured non-faculty public employee who is suspended without pay.[299] In *Gilbert v. Homar*, the Court ruled that the due process rights of Richard Homar, a tenured police officer at East Stroudsberg University, had not been violated when the administration suspended him without pay for sixteen days without a pre-suspension hearing after his arrest in a drug raid.[300] Homar challenged the unpaid suspension before his meeting with university officials as violative of his due process rights.[301] The Third Circuit had agreed with Homar, ruling that the administration's failure to provide him with a pre-suspension hearing violated his due process rights.[302]

The Supreme Court reversed, ruling that no absolute constitutional rule required a hearing before the unpaid suspension of a tenured employee.[303] It explained that the concept of due process is flexible, providing "such procedural protections as the particular situation demands," especially in this situation where the university believed that it needed to move quickly to protect public confidence in campus law enforcement.[304] The Court further observed that "the length [and] finality of the deprivation [should be considered] in determining what process is due."[305] The Court differentiated between Homar's interest in remaining employed and his interest in the temporary loss of pay, which the court found to be "insubstantial."[306] The Court further noted the administration's strong interest in moving quickly given the pending felony charges against Homar.[307]

The *Gilbert* decision should not be generally applicable to the due process

evaluation following complaints from students that his classes were conducted in an unprofessional manner"; the administration had strictly followed collective bargaining agreement by scheduling a grievance hearing to contest the suspension and professor had skipped the hearing).

299. Gilbert v. Homar, 520 U.S. 924 (1997).

300. *Id.* at 924.

301. *Id.* at 928.

302. Homar v. Gilbert, 89 F.3d 1009 (3d Cir. 1996), *rev'd*, 520 U.S. 924 (1997).

303. *Gilbert*, 520 U.S. at 929–31.

304. *Id*. at 930 (quoting Morrissey v. Brewer, 409 U.S. 471, 481 (1972)). In determining what constitutes due process in a particular case, "three distinct factors" must be balanced. *Id.* at 931. The Court lists these factors as "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Id.* at 931–32 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

305. *Id.* at 932. *See, e.g.*, McLaurin v. Clarke, 133 F.3d 928, No. 96-16823, 1997 WL 800243, at *3 (9th Cir. Dec. 17, 1997) (unpublished table decision) (ruling in post-*Gilbert* case that Los Rios Community College District administration did not violate the due process of tenured faculty member who was removed as administrator due to violation of sexual harassment policy because his removal "did not include termination or pay demotion"; rather, the discipline included his transfer to a teaching position and a letter of reprimand being placed in his file).

306. *Gilbert*, 520 U.S. at 932.

307. *Id.* Homar's suspension was upheld on remand. Homar v. Gilbert, 63 F. Supp. 2d 559 (M.D. Pa. 1999).

protections afforded suspended faculty members

> [u]nless a college could demonstrate that it needed to remove a tenured faculty member quickly because he or she was a potential threat to the health or safety of others, or because the faculty member had committed some act that rendered him or her unfit to continue teaching pending a disciplinary hearing.[308]

Nevertheless, at least some courts appear to be reading *Gilbert* as allowing for no pre-suspension hearings of faculty in a wide variety of situations.[309]

K. Immediate Suspensions

Regulation 5 of the AAUP's RIR provides that an institution may suspend a professor when immediate harm to the individual or others is threatened pending a hearing on changes and the ultimate determination of the individual's status.[310] Regulation 5 further provides that, before suspending a faculty member, the administration should consult with a faculty committee concerning the propriety, length, and other conditions of the suspension.[311] The threat of physical harm can certainly warrant suspension, but so can harm to the educational process (e.g., a faculty member who refuses to evaluate the work of most of her students). AAUP policy provides that such suspensions should be with pay and such suspensions can remain in effect during investigation and disciplinary proceedings.[312]

In *Delahoussaye v. Board of Supervisors of Community and Technical Colleges*,[313] the Louisiana appellate court ruled that the administration violated the due process rights of Ted Delahoussaye, a tenured instructor at Louisiana

308. WILLIAM A. KAPLIN & BARBARA A. LEE, YEAR 2000 CUMULATIVE SUPPLEMENT TO THE LAW OF HIGHER EDUCATION, 280–96 (3d ed. 2000). *See, e.g.*, Malla v. Univ. of Conn., 312 F. Supp. 2d 305, 308 (D. Conn. 2004) (ruling that a genuine issue of material fact existed because the professor's removal from the center director position was so significant in the academic community that his removal required greater procedural protections, and noting in a footnote that in *Gilbert* the "Supreme Court has left open the question of whether discipline of tenured public employees short of termination is afforded protection under the Due Process Clause"); Delahoussaye v. Bd. of Supervisors of Cmty. & Tech. Colls., 906 So. 2d 646, 655 (La. Ct. App. 2005) (finding that the "factual circumstances thus fail to bring this case within the *Gilbert* exception to the general rule of *Loudermill*").

309. *See, e.g.*, Levenstein v. Salafsky, 164 F.3d 345 (7th Cir. 1998) (noting that professor was "wise" not to argue under *Gilbert* "that the initial act of suspending him with pay violated any constitutional right"); Levenstein v. Salafsky, 414 F.3d 767, 775 (7th Cir. 2005) (citing *Gilbert* for the proposition that "suspensions without pay are also possible under some circumstances"); Simonson v. Iowa State Univ., 603 N.W.2d 557, 561 (Iowa 1999) (citing *Gilbert* for the proposition that tenured public employees cannot be fired without due process). *See generally* Daniel T. Gallagher, *Summary Suspension of Public Employee Without Pay Does Not Violate Due Process*, 39 B.C. L. REV. 464 (1998) (discussing the history of the law before *Gilbert* and possible future implications of the then-new law).

310. *Regulations of Academic Freedom and Tenure*, *supra* note 72, at 26.

311. *Id.*

312. *Id.*

313. 906 So. 2d 646 (La. Ct. App. 2005).

Technical College-Lafayette campus, by placing him on administrative leave without pay for one day during an investigation after students sent letters to administrators complaining about sexual harassment.[314] The day after he was suspended, the college held a "post-suspension hearing" to inform the instructor of the reasons for his suspension, and to provide him with a chance to respond to the allegations.[315] The investigation found that the professor's "offensive statements" in class "created a detrimental learning environment," and the college scheduled a hearing to remove the instructor.[316] However, before the hearing took place, Delahoussaye sought a "judicial declaration of the unconstitutionality of the [college]'s imposition of leave without pay under its policy, as well as a writ of mandamus restoring his salary and benefits." [317]

The court ruled that the instructor's right to due process had been violated when he was suspended without pay before the hearing because the allegations lacked "indicia of independent, substantial trustworthiness provided by an indictment or arrest," were not "of such egregious character as to warrant immediate, 'emergency' action" by the board, and "the factual circumstances did not warrant the immediate, indefinite deprivation of [the instructor's] interest in receiving his salary."[318] The court further explained that the "mere fact that he was afforded a postsuspension hearing the day after the suspension's effective date does not serve to change the indefinite suspension without pay into a one-day loss of pay."[319]

L. Removal from Administrative Position

Some faculty members hold administrative positions, such as department chair, program director, or dean. These individuals often receive one or more course releases, an additional payment, or a calendar year contract (compared to the academic year contracts issued to many faculty). Although institutional policies and individual arrangements vary, in many cases individuals appointed to administrative positions serve at will,[320] and thus, may be removed from their administrative appointment (but not from their tenured faculty position) without cause and without due process protections.[321]

314. *Id.* at 656.

315. *Id.* at 647.

316. *Id.* at 648.

317. *Id.* at 648–49.

318. *Id.* at 654.

319. *Id.* at 655.

320. *See, e.g.*, Franken v. Ariz. Bd. of Regents, 714 P.2d 1308 (Ariz. Ct. App. 1985) (noting that the letter of appointment to administrative position specified that assignment was at-will).

321. *See, e.g.*, Mahaffey v. Kan. Bd. of Regents, 562 F. Supp. 887 (D. Kan. 1983) (finding no constitutionally-protected property interest in administrative salary or its perquisites). *But see* Roberts v. Coll. of the Desert, 870 F.2d 1411 (9th Cir. 1988) (holding department chair had a protectable property interest in retaining position as chair because the college president had testified that he and the chair had "mutually explicit understandings" that the president could not reassign her without good cause). *See also* Spiegel v. Univ. of S. Fla., 555 So. 2d 428 (Fla. Dist. Ct. App. 1989) (stating that department chair's contract was basis for property rights requiring

Courts have made it clear that, although an individual may hold tenure as a faculty member, there is no tenure in administrative positions (unless, of course, state law, institutional policy, or an individual contract explicitly provides for tenure in administrative roles).[322] In *Kirsner v. University of Miami*,[323] a state court ruled that the University of Miami could lawfully reduce a former department chair's salary by the amount attributable to his service as chair because, although he was a tenured faculty member, he was not tenured in the chair position.[324] Similarly, the Florida Supreme Court ruled that a department chair did not have tenure in that position, but only as a faculty member, and thus, the university's rules for nonreappointment of faculty did not apply to the decision not to reappoint a department chair.[325] Because no tenure in an administrative position exists, faculty members who are demoted from administrative positions do not have a constitutionally-protected property interest in that administrative position, and are not entitled to a notice or a hearing before being relieved of the position.[326]

If, however, institutional policy or an individual contract provides that removal from the administrative position may only be for cause, or the contract specifies a term for the appointment, then the administrator may not be removed without due process protections. In *Mangaroo v. Nelson*,[327] the university's faculty handbook

notice and opportunity to be heard). In *Speigel*, the department chair was removed only two months into his one-year contract without explanation or any opportunity to challenge the reasons for his removal. *Id.* at 428–29. The court reacted harshly to what it apparently considered unfair treatment:

> We hold that Dr. Spiegel's contractual status and the potential right to compensation over and above that of a professor are protected property rights that cannot be withdrawn without notice and the opportunity to be heard. This is not, however, the sole concern we have with the manner in which Dr. Spiegel was removed. Removing him without charging misconduct or providing any other explanation for such action may well damage his standing with his associates and in the community generally. It may place upon him a stigma giving rise to suspicions as to the reason for his removal, damaging his reputation and impairing his ability to obtain employment elsewhere, factors which implicate his liberty interest protected by the Fourteenth Amendment. These reasons, standing alone, suggest the propriety of a hearing prior to the termination of his contract. Thus, we find that Dr. Spiegel possesses a constitutionally protected property interest in the benefits flowing from his chairmanship as well as his tenured position of professor entitling him to the procedural protections of Chapter 6C4-10, Florida Administrative Code.

Id. at 429.

322. The AAUP's *Statement on Government of Colleges and Universities* provides: "The chair or department head should not have tenure in office; tenure as a faculty member is a matter of separate right. The chair or head should serve for a stated term but without prejudice to reelection or to reappointment by procedures which involve appropriate faculty consultation." *Statement on Colleges and Universities*, *supra* note 41, at 222.

323. 362 So. 2d 449 (Fla. Dist. Ct. App. 1978).

324. *Id.* at 451.

325. Mohammed v. Dep't of Educ., 444 So. 2d 1007 (Fla. Dist. Ct. App. 1984).

326. *See, e.g.*, Barde v. Trs. of Reg'l Cmty Colls., 539 A.2d 1000 (Conn. 1988); *see also* Jimenez-Torres de Panepinto v. Saldana, 834 F.2d 25 (1st Cir. 1985).

327. 864 F.2d 1202 (5th Cir. 1989).

stated that administrators could be removed only "for cause," and that removal before the end of the administrator's one-year contract required that due process protections be provided.[328] But in *Tuckman v. Florida State University*,[329] a dean who was removed prior to the end of his contractual term sued for breach of contract.[330] The court ruled that, because Florida State University continued to employ the former dean as a tenured professor and continued to pay him the enhanced salary and benefits until the expiration of the contract for his services as dean, there was no breach of contract.[331]

M. Demotion in Rank

Institutions on rare occasions demote faculty members from certain ranks or status as a form of discipline. The AAUP generally views reductions in faculty rank, such as from associate to assistant professor, as an inappropriate sanction, except in situations where the promotion had obtained through fraud or dishonesty.[332] Demotion claims tend to arise from academic misconduct allegations and have resulted in mixed judicial outcomes.[333]

328. *Id.* at 1203.

329. 530 So. 2d 1041 (Fla. Dist. Ct. App. 1988).

330. *Id.* at 1042. *See also Drucker v. Hofstra Univ.*, 719 N.Y.S.2d 263 (App. Div. 2001) (stating that the university complied with all provisions in faculty manual during removal of department chair for failure to maintain "an effective communications climate," and gave the plaintiff sufficient opportunity to respond to the administration's concerns before her removal).

331. *Tuckman*, 530 So. 2d at 1042.

332. AAUP, *Committee A Action Minutes* (June 10–11, 1992) (finding that "the penalty of demotion in rank, while not categorically inappropriate, should generally be resisted") (on file with authors). *See*, *e.g.*, AAUP, *Academic Freedom and Tenure: Simpson College (Iowa)*, 26 AAUP BULL. 607, 612 (Dec. 1940) (finding as violative of AAUP policies demotion of tenured associate to rank of assistant professor that would have "deprived" the professor under the tenure rules in force of "permanent tenure and of all rights to a hearing in the future" because of criticism of his administrative ability as department chair). The mechanics of a demotion would seem to raise a number of issues, including what are the conditions to be met to restore the previously held rank—simply the absence of further misconduct or additional academic achievement? If absence of misconduct, for how long?

333. *See* Bowman v. Shawnee State Univ., 220 F.3d 456, 459–62 (6th Cir. 2000) (ruling that full-time instructor of health and physical education was not unlawfully retaliated against by the dean after he rebuffed her sexual advances because even though she stripped him of his title, "Coordinator of Sports Studies," he was reinstated to the coordinator position after a week and there was no diminution in salary or prestige); Kirschenbaum v. Northwestern Univ., 728 N.E.2d 752, 762 (Ill. App. Ct. 1999) (finding that administration did not breach medical professor's tenure contract when it changed his status from "full-time" to "contributed service" because the "reclassification did not affect plaintiff's status as a tenured faculty member"); Hollister v. Tuttle, 210 F.3d 1033, 1036 (9th Cir. 2000) (finding that reduction in the number of academic credits offered for a course taught by professor and his removal from appointment on a college search committee was not "generally a demotion"). *But see* Klinge v. Ithaca Coll., 634 N.Y.S.2d 1000 (Sup. Ct. 1995) (ruling that a factual issue for jury existed regarding whether tenure was breached for professor, who was found guilty of plagiarizing, when he was demoted from full to associate professor, his salary was reduced, and his academic duties restricted); Moosa v. State Personnel Bd., 126 Cal. Rptr. 2d 321, 326 (Ct. App. 2002) (finding that administration violated collective

In *Radolf v. University of Connecticut*,[334] Justin Radolf, a tenured medical school professor, was eventually placed on academic probation by the university and the federal government for five years with respect to his federally funded research after it was discovered that he had falsified data in grant proposals.[335] Soon thereafter, the professor resigned from his position as director of the medical school's Center for Microbial Pathogenesis, where he was responsible for finding a cure for Lyme disease, but retained his title of full professor.[336] After he was not reinstated to the director position, he sued the medical school and the center's faculty members, arguing that his due process rights had been violated when he was not granted a pre-decision hearing before being denied reappointment as director.[337] The federal district court described the litigation as arising from the university administration's "attempt to navigate the difficult terrain of continuing to employ a tenured professor who was on academic probation imposed by the [university] and under investigation by the federal government for scientific misconduct."[338]

The court ultimately rejected Radolf's federal claims, granting summary judgment to the university, and declining to exercise jurisdiction over the remaining state claims.[339] The court reasoned that Radolf had no property interest in regaining the position of director, which was a discretionary appointment that he had "voluntarily relinquished" and, therefore, he was entitled to no procedural due process.[340] The court noted that Radolf had not suffered a reduction in salary or laboratory support, so the court was "skeptical that such intangible benefits [as prestige and honor] are sufficiently compelling to require a hearing before a decision is made on appointing a professor."[341] The court also found that Radolf had no particular property interest in participating in a Department of Defense (DOD) research grant: no evidence existed that "his income, tenure or research was intimately connected [to] and dependent on the DOD Grant so as to create a property interest in participation in this grant, or that he had any other right to participation in the DOD research which would create such a property interest."[342]

The court also rejected Radolf's claim that his First Amendment right to academic freedom was violated. While recognizing the First Amendment right of

bargaining agreement by demoting tenured faculty member from full to associate professor because of the professor's failure to comply with an administrative directive to develop and submit an improvement plan; the contract only authorized a discussion "along with suggestions").

334. 364 F. Supp. 2d 204 (D. Conn. 2005).

335. *Id.* at 208. A letter of reprimand was also placed in his personnel file. *Id.*

336. *Id.*

337. *Id.* at 206. This litigation appears to have been particularly acrimonious. The court noted that this "bitter dispute" appeared to have redirected "much of the time, energy and passion of the parties . . . towards this destructive, accusation-laden battle." *Id.*

338. *Id.* at 209.

339. *Id.* at 207.

340. *Id.* at 212–13.

341. *Id.* at 213.

342. *Id.* at 221.

academic freedom, the court found that Radolf had no such constitutionally protected "right to participate in writing a particular grant proposal or performing research under a particular grant."[343] Even if this "particular alleged variant of the First Amendment right to academic freedom" existed, the court wrote, it was not clearly established at the time of the administration's actions, and therefore the university administrators were entitled to qualified immunity.[344] The court "hasten[ed]" to note, however, that:

> [I]t is certainly possible that an academic institution could make a tenured professor's life so onerous and so difficult through denial of normal privileges and benefits of tenure that the University's actions could rise to the level of a constructive demotion. For example, a university might make it impossible for a professor to perform his duties by denying the tenured professor access to the library, laboratory spaces, classrooms, offices and other University resources that are usually accorded tenured professors.[345]

Radolf's situation, however, did not establish such a case of "constructive demotion."[346]

In an earlier case the Seventh Circuit upheld a university's demotion of a professor for professional misconduct.[347] In *Keen v. Penson*, Carl Keen, a tenured English professor at the University of Wisconsin-Oshkosh, failed a student and berated her in correspondence after he found as insufficient her apology for publicly complaining about his class assignments and grading policy in modern American literature.[348] Several internal faculty reviews of the matter resulted in a finding that Keen's letters were "unwarranted, personally demeaning to the intended reader, overbearing, unforgiving, and relentless" and "unprofessional," and that Keen violated the AAUP's *Statement of Professional Ethics* by failing the student when she merited a higher grade.[349] Based on the recommended sanctions

343. *Id.* at 215.

344. *Id.* at 218.

345. *Id.* at 228.

346. *Id.* The court in *Radolf* observed:

> Dr. Radolf continues to perform research in his chosen field; he is still a tenured faculty member; his salary and fringe benefits have not been reduced; he has not suffered any reduction in lab space or institutional support; he has received pay increases; he continues to apply for and receive grant funding; he continues to publish academic articles; he is still a member of academic societies, reviews manuscripts for academic journals and sits on editorial boards; he attends and speaks at scientific conferences; and he still sits on certain academic committees at [the university], just not the ones he wants to sit on.

Id. at 228. *But see* Gertler v. Goodgold, 487 N.Y.S.2d 565, 567–69 (App. Div. 1985), *aff'd*, 489 N.E.2d 748 (N.Y. 1985) (ruling that tenured medical school professor was not entitled contractually to adequate research space, fair teaching assignments, and participation in research grants because such "benefits" are "perquisites of faculty life," not "contract entitlements").

347. *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992).

348. *Id.* at 253.

349. *Id.* at 254.

by the faculty committee, the university's president ordered Keen to apologize to the student and give her a grade of "C."[350] When Keen refused, the president demoted him from associate to assistant professor and reduced his salary by $700.[351] Keen then appealed to the faculty senate executive committee, which upheld as "appropriate" the demotion in Keen's rank and salary.[352] Keen then sought review by the board of trustees, which declined to consider the matter.[353]

Keen sued, alleging that the university president's demoting him in rank violated his academic freedom and due process.[354] The lower court granted the university's motion for summary judgment, and the Seventh Circuit affirmed.[355] The court observed that the "various reviewing committees . . . [support]" the conclusion that "Keen abused his power as a professor in his dealing with his former student and deserves sanctions."[356] The court rejected Keen's First Amendment academic freedom argument, struggling to understand how the professor's interest in a First Amendment right to give the student an "F" and write demeaning letters to the student involved a matter of public concern.[357] In any case, the court reasoned that the University of Wisconsin had a stronger "interest in ensuring that its students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments," than in the faculty member's concerns.[358] The court opined:

> It is true that if Keen had written the apology and changed Johnson's grade, he could have avoided the loss of rank and salary. In a 'but-for' sense, then, Keen was demoted because he failed to write the apology. But in a 'proximate-cause' sense, he was demoted not because of his failure to apologize and change Johnson's grade but because of his sanctionable misconduct.[359]

The court further rejected the professor's contention that the punishment was unfair because no policy existed on grading or correspondence with students, declaring that a "university need not adopt a quasi-criminal code before it can discipline its professors . . . and should not be expected to foresee every particular type of unprofessional behavior on the part of its professors."[360] Lastly, the court rejected Keen's argument that he was denied procedural due process, citing to the

350. *Id.* at 254–56.
351. *Id.* at 255.
352. *Id.*
353. *Id.* at 256.
354. *Id.* at 256–57.
355. *Id.* at 257–59.
356. *Id.* at 257.
357. *Id.* at 257–58.
358. *Id.* at 258.
359. *Id.* The court cited to the board of regents' committee finding, which stated: "The circumstances reflect the institution's belief that Professor Keen's unprofessional behavior towards the student should be penalized, not that his opinions and views of the situation should be silenced." *Id.* at 259.
360. *Id.*

district court's finding that Keen had received "much more due process than even the most violent recidivist sitting on death row has been afforded in terms of the criminal justice system."[361]

N. Shadow Sections

"Shadow sections"—courses taught by other instructors to compensate for perceived problems in the teaching of the original professor—may violate a public college or university professor's constitutionally protected interests depending on why and how these parallel sections are created. Significant legal and policy risks are involved in the creation of shadow sections, and such an action should not be taken without thorough consideration of these risks. In the infamous case, *Levin v. Harleston*,[362] the administration of the City College of the City University of New York (CUNY) created shadow sections of a course, Philosophy 101, taught by Michael Levin, a white tenured professor who spoke in public about affirmative action quotas and the lack of intelligence of blacks as compared to whites, to "protect" and "insulate" his present and future students from the professor's "odious" remarks.[363] However, no students had ever complained about Levin's course.[364] The dean had asked the chair to assign someone else to teach Levin's section, which the chair refused to do because he found the action to be "immoral and illegal, and an unwarranted interference in the discretionary powers of a department chairman."[365] The dean then moved forward on his own, writing a letter to students enrolled in Levin's course and offering them a new section if they wished to transfer out of the course because of Levin's "controversial views."[366]

The district court enjoined permanently the continuance of the alternative sections of the introductory philosophy course, because the shadow sections "were established with the intent and consequence of stigmatizing Professor Levin solely because of his expression of ideas."[367] Instead, the effect of the dean's letter was to "officially [condemn] his views as controversial and dangerous to the welfare of his students and the educational process in the College at large."[368] The district court found no evidence to support the administration's contention that it created the "parallel" sections because Levin's theories outside the classroom harmed the students and the educational process in the classroom.[369] The court concluded: "University and College administrators may under certain circumstances penalize a faculty member for deficient scholarship or teaching, *if* they follow proper procedures, apply clear and announced criteria, and invoke, without distortion,

361. *Id.* at 257.
362. 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in relevant part*, 966 F.2d 85 (2d Cir. 1992).
363. *Id.* at 898.
364. *Id.*
365. *Id.* at 907–08.
366. *Id.* at 908.
367. *Id.* at 915, 927.
368. *Id.* at 918.
369. *Id.* at 922.

peer judgment. This was manifestly not done here."[370]

The Second Circuit affirmed, rejecting the administration's argument that the alternative sections "presuppose that Professor Levin will continue to teach a class section,"[371] and therefore, his First Amendment rights were not violated. The court opined, "Appellants' encouragement of the continued erosion in the size of Professor Levin's class if he does not mend his extracurricular ways is the antithesis of freedom of expression."[372]

In *Silva v. University of New Hampshire*,[373] the district court granted J. Donald Silva's preliminary injunction, finding that the university employed a subjective standard that violated the tenured professor's First Amendment academic freedom.[374] In so doing, it noted that the administration created "[t]wo shadow classes" when Silva was accused of sexual harassment.[375] Twenty-six students changed to the two alternate sections of the technical writing class.[376] One administrator noted that "scheduling a separate class is an extreme measure and an option he has never exercised in his six years."[377]

The AAUP's investigating committee report on Professor Silva at the University of New Hampshire discussed the creation of the shadow sections in more detail.[378] It reported that Silva "was required to announce at the beginning of each of his three sections of the technical writing course on March 18 that students could transfer to an alternate section" in light of the sexual harassment allegations

370. *Id.* at 927.

371. Levin v. Harleston, 966 F.2d 85, 88 (2d Cir. 1992).

372. *Id.* In an amicus brief filed in support of Levin in the Second Circuit, the AAUP and the other amici wrote: "[V]iable alternatives pre-dated establishment of the shadow sections. The district court noted the multiple sections of Philosophy 101 and the ready availability of transfer, were any student to so request." Brief for the AAUP, the New York Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellee, 29–30, Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992) (No. 91-7953). As Professor Robert O'Neil has commented:

> Concern about [Levin's] published writings and their startlingly insensitive views on race and intelligence needed urgent attention. The City College administration did almost everything right but in the end made two big mistakes. One concerns the "shadow sections," born of a commendable desire to protect students. If the dean had simply been prepared to offer alternative sections to any students who came and expressed discomfort about the racial views of their instructor rather than jumping the gun and stigmatizing a teacher about whom none had complained, the policy would have been not only acceptable but in fact laudable.

ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 50–51 (1997). *See also* McClennan v. Bd. of Regents of the State Univ., 921 S.W.2d 684, 687 (Tenn. 1996) (upholding "course substitutions" for students not wishing to enroll in a course with a professor found to have sexually harassed a student in teaching how to administer electrocardiograms).

373. 888 F. Supp. 293 (D.N.H. 1994).

374. *Id.* at 314, 332.

375. *Id.* at 320.

376. *Id.* at 310.

377. *Id.*

378. AAUP, *Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME 70 (Nov.–Dec. 1994).

against him.[379] According to the report, twenty-six of Silva's seventy-two students, including those who had filed sexual harassment complaints against him, transferred.[380] The reprimand imposed upon Silva required that he "reimburse the university for the cost of the alternate sections."[381] A faculty hearing panel recommended the imposition of "severe sanctions," including that "he not be allowed to return to the classroom until he had reimbursed the university for the alternate sections of his three classes the previous spring."[382]

O. Class Monitoring

Faculty members have been subjected in rare circumstances to college or university classroom monitoring as a form of discipline.

In *Parate v. Isibor*,[383] Natthu Parate, an Indian non-tenured civil engineering professor at East Tennessee State University, was ordered by his dean to alter the grading scale of one of his courses so that a student could receive a higher grade.[384] After other students complained about the grade they received on Parate's exam, the dean came to class, interrupted the professor and told the class that Parate was a poor teacher.[385] During the remainder of the year, administrators "continually sent faculty observers to his classroom."[386] Parate sued the dean and the head of his department, claiming he had been discriminated against and that his First Amendment rights had been violated.[387] Parate specifically argued that the type of classroom monitoring engaged in by the university administrators violated his academic freedom, because the university had already decided not to retain him, so

379. *Id*. at 72.

380. *Id.*

381. *Id*.

382. *Id.* at 74.

383. 868 F.2d 821 (6th Cir. 1989).

384. *Id.* at 824.

385. *Id.* at 825.

386. *Id.* In the report and recommendation to the district court in the Parate matter, the magistrate concluded, "School administrators have the right and duty to monitor classroom performance in an effort to determine if instructors are carrying out their teaching responsibilities in a professional and capable manner." Parate v. Isibor, No. 3-86-0311 at 17–18 (M.D. Tenn. Jan. 23, 1987) (Magistrate Judge's Report and Recommendation) (on file with author). The magistrate conceded, however, that "[i]n hindsight, it would have been more professional for defendants to have observed plaintiff's teaching performance, and then discussed any perceived deficiencies with him in private, rather than to humiliate him in front of his class. However, boorish behavior does not translate into a constitutional violation." *Id.* at 18. The magistrate concluded, "Plaintiff was not protected by the First Amendment from monitoring and inquiry into his competence as a teacher." *Id.* at 19. Parate took exception to this recommendation. While he recognized the right of the university to observe, review, and evaluate his competence as a teacher, in this case, Parate argued, "no legitimate reason" existed to investigate his teaching competence since his contract was not being renewed. Plaintiff's Objections to Magistrate's Report and Recommendation, *Parate*, No. 3-86-0311, at 11 (M.D. Tenn. Feb. 2, 1987) (on file with author). Instead, Parate argued that the supervisor's attendance was in retaliation for the professor's refusal to change the grades of the students. *Id.* at 12.

387. *Parate*, 868 F.2d at 825.

the monitoring served no evaluative function.[388] The federal appellate court disagreed. While it conceded that the administrator's behavior in Parate's classroom was "unprofessional," the court concluded that because "the defendants interfered with [Parate's] classroom teaching on only one occasion," the administrators' conduct "could not have resulted in a 'pall of orthodoxy' being cast' over his class."[389] The court ruled that such classroom monitoring, however "boorish," did not infringe upon Parate's academic freedom.[390]

As a policy matter, if periodic monitoring is deemed a necessary discipline, the primary responsibility should be in the hands of faculty familiar with the subject matter.[391]

P. Mandatory Counseling

Some administrations have required that faculty undergo counseling. The imposition of such a disciplinary sanction often arises in sexual harassment cases.[392] Such disciplinary "sensitivity training" triggers significant legal and

388. *Id.* at 830.

389. *Id.* at 831. The court further found that no academic freedom violation existed because Parate failed to contend that the administrators "consistently denied him a free and open exchange with his students." *Id*. It also stated that Parate, as a nontenured professor, had no "First Amendment right to teach a particular class or to be free from the supervision of university officials." *Id*.

390. *Id. But see* Kalia v. St. Cloud State Univ., 539 N.W.2d 828, 835 (Minn. App. 1995) (examining professor's race and national origin discrimination claim and noting that the university's request to have him submit to classroom monitoring "appear[ed] . . . to represent the peak in a series of prior related incidents" that constituted "evidence that the discrimination . . . occurred . . . with the purpose of denying tenure and promotion"). *Cf.* Rheams v. Marquette Univ., 989 F. Supp. 991, 997 (1997) (noting the grievance committee's discovery of several deficiencies in the professor's teaching style and a failure to adhere to university policy regarding exam administration during a classroom monitoring session undertaken at professor's request).

391. *See, e.g.*, Robert C. Post, *Academic Freedom and the "Intifada Curriculum,"* 89 ACADEME 16, 20 (May–June 2003), *available at* http://www.aaup.org/publications/Academe/2003/03mj/03mjpost.htm (last visited Jan. 23, 2006) (observing that English department took the "extraordinary step of requiring that a full tenured member of the faculty observe [a class on "The Politics and Poetics of Palestinian Resistance" taught by a graduate assistant which had originally been described as excluding those hostile to the Palestinian cause] to ensure that it would be taught in a way that was entirely consistent with applicable academic standards").

392. In addition to the cases discussed in this section, see also, *Powell v. Ross*, No. 03-C-0610-C, 2004 U.S. Dist. LEXIS 3601, at *3 (W.D. Wis. Feb. 27, 2004), where the court rejected a professor's defamation claim arising in part from a recommendation that he "attend sexual harassment training to identify his 'problem areas'"; Katherine S. Mangan, *Thorny Legal Issues Face Colleges Hit by Sexual-Harassment Cases*, CHRON. HIGHER EDUC., Aug. 4, 1993, at A13, which discusses a case where a University of Houston educational leadership professor was suspended and forced to undergo counseling after making a sexual advance toward a graduate student and the professor later sued after the university did not agree that he was fit to return, saying that his counseling did not "adequately deal with the harassment issue"; Robin Wilson, *Students Sue Professor and U. of Texas in Harassment Case*, CHRON. HIGHER EDUC., July 2, 2004, at A12, which reports on a professor at the University of Texas-Pan American who was found to have created a hostile learning environment for some of his students and was required to undergo counseling. Some sexual harassment policies explicitly delineate such mandatory

policy concerns including those relating to free expression, academic freedom, and privacy: "Colleges and universities need to distinguish between behavior—which they have a right to punish—and the attitudes or ideas that drive that behavior—which they do not."[393]

Requiring a faculty member to undergo mandatory counseling may also trigger protections under the Americans with Disabilities Act (ADA).[394] Some courts have ruled that an employer's directive that an employee undergo mandatory psychiatric counseling or "anger management" counseling is evidence that the employer "regarded" the employee as disabled, and thus the employee is entitled to the protections of the ADA.[395]

In *Bauer v. Sampson*,[396] the Ninth Circuit ruled that the chancellor of South Orange Community College District violated the First Amendment rights of Roy Bauer, a tenured professor of ethics and political philosophy at Irvine Valley College, by requiring the professor to meet with an anger management counselor.[397] Bauer "voiced his disapproval" of the acting college president through four writings and two illustrations—which the court described as "adolescent, insulting, crude and uncivil"—in the campus newspaper.[398] The

counseling as a proper sanction. For example, the University of Nebraska Employee Policies and Practices manual requires sexual harassment education to address particular faculty members' deficiencies. UNIV. OF NEB., EMPLOYEE POLICIES AND PRACTICES, *available at* http://www.nebraska.edu/hr/EmployeePolicyManual.pdf (last visited Jan. 23, 2006).

393. Jonathan Knight, Op-Ed., *The Misuse of Mandatory Counseling*, CHRON. HIGHER EDUC., Nov. 17, 1995, at B1 ("No single punishment is appropriate for all sexual-harassment cases, but it is the faculty member's misconduct, not his ideas, that should be punished."). There is more literature and case law raising significant concerns about mandatory counseling for students than for faculty. *See, e.g.*, Gorman v. Univ. of R.I., 646 F. Supp. 799, 814 (D.R.I. 1986), *rev'd on other grounds*, 837 F.2d 7 (1st Cir. 1988) (finding that the university's discipline of student that included "compulsory psychiatric treatment [was] a 'shocking extreme'" and an "invasion of protected privacy rights [that] can survive constitutional scrutiny only if it furthers a compelling state interest"). *See generally* Steven P. Gilbert & Judith A. Sheiman, *Mandatory Counseling of University Students: An Oxymoron?*, J. C. STUDENT PSYCHOTHERAPY, 1995, at 3 (summarizing the clinical, ethical, legal and political problems with mandatory outpatient counseling of university students and concluding that the use of mandatory counseling as discipline fails to help either the institution or the student).

394. 42 U.S.C. §§12101–12300 (2000).

395. *See, e.g.*, Holihan v. Lucky Stores, Inc., 87 F.3d 362, 365–66 (9th Cir. 1996) (concluding that genuine issues of material fact existed as to whether employee was "disabled" as defined under the ADA, when employee's stress and depression were possibly the result of an ADA-recognized disorder known as "organic mental syndrome"); Sullivan v. River Valley Sch. Dist., 197 F.3d 804 (6th Cir. 1999) (holding that school district's request that teacher submit to mental and physical exams "to determine his fitness as a teacher" was insufficient evidence to prove that school district regarded him as disabled under the ADA); Miners v. Cargill Commc'ns, Inc., 113 F.3d 820, 823–24 (8th Cir. 1997) (reversing the district court and concluding that employee presented sufficient evidence that her employer regarded her as being an alcoholic—and thus, disabled within the meaning of the ADA—when it presented her with the choice of either attending an alcohol treatment program or being terminated).

396. 261 F.3d 775 (9th Cir. 2001).

397. *Id.* at 780.

398. *Id.* at 780, 783.

chancellor of the community college district responded to the submissions by alleging that Bauer had violated district policies on workplace violence and racial harassment, and "strongly urged" the professor to "[deal] with [his] feelings of anger" by participating in the district's employee assistance program.[399] Later the chancellor, wrote to Bauer and directed him to

> [s]chedule a minimum of two meetings with the employee assistance counselor provided by the District, or make similar arrangements with another counselor approved by the Vice Chancellor [of] Human Resources, and report, in writing, that you have met the counselor. The confirming letter will become part of the District's record and your personnel file.[400]

Failure to comply with this and other terms of the letter "would be grounds for more severe discipline."[401]

Bauer sued in district court, seeking declaratory and injunctive relief on a number of claims, including violation of his First Amendment rights under the federal and state constitutions.[402] The district court granted Bauer preliminary injunctive relief, directing the district "to withdraw the directive for Bauer to undergo counseling."[403]

Other faculty legal challenges to mandatory counseling in the sexual harassment context have been similarly successful. In *Cohen v. San Bernardino Valley College*,[404] Dean Cohen, a tenured professor of English and film studies at the community college, challenged the institution's sexual harassment policy on a number of grounds, including that it violated his free speech and academic freedom.[405] A student was offended by Cohen's use of vivid sexual imagery in his remedial English class, and filed a sexual harassment complaint against him.[406] The grievance committee found for the student, ruling that Cohen had violated the institution's sexual harassment policy by creating a hostile learning environment, a finding accepted by the college president.[407] Neither party was satisfied, and both appealed to the board.[408] The board ruled against Cohen, ordering a variety of

399. *Id.* at 780 (alteration in original) (citation omitted).

400. *Id*. (alteration in original) (citation omitted).

401. *Id.* at 780–81.

402. *Id.* at 781.

403. *Id.* The district court later granted Bauer summary judgment on his First Amendment claims, which included the challenge to the counseling directive. *Id.* The school district appealed the district court's ruling to the Ninth Circuit, and the court struck down the workplace violence policy as vague. *Id*. at 785.

404. 92 F.3d 968 (9th Cir. 1996).

405. *Id.* at 970.

406. *Id.* The court described these episodes as including that Cohen "typically assigned provocative essays such as Jonathan Swift's 'A Modest Proposal' and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a 'devil's advocate' style." *Id*. at 970.

407. *Id.* at 971.

408. *Id.*

disciplinary actions, including that he "[a]ttend a sexual harassment seminar within ninety days" and that he "[b]ecome sensitive to the particular needs and background of his students."[409] The Ninth Circuit found the sexual harassment policy vague, and described the administration's actions against Cohen as a "legalistic ambush."[410] The federal appellate court partially reversed the lower court's ruling, striking down the imposition of the discipline, including the mandatory attendance at the sexual harassment seminar and the "sensitivity" requirement.[411]

Similarly, in *Silva v. University of New Hampshire*,[412] a court struck down as violative of the First Amendment the University of New Hampshire's sexual harassment policy that was challenged by J. Donald Silva, a tenured professor of English.[413] After receiving complaints from nine students who alleged that Silva had sexually harassed them, the dean initially required Silva to attend weekly sessions for one year with a "professional psychotherapist approved by the University."[414] A faculty hearing committee found that Silva had been guilty of harassing the students, and recommended that he be suspended without pay and be required to continue counseling at his own expense.[415] The president generally concurred with the recommendations.[416] Silva appealed the president's ruling to another faculty committee, and, like the faculty hearing panel, the appeals panel found that Silva had violated the school's sexual harassment policy, and reiterated the discipline to be imposed, which included counseling at his own expense.[417] The suspension was to end upon the therapist's notifying the administration that Silva was "ready to return to the classroom."[418] In the end, the parties reached a

409. *Id.*

410. *Id.* at 972.

411. *Id.* at 970. At the same time, the court affirmed the lower court's ruling that the individual officers sued by Cohen were entitled to qualified immunity. *Id.* at 970. The amicus brief before the Ninth Circuit in this case, filed by the AAUP, the Thomas Jefferson Center for Free Expression, and the Freedom to Read Foundation, contended that the sanctions imposed on Cohen were "substantial" and infringed upon his academic freedom. Brief for the AAUP et al. as Amici Curiae Supporting Appellant at 21, Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996) (No. 94-1083). The brief contended that "while a professor who has engaged in certain unlawful conduct (including sexual harassment) might be expected to take ameliorative steps—requiring a DUI convict to attend driver-training classes is fairly routine—any such sanction must be invoked with greater care and precision than the open-ended mandate here reflects." *Id.* The brief continued: "It is . . . the fourth sanction [—to 'become sensitive' to the needs and background of his students—] that arouses deepest concern. . . . How a professor is to 'become sensitive' to the needs of his students—especially when he believes he has been sensitive all along—remains a mystery." *Id.* at 21–22.

412. 888 F. Supp. 293 (D.N.H. 1994). *See also* AAUP, *Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME 70 (Nov.–Dec. 1994).

413. *Silva*, 888 F. Supp. at 314, 316.

414. *Academic Freedom and Tenure: University of New Hampshire*, *supra* note 412, at 72.

415. *Id.* at 74.

416. *Id.*

417. *Id.* at 75.

418. *Id.*

settlement agreement and the sanctions, including mandatory counseling, were withdrawn.[419] The AAUP found in its investigation of the matter that the psychotherapy sanction was a "severe penalty," given its "stigma of guilt," and "as such should not have been imposed without complaints about Professor Silva's alleged misconduct having first been considered by a faculty body."[420]

V. DRAFTING POLICIES TO ADDRESS FACULTY MISCONDUCT

Faculty disciplinary policies at U.S. colleges and universities are generally divided between two approaches. At some institutions, an administrator makes a preliminary determination as to whether misconduct has occurred and what discipline, if any, should be imposed; the faculty member then has the right to

419. "The professor initiated litigation in federal court. Following publication of the investigating committee's report and an opinion by the district judge strongly supportive of the professor, he and the administration reached a settlement of his case. He has returned, with tenure, to his teaching duties." AAUP, *Report of Committee A, 1994–95*, 81 ACADEME 47 (Sept.–Oct. 1995).

420. *Id.* at 76. According to the AAUP investigating committee report:

> No university official has explained to Professor Silva why his entering counseling is a condition for his return to teaching, but the available evidence suggests to the investigating committee that the requirement is perhaps meant to induce Professor Silva to concede that he sexually harassed students. Dr. Giles told Professor Silva that the "goal" of requiring him to participate in weekly sessions with a psychotherapist was to make him "better aware of the nature of [his] behavior towards students and to ensure that there will be no further incidents of sexual harassment on [his] part". . . . The similarity to mandatory counseling for drug or alcohol abuse seems obvious, although it should be noted that the university apparently pays the cost for counseling of faculty members who have alcohol-related problems. The investigating committee will refrain from pursuing all the implications of a university's using mandatory counseling as a possible device to elicit a confession from a faculty member. Suffice it to observe that if the purpose of counseling is rehabilitation, the objective is unlikely to be achieved unless all the parties concerned subscribe to that goal. The university's emphasis in Professor Silva's case on meting out punishment seems directly at odds with this purpose.

Id. at 79–80. The report continued:

> The investigating committee finds potentially even more troubling another aspect of the mandatory counseling . . . . There may be circumstances in which a faculty member's return to classroom duties is properly conditioned on entering counseling, as with a professor who has a drug or alcohol-related problem that has adversely affected professional performance. Very different is mandatory counseling that focuses on a faculty member's utterances which some consider deeply offensive. . . . If, in fact, the counseling was intended to compel Professor Silva to agree to certain ideas about sexual harassment, the investigating committee can state that such a purpose would be repugnant to the principles of academic freedom.

Id. at 80. *See also* AAUP, *Academic Freedom and Tenure: Philander Smith College (Arkansas)*, 90 ACADEME 57, 64 (Jan.–Feb. 2004) (noting sanction of "tenure removal with mandatory counseling"). Like mandatory counseling, the imposition of a required apology would appear to raise similar policy and legal concerns. *See, e.g.*, *Silva*, 888 F. Supp. at 308 (noting that faculty hearing panel recommended that professor apologize in writing to female students who accused him of sexual harassment, but internal appeals committee declined to endorse this discipline).

appeal that determination to a faculty grievance committee.[421] At other institutions, a member of the administration charges the faculty member with specific instances of misconduct, and a faculty hearing board or committee makes a determination as to whether misconduct has occurred and recommends a sanction to a higher level administrator.[422] Some institutions have separate investigative and factfinding processes for charges of scientific misconduct or sexual harassment as opposed to other types of faculty misconduct.[423] In some cases, institutional policies provide for redundant or overlapping jurisdiction of administrators and faculty committees; such redundancy can often cause confusion, lengthen the decision-making process, and encourage litigation.[424]

A. Preliminary Issues

Before developing or revising campus policies addressing faculty misconduct, institutional counsel, faculty, and administrators need to determine whether state law limits either the type of policy or the institution's autonomy to deal with faculty misconduct internally. If the faculty are represented by a union, state law (for public institutions) or the National Labor Relations Act (for private institutions) will very likely view the disciplinary process as a term and condition of employment that must be negotiated with representatives of the union.[425] State law may also dictate how discipline may be used at public institutions, and also any grievance mechanisms that faculty may use to challenge such discipline.[426]

421. *See, e.g.*, UNIV. OF WIS.-MADISON, DISCIPLINE AND DISMISSAL OF FACULTY FOR CAUSE, *available at* http://www.secfac.wisc.edu/governance/FPP/Chapter_9.htm (last visited Jan. 23, 2006).

422. *See, e.g.*, STANFORD UNIV., *supra* note 65 (noting that faculty advisory board makes findings of fact and recommends sanction, if any, to president).

423. *See, e.g.*, UNIV. OF WIS.-MADISON, *supra* note 421 (noting separate policy for charges of scientific misconduct). *See also* MICH. STATE UNIV., POLICY AND PROCEDURE FOR IMPLEMENTING DISCIPLINARY ACTION WHERE DISMISSAL IS NOT SOUGHT, *available at* http://www.hr.msu.edu/HRsite/Documents/Faculty/Handbooks/Faculty/AcademicPersonnelPolicies/iv-disciplinary.htm (last visited Jan. 23, 2006). For an example of the use of a separate procedure for adjudicating complaints of sexual harassment, see UNIV. OF S. CAL., FACULTY HANDBOOK OF THE UNIVERSITY OF SOUTHERN CALIFORNIA § 7-A, *available at* http://policies.usc.edu/facultyhandbook/facultyhandbook 2005.pdf (last visited Jan. 23, 2006).

424. *See, e.g.*, UNIV. OF CAL. AT IRVINE TASK FORCE ON FACULTY DISCIPLINE, RECOMMENDATIONS OF THE TASK FORCE ON FACULTY DISCIPLINE (Sept. 17, 1999), *available at* http://www.senate.uci.edu/3_DivSenateAssembly/3_DSAAgendas/03-04Agendas/6_3_04Agenda/PT_Rep_files/Att_3.htm (last visited Jan. 23, 2006) (recommending a streamlined system of investigation and adjudication of faculty discipline issues).

425. The National Labor Relations Act, which regulates collective bargaining in the private sector, requires employers to negotiate with representatives of duly recognized unions over "wages, hours, and other terms and conditions of employment." 29 U.S.C. §158(d) (2000).

426. For a discussion of negotiable subjects under state collective bargaining laws, see Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242 (1978). For an example of a faculty disciplinary policy that is part of a collective bargaining agreement between the Minnesota State Colleges and Universities and the faculty union, see MNSCU-UTCE MASTER AGREEMENT 1997–1999, ARTICLE 23,

Another preliminary issue for public institutions is the degree to which public meetings laws and open records laws may affect the public's access to disciplinary hearings or to the documents produced by hearing panels or by individual administrators.[427] Although many open meetings and open records laws contain exceptions for personnel decisions,[428] not all do; some laws give the subject of the hearing or document the right to request a public hearing or the release of the otherwise exempt document.[429]

A third issue that policy developers may wish to consider is whether the disciplinary process is mandatory. If, for example, the accused faculty member agrees to the discipline, must a hearing still be held? Does the institution's policy allow for, or require, attempts to resolve the charges against the faculty member informally? In certain circumstances, if serious discipline is contemplated, the accused faculty member may wish to resign and negotiate a severance package. Although "buyouts" and other informal methods of resolving disputes about faculty behavior circumvent the public notice aspect of progressive discipline,[430] the institution may choose this approach for a variety of strategic reasons, such as concern for the institution's public image, the desire to protect the privacy of students or other faculty members who would need to testify regarding the misconduct, a concern that a formal hearing or other factfinding process might damage relationships within a department or among departments,[431] or a desire to resolve the situation quickly. In those states in which faculty hearing boards or their reports are subject to public meetings and open records statutes, informal resolution may be an attractive option for the accused faculty member and the

FACULTY DISCIPLINE, *available at* http://www.hr.mnscu.edu/LR/Contracts/archive/UTCE/art23.htm (last visited Jan. 23, 2006).

427. *See, e.g.*, Marder v. Bd. of Regents, 226 Wis. 2d 563 (Ct. App. 1999) (ruling that University of Wisconsin had to disclose to the media copies of the personnel records and investigation files compiled by administration in response to a sexual misconduct claim filed against tenured professor of mass communications, and opining that the professor's privacy interests were outweighed by the public's "substantial legitimate interest in student-faculty relations at our state universities, the manner in which school administrations handle student complaints against faculty, and the enforcement of university rules"). *See generally* Donna R. Euben, *Let the Sunshine In? State Open-Records Laws*, 88 ACADEME 102 (Mar.–Apr. 2002).

428. For example, CAL GOV'T CODE § 6254(c) (West 2000) exempts personnel files from disclosure because disclosure would be "an unwarranted invasion of personal privacy." *See also* Donahue v. State, 474 N.W.2d 537 (Iowa 1991) (stating that tenure appeals committee hearing not subject to Iowa open public meetings law).

429. Similarly, Alaska's open public meetings statute permits a public body to meet in executive session if the meeting involves "subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion." ALASKA STAT. § 44.62.310(c)(2) (LEXIS through 2005 legislation). For a case applying this law to the deliberations of a tenure committee at the University of Alaska, see Univ. of Ala. v. Geistauts, 666 P.2d 424 (Alaska 1983), which states that because a candidate for tenure was not given the opportunity to request a public hearing, the tenure decision was void and had to be redone.

430. *See supra* text accompanying note 9.

431. For a discussion of the negative effect of disputes over faculty conduct and the impact of litigation on collegiality, see GEORGE R. LANOUE & BARBARA A. LEE, ACADEMICS IN COURT (1987).

college or university's leaders.

Several institutions' faculty disciplinary policies address the issue of informal resolution before initiation of formal discipline. For example, Stanford University's *Statement on Faculty Discipline* states that a misconduct charge against a faculty member may be "settled by agreement" before such initiation as long as the university president approves.[432] The Stanford handbook also provides that the matter may be "settled by agreement" at any point in the formal discipline process.[433] The faculty disciplinary policies at Johns Hopkins University's School of Public Health, Indiana University, the University of Pennsylvania, the University of Wisconsin, and Ohio State University, among others, also suggest or require that administrators attempt to resolve charges against faculty members informally before the initiation of formal disciplinary proceedings.[434] Even if an informal resolution is attempted and effected, however, the agreement should be reviewed by key administrators and college or university counsel to ensure consistent treatment across the institution, as well as an institutional record of the outcome of the informal resolution.

B. Process for Policy Development

Whether the institution is developing a faculty disciplinary policy for the first time or is revising existing policy, representatives of the faculty should be involved in the process. Faculty members are the individuals potentially affected by such policies, and they are often most expert in the kinds of faculty misconduct at issue and possible responses to such misconduct. Moreover, it is likely that the faculty will view the policy that is eventually developed as more legitimate if they have had a role in shaping it. And if, as the authors believe they should be, faculty members are involved in making recommendations about faculty discipline, their involvement in the policy development process will enhance their understanding of

432. STANFORD UNIV., *supra* note 65, at 1.

433. *Id.* at 2.

434. IND. UNIV. AT BLOOMINGTON, FACULTY MISCONDUCT POLICY, *available at* http://www.indiana.edu/~bfc/docs/policies/facultymisconduct.htm) (last visited Jan. 23, 2006) (requiring the misconduct policies of academic units to provide for informal resolution of misconduct charges); JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, PROCEDURE FOR HANDLING ALLEGATIONS OF UNSATISFACTORY PERFORMANCE OR UNACCEPTABLE BEHAVIORS, *available at* http://www.jhsph.edu/schoolpolicies/ppm_faculty_8_handling_allegations.shtml (last visited Jan. 23, 2006) (requiring an initial attempt at informal resolution); THE OHIO STATE UNIV. BD. OF TRS., RULES OF THE UNIVERSITY FACULTY, HEARING PROCEDURES FOR COMPLAINTS AGAINST REGULAR, REGULAR CLINICAL, AND AUXILIARY FACULTY MEMBERS, *available at* http://trustees.osu.edu/rules5/ru5-04.html (last visited Jan. 23, 2006) (requiring administrators, at all stages of the disciplinary process, to attempt to resolve complaints informally); UNIV. OF PA., PROCEDURE GOVERNING SANCTIONS TAKEN AGAINST MEMBERS OF THE FACULTY, FACULTY HANDBOOK, *available at* http://www.upenn.edu/assoc-provost/handbook/ii_e_16.html (last visited Jan. 23, 2006) (requiring dean to attempt informal resolution of misconduct charge); UNIV. OF WIS.-MADISON, *supra* note 421 (requiring provost to invite faculty member to participate in voluntary and confidential settlement negotiations, or if both agree, formal mediation).

the process and its requirements.

Policies may be drafted by a faculty governance committee or by the administration, which then shares the draft with the faculty senate or a similar faculty governance group. Given the potential for litigation concerning discipline meted out under an institution's misconduct policy, it is advisable to have experienced counsel involved in the drafting process before implementation of the policy.

C. Due Process Considerations

If the faculty disciplinary policy has the potential to affect an accused faculty member's reputation, salary, or other job benefits, then due process protections must be given to faculty members at public institutions.[435] The elements of due process for faculty hearings were developed by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill*.[436] The Court ruled that a tenured teacher who was being terminated was entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[437] Institutions may differ as to whether a formal hearing should be available to faculty who are charged with offenses that would not lead to dismissal; it would appear that the relatively informal type of due process outlined in *Loudermill* would be sufficient to satisfy due process requirements for a non-dismissable offense. However, the AAUP distinguishes between a "major" sanction and a "minor" sanction, stating that major sanctions, such as suspensions, should only be imposed after a faculty member receives the same type of hearing that he or she would receive if he or she were to be dismissed.[438] Therefore, an important decision that will need to be made is whether the institution will adopt the AAUP recommended regulation ("academic due process") or whether a less formal process that complies with the parameters of *Loudermill* will be used for non-dismissable offenses ("legal due process"). This decision is a matter of institutional policy rather than a matter of law.

Developers of faculty disciplinary policy at private colleges and universities have more legal latitude in that these institutions are not subject to federal constitutional due process requirements. However, state constitutions may have

435. The parameters of due process protections for faculty at public institutions were developed by the U.S. Supreme Court in two cases: *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Although both cases involve the nonrenewal of faculty members' contracts, the principles articulated in the cases are relevant to discipline short of dismissal in situations where the faculty member has a liberty or property interest in the position. Tenured faculty have a property interest in continued employment as do faculty members during the term of their contracts; a professor accused of violating a faculty code of conduct would very likely have a liberty interest in clearing his or her name.

436. 470 U.S. 532 (1985). For a discussion of due process issues in faculty employment, see *supra* note 87.

437. *Id.* at 546.

438. *Regulations on Academic Freedom and Tenure*, *supra* note 72, at 28.

explicit protections for privacy or property rights, or state courts may have interpreted their state's constitution to provide such rights for private sector employees.[439] For example, in *Hennessey v. Coastal Eagle Point Oil Co.*,[440] while the New Jersey Supreme Court refused to apply the state constitution's privacy protections directly to a private sector employer, it ruled that the constitution's privacy protections created a basis for a public policy exception to at-will employment, thus allowing the plaintiff to make a wrongful discharge claim.[441] The New Jersey Supreme Court also held that the state constitution provides free speech protections for an individual seeking to engage in speech or expressive conduct on the campus of Princeton University, a private institution.[442] The Pennsylvania Supreme Court subsequently followed the New Jersey court's reasoning to hold that its state constitution protected an individual's free speech rights at Muhlenberg College.[443] In both cases, the plaintiffs were members of the public (not faculty members, employees, or students) who sought to distribute leaflets on campus and were arrested for trespass.[444] These cases suggest that faculty members at a private institution in those states would have rights similar to those of the alleged trespassers, and that discipline for conduct that involved speech or expressive conduct may require due process protections.

Contract law is also an important consideration at both public and private institutions; the faculty disciplinary policy, if contained in a faculty handbook or an institutional policy manual (or their electronic equivalents), would be construed as contractually binding in many states.[445] Discrimination claims under federal or state law may ensue when institutions attempt to discipline faculty. Therefore, the advice of counsel is very important to ensure that the policy complies with all federal and state laws, and that the application of the policy is fair and consistent.

Another consideration facing developers of faculty disciplinary policies is whether there should be a standard approach for determining whether, and what, discipline should be meted out, or whether the institution wants to retain some flexibility, particularly for first offenses or for misconduct that is relatively minor.

439. For a review of state constitutions providing a basis for causes of action by private sector employees against their employers, see generally G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998). *See also* Alexander Wohl, *New Life for Old Liberties: The Massachusetts Declaration of Rights: A State Constitutional Law Study*, 25 NEW ENG. L. REV. 177 (1998).

440. 609 A.2d 11 (N.J. 1992).

441. *Id.* at 29. *See also* Semore v. Pool, 266 Cal. Rptr. 280, 282 (Ct. App. 1990) (finding that the "right of privacy in the California Constitution protects Californians from actions of private employers as well as government agencies. Accordingly, when a private employee is terminated for refusing to take a random drug test, he may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right of privacy").

442. State v. Schmid, 423 A.2d 615 (N.J. 1980).

443. Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981).

444. *Schmid*, 423 A.2d at 616; *Tate*, 432 A.2d at 1384.

445. For a discussion of the contractual status of faculty handbooks, see KAPLIN & LEE, *supra* note 1, at 151–52, 297. *See also* AAUP, FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE (5th ed. 2005).

For example, should a faculty hearing board be convened to deal with a first offense when the administration is considering only a warning or a reprimand? On the other hand, will a reprimand that is a result of faculty deliberations carry more weight than one that is issued by a dean or provost? Such low level discipline may provide the foundation for more serious sanctions and, therefore, can have significant implications. Institutional culture will play a role in reaching these decisions; as long as the minimal *Loudermill* requirements[446] are met in the public sector, the institution has some flexibility in deciding which types of misconduct will be dealt with through a formal process involving a faculty body as the initial factfinder and recommender of sanctions.

At Cornell University, only faculty members who face "severe sanctions" (suspension or dismissal) are entitled to a hearing prior to a faculty panel before the imposition of the sanction.[447] Those faculty facing a "minor sanction" (defined as "any sanction other than dismissal or suspension") may grieve the imposition of a sanction after it has been imposed.[448] The faculty disciplinary policy of Rice University uses a similar approach.[449]

D. Use of Alternative Dispute Resolution

As noted above, the policies of several public and private institutions require an initial attempt to resolve the faculty disciplinary matter through mediation before the use of formal hearing bodies. Although mediation is mentioned in the policy of the University of Wisconsin-Madison, it is not a required step, and both parties must agree to use it.[450] At the University of California at San Francisco, the individual investigating the claim of faculty misconduct is required to attempt to resolve the matter informally through mediation, which can occur even after the matter has been referred to a faculty hearing committee.[451] At Iowa State University, complaints of faculty misconduct may be resolved through mediation or through a formal process that involves peer review.[452] If the faculty member were to select the mediation option, then a subsequent breach of the mediation agreement entered into by the faculty member could be considered a form of misconduct for which discipline may be imposed.[453] Some institutions exclude

446. *See supra* note 87.

447. CORNELL UNIV., POLICY ON SANCTIONS FOR JOB-RELATED FACULTY MISCONDUCT, *available at* http://web.cornell.edu/UniversityFaculty/FacSen/050511SenateMtg/SanctionsPolicy.pdf (last visited Jan. 23, 2006).

448. *Id.*

449. RICE UNIV., RICE UNIVERSITY ORGANIZATION POLICY NO. 201-01, *available at* http://www.ruf.rice.edu/~facsec/facmin/Rice_Univ_Organization_Po2.pdf (last visited Jan. 23, 2006).

450. UNIV. OF WIS.-MADISON, *supra* note 421.

451. UNIV. OF CAL. SAN FRANCISCO, INTERIM PROCEDURE FOR INVESTIGATION OF FACULTY MISCONDUCT AND THE ADMINISTRATION OF DISCIPLINE, *available at* http://acpers.ucsf.edu/policies/facinvestinterimproc.pdf (last visited Jan. 23, 2006).

452. IOWA STATE UNIV., *supra* note 54.

453. *Id.* at § 7.2.2.5.5.

certain forms of misconduct, such as dishonesty in research, from mediation.[454]

A few institutions allow for binding arbitration of disputes over alleged faculty misconduct even in the absence of a faculty union. For example, the faculty handbook of the University of Southern California provides for binding arbitration, but only if both the faculty member and the president agree that they will be bound by the decision of the arbitrator.[455] Use of the binding arbitration option, according to the faculty handbook, requires the faculty member to agree to forego the right to sue in court concerning the subject of the arbitration.[456] The arbitration provision excludes disputes over promotion or tenure, dismissal for cause, or nonreappointment.[457]

E. Allocation of Responsibility for Factfinding

Whether or not an institution will provide the opportunity for informal resolution of misconduct charges against a faculty member, it will need a more established process for determining whether charges of misconduct are supported by sufficient evidence. This requires the faculty and administration to determine who will conduct the factfinding process and how the information obtained thereby will be used.

At some institutions, there is a two-step process of factfinding. At the initial step, an individual, usually an administrator,[458] conducts an "informal" inquiry to determine whether there is "probable cause" to refer the alleged misconduct charge to a factfinding body.[459] Should that individual find probable cause to believe that misconduct has occurred that warrants discipline, then the matter is referred to a faculty body, either appointed or elected institution-wide by the faculty with representation from each component of the institution.[460] The conclusions of the faculty body are typically treated as a recommendation to the president/chancellor or to the institution's board of trustees.[461] Should the president/chancellor disagree

454. *See*, e.g., UNIV. OF CAL. SAN FRANCISCO, *supra* note 451; *see also* MICH. STATE UNIV., MEDIATION SERVICE *available at* http://www.msu.edu/~mediate/ (last visited Jan. 23, 2006) (excluding "serious workplace misconduct," sexual harassment, and scientific misconduct from mediation).

455. UNIV. OF S. CAL., *supra* note 423, at § 7.

456. *Id.*

457. *Id.*

458. *See* MICH. STATE UNIV., *supra* note 423 (noting that at Michigan State University, the "faculty grievance official," who is a member of the faculty appointed for a five-year term by the board of trustees upon the recommendation of the University Committee on Faculty Affairs, conducts the preliminary investigation of the misconduct charge).

459. *See, e.g.*, THE OHIO STATE UNIV., *supra* note 434.

460. *See, e.g.*, STANFORD UNIV., *supra* note 65; *see also* THE OHIO STATE UNIV., *supra* note 434; UNIV. OF CAL. SAN FRANCISCO, *supra* note 451.

461. *See, e.g.*, UNIV. OF CAL. SAN FRANCISCO, *supra* note 451. *But see* THE OHIO STATE UNIV., *supra* note 434. The policy provides for a college-level "investigation committee" that makes recommendations to the dean concerning the merits of the complaint and any recommended sanction. According to the policy, "[i]f the college investigation committee has recommended a sanction other than termination of employment, the dean may not increase the

with the faculty body's conclusions and/or recommended sanctions, many institutional policies require the president/chancellor to inform the committee in writing, meet with the committee, or remand the matter to the committee for further deliberation.[462]

Although institutional histories, missions, and cultures differ (and a faculty disciplinary policy should, where possible, reflect institutional culture), it appears that the combination of initial administrative review (to determine "probable cause") and a faculty factfinding process, culminating in a final decision by the president/chancellor or board of trustees, provides sufficient due process to satisfy both constitutional requirements and the dictates of academic custom and usage with respect to the faculty role in evaluating the conduct (or misconduct) of their peers and applying professional norms to that conduct.[463] Neither the AAUP statements and recommended policies, nor most of the institutional policies reviewed for this article, require the president/chancellor or trustees to accept the faculty hearing committee's recommendation, although they do place responsibility on the president to explain why he or she may disagree with the recommendation. There seems to be no obvious advantage to a system that uses two faculty committees—one to draw up the list of charges and a second to act as the factfinding body. Although this two-committee approach is routinely used to investigate scientific misconduct,[464] most charges of faculty misconduct unrelated

sanction to termination of employment." *Id.*

462. *See* UNIV. OF CAL. SAN FRANCISCO, *supra* note 451, at 6; THE OHIO STATE UNIV., *supra* note 434. Regulation 7 of the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* provides that, should the president disagree with the recommendations of the faculty hearing committee, the president should explain his or her reasons for rejecting the recommendations and should remand them to the faculty hearing committee for its response before transmitting the president's recommendation to the institution's governing board. *Regulations on Academic Freedom and Tenure*, *supra* note 72, at 27. Regulation 7 also provides that, should an administrator decide to impose a "minor" sanction on a faculty member, that faculty member should be given "an opportunity to persuade the administration that the proposed sanction should not be imposed." *Id.* at 28. *See also* STANFORD UNIV., *supra* note 65. The Stanford policy provides that, should the president disagree with the recommendation of the advisory board, he/she must resubmit the case to the advisory board "for reconsideration with a statement of questions or objections." *Id.* The board will either revise its recommendation or resubmit the original recommendation.

> After study of the Board's reconsidered decision, the President may make a final decision different from that of the Board only if the President determines: that the faculty member or the University was denied a fair hearing; or that the Board's decision (as to whether there has been professional misconduct and/or as to the sanction) was not one which a decision-making body in the position of the Board might reasonably have made.

Id.

463. For a discussion of academic custom and usage, see KAPLIN & LEE, *supra* note 1, at 153–54. *See also* AAUP, *Academic Freedom and Tenure: University of Virginia*, 87 ACADEME 49, 59 (Nov.–Dec. 2001) (finding a violation of AAUP policy when a tenured professor was "afforded no opportunity to respond" to actions by the administration "imposed on him, and the administration did not consult with any faculty body before it acted as it did").

464. For a discussion of federal regulations concerning the investigation of scientific

to research fraud or plagiarism do not necessarily require the type of specialized expertise that an investigation into scientific misconduct may require.

Some institutions have decentralized faculty disciplinary policies, requiring each academic unit to develop its own complaint process according to general guidelines developed by a faculty body or by the institution itself.[465] This approach has the advantage of involving faculty at the unit level in the development of the policy and the adjudication of faculty misconduct cases; it has the potential disadvantage that any decentralized process has in that similar types of misconduct may be treated differently by academic units.

F. Who Decides the Sanction?

The policies reviewed for this article take one of two basic approaches to the determination of the sanction. In most policies, the faculty factfinding panel also recommends a sanction (or no sanction if the body concludes that no policies or rules have been violated) to the president or chancellor.[466] The president or his/her designee may accept the faculty hearing panel's recommendation, reject it, or return the matter to the hearing body for further deliberation. Most policies do not limit the president's ability to determine the sanction, even if the faculty hearing panel has recommended some other sanction.[467] In some policies, the faculty body reports to the president on whether the alleged misconduct occurred and whether it violates institutional policies or academic norms, but the policy does not specify whether the faculty body recommends a particular sanction to the president.[468]

G. Drafting Policies to Encourage Judicial Deference

Faculty misconduct policies and disciplinary procedures that keep the factfinding and sanction-setting decisions inside the institution, determined by academics rather than by juries, should be the goal of the developers of these policies. As with any other institutional policy that may be challenged, either internally or in court, faculty misconduct policies need to be drafted carefully and reviewed by legal counsel who are experienced in academic employment matters. In some cases, faculty members who have challenged the outcome of a disciplinary process have found that courts will not review the merits of the decision, unless discrimination or constitutional violations are alleged.[469] As the AAUP recognizes

misconduct, see Debra M. Parrish, *The Federal Government and Scientific Misconduct Proceedings Past, Present, and Future as Seen Through the Thereza Imanishi-Kari Case*, 24 J.C. & U.L. 581 (1998).

465. *See, e.g.*, IND. UNIV. AT BLOOMINGTON, *supra* note 434.

466. *Id. See also* MICH. STATE UNIV., *supra* note 423; THE OHIO STATE UNIV., *supra* note 434.

467. *But see* STANFORD UNIV., *supra* note 65 (imposing a number of limits on the president's freedom to reject or modify the recommendations of the faculty hearing panel).

468. *See, e.g.*, RICE UNIV., *supra* note 449.

469. *See e.g.*, Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418 (Pa. 2001); s*ee also* Ferrer v. Trs. of the Univ. of Pa., 825 A.2d 591 (Pa. 2002). The same court reinstated a jury

in its *Statement on Government of Colleges and Universities*, the governing board and president have final authority "on questions of faculty status," although the AAUP's statement provides that those bodies should concur with the faculty's judgment "except in rare instances and for compelling reasons which should be stated in detail."[470]

In *Murphy v. Duquesne University of the Holy Ghost*, the Pennsylvania Supreme Court affirmed an appellate court's determination that the university had not breached the faculty handbook's provisions regarding the dismissal of tenured faculty, and held the parties to the language of the handbook, using traditional contract law doctrine.[471]

> [P]rivate parties, including religious or educational institutions, may draft employment contracts which restrict review of professional employees' qualifications to an internal process that, if conducted in good faith, is final within the institution and precludes or prohibits review in a court of law. . . . When a contract so specifies, generally applicable principles of contract law will suffice to insulate the institution's internal, private decisions from judicial review.[472]

The court examined the language of the faculty handbook, and noted that it reserved to the faculty and the university the determination of whether a faculty member's conduct met the definition of "serious misconduct" such that it justified a decision to dismiss a tenured faculty member.[473] The handbook required the faculty hearing body to determine that the university had proven, by clear and convincing evidence, that the individual had engaged in serious misconduct under the handbook's definition.[474] It provided that the president could disagree with the faculty body, and that if that occurred, the individual charged with misconduct could appeal that decision to the board of trustees.[475] Given the specificity of the process and the clear allocation of the decision-making authority to the president and the trustees, the court ruled that Murphy was not entitled to have a jury "re-consider the merits of his termination."[476] Careful drafting of the disciplinary and

verdict for the faculty plaintiff because, despite the fact that a faculty body had found in his favor and recommended that he not be sanctioned, the provost imposed sanctions because he disagreed with the findings of the faculty hearing panel. *Id.* at 594. The faculty handbook provided that the panel's determination of guilt or innocence was binding on the administration. The court justified its decision on the basis that it was reviewing alleged procedural violations by the administration, not the merits of the decision. *Id.* at 609.

470. *See Statement on Colleges and Universities*, *supra* note 41 and accompanying text.

471. *Murphy*, 777 A.2d at 434.

472. *Id.* at 428.

473. *Id.* at 421.

474. *Id.* at 432.

475. *Id.*

476. *Id.* at 433. *See* Pomona Coll. v. Superior Court *ex. rel.* Corin, 53 Cal. Rptr. 2d 662 (Ct. App. 1996). A California appellate court reached a similar conclusion in this case involving the denial of tenure. *Id.* at 664. A professor denied tenure had filed breach-of-contract and wrongful termination claims against the college. *Id.* The college, noting that the faculty member's grievance challenging the tenure denial had been heard by a grievance committee, as provided for

grievance policies with attention to procedural due process protections might encourage other courts to follow the *Murphy* Court's deference to academic judgment.

CONCLUSION

The review of case law, AAUP statements and other policy documents, institutional policies, and the literature on discipline suggests that stating the expected standards of conduct clearly, following the procedures for making decisions concerning faculty misconduct carefully, imposing a degree of discipline that is appropriate to the severity of the misconduct, and giving written justifications for recommendations or decisions made under the faculty handbook or other policies, are critical. Because these documents are the source of employment rights at private institutions and at many public institutions as well, they should reflect the consensus of the academic community with respect to both the criteria and the procedures that will be used to make these disciplinary decisions. Perhaps in doing so, institutions can avoid having to proceed with the penalty of dismissal—the "capital punishment" of the academy—for those forms of faculty misconduct that do not merit the imposition of so serious a sanction.

in the faculty handbook, argued that California law limits review of a college's internal hearings to evaluating the fairness of the hearing by filing a claim of administrative mandamus. *Id.* at 664–65. The court dismissed the faculty member's contract and wrongful termination claims. *Id.* at 671.

AMERICANS ABROAD: INTERNATIONAL EDUCATIONAL PROGRAMS AND TORT LIABILITY

VINCENT R. JOHNSON*

I. LIABILITY IN PERSPECTIVE

In recent decades, the number of foreign programs operated by American colleges and universities has greatly expanded.[1] Higher education institutions now

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1. According to the Institute of International Education, "[i]n academic year 2003/2004, 191,321 U.S. students studied abroad, an increase of 9.6% from the previous year" and twice as many as a decade earlier. Open Doors: U.S. Study Abroad, http://opendoors.iienetwork.org/?p=69702. Study abroad programs span a wide range of disciplines, *see* Open Doors: U.S. Study Abroad, Fields of Study, http://opendoors.iienetwork.org/?p=71103, and all parts of the globe, *see* Open Doors: U.S. Study Abroad, Host Regions, http://opendoors.iienetwork.org/?p=69707. In New Jersey, for example, "colleges and universities have developed study abroad or exchange options that can place students in more than 50 countries around the world." *The New Student Rush is to Go Overseas*, N.J. REC., Sept. 4, 2005, at T1. "Increasing numbers of American colleges and universities are operating their own programs overseas, rather than merely sending their students to study at overseas universities." John E. Watson, *Practical Risk Management in International Study: Limiting Risks, Crisis Management, and Administrative Practice*, URMIA J. 7, 8 (2002).

The students who participate in study abroad programs are overwhelmingly enrolled at the undergraduate level and roughly two-thirds are female. *See* Open Doors: U.S. Study Abroad, U.S. Student Profile, http://opendoors.iienetwork.org/?p=69715 (collecting statistics from academic year 1993–94 to academic year 2003–04). However, in some professional fields of education, study abroad is robust. American law schools, for example, now operate ten semester abroad programs and 197 foreign summer programs approved by the American Bar Association. *See* CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION, 2004–2005 ANNUAL REPORT 22 (2005); Lindsay Fortado, *Thinking Globally: Law Schools Expand*

offer a multitude of classes, internships, or study tours conducted wholly or partially outside the United States.[2] These educational ventures are the most recent incarnations of the rich liberal arts tradition of learning through travel,[3] an idea that can be traced back to the days of The Grand Tour, to the work of the scholar Erasmus, and indeed back to the ancient Greeks. Herodotus (484–25 B.C.), "the father of history," learned about other countries by traveling around most of the known world.[4] Two thousand years later, Erasmus (1465–1536), "[a]n untiring adversary of dogmatic thought in all fields of human endeavor, . . . lived and worked in several parts of Europe, in quest of the knowledge, experience and insights which only such contacts with other countries could bring."[5] Between the sixteenth and nineteenth centuries, it became fashionable for young men and women from well-bred families in England and elsewhere to finish their education by traveling to France and Italy to study art and culture.[6]

Today, study abroad is conducted on a scale that is typically more common and frugal than grand and elite, but it is also more robust than ever before.[7] The vast majority of American colleges and universities now say that study abroad is a valuable academic option.[8] Some institutions even treat a foreign educational

International Curricula, NAT'L L.J., Mar. 6, 2006, at 1 (stating that "[n]early all law schools now offer at least one overseas study or 'study abroad' opportunity").

2. *See generally* William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth . . . The Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151, 153 (2000) (discussing the growth of international programs).

3. "Perhaps travel cannot prevent bigotry, but by demonstrating that all peoples cry, laugh, eat, worry, and die, it can introduce the idea that if we try and understand each other, we may even become friends." MAYA ANGELOU, WOULDN'T TAKE NOTHING FOR MY JOURNEY NOW 12 (1993).

4. *See* THOMAS CAHILL, SAILING THE WINE-DARK SEA 188–89 (2003) (discussing Herodotus's "insatiable curiosity"). *See also* Herodotus—Who Were the Greek Historians?, http://ancienthistory.about.com/od/herodotus/p/Herodotus.htm (last visited Apr. 25, 2006) (discussing Greek historians and Herodotus in particular). Of course, Macro Polo's travels in the late thirteenth century set a high benchmark for what can be learned through travel and disbursed by authorship. "[N]ever before or since has one man given such an immense body of new geographical knowledge to the West." JOHN LARNER, MARCO POLO AND THE DISCOVERY OF THE WORLD 1 (1999).

5. European Union Erasmus Program for Higher Education, http://europa.eu.int/comm/education/programmes/socrates/erasmus/what_en.html (last visited Apr. 25, 2006).

6. "Beginning in the late sixteenth century, it became fashionable for young aristocrats to visit Paris, Venice, Florence, and above all Rome, as the culmination of their classical education. Thus was born the idea of the Grand Tour, a practice which introduced Englishmen, Germans, Scandinavians, and also Americans to the art and culture of France and Italy for the next 300 years." Metropolitan Museum of Art, Time Line of Art History: The Grand Tour, http://www.metmuseum.org/toah/hd/grtr/hd_grtr.htm (last visited Apr. 25, 2006).

7. ARTHUR FROMMER, ARTHUR FROMMER'S NEW WORLD OF TRAVEL xiv (5th ed. 1996) (noting that this is "the first generation in human history to fly to other continents as easily as people once boarded a train to the next town, . . . the first generation . . . for whom travel is not restricted to an affluent few").

8. "Yale College encourages students to spend all or part of their junior year studying in an approved program abroad." Yale College Programs of Study, Chapter III: Special Arrangements 2005–2006, *available at* http://www.yale.edu/yalecollege/publications/ycps/chapter_iii/ special.html.

experience as an integral and required part of earning a degree.[9]

For reasons ranging from enhanced student recruitment[10] to national security[11] and economic competitiveness,[12] there is reason to expect the number and size of foreign educational programs to increase. Indeed, study abroad is now recognized as an important component in promoting American ideals around the globe. As Secretary of State Condoleezza Rice recently remarked, "every American studying abroad is an ambassador for our nation, an individual who represents the true nature of our people and the principles of freedom and democracy for which we stand. . . . [W]e must work together to expand existing programs with proven records of success."[13]

The proliferation of collegiate international study has been paralleled in American society by heightened concerns—sometimes ill-founded[14]—about the risks of tort liability.[15] Thus, it is not surprising that "program providers"[16]

9. *See* Danna Harman, *Harvard (Finally) Gets a Passport*, CHRISTIAN SCI. MONITOR, Mar. 15, 2005, at 14 (discussing "[a] new requirement . . . that every Harvard undergraduate get[] a 'significant' overseas experience, be it work, research, or study"); Holli Chmela, *Foreign Detour En Route to a College Degree*, N.Y. TIMES, Oct. 19, 2005, at B9 (stating that in Maryland "[s]tudy abroad has been an option for Goucher College students for 25 years. Beginning next fall, it will be mandatory"). "The Notre Dame Rome Studies Program is the only year-long foreign studies program among American university architecture schools that is required for all its students." University of Notre Dame School of Architecture's Year In Rome Program, http://architecture.nd.edu/academic_programs/year_in_rome.shtml (last visited Apr. 25, 2006). The University of Denver has a study abroad requirement for students majoring in International Studies. *See* University of Denver's Bachelor of Arts in International Studies Major, http://www.du.edu/gsis/undergrad/major.html (last visited Apr. 25, 2006).

10. *See* Chmela, *supra* note 9 (discussing how study abroad affects college and university recruitment).

11. *See* Michael Janofsky, *Bush Proposes Broader Language Training*, N.Y. TIMES, Jan. 6, 2006, at A15 (discussing how foreign language training can "play a critical role in national security").

12. *See* Steve Ivey, *Study Abroad Seen as Diplomatic Tool*, MONTEREY COUNTY HERALD, Nov. 14, 2005 (stating that "[g]iving more American college students an international education is key to addressing the United States' increasing security and diplomacy challenges in the Middle East and economic challenges from China and India").

13. Condoleezza Rice, Secretary of State, Remarks to the U.S. University Presidents Summit on International Education (Jan. 5, 2006).

14. PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 188–89 (1997) (discussing how massive campaigns to impugn the tort system influence and distort public perceptions about liability for accidental harm).

15. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 12 (1988) (discussing the tort "revolution"), *reviewed by* Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026 (1989) (stating that "if Huber is to be believed, the current plague of tort liability has all but idled the engines of progress and stripped the shelves of consumer goods"); *see also* JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 19 (2004) (discussing the conservative campaign to reshape tort law to reduce the threat of legal liability for harm caused by accidents).

16. This article will use the term "program provider" to encompass the entire range of international education program providers, except when the context calls for more specific terminology. For example, certain rules of law discuss the duties owed by a college or university to its students. *See infra* text accompanying notes 199–202. Those principles may not apply to

(including colleges, universities, consortia, companies, and individuals)[17] have focused increasingly on the threat of being sued for damages based on actions or omissions related to college and university activities generally[18] or to study abroad in particular.[19] Until lately, there were few reported cases involving claims arising from foreign educational ventures.[20] However, several recent disputes are now memorialized in court opinions. Students have sued foreign program providers for:

- negligent supervision of medical care provided to a student in Austria;[21]
- breach of fiduciary duty and other torts relating to discrimination based on disabilities in a program which "required participants to spend much of their time exploring the Australian continent;"[22]

other forms of program providers.

17. For example, in *Paneno v. Centres for Academic Programmes Abroad Ltd.*, an action arising from injuries sustained by a student in an overseas educational program, there were three defendants. 118 Cal. App. 4th 1447, 1450 (Ct. App. 2004). The first was a California community college which had entered a contract with certain corporate entities relating to its program in Italy. *Id.* at 1453. The second was a U.K. company, which functioned "much like a tour operator in . . . making arrangements with travel suppliers, accommodation suppliers, and other logistical suppliers." *Id.* at 1450. The third was a California mutual benefit company which was affiliated with the U.K. company and which entered into contracts with California educational institutions, including the defendant community college, and individual California students who wished to participate in study abroad programs. *Id.* at 1452.

18. *See* Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 485 (2003) (discussing increased tort litigation against colleges and universities and the "unsatisfying quagmire of case law" faced by administrators charged with developing policies and procedures).

19. *See* Susan Gilbert, *Study Abroad: Getting Younger*, N.Y. TIMES, Mar. 31, 2002, § 5, at 2 (stating that "[t]here's an increased concern by students and their parents about safety as a critical component in making a final decision about study abroad" and as a result "the industry has updated its safety and security recommendations to study-abroad-program administrators"); *cf. "Floating University" Will Move to U.Va.*, RICHMOND TIMES DISPATCH (Va.), Dec. 21, 2005, at K2 (discussing plans to move a cruise ship study program to the University of Virginia after the prior sponsor, the University of Pittsburgh, expressed concerns about the ship's safety following a 2005 accident).

20. *See* William P. Hoye, Comment, *The Legal Liability Risk Associated with International Study Abroad Programs*, 131 EDUC. L. REP. 7, 8 (Feb. 4, 1999) (noting "few reported court decisions").

21. McNeil v. Wagner Coll., 667 N.Y.S.2d 397 (App. Div. 1998). *See infra* text accompanying note 220 (discussing the unsuccessful claim).

22. Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1017 (9th Cir. 2002). The student alleged "(1) violation of the [federal Rehabilitation Act], (2) violation of Title III of the [Americans with Disabilities Act], (3) breach of contract, (4) breach of fiduciary duty, (5) defamation, (6) negligence, (7) fraud, (8) negligent misrepresentation, and (9) intentional infliction of emotional distress." *Id.* at 1019. The Ninth Circuit found that "[a]ll of the claims essentially share[d] one premise: during Bird's stay in Australia, the College discriminated against her on the basis of disability by failing to provide her with wheelchair access." *Id.* The trial court had granted summary judgment for the college on the defamation and intentional infliction of emotional distress claims. *Id.* "The jury found against [the student] on all but the breach of fiduciary duty claim for which it awarded her $5,000." *Id.* The Ninth Circuit affirmed. *Id.* at 1023. *See infra* text accompanying notes 248–252 (discussing *Bird*).

- negligence relating to injuries sustained by a student when he fell from an apartment house balcony where he resided while participating in a program in Italy;[23]
- "abandoning" an American female student at a Peruvian clinic where male doctors performed unnecessary surgery and took sexual liberties with her;[24] and
- negligence pertaining to sexual-assault injuries sustained by a student in a cultural immersion program in Mexico.[25]

There was another reported case in which women alleged indifference on the part of the administrators of a study abroad program in South Africa to their complaints of abuse.[26] Such a claim may, alternatively, have been brought for intentional infliction of emotional distress. Courts have occasionally held that failure to respond appropriately to allegations of discriminatory treatment may constitute extreme and outrageous conduct that can support a tort action for damages.[27]

23. Paneno v. Centres for Academic Programmes Abroad Ltd., 13 Cal. Rptr. 3d 759, 761 n.1, 766 (Ct. App. 2004) (indicating that a student who was injured in a six-story fall from a residential balcony while participating in an overseas educational program stipulated to the dismissal of his claim against an American community college but established general jurisdiction over a foreign corporation which had arranged the accommodations).

24. Fay v. Thiel Coll., 55 Pa. D. & C.4th 353, 367 (Ct. Com. Pl. 2001) (holding that an exculpatory clause contained in the waiver of liability form signed by the student was not valid and that the college owed the plaintiff a special duty of care pursuant to the terms of a consent form the student was required to sign).

25. Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999). A student who was raped by a taxi driver "sued the University for negligence in its failure to secure housing closer to the [foreign program] campus, failure to provide transportation to and from campus, failure to adequately warn about risks, and failure to protect students from foreseeable harm." *Id.* at 663. The appellate court held that the student's claim failed because the university had demonstrated that it was "entitled to statutory immunity in the exercise of its discretionary decision to create a cultural immersion program that placed students in host homes, relied on available public transportation, and provided a variety of student warnings and information." *Id.* at 667.

26. King v. Bd. of Control of E. Mich. Univ., 221 F. Supp. 2d 783, 791 (E.D. Mich. 2002) (opining that "[s]tudy abroad programs are an integral part of college education today" and that "[a] denial of equal opportunity in those programs has ramifications on students' education as a whole and detracts from their overall education").

27. *See* Ford v. Revlon, Inc., 734 P.2d 580, 586 (Ariz. 1987) (holding that a corporation's failure to take appropriate action in response to an employee's allegation of sexual harassment by a manager constituted intentional infliction of emotional distress). *See also* Manning v. Metro. Life Ins., 127 F.3d 686 (8th Cir. 1997) (holding that whether an employer's alleged toleration of sexual harassment by a supervisor and coworker constituted the tort of outrage was question for jury). *But see* Hoffman-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438 (Tex. 2004) (holding that a "handful of off-color jokes did not show employer fostered a culture that encouraged extreme and outrageous conduct"); Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991) (holding that failure to investigate rumors of sexual harassment was at most a negligent omission); Ammon v. Baron Auto. Group, 270 F. Supp. 2d 1293 (D. Kan. 2003) (finding that an alleged lack of response to sexually abusive comments of employees, if proven, was not extreme and outrageous); Farris v. Bd. of County Comm'rs, 924 F. Supp. 1041, 1051 (D. Kan. 1996) (stating that failure to investigate alleged harassment was not extreme even though employee had filed EEOC charges

News reports sometimes discuss incidents of harm to students studying abroad for which there are no reported decisions.[28] Because of the tendency of tort cases to be settled, rather than fully tried, the number of unreported cases based on harm to students participating in study abroad programs may be considerably larger than what appears in legal research databases.[29] Accidents, including many of a serious nature,[30] are probably at least as likely to happen to Americans traveling in other countries as in the United States.[31]

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and a complaint with the defendant employer).

28. *See, e.g.*, Gary Rotstein, *Arrest in Seoul Killing: Ex-Marshall Student Confesses to Derry Woman's Beating*, PITTSBURGH POST-GAZETTE, Mar. 2, 2002, at A1 (discussing a student at the University of Pittsburgh who was found "naked and beaten to death in her room" while traveling on a break from studies at Kiemyung University in Korea).

29. *Cf.* Watson, *supra* note 1, at 7 (describing briefly four incidents).

30. Respondent's Brief at 6, Paneno v. Centres for Academic Programmes Abroad Ltd., 13 Cal. Rptr. 3d 759 (Ct. App. 2004) (No. B162753) (describing a fall resulting in paralysis).

31. *But see* Watson, *supra* note 1, at 7 (stating that "[g]iven the numbers of students on American college campuses who die each year from noncriminal activity such as auto accidents, or who are assaulted or robbed on their home campus, it is arguable that students are statistically safer overseas than they are in the United States"). It is difficult to prove whether or not accidents are more likely to occur in the United States or abroad. American criminologists, for example, find it hard to "provide precise data on the number of American victimizations abroad." Daniel B. Kennedy & Jason R. Sakis, *Tourist Industry Liability for Crimes Against International Travelers*, 22 TRIAL LAW. 301, 302 (1999). However, one might reason circumstantially. Auto accidents are more common in many countries than they are in the United States. According to the U.S. State Department, "[a]n estimated 1.17 million deaths occur each year worldwide due to road accidents. The majority of these deaths, about 70 percent, occur in developing countries." U.S. Dep't of State, Road Safety Overseas, http://travel.state.gov/travel/tips/safety/safety_1179.html (last visited Apr. 25, 2006). Some studies have ranked the United States among the ten safest countries for road travel. *See* Victoria Griffith, *The Road to Trouble*, FIN. TIMES, May 13, 1996, *available at* http://www.asirt.org/Publications/financialtimes.htm (discussing a study by the Association for Safe International Travel). Also, safety may correlate with economic development and technology. Some persons argue that "newer is generally safer than older in the modern technological world." HUBER, *supra* note 15, at 160. One might therefore suggest that countries with access to the most modern technologies are safer than those that are less developed. But other persons vigorously dispute the underlying proposition about the correlation between modern technology and safety. As one author wrote:

> The industrial revolution brought with it an unprecedented holocaust of workplace injuries and accidents: severed limbs, scalded faces, mine caveins, brown lung disease, and so on. In the twentieth century these workplace hazards have been supplemented by . . . exposure to hundreds of toxic chemicals . . . . Outside the workplace we face acid rain, the carnage of automobile accidents, the creeping poison of toxic dumps, and the unquantifiable peril of nuclear waste and nuclear accident.

Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 543 (1990). The fact that life expectancy is longer in the United States than in many other countries may also be some indication that life in the United States is safer. *See* James W. Shaw, William C. Horrace & Ronald J. Vogel, *The Determinants of Life Expectancy: An Analysis of the OECD Health Data*, 74 S. ECON. J. 768 (Apr. 1, 2005) (discussing that the "general consensus is that population life expectancy (or mortality) is a function" of several variables, including safety).

Presumably, the answer to whether life abroad is safer than life in the United States turns upon the type of harm at issue. My personal opinion, based on six trips to China during the past decade, is that in China there is a reduced risk of *criminal* harm (perhaps as a result of traditional

It is important to consider carefully the risks and limits of potential liability in international education programs. Overstating the risk of being sued threatens to divert limited resources from the educational components of study abroad to an illusory quest for risk-free education. However, understating the threat of liability not only makes it more likely that a program provider will be mired in claims for damages, it also squanders valuable opportunities for achieving an optimal level of safety in foreign educational ventures.[32] "Resources are scarce, and so it would be wasteful either to devote too many of those resources to accident prevention or to devote too little to accident prevention."[33] Consequently, "[p]roper deterrence requires making those who contemplate dangerous conduct liable for all of the increased harm that occurs whenever that dangerous conduct is undertaken. Making actors liable for more than that over-deters."[34]

In managing the risks associated with operation of an international education venture, it may be useful for program providers to distinguish between risks that are inherent in any study abroad program (e.g., risks relating to the condition of the program's facilities) and special risks that are not a necessary part of study abroad (e.g., risks relating to non-educational activities, such as bungee jumping and other forms of recreation). A program provider has no choice but to devote attention and resources to managing inherent risks. Special risks that are not an integral part of the education program can be addressed by dropping those activities from the foreign program and neither sponsoring nor recommending them as outside activities.

Chinese respect for foreign visitors) and a greatly enhanced risk of *accidental* harm (resulting from all sorts of preventable dangers, such a multitudinous missing man-hole covers in major cities, unlighted stairways, and egregiously bad driving practices). Such dangers of accidental harm give rise to substantial liability in the United States. *See $16M Award for Woman Injured in Manhole Fall*, NAT'L L.J., Mar. 27, 2006, at 15. Therefore, precautions often are taken in this country to avoid such dangers.

Of course, it makes all the difference where one is traveling. New Zealand is not the Balkans. *See* John Henzell, *New Zealand Voted Safest, Not Most Boring Travel Destination*, PRESS (N.Z.), Feb. 23, 2005, at 13 (discussing a poll by *Wanderlust*, a British travel magazine). American students participating in a foreign educational program operated in Austria or Germany might legitimately feel an enhanced level of personal security (as a result of cultural norms and state-of-the-art technology). In contrast, American students studying in Moldova or Mongolia may encounter many of the risks of accidental and intentional harm that are the natural byproducts of a weak economy. Some of those injuries will inevitably result in tort litigation.

32. *See* Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 624 (2005) (stating that the "modern college or university now attends to foreseeable risks as a matter of good business, not just for litigation avoidance").

33. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 250 (3d ed. 2005).

34. *Id.* at 433. *See also* Johnson, *supra* note 15, at 1037 ("Over-deterrence occurs where the risk of tort liability prompts persons to spend resources on efforts designed solely to avoid liability (as may be the case where malpractice-wary physicians order unnecessary medical tests) or to abandon fields of endeavor entirely (as is true where doctors refuse to perform obstetric services and companies terminate contraceptive research)."); Dall, *supra* note 18, at 506 ("Excessive imposition of liability not only creates a financial burden but may also cause rational college administrators to reduce programming and to interact differently with students.").

The objective of focusing on safety concerns related to study abroad is not to offer a risk-free foreign experience. That goal is no more desirable than the idea that car manufacturers should produce risk-free vehicles so crash-worthy and slow that no one could ever be harmed in an auto-accident and no suit ever filed. Education inevitably entails risks,[35] particularly when it takes place in another country. Exposing students to some of those risks is part of the educational process. Allowing students to become immersed in a foreign culture, rather than sheltered within the confines of an Americanized foreign educational outpost, helps them to understand how other people live and why those people do what they do.[36] Cultural immersion also helps students to see that the choices that define the fabric of foreign economic cultures and foreign legal systems produce different levels of affluence, citizen empowerment, and consumer protection. Americans need to appreciate, both through experience and intellect, that only a fraction of the world enjoys the level of prosperity, political freedom, and general safety that now prevail in the United States.

American program providers should not operate super-cautious foreign programs,[37] excessively concerned with imposing American practices on life in foreign cultures. "The key objective [of travel] is to experience events, lifestyles, attitudes, cultures, political outlooks, and theological views utterly different from what you encounter at home."[38] Thus, American program providers should not strive to make a foreign educational experience the same as studying in the United States, but should simply take reasonable precautions to minimize the foreseeable risks of harm to program participants. One way of doing this is by providing accurate information to students and their families that allow them to make an informed choice about whether a program entails an acceptable level of risk. Another way of promoting safety is to implement programmatic practices that minimize the probability of unnecessary harm. Yet it is important to remember

35. *See* Nancy Tribbensee, *Tort Litigation in Higher Educations: A Review of Cases Decided in the Year 2001*, 29 J.C. & U.L. 249, 284 (2003) (stating that "[s]ome level of risk is inherent in teaching, learning, and managing the daily operations of a college or university," but that many tort claims can be avoided).

36. *See* FROMMER, *supra* note 7, at xiv ("To have meaning at all, travel must . . . challenge our preconceptions and most cherished views, cause us to rethink our assumptions, shake us a bit, make us broader-minded and more understanding.").

37. However, some persons advocate what others might think of as unusual or extraordinary steps to plan ahead for contingencies. For example, in his article regarding crisis management for international study, John E. Watson states "[i]t is highly recommended that consideration be given to procuring kidnap and ransom coverage, which is designed to fund not only the economic demands of the perpetrators but to provide the institution direct access to specialists in hostage negotiation and recovery. . . . [O]n-site assessments of [foreign facilities] present the opportunity to discover unique hazards that might otherwise go unrecognized . . . including lack of local fire hydrants, . . . lack of safety glass in doors, . . . [and] uneven pavement." Watson, *supra* note 1, at 9. Watson further states that it is useful to develop personal contacts with "key representatives from the local police and fire agencies." *Id.* at 10.

38. Jonathan T. Weisberg, *Arthur Frommer: The Traveler at Home*, YALE L. REP. Summer 2005, at 47 (quoting Arthur Frommer, the Yale lawyer and entrepreneur who wrote EUROPE ON 5 DOLLARS A DAY (1957) and other books that, beginning in the 1950s, revolutionized foreign travel for Americans).

that "some measures to reduce the costs of accidents are not worth taking, because the benefits of added safety would amount to less than the costs."[39]

The liability issues relevant to study abroad programs are as broad as the expansive field of torts. To some extent, the claims that will arise in the international education context may be similar to suits involving home campus activities that raise issues relating to premises liability,[40] intentional or negligent infliction of emotional distress,[41] negligent misrepresentation,[42] fraud,[43] and negligent security.[44] However, some causes of action related to the unique nature of study abroad may have no precise home campus counterparts, such as suits concerned with the duties owed to students when civil unrest or political violence wracks the host country, when gunmen ambush a bus,[45] or when dangers arise

39. JOHNSON & GUNN, *supra* note 33, at 251. *See also id.* at 250 (stating, with respect to the Learned Hand negligence formula, that "this is why the law insists that drivers keep to the right on two-way streets, while not bothering to make pedestrians on sidewalks stay in lanes").

40. *See* Cohen v. Univ. of Dayton, 840 N.E.2d 1144, 1146 (Ohio Ct. App. 2005) (alleging that a university negligently caused the death of one student who died as a result of arson committed by a second student in a university residence); Manon v. Univ. of Toledo, No. 2003-09840, 2005 WL 1532916, at *1–2 (Ohio Ct. Cl. June 21, 2005) (holding that a student failed to prove that a university negligently caused a slip-and-fall accident); Candido v. Univ. of R.I., 880 A.2d 853, 857–60 (R.I. 2005) (holding that a university was not liable for negligence where evidence established that the dark area where the plaintiff student fell was not an existing pathway and that student could have used existing pathways rather than his chosen route); Webb v. Univ. of Utah, 125 P.3d 906, 912–13 (Utah 2005) (holding that a state university instructor's directive to students during a field trip to traverse icy sidewalks did not reasonably induce students to rely on the directive such that a student could prevail on a negligence claim against the university for injuries suffered when another person grabbed the student while slipping on the sidewalk).

41. *See* Turner v. Univ. of S.F. Sch. of Nursing, No. C 05-02048 JSW, 2005 WL 3097874, at *4 (N.D. Cal. Nov. 18, 2005) (dismissing claims by a student with learning disabilities for intentional and negligent infliction of emotional distress, but allowing the student to re-plead); Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 46–47 (D. Me. 2005) (holding that a university's finding that two students had committed sexual assault did not constitute intentional infliction of emotional distress, absent a showing that the finding was intentionally false); Shelton v. Trs. of Columbia Univ., No. 04 Civ. 6714(AKH), 2005 WL 2898237, at *2 (S.D.N.Y. Nov. 1, 2005) (holding that a claim for intentional infliction of emotional distress based on expulsion was time barred).

42. *See Gomes*, 365 F. Supp. 2d at 47–48 (holding that any failure of a university disciplinary committee's presiding officer to forward allegedly promised information to the committee did not amount to negligent misrepresentation, absent evidence of justifiable reliance by the plaintiff students).

43. *See* Harmon v. Sullivan Univ. Sys., Inc., No. Civ. A. 03-738-C, 2005 WL 1353752, at *3–6 (W.D. Ky. June 6, 2005) (holding that a student presented sufficient evidence to support claims for fraud and negligent misrepresentation relating to accreditation of the school); *Shelton*, 2005 WL 2898237, at *5 (holding that plaintiff failed to prove fraud based on presentation of allegedly false information at plagiarism hearing).

44. *See* Shivers v. Univ. of Cincinnati, No. 2000-02461, 2005 WL 517450, at *4 (Ohio Ct. Cl. Jan. 6, 2005) (holding that a university's failure to install locks or latches on shower doors constituted a breach of duty of care that caused the student's injuries); Kleisch v. Cleveland State Univ., No. 2003-08452, 2005 WL 663214, at *3 (Ohio Ct. Cl. Feb. 22, 2005) (holding that a university was not liable for the unforeseeable rape of a student in a classroom).

45. *See* Hoye, *supra* note 20, at 10 (discussing an ambush in Guatemala in 1998); *id.* at 11

from educational contact with a controversial foreign scholar.[46]

This article will address selected topics relating to the demands that American tort law places on the operation of study abroad programs. However, the discussion will commence by considering three issues which may limit the role that American law or American courts play in resolving tort claims arising in connection with international educational programs, namely the efficacy of contractual provisions specifying choice of law (Part II), choice of arbitration (Part III), or choice of forum (Part IV). These important, but heretofore little discussed, matters may play pivotal roles in determining issues of tort liability.

The remaining sections focus on the principles of American tort law that will guide the resolution of claims that are resolved by reference to the law of an American state (as opposed to the law of another country). Part V discusses the principal theories under which a program provider may be subject to liability (fault, respondeat superior, nondelegable duty, and ostensible agency). Part VI then focuses on negligence claims, exploring in turn the relationship between reasonable care and foreseeability; the contextual nature of reasonable care; the significance of conformance with or departure from customary practices; and liability based on voluntary assumption of a duty that would not otherwise exist. Next, Part VII considers legal responsibility for misrepresentations made in relation to foreign educational programs and breach of fiduciary duty. Part VIII, the conclusion, emphasizes the importance of sound personnel decisions and returns the discussion to its starting point, the need to keep the risk of tort liability in perspective.

II. CHOICE OF LAW

The mere fact that an injury occurs outside the United States does not mean that an American court lacks jurisdiction to adjudicate a claim based on the injury.[47]

(discussing an ambush in Ecuador in 1997).

46. "Intellectuals and academics whose work threatens established orthodoxy have been persecuted in every age." Inst. of Int'l Educ., Saving Lives and Ideas: A Brief History of Scholar Rescue, Jan. 2006, http://www.iie.org/Content/NavigationMenu/Programs7/SRF/Saving_Lives_and_Ideas.htm (last visited Apr. 25, 2006) (discussing the scholar rescue program of the Institute of International Education).

47. *See* Arno v. Club Med Inc., 22 F.3d 1464 (9th Cir. 1994) (adjudicating tort and contract claims arising from a rape at a resort in France); McGhee v. Arabian Am. Oil Co., 871 F.2d 1412 (9th Cir. 1989) (adjudicating tort and contract claims arising from events that took place in Saudi Arabia); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980) (stating that "[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred"); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (providing that "[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems").

The usual rules of jurisdiction will apply. A program provider, such as a college or university, may be sued in the state in which it is located, in another state where it has "minimum contacts,"[48] or in federal court subject to the rules of personal and subject matter jurisdiction.[49]

The principles of tort law applicable to a suit involving an injury occurring outside the United States will ordinarily be determined under choice-of-law rules.[50] For example, if a student from state A sues a program provider from state B for harm suffered in connection with a program conducted in foreign country C, a court will apply choice-of-law rules to decide whether the tort law of jurisdiction A, B, or C, or perhaps even some other jurisdiction, governs the dispute.[51] The applicable tests for determining choice of law are stated at a high level of generality due to "the great variety of torts . . . and . . . [the] fluidity of the decisions and scholarly writings on choice of law in torts."[52] As a result, it is difficult to predict which body of law will apply to a foreign educational program tort claim.

Indeed, the uncertainty is even greater than might first appear. An accident in a study abroad program might affect multiple participants drawn from different parts of the United States or from different countries, and therefore there may be diverse competing interests relevant to the claims of the various injured parties. Moreover,

> courts have long recognized that they are not bound to decide all issues under the local law of a single state. . . . Each issue is to receive separate consideration if it is one which would be resolved differently under the

48. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"); *see also* Antoine v. Syracuse Univ., No. CV030473601, 2003 WL 22481407, at *5 (Conn. Super. Ct. Oct. 20, 2003) (dismissing because of the court's lack of personal jurisdiction over out-of-state university); Severinsen v. Widener Univ., 768 A.2d 200, 206 (N.J. Super. Ct. App. Div. 2001) (holding that an out-of-state university's recruitment activities in New Jersey were not so systematic, pervasive, and continuous as to support the exercise of personal jurisdiction for purposes of a negligence action brought by a student who was injured in a university dormitory).

49. *See* Vilchis v. Miami Univ. of Ohio, 99 F. App'x 743, 745–46 (7th Cir. 2004) (holding that a university was not subject to jurisdiction in Illinois, even though a coach recruited the plaintiff diver while she lived in Illinois and the swim team traveled to Illinois once, because the university was located in Ohio, the diving team practiced on campus and had a majority of its meets in Ohio, and the injury occurred in Ohio). "Where the jurisdiction of a federal court is premised on diversity, the court has personal jurisdiction over a defendant only if a state court where the district court sits would have personal jurisdiction." *Id.* at 745 (citing Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 713 (7th Cir. 2002)).

50. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS § 145(1) (1971) (stating that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence").

51. *Cf. Arno*, 22 F.3d at 1467 (applying choice-of-law rules and determining that French law governed tort claims arising from a rape at a resort in France); *McGhee*, 871 F.2d at 1422 (holding that Saudi law governed claims for defamation, intentional infliction of emotional distress, fraud, and conversion arising from events that took place in Saudi Arabia).

52. RESTATEMENT (SECOND) OF CONFLICTS § 145 cmt. a (1971).

local law rule of two or more of the potentially interested states.[53]

A program provider may seek to reduce uncertainties relating to applicable legal principles by specifying in its agreement with program participants that claims will be governed by the law of a particular state. Many colleges and universities already do this. "[P]arties may generally consent to application of American law to govern their relations, as evidenced by a choice of law clause."[54] "[R]easonable stipulations of choice of law are honored in contract cases."[55] In addition, courts have found that there is no reason why the same principles of deference to party choice should not apply to tort claims,[56] at least if the choice-of-law clause "embraces all aspects of the legal relationship."[57]

53. *Id.* § 145 cmt. d.

54. Neely v. Club Med Mgmt. Servs., Inc., 63 F.3d 166, 185 (3d Cir. 1995). *See also* Holloway v. HECI Exploration Co. Employee's Profit Sharing Plan, 76 B.R. 563, 572 (Bankr. N.D. Tex. 1987) (stating in dicta that "parties can, within broad limits, stipulate the substantive law to be applied to their dispute"); Muslin v. Freylinghuysen Livestock Managers, Inc., 777 F.2d 1230, 1231 n.1 (7th Cir. 1985) (holding that the parties could stipulate to New York law); Casio, Inc. v. S.M. & R. Co., Inc., 755 F.2d 528, 531 (7th Cir. 1985) (stating that "[p]arties can within broad limits stipulate the substantive law to be applied to their dispute").

55. Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) (citing RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 355–56 (2d ed. 1980)). *See also* Von Hundertmark v. Boston Prof'l Hockey Ass'n, Inc., No. CV-93-1369 (CPS), 1996 WL 118538, at *4 (E.D.N.Y. Mar. 7, 1996) (stating, with respect to a contractual choice-of-law provision, that under New York law, which provides by statute that "parties may contract, agree, or undertake in advance to apply a certain forum's law . . . there is no express prohibition against parties stipulating as to the choice of law in tort actions"). *But see* Ezell v. Hayes Oilfield Constr. Co., Inc., 693 F.2d 489, 492 n.2 (5th Cir. 1982) ("Louisiana does allow parties to agree *contractually* to what state's law would be applied to resolution of contractual disputes."); Swanson v. Image Bank, Inc., 77 P.3d 439, 441–42 (Ariz. 2003) (stating that "neither a statute nor a rule of law permitting parties to choose the applicable law confers unfettered freedom to contract at will on this point," and that when the parties include an express choice of law provision, the court must conduct an "analysis to ascertain the appropriate balance between the parties' circumstances and the states' interests" and thereby determine if the provision is valid and effective).

56. *See Lloyd*, 694 F.2d at 495 ("[W]e do not see why the same principle should not apply in tort cases, though the issue has not to our knowledge arisen in such a case."). As described in *Twohy v. First National Bank of Chicago*, 758 F.2d 1185, 1190 (7th Cir. 1985):

> *Lloyd* considered whether the Wisconsin courts would recognize a tort of wrongful interference with a child's custody . . . . Both parties had stipulated in the district court below that the law of Wisconsin applied to the substantive issues of the case. Plaintiffs, however, urged on appeal that under Wisconsin conflict of laws principles, the law of Maryland should control the "wrongful interference" issue.

Id. at 1190 (citations omitted). *Twohy* found that reasonable stipulations of litigants as to choice of law in tort cases would be honored by Illinois law. *Id.* at 1191.

57. Jiffy Lube Int'l, Inc. v. Jiffy Lube of Pa., Inc., 848 F. Supp. 569, 576 (E.D. Pa. 1994) (stating that "[c]ontractual choice of law provisions . . . do not govern tort claims between contracting parties unless the fair import of the provision embraces all aspects of the legal relationship," and declining to find that a narrow provision "limited on its face to 'this agreement'" determined the choice of law for tort claims involving fraud and misrepresentation). *See also* Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304, 309 (2d Cir. 1994) (finding that a contractual choice-of-law provision covering "any controversy or claim *arising out of or relating to* this contract or breach thereof" was sufficiently broad to encompass a claim for common law fraud); Benchmark Elecs., Inc. v. J.M. Huber Corp., 343 F.3d 719, 726 (5th Cir. 2003) (holding

A judicious choice-of-law provision may confer substantial advantages on a program provider. Today, in the United States, tort principles and judicial attitudes are considerably more favorable to plaintiffs in some states than in others. Suppose, for example, that New Mexico tort law tends to be pro-plaintiff[58] and that Texas tort law tends to be pro-defendant.[59] A Texas college or university that operates a foreign program which attracts students from New Mexico might benefit from stating, as part of the student-provider contract, that Texas law governs disputes arising in connection with the program.[60] A court may rely on

that claims for fraud and negligent misrepresentation were not governed by the parties' narrow choice-of-law provision); Dorsey v. N. Life Ins. Co., No. Civ.A. 04-0342, 2005 WL 2036738, at *6 (E.D. La. Aug. 15, 2005) (stating that in the Fifth Circuit narrowly worded "choice of law clauses . . . apply only to contract claims and not to tort claims arising out of the contractual relationship"); Turtur v. Union Oil Co. of Cal. v. John Brown, No. 94 C 4424, 1994 WL 535108, at *2 (N.D. Ill. Sept. 30, 1994) (declining to apply a choice-of-law clause to tort claims because "[a]lthough the choice-of-law clause specifies that the contract's terms are to be interpreted and enforced in accordance with California law, neither the choice-of-law clause nor any other language in the contract suggests that the parties also intended tort or other non-contractual claims to be governed by California law").

58. *See, e.g.*, Lozoya v. Sanchez, 66 P.3d 948, 954 (N.M. 2003) (holding that although "no other State in the union currently allows unmarried cohabitants to recover for loss of consortium," such a claim may be asserted in New Mexico by an unmarried cohabitant who proves an intimate familial relationship with the victim).

59. For example, "[v]irtually all courts confronting the issue have decided that mental-health professionals owe some affirmative duty to third parties with regard to patients who are recognized as posing dangers." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41 cmt. g (Proposed Final Draft No. 1, 2005). However, Texas is to the contrary. *See* Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999) (holding that a psychiatrist has no duty to warn a victim or the victim's family). As to the conservatism of Texas tort law, see generally Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 518–19 (2006) (discussing comprehensive tort reform legislation which was criticized for "reduc[ing] damage awards and severely restrict[ing] certain causes of action" and will potentially create great obstacles for plaintiffs seeking punitive damages); Phil Hardberger, *Juries Under Seige*, 30 ST. MARY'S L.J. 1, 4 (1998) (describing decisions of the conservative Texas Supreme Court during the 1990s); Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 52 (1997) ("[N]owhere has [the] modern retreat from a pro-plaintiff atmosphere been more apparent than in Texas.").

60. Anyone who doubts that specifying Texas law would confer a benefit on a defendant may want to survey Texas tort law. Among other things, Texas has largely abolished claims for negligent infliction of emotional distress, *see* Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying It Does Not Exist*, 33 ST. MARY'S L.J. 455, 465 (2002) (discussing the Texas Supreme Court's retreat from a broad interpretation of the tort), declines to award loss of consortium damages in cases of injury to a child, Roberts v. Williamson, 111 S.W.3d 113, 117 (Tex. 2003), rejects social host liability for providers of alcohol, Beard v. Graff, 858 S.W.2d 918 (Tex. 1993), broadly construes the no-duty rules relating to obvious dangers, Wal-Mart Stores, Inc. v. Miller, 102 S.W.3d 706 (Tex. 2003), narrowly applies the doctrine of constructive notice, Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812 (Tex. 2002), restricts application of the res ipsa loquitur doctrine, Trans Am. Holding v. Market-Antiques, 39 S.W.3d 640 (Tex. App. 2000), and follows the traditional rules on premises liability rather than modern standards that broaden the duties of possessors of land, Wong v. Tenet Hosps., Ltd., 181 S.W.3d 532 (Tex. App. 2005).

that language in resolving choice-of-law issues, as it is customary for the judiciary to defer to decisions made by the parties regarding applicable law, assuming the choice-of-law clause is reasonable.[61] Presumably, the parties must specify the law of a state to which the program provider, the student, or the program has a clear relationship.[62] In the context of contractual choice-of-law provisions, "[o]rdinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."[63] Courts sometimes question the validity of boilerplate choice-of-law provisions which have not been specifically bargained for by the parties.[64] However, reasonable provisions that are part of standard form contracts have often been enforced.[65]

If there are several reasonable choices that might be made in specifying which

61. *See* Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218–19 n.6 (7th Cir. 1995) (stating that "'[l]itigants can, by stipulation, formal or informal, agree on the substantive law to be applied to their case,' as long as the stipulation is reasonable" (citing City of Clinton v. Moffitt, 812 F.2d 341, 341 (7th Cir. 1987))). In *City of Clinton*, the court found that "the parties agree that Illinois contract law governs, and that is all that is necessary to make it govern." *City of Clinton*, 812 F.2d at 342. *Cf. In re* Marriage of Adams, 551 N.E.2d 635, 638 (Ill. 1990) (holding that a stipulation, applying Illinois law, entered into after litigation had commenced, would not be enforced because it was "unreasonable"). The *Adams* court stated:

> we decline to accept the parties' stipulation that Illinois law should govern . . . . We do not believe that we should allow the minor to forgo what benefits may exist for him under the Florida statute and to stipulate instead to the application of what is perhaps the more stringent provision.

Id. at 639. Of course, the validity of a choice-of-law agreement antedating litigation may be subject to a different analysis.

62. *See* Von Hundertmark v. Boston Prof'l Hockey Ass'n, Inc., No. CV-93-1369 (CPS), 1996 WL 118538, at *4 (E.D.N.Y. Mar. 7, 1996) (recognizing that there is no prohibition under New York law to party stipulation of choice of law in tort actions and that "choice of law clauses are routinely enforced so long as there is a reasonable basis for the choice or the state whose law is selected has sufficient contacts with the transaction"). *See generally* RESTATEMENT (SECOND) OF CONFLICTS § 187(2) (1971) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."); Thomas P. Hanley, *Enforcing Governing Law Clauses in Contracts*, N.Y. L.J., Jan. 18, 2001, at 1 (stating that despite a New York statute governing certain large transactions, which provides that "the parties' governing law clause must be enforced, regardless whether the underlying transaction bears a reasonable relationship to New York State . . . several federal courts have persisted in requiring a sufficient connection between the agreement at issue and this state before upholding a contractual stipulation of New York law"); Michael A. Rosenhouse, Annotation, *Validity and Effect of Stipulation in Contract to Effect That It Shall Be Governed by Law of Particular State Which Is Neither Place Where Contract Is Made Nor Place Where It Is to Be Performed*, 16 A.L.R.4th 967 (2005) (stating that enforcement is rarely allowed).

63. Churchill Corp. v. Third Century, Inc., 578 A.2d 532, 537 (Pa. Super. Ct. 1990) (stating that "Pennsylvania courts will uphold choice-of-law provisions in contracts to the extent that the transaction bears a reasonable relation to the chosen forum").

64. *Id.* (stating, in a dispute arising from a lease of office equipment, that it was unclear whether a choice-of-law provision that was not bargained-over was valid, but that it was unnecessary to resolve that issue because the parties agreed as to which state's law applied).

65. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 54 (1995) (enforcing a choice-o-law provision in a standard form contract); Volt Info.Sci., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) (upholding a "standard" choice-of-law provision).

state's tort law is applicable to a dispute between a foreign program participant and a program provider, then the most important consideration may be the states' respective positions on the validity of written releases limiting liability for negligence or continued adherence to charitable immunity. States differ widely in their willingness to enforce written releases.[66] The law of some jurisdictions will be more favorable to defendant program providers than others. So too, while charitable immunity has been abolished or severely limited in several states, it retains continued vitality in other states.[67] In one recent case, a student, who was domiciled in Connecticut, brought an action against a university located in New Jersey for personal injuries sustained in New York during a university club rugby event.[68] The Second Circuit held that the university's motion to dismiss was properly granted because New Jersey's charitable immunity law applied to the dispute.[69]

A somewhat different question is whether the contract between a program provider and a participant could (or should) say that a tort suit will be governed by the law of the country that is the host site for the foreign program. In some cases, such a choice might be reasonable. European countries, for example, have tort regimes that are in many respects similar to American law.[70] A student

66. *See* Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still a Place for Their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 617 (2003) (stating that "[s]ome courts emphasize the public interest in holding releases invalid when the service or activity is essential and cannot be obtained elsewhere, while others focus on the bargaining power of the respective parties. Some courts enforce releases containing broad, general language; others do not. Some courts require that the word 'negligence' be used to release a party from its own negligence; others do not. Some demand evidence that the release was 'negotiated' and 'bargained for,' while other courts place no emphasis on this requirement. Most courts uphold clearly expressed releases in situations where the activity at question is voluntary, but not all do so"). *See also* Respondent's Brief at 6, Paneno v. Centres for Academic Programmes Abroad Ltd., 13 Cal. Rptr. 3d 759 (Ct. App. 2004) (No. B162753) (describing a broadly-worded release); Gonzalez v. Univ. Sys. of N.H., 38 Conn. L. Rptr. 673 (Super. Ct. 2005) (holding release invalid in suit involving a cheerleading accident); Lemoine v. Cornell Univ., 769 N.Y.S.2d 313, 315–16 (App. Div. 2003) (holding that a release barred university liability for injuries a student sustained in a climbing wall accident); Wheeler v. Owens Cmty. Coll., No. 2003-07855, 2005 WL 106781, at *5 (Ohio Ct. Cl. Jan. 11, 2005) (holding that "language of the release was too general to be enforceable because it purport[ed] to release [the] defendant from any type of misconduct, whether it be negligent, wanton or willful misconduct"); Fay v. Thiel Coll., 55 Pa. D. & C.4th 353, 360 (Ct. Com. Pl. 2001) (holding that an exculpatory clause contained in the waiver of liability form signed by the student who participated in a study abroad program in Peru was an invalid contract of adhesion because the "form was presented to plaintiff on a take-it-or-leave-it basis").

67. *See generally* JOHNSON & GUNN, *supra* note 33, at 853–59 (discussing abrogation and restoration of charitable immunity).

68. Gilbert v. Seton Hall Univ., 332 F.3d 105, 106 (2d Cir. 2003).

69. *Id.*

70. *See* EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (2005), *available at* www.egtl.org. *See generally* Bernhard A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law,"* 53 AM. J. COMP. L. 189, 191 (2005) (stating that the *Principles* "present a common framework both for the further development of national laws and for uniform European legislation"). In Europe, tort damages awards are often considerably less than in the United States. *See* Anita Bernstein, *Muss Es Sein? Not Necessarily,*

participating in a summer program in Austria is subject to the criminal laws of that country.[71] Why would it be unfair to say that the student's rights to recover for personal injury or property damage occurring in Austria will be determined under Austrian tort law? In commercial contexts, courts have upheld choice-of-law provisions selecting the law of a foreign country with a clear relationship to the contract.[72] A court might well defer to a choice of the law of an international education program's host country if the choice offers viable tort remedies.[73] Dicta in federal court cases has said that the parties cannot agree that their disputes will be governed by "the Code of Hammurabi" because that ancient code is nowhere in force.[74] However, if the parties agree that a dispute shall be governed by a living, current body of law, judicial deference to that choice may follow. As the Seventh Circuit has recognized, while a "court has an interest . . . in applying a body of law that is in force somewhere, [it has] less interest in which such body of law to apply."[75]

Some countries, such as China, have nothing even roughly equivalent to American tort law.[76] Therefore, a provision in an educational program contract,

Says Tort Law, 67 L. & CONTEMP. PROB. 7, 22 n.55 (2004) (stating that "in Europe, Canada, Japan, and Australia . . . plaintiffs are awarded much lower judgments"). Also, in Europe, contingent fees are generally not permitted, so plaintiffs have greater difficulty gaining access to the courts. Virginia G. Mauer, Robert E. Thomas & Pamela A. DeBooth, *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 320 (1999) ("The percentage contingency fee is not permitted in most of the continental legal systems."). However, these impediments to recovery would presumably not apply if an American court and jury were applying European tort law principles.

71. U.S. Dep't. of State, Consular Information Sheet: Austria, http://travel.state.gov/travel/cis_pa_tw/cis/cis_965.html (last visited Apr. 26, 2006) (stating that "[p]ersons violating Austrian laws, even unknowingly, may be expelled, arrested or imprisoned").

72. *Cf.* Twohy v. First Nat'l Bank of Chi., 758 F.2d 1185, 1191 n.2 (7th Cir. 1985) (enforcing a stipulation of Spanish law in a suit involving tort claims for fraud, misrepresentation, and libel because the law of Spain bore a "significant relationship to or [had] significant contacts with the parties and alleged transaction and injury in this suit." Furthermore, "[t]he relationship of the parties was centered in Spain, the alleged injury occurred in Spain, and the alleged loan agreement was both negotiated in Spain and intended to be performed in Spain"); El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc., 344 F. Supp. 2d 986, 988 (S.D. Tex. 2004) (finding that a provision designating Mexican law as governing "[a]ll disputes which may arise in connection with the performance of this Agreement" was sufficiently broad to require application of Mexican law to tort claims).

73. New Zealand does not have a conventional tort system. An accident compensation scheme substitutes for tort remedies. *See* Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404, 495 (2000). "Visitors, like everyone else, can make a claim," but entitlements are limited. *Id.* at 444.

74. *See* Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) ("If the parties had stipulated that the substantive law to be applied was the Code of Hammurabi, we think the district court should have said that it did not have the power to render a decision on that basis. Such a decision could not have any value as precedent, and the production of precedents is a major function of judicial decision-making."); *see also Twohy*, 758 F.2d at 1191 (stating that "a court . . . would lack power to render a decision based on the Code of Hammurabi" because that would "call into question the court's subject matter jurisdiction").

75. *See Lloyd*, 694 F.2d at 495.

76. *See* Vincent R. Johnson & Brian T. Bagley, *Fighting Epidemics with Information and*

stating that Chinese law will govern compensation for injuries to a student injured while participating in a program in China, would effectively deny the participant any viable remedy. It is doubtful that an American court would defer to such a choice.[77] Contractual choice-of-law provisions are ineffective when adherence to the parties' selected law would frustrate public policy.[78] Relegating a student to recovery under principles of law of a country which offers no realistic chance for adequate compensation would surely violate American public policy.

While minimizing uncertainty about applicable law is a desirable goal, great care should be exercised before specifying in the program provider-participant contract that disputes are to be governed by the law of another country. First, American courts typically have little expertise in applying foreign law. The skills of American judges educated in the common-law tradition may be insufficient for accurately interpreting and applying, for example, the German Civil Code.[79] To that extent, the court may be unwilling to defer to the parties' choice-of-law (since it burdens the limited resources of the court), may apply the foreign law erroneously (which may generate appeals), or may insist on greater briefing by the parties (which will entail delay and expense). Second, before specifying foreign law as the applicable regime, a program provider would need to consult an expert

Laws: The Case of SARS in China, 24 PENN ST. INT'L L. REV. 157, 173 (2005) (discussing the undeveloped state of tort law in China and indicating that before the recent rise of a market economy and the decline of the old-style communism "there was traditionally little need [in China] for a tort system and little tort litigation"); William P. Alford & Yuanyuan Shen, *The Limits of Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 147 (1997) (indicating that "the Chinese system defines very narrowly the range of activities actionable under tort law"). *See also* Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 617 (2003) (noting on-going efforts to draft China's first tort law).

77. *Cf.* Cent. Soya Co., Inc. v. Epstein Fisheries, Inc., 676 F.2d 939, 941 (7th Cir. 1982) ("The parties and the district court have treated this as a case governed by general common law, much as if *Erie R. R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), had never been decided. We do not think we could be required by a stipulation of the parties to decide a case according to a body of law that is nowhere in force, and that is what we would be doing if we tried to decide this case under general common law.").

78. *See* Keller v. Brunswick Corp., 369 N.E.2d 327, 329 (Ill. Ct. App. 1977) (stating that "[w]hile the parties may have intended to make a limited choice of Wisconsin law in this case, *i.e.*, a choice of the Wisconsin law necessary to interpret only the ambiguous terms of their agreement, we cannot allow such an agreement to violate the clear requirements of the Wisconsin Fair Dealership Law which was in effect when the parties entered their contract"). *See also* Fulcrum Fin. Partners v. Meridian Leasing Corp., 230 F.3d 1004, 1011 (7th Cir. 2000) (stating that in contract cases, "Illinois respects the contract's choice-of-law clause as long as the contract is valid and the law chosen is not contrary to Illinois's fundamental public policy"). *See generally* 12 ILL. LAW AND PRACTICE: CONTRACTS § 163 (2006) ("The power by which courts may declare a contract void as against public policy is far-reaching . . . [but courts] should not hold contracts void as against public policy unless they are clearly and unmistakably so. In order that a contract may be declared void as being against public policy, the line of that policy must be clear and distinct, and, in the absence of express legislative or constitutional prohibition, the court must find that the contract is injurious in some way to the interests of society.").

79. *Cf.* Ezell v. Hayes Oilfield Constr. Co., Inc., 693 F.2d 489, 492 (5th Cir. 1982) (discussing, in a conflict-of-law context, the "great difficulty for federal judges unaccustomed to treading the narrow path of the civil law").

about whether foreign law protects the interests of the program provider more effectively than American law. That consultation process could itself be slow, time-consuming, and costly. In short, a contractual choice-of-law provision that specifies foreign law as the source of tort principles (in contrast to a clause that specifies the law of an American state) might well add unnecessary layers of uncertainty and difficulty to the task of minimizing tort liability related to an international education program.

III. CHOICE OF ARBITRATION

An agreement between a program provider and participants might also provide for arbitration of disputes,[80] and that provision may explicitly[81] or implicitly encompass arbitration of tort claims arising in connection with the program. However, whether an arbitration clause will confer an advantage on a program provider defending against a tort claim is a matter of both construction of the provision and dispute-resolution perspective.[82]

First, while broadly-worded arbitration provisions[83] are often held to include resolution of tort claims,[84] some courts hold that only if a tort claim arises out of

80. Public policy favors arbitration in cases where the parties have clearly indicated willingness to arbitrate. However, "[a]rbitration clauses must be clear and unequivocal" and "[g]enuine issues of fact will preclude an order to arbitrate." Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 446 (3d Cir. 2003).

81. Contract language may expressly state that an agreement to arbitrate encompasses tort claims. *See Drafting Dispute Resolution Clauses—A Practical Guide*, 605 PLI/LIT 23, 44 (1999) (suggesting that a financial institution might use language specifying that "[a]ny controversy or claim arising out of or relating to this Agreement . . . including but not limited to a claim based on or arising from an alleged tort, shall at the request of any party be determined by arbitration"); Terry L. Trantina, *An Attorney's Guide to Alternative Dispute Resolution ADR: "ADR 1.01,"* 1102 PLI/CORP 29, 281 (1999) (containing language "providing for alternative dispute resolution of any and all disputes, controversies or claims, . . . whether based on contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory, arising out of or relating to this Agreement").

82. *See also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 321 (2001) ("It is common for disputes to arise in international arbitration over the arbitrability of common law tort claims.").

83. *See* Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221, 227 (1998) (opining that a "broad clause should contain three key expressions: 'all disputes,' 'in connection with,' and 'finally settled'").

84. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967) (holding that an arbitration clause required that a fraud claim that was related generally to the contract had to be arbitrated because the alleged fraud did not relate specifically to the arbitration provision itself); Pierson v. Dean Witter, Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984) (holding that claims of fraud under a contract, breach of fiduciary duty, negligence, and gross negligence were not immune from arbitration under a broadly-worded and valid arbitration clause); Bos Material Handling, Inc. v. Crown Controls Corp., 186 Cal. Rptr. 740, 745 (Ct. App. 1983) (stating that "where contracts provide arbitration for 'any controversy . . . arising out of or relating to the contract,'" arbitration is required as long as the tort claims "have their roots in the relationship between the parties which was created by the contract"); Gratech Co., Ltd. v. Wold Eng'g, P.C., 672 N.W.2d 672, 678 (N.D. 2003) (requiring arbitration of tort claims); Valero Energy Corp. v. Wagner & Brown, II, 777 S.W.2d 564, 567 (Tex. App. 1989) ("[W]hen the

the contract itself, or its resolution necessitates reference to the contract, must the claim be arbitrated.[85] Thus, courts have sometimes said that:

> If a tort claim is so interwoven with the contract that it cannot stand alone, it falls within the scope of an agreement to arbitrate; if, on the other hand, a tort claim is completely independent of the contract and could be maintained without reference to the contract, it falls outside the scope of an agreement to arbitrate.[86]

The mere fact that the tort claim involves parties who entered into a contract containing an arbitration clause, will not, in some states, take a tort claim out of court.[87] If an arbitration clause does encompass a tort claim, there will be a

parties have agreed to arbitrate any dispute or disagreement 'arising under the contract,' all disputes of whatever nature, including those sounding in tort, that are directly and closely related to the performance of the contract and are otherwise arbitrable, are subject to arbitration upon the demand of a party to the agreement."). *See generally* Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 932 (1996).

85. *See* Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz. Ct. App. 1990) (holding that the arbitration clause in a licensing agreement did not apply to personal injury tort claims associated with the licensee's exposure to chemicals supplied by the licensor because the suit did not contend that the duty to warn the licensee of the toxic nature of the chemicals arose out of any contractual obligation that required reference to the contract to resolve the dispute); Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999) (stating that "the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause" and holding that a tort claim against a home builder for carbon monoxide poisoning, based on the design of a garage, was not subject to arbitration). In *Seifert*, the court reasoned:

> If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. Analogously, such a claim would be one arising from the contract terms and therefore subject to arbitration where the contract required it. *If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort*. Therefore, a contractually-imposed arbitration requirement . . . would not apply to such a claim.

Id. at 639 (quoting *Dusold*, 807 P.2d at 529–31) (citations omitted).

86. Assoc. Glass, Ltd. v. Eye Ten Oaks Inv., Ltd., 147 S.W.3d 507, 513 (Tex. App. 2004) (finding tort claims covered by the arbitration provision); Dr. Kenneth Ford v. NYLCARE Health Plans of Gulf Coast, Inc., 141 F.3d 243, 250 (5th Cir. 1998) (stating similar test).

87. *See* Lovey v. Regence BlueShield of Idaho, 72 P.3d 877, 887 (Idaho 2003) ("For a tort claim to be considered as 'arising out of or relating to' a contract, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself. The required relationship between the dispute and the contract does not exist simply because the dispute would not have arisen absent the existence of the contract between the parties.") (citations omitted). *See also* W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 65 (3d ed. 2000) ("Since the very mechanism of arbitration is created by contract, and since the judicial sanction of tortious conduct does not contemplate a contractual relationship between plaintiff and defendant, claims based on alleged torts are generally not arbitrated. . . . [A]rbitration clauses contained in contracts antedating the dispute . . . may or may not, depending to a great extent on their wording, be deemed to cover claims of wrongful behavior that does not constitute breach of contract but is nevertheless connected with the contractual relationships.").

choice-of-law question as to what law should be applied by the arbitrators in resolving the underlying dispute. If the arbitration clause specifies governing law, that choice will raise the issues similar to those discussed above relating to whether contractual choice-of-law provisions will be followed by courts.[88]

Some authorities argue that arbitration is inefficient because it often does not result in cost savings.[89] Writers also say that referral to arbitration injects into the dispute resolution process a level of legal unpredictability[90] that will be disadvantageous to some or all of the participants. In some instances, a program provider may therefore be better off having a tort claim reviewed by the judiciary in forums where clearly articulated rules of substantive and procedural law apply and where legal errors are subject to correction through appellate review.[91]

IV. CHOICE OF FORUM

A question closely related to the efficacy of contractual choice-of-law[92] or choice-of-arbitration[93] provisions is the issue of whether the parties to a study abroad agreement may, if they prefer litigation to arbitration, *contractually* specify the forum in which a *tort* claim will be litigated. The answer to this question echoes the analysis offered in the preceding sections. On the one hand, similar to choice-of-law provisions, choice-of-forum provisions must be reasonable. On the other hand, like an arbitration clause, a contractual choice-of-forum provision will govern the resolution of a tort claim only if that claim has such a relationship to the contract that it is fair to say that contractual language governs forum selection for the tort action.[94]

88. *See generally* EDWARD BURNETT, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 79–83 (2006) (discussing power of parties to vary federal law by agreement); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 25 (1994) ("International arbitrators typically give effect to the parties' agreements concerning applicable law."); *id.* at 121 ("Despite this general recognition of party autonomy in the selection of substantive law, . . . some states will not enforce choice-of-law agreements if either: (a) the chosen law lacks a reasonable relationship to the parties' transaction; or (b) the chosen law is contrary to some fundamental public policy of the forum, or, less clearly, another state."); Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1219–20 (2003) (discussing governing law and stating that in some instances the "party provision may not be controlling").

89. *See* Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 637 (1995) ("Though quick and inexpensive arbitration proceedings are possible, the delay and expense can be great when the stakes are high.").

90. *See* William H. Krull, III & Noah B. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option*, 11 AM. REV. INT'L ARB. 531, 545 (2000) (discussing unpredictable or unprincipled arbitration awards).

91. *See id.* at 531 ("[F]inality would always be an asset if arbitrators, unlike distinguished judges, never made mistakes.").

92. *See supra* Part II.

93. *See supra* Part III.

94. *See* Terra Int'l, Inc. v. Miss. Chem. Corp., 922 F. Supp. 1334, 1397 (N.D. Iowa 1996) ("[T]he critical question is not whether the language of the forum selection clause at issue

Addressing the first issue—the reasonableness of the contractually chosen forum—one court recently summarized the law as follows:

> as a general principle, private parties may agree to conduct all potential litigation arising out of a contract in a single jurisdiction. Such Merger Agreements are presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes: (i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. Generally put, forum selection clauses are enforced so long as enforcement at the time of litigation would not place any of the parties at a substantial and unfair disadvantage or otherwise deny a litigant his day in court.[95]

A contractual forum-selection clause requiring claims by study abroad participants to be litigated in an American state where the program provider is located, where the participant resides, or where a substantial part of the contract is to be performed might well be found to be reasonable. In contrast, a clause requiring an *American program participant* to litigate a tort claim against an *American program provider* in a foreign country may be subject to challenge. Whether that challenge will be successful will depend upon the particular facts of the case. Requiring a program participant to litigate a claim in a far away country with an under-developed legal system might be so seriously inconvenient as to effectively deny the litigant a day in court.

The same is not necessarily true if one of the parties—the claimant or the program provider—is located in the foreign country which the choice-of-forum provision specifies as the forum for disputes. That choice might be deemed to be reasonable since, when litigants reside in different countries, one or the other will inevitably be disadvantaged by litigating far from home.[96] Indeed, in cases involving commercial disputes, courts have sometimes approved the choice of a forum located in a country to which neither party had a continuing relationship. In one suit, where "a Houston-based American corporation, contracted with . . . a German corporation, to tow . . . [a] drilling rig . . . from Louisiana to a point off Ravenna, Italy,"[97] the Supreme Court of the United States upheld a forum-selection provision specifying the London Court of Justice.[98] As Chief Justice

expressly encompasses non-contract claims, but instead whether the non-contract claims asserted are directly or indirectly related to the contractual relationship of the parties."), *aff'd*, 119 F.3d 688, 693–95 (8th Cir. 1997).

95. Hadley v. Shaffer, No. Civ. A. 99-144-JJF, 2003 WL 21960406, at *4 (D. Del. Aug. 12, 2003).

96. *Cf.* Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 202 (3d Cir. 1983) (rejecting, in a suit involving contract and tort claims related to a contract between a New Jersey corporation and a British corporation, the argument that the contractual choice of an English forum was "seriously inconvenient"), *overruled on other grounds by* Lauro Lines v. Chasser, 490 U.S. 495 (1989).

97. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).

98. *Id.* at 12 (holding that a forum-selection clause in a commercial agreement negotiated at

Warren Burger explained: "[n]ot surprisingly, foreign businessmen prefer . . . to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation."[99]

Today, some courts, but not all, give heightened scrutiny to the fairness of forum-selection clauses not specifically negotiated by the parties.[100] Courts also hold that "any ambiguity as to the mandatory or permissive nature of the forum selection clause should be construed against . . . [the] drafters."[101]

Addressing the second issue—whether a contractual choice-of-forum provision governs claims in tort, as well as claims in contract—courts often focus on the source of the duty underlying the tort claim. Thus, in a suit by an American third-party beneficiary (Coastal) to an English contract between English companies (Farmer Norton and Tilghman), which contained a forum-selection clause specifying English courts, the Second Circuit wrote:

> The second circumstance relied on by the district court for denying enforcement [of the choice of the English forum] is that Coastal has asserted tort claims as well as contract claims, and that the forum selection clause is inapplicable to the former. The difficulty with this reasoning is that it ignores the reality that the Tilghman-Farmer Norton contract is the basic source of *any* duty to Coastal. There is no evidence suggesting that the clause was not intended to apply to all claims growing out of the contractual relationship. If forum selection clauses are to be enforced as a matter of public policy, that same public policy requires that they not be defeated by artful pleading of claims such as negligent design, breach of implied warranty, or misrepresentation. Coastal's claims ultimately depend on the existence of a contractual relationship between Tilghman and Farmer Norton, and those parties bargained for an English forum. We agree with those courts which have held that where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain. . . . [D]isregarding the forum selection clause was on this record improper.[102]

Consequently, whether a forum-selection clause encompasses a tort claim may depend upon the source of the duty at issue. If the director of a study abroad program negligently backs a rental car over a program participant, it is doubtful that the resulting tort claim will be subject to a contractual choice-of-forum

arm's length should be enforced by the courts in the absence of a compelling countervailing reason that would make enforcement unreasonable).

99. *Id.* at 11–12.

100. *See* Forrest v. Verizon Commc'n, Inc., 805 A.2d 1007, 1011 n.9 (D.C. 2002) (discussing the split of authority).

101. Beckley v. Auto Profit Masters, L.L.C., 266 F. Supp. 2d 1001, 1004 (S.D. Iowa 2003) (holding that a forum selection clause was permissive, rather than mandatory).

102. Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir. 1983), *overruled on other grounds by* Lauro Lines v. Chasser, 490 U.S. 495 (1989).

provision. The duty to exercise reasonable care in driving does not arise from the program provider-participant contract, but instead, if American law applies, from garden-variety common-law principles.[103] Resolution of that tort claim also does not require reference to the terms of the program participation agreement. In contrast, if a program provider is sued for misrepresentation based on allegedly false statements in the program's advertising materials, those tort allegations may be so closely tied to the contractual relationship, and to related contract-law claims, that it is fair to say that they are encompassed by a forum-selection clause in the contract between the defendant program provider and the plaintiff participant.[104] "The better general rule . . . is that contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties."[105] Of course, a broadly-worded forum-selection clause is more likely to be deemed to encompass tort claims, because "[w]hether tort claims are governed by forum selection provisions depends upon the intention of the parties as reflected by the wording of the particular clauses and the facts of each case."[106]

V. THEORIES OF RESPONSIBILITY

Under American law, a program provider may be liable for injuries sustained by a participant in an international educational program under a broad array of theories. These bases of liability include: fault, respondeat superior, nondelegable duty, and ostensible agency.

A. Fault

First, an educational program may be subject to fault-based liability, such as

103. *Beckley*, 266 F. Supp. 2d at 1004–05 (holding that a forum-selection clause in a consulting agreement applied only to the business's claims for breach of contract, and did not preclude the business from filing suit in another forum for fraudulent inducement, rescission, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO)).

104. *But see id.* at 1005 (holding that a forum selection clause was inapplicable for a claim for fraudulent inducement because that claim was "actionable independent of the contract itself").

105. Lambert v. Kysar, 983 F.2d 1110, 1121–22 (1st Cir. 1983). *See also* Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 693–95 (8th Cir. 1997) (reviewing in detail the various tests adopted by courts for determining whether a contractual choice-of-forum provision encompasses tort claims and holding that the relevant question is whether the "tort claims involve the same operative facts as would a parallel claim for breach of contract"); CoBank, ACB v. Reorganized Farmers Coop. Ass'n, No. 04-3385, 2006 WL 620864, at *7 (10th Cir. Mar. 14, 2006) ("[G]enerally speaking, other circuits applying state law have determined a contract forum provision cannot apply to tort claims unless the provision is broad enough to be construed to cover such claims or the tort claims involve the same operative facts as a parallel breach of contract claim.") (citations omitted).

106. Digital Envoy, Inc. v. Google, Inc., 319 F. Supp. 2d 1377, 1380 (N.D. Ga. 2004) (holding that claims against a licensee for misappropriation of trade secrets, unfair competition, and unjust enrichment, which were all premised on allegations that licensee's use of software had gone beyond scope of the license agreement, came within scope of the agreement's forum-selection clause, which applied to "[a]ny lawsuit regarding this agreement").

claims for negligent hiring,[107] training,[108] supervision,[109] or retention of employees or agents;[110] negligent selection, retention, or discipline of participants;[111] or negligent failure to protect business invitees (e.g., students) from hazards on a foreign premises over which the program exercises control (e.g., classrooms or study areas).[112] The principles of negligence-based liability will be considered in

107. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 19 (Proposed Final Draft No. 1, 2005) (citing cases on negligent hiring).

108. *Cf.* Saville v. Sierra Coll., No. C047923, 2005 WL 3150521, at *2 (Cal. Ct. App. Nov. 28, 2005) (holding that plaintiff failed to plead facts that would support a claim that college negligently failed to provide skilled instructors for a peace officer training class involving physical maneuvers).

109. *See* Molinari v. Tuskegee Univ., 339 F. Supp. 2d 1293, 1301–02 (M.D. Ala. 2004) (finding that a cause of action was stated as to whether allegedly negligent supervision of a professor caused injuries to a student who was kicked by a cow); Shlien v. Bd. of Regents, Univ. of Neb., 640 N.W.2d 643, 650 (Neb. 2002) (discussing a claim based on alleged negligence for failing to properly supervise a professor's Internet access and failing to have safeguards in place to prevent unauthorized publication of student material); Wood v. N.C. State Univ., 556 S.E.2d 38, 39 (N.C. Ct. App. 2001) (alleging negligent retention and supervision of a professor who allegedly committed sexual harassment).

110. *See* Bell v. Univ. of V.I., No. Civ. 2000-0062, 2003 WL 23517144, at *3–4 (D.V.I. Nov. 19, 2003) (finding that a claim was stated for alleged negligent hiring and retaining of a professor who was known to be dangerous to students).

111. *See* Marro v. Fairfield Univ., No. CV040410044S, 2005 WL 3164148, at *2 (Conn. Super. Ct. Nov. 10, 2005) (holding that it could not be said as a matter of law that a university, which allegedly had knowledge of students leaving the campus, consuming alcoholic beverages, and driving back to the university, had no duty to enforce its rules against such conduct). *Cf.* Varner v. District of Columbia, 891 A.2d 260, 268–69 (D.C. 2006) (finding that parents failed to establish the standard of care in a wrongful death suit alleging that the murder of their son resulted from the university's insufficient disciplining of the student-murderer prior to the attack).

112. *See* Appellant's Opening Brief at 5, Paneno v. Centres for Academic Programmes Abroad Ltd., 13 Cal. Rptr. 3d 759 (Ct. App. 2004) (No. B162753) (describing claims for negligence and premises liability); Miano v. State Univ. Constr. Fund, 736 N.Y.S.2d 556, 556 (App. Div. 2002) ("[D]uties [to warn or make safe] were assumed by the College when it took control over the construction area."). *See also* Rogers v. Del. State Univ., No. Civ. A. 03C-03-218-PLA, 2005 WL 2462271, at *6 (Del. Super. Ct. Oct. 5, 2005) (holding that a university that temporarily placed students in off-campus housing "had assumed a duty to provide the displaced students with reasonably safe accommodations"). Persons who exercise control over the real property of others may be held liable if their invitees are injured on that property. *See generally* Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322 (Fla. Dist. Ct. App. 1991) (holding that a duty of reasonable care to patrons extended to adjacent lots where patrons parked in accordance with the instructions of security guards), *appeal dismissed*, 589 So. 2d 291 (Fla. 1991); Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1120–21 (N.J. 1993) (stating that a real estate broker owes reasonable care to prospective buyers touring an open house); Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 324 (Tex. 1993) (finding that a lessee exercised control over a construction ramp, even though the lease covered only space inside the building); Orthmann v. Apple River Campground, Inc., 757 F.2d 909, 914 (7th Cir. 1985) ("Whoever controls the land is responsible for its safety."). Of course, there may be a real question as to whether a program exercises "control" over a foreign educational premises. An American program provider may be permitted to use the classrooms and offices of a foreign college or university, but it may have no right to make alterations to those facilities or even to employ persons to clean or make repairs. Presumably, these limitations will be relevant to determining just what the duty of reasonable care requires. It may be fair to expect the American program provider to call dangers to the attention of the foreign host institution or program participants, but not fair to fault the American

detail below in Part VI.

B. Respondeat Superior

Second, a program provider may be subject to strict liability of a respondeat superior[113] variety for the torts of employees[114] committed within the scope of their employment.[115] In the study abroad context, the scope of employment for administrators and faculty members may be broad.[116] The director of a foreign program may be "on duty" virtually all day.[117] If an American-run foreign study program employs foreign faculty or staff, different legal principles may govern liability issues relating to that employment relationship.[118] The faculty member's day may consist of activities, which, though not separately compensated,[119] in a

program provider for repairs that have not been made. *Cf.* Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1022 (9th Cir. 2002) (affirming the rejection of a proposed jury instruction relating to accommodation of disabilities under federal law because the instruction implied that an American college was "required to make structural modifications to the buildings in Australia").

113. Respondeat superior is a Latin phrase meaning "let the superior make answer." BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).

114. If the employee did not commit a tort, the theory of respondeat superior is inapplicable. *See* Geiersbach v. Frieje, 807 N.E.2d 114, 122 (Ind. Ct. App. 2004) (holding that summary judgment was properly granted to the coaches and the university was not vicariously liable).

115. *Cf.* Chambers v. Lehmann, No. 262502, 2005 WL 2291889 (Mich. Ct. App. Sept. 20, 2005) (discussing a tort claim involving a university vehicle driven by a university employee on campus).

116. Courts differ in how tightly or narrowly they focus the scope-of-employment inquiry. *Compare* Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 448 (Cal. 1995) ("In California, the scope of employment has been interpreted broadly. . . . For example, 'the fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer.' . . . Moreover, 'where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.'") (citations omitted), *with* O'Toole v. Carr, 815 A.2d 471, 473 (N.J. 2003) (declining to adopt a broad approach which would too readily subject businesses to liability for harm incidental to their activities).

117. This is important because "off-duty" conduct is ordinarily not within the scope of employment. *See* Freeman v. Busch, 150 F. Supp. 2d 995, 1004 (S.D. Iowa 2001) (holding, in part, that a college was not vicariously liable for a student employee's alleged omissions of his duties as a security guard because the student employee was not on duty when a party guest was raped in a dormitory). *See also* Burroughs v. Massachusetts, 673 N.E.2d 1217, 1219 (Mass. 1996) (holding that an off-duty national guard member who served as a bartender at the armory was not within the scope of his employment); Ginther v. Domino's Pizza, Inc., 93 S.W.3d 300 (Tex. App. 2002) (finding no liability because the driver's shift had ended and he had left work almost two hours earlier).

118. *See generally* Part VIII (discussing choice of law).

119. *Cf.* Bishop v. Texas A & M Univ., 35 S.W.3d 605, 607 (Tex. 2000) (holding, in a suit arising from an accidental stabbing during a university play, that the faculty advisors to a drama club were employees, not volunteers, because, even though they were not separately paid for that activity, service as an advisor to a student organization was considered in determining overall compensation).

very real sense are intended, at least in part, to benefit the business purposes[120] of the program provider. Entertaining visiting faculty members, hosting dinners, and leading walking tours around the town may fall within this category. An excursion down the valley by car with other faculty members might be a mixture of business and pleasure, and if an auto accident occurs, there may be a plausible argument that the allegedly negligent driving was within the scope of the director's employment.[121] Conduct—even ill-advised conduct[122]—that is intended, in part, to further the business purposes of the employer,[123] and done as part of the employer's business,[124] may raise an issue of fact sufficient to support a finding of respondeat superior liability.[125]

120. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (Tentative Draft No. 5, 2004) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."); Haybeck v. Prodigy Servs. Co., 944 F. Supp. 326, 331 (S.D.N.Y. 1996) (holding that having sex with a company client away from the place of employment was not within the scope of employment even if the employee's conduct arose in part from a desire to encourage the plaintiff to use more of the employer's services), *appeal dismissed on other grounds*, 116 F.3d 465 (2d Cir. 1997).

121. *See, e.g.*, Mayes v. Goodyear Tire & Rubber Co., 144 S.W.3d 50, 56 (Tex. App. 2004) (finding the evidence sufficient to raise a genuine issue of material fact regarding whether a driver was within the course and scope of his employment, despite being on a personal errand, where, among other things, the driver "was available via pager 24 hours a day; and . . . was not restricted in any way from using the truck for personal business").

122. *See* Smith v. Lannert, 429 S.W.2d 8, 15 (Mo. Ct. App. 1968) (holding a grocery store liable for injuries that resulted when a supervisor spanked a cashier for taking an unauthorized break. "[T]he jury could find Lannert's act in striking plaintiff was to enforce employee discipline with respect to orders given by the store manager with reference to employee rest breaks, thus promoting Bettendorf-Rapp's purpose of keeping an adequate work force on the floor and maintaining employee discipline").

123. *Cf.* Bell v. Univ. of V.I., No. Civ. 2000-0062, 2003 WL 23517144, at *3 (V.I. Nov. 19, 2003) (holding that a university was entitled to partial summary judgment on claims for assault, battery, and intentional and negligent infliction of emotional distress because the plaintiff student did not and could not show that the invasive conduct of the professor "served" the university or that the professor was "hired to push students").

124. *See* Commercial Bank v. Hearn, 923 So. 2d 202, 206–07 (Miss. 2006) (stating that "[a]n indirect benefit to the employer . . . is not the appropriate test for *respondeat superior*. . . . The inquiry is . . . whether, from the *nature of the act itself* as actually done, it was *an act* done in the master's business, or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account").

125. Section 228 of Second Restatement of Agency provides that the:

> Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and
> (d) if force is intentionally used by the servant against another, the use of the force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958). The evolving Third Restatement of Agency proposes a somewhat different test for scope of employment:

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an

C. Non-delegable Duty

Third, although employers,[126] including educational program providers,[127] are ordinarily not liable for the torts of agents who are independent contractors,[128] strict liability may be imposed on an employer if an independent contractor breaches a non-delegable duty.[129] American law on non-delegable duties is in many respects unclear. The Second Restatement of Torts acknowledges that "[f]ew courts have made any attempt to state any general principles as to when the employer's duty cannot be delegated, and it may as yet be impossible to reduce these exceptions to such principles."[130] However, the same authority then provides that a duty is non-delegable and a principal therefore cannot shift responsibility for the proper conduct of work to an independent contractor if the work requires "special precautions,"[131] is to be done in a public place,[132] involves instrumentalities used in highly dangerous activities,[133] is subject to safety requirements imposed by legislation or administrative regulation,[134] is itself inherently dangerous,[135] or involves an "abnormally dangerous" activity.[136] It is

independent course of conduct not intended by the employee to serve any purpose of the employer.

RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (Tentative Draft No. 5, 2004). Conduct not intended to further any business purpose of the employer ordinarily will not give rise to respondeat superior liability. *See* Jones v. Baisch, 40 F.3d 252 (8th Cir. 1994) (stating that leaking confidential information was not within the scope of employment); Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 579 (Tex. 2002) (holding that a manager was not acting within the scope of his employment when he lied during a workplace investigation).

126. *See* RESTATEMENT (SECOND) OF TORTS § 409 (1965) (stating the general rule that a principal is ordinarily not vicariously liable for the torts of an agent who is an independent contractor); Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998) ("Because an independent contractor has sole control over the means and methods of the work to be accomplished, . . . the individual or entity that hires the independent contractor is generally not vicariously liable for the tort or negligence of that person."). *See also* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (Tentative Draft No. 2, 2001) ("Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent.").

127. *See* Texas A & M Univ. v. Bishop, 156 S.W.3d 580, 584–85 (Tex. 2005) (holding that a university was not liable for the allegedly tortious conduct of a play's director and prop assistant, who were independent contractors rather than state employees).

128. *See* RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) ("An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.").

129. *See, e.g.*, Gazo v. City of Stamford, 765 A.2d 505, 511 (Conn. 2001) (stating that "the nondelegable duty doctrine means that the party with such a duty . . . may not absolve itself of liability by contracting out the performance of that duty").

130. RESTATEMENT (SECOND) OF TORTS § 416 introductory note (1965).

131. *Id.* § 416; *see also* § 413 (imposing negligence-based liability relating to harm caused by an independent contractor's failure to take special precautions).

132. *Id.* §§ 417–18.

133. *Id.* § 423.

134. *Id.* § 424.

135. *Id.* § 427 ("One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to

possible that these broad, loosely-defined categories may encompass certain activities that are part of a foreign study program.

For example, a program provider might be subject to a non-delegable-duty claim based on hiring a person or company to transport a handicapped student who is confined to a wheel chair[137] or to guide a hike into the mountains on the theory that the transportation or excursion required "special precautions."[138] Similarly, a program provider operating in a dangerous country[139] might be liable for an independent contractor's failure to exercise reasonable care in transporting participants, on the ground that the activity of arranging travel for persons in a dangerous country is, by definition, inherently dangerous,[140] in the sense that the risks of harm cannot be eliminated despite the exercise of all reasonable care.[141]

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the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."). One court stated:

> The theory upon which this liability is based is that a person who engages a contractor to do work of an inherently dangerous character remains subject to an absolute, nondelegable duty to see that it is performed with that degree of care which is appropriate to the circumstances, or in other words, to see that all reasonable precautions shall be taken during its performance, to the end that third persons may be effectually protected against injury.

Hatch v. V.P. Fair Found., Inc., 990 S.W.2d 126, 134 (Mo. Ct. App. 1999) (quoting 41 AM. JUR. 2D *Independent Contractors* § 41 (1968)).

136. RESTATEMENT (SECOND) OF TORTS § 427A (1965).

137. *See* Kelly v. United Airlines, Inc., 986 F. Supp. 684, 687 (D. Mass. 1997) (holding, in a suit where a handicapped passenger sustained injuries when she fell out of an aisle chair while being boarded on an airplane, that the airline could be liable, under § 427 of the Restatement of Torts, for the negligence of the contractor who provided the wheelchair services. The Restatement, RESTATEMENT (SECOND) OF TORTS § 427 (1965), imposes "vicarious liability making the employer liable for the negligence of the independent contractor in failing to guard against a special danger, irrespective of whether the employer has itself been at fault").

138. *But see* Ignato v. Wilmington Coll., Inc., No. 03C-05-87, 2005 WL 2475750, at *1 (Del. Aug. 22, 2005) (finding the "peculiar risk" doctrine of the Restatement, RESTATEMENT (SECOND) OF TORTS § 413 (1965), inapplicable to the case of a student injured during flight training).

139. For example, a dangerous country may be considered one for which the U.S. State Department has issued a Travel Warning. "Travel Warnings are issued when the State Department recommends that Americans avoid a certain country." *See* U.S. Dep't of State, Current Travel Warnings, http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited Apr. 25, 2006).

140. *But see* Chainani v. Bd. of Educ. of N.Y., 663 N.E.2d 283, 287 (N.Y. 1995) ("[T]he activity of transporting children by bus to and from school—successfully accomplished countless times daily—does not involve that sort of inherent risk for the nonnegligent driver and is simply not an inherently dangerous activity so as to trigger vicarious liability.").

141. *Id.* In *Chainani*, the court explained the non-delegable-duty rule relating to inherently dangerous activities in the following terms:

> This State has long recognized an exception from the general rule [of non-liability for the acts of an independent contractor] where, generically, the activity involved is "dangerous *in spite of all reasonable care*." . . . This exception applies when it appears both that "the work involves a risk of harm inherent in the nature of the work itself [and] that the employer recognizes, or should recognize, that risk in advance of the contract."

Id. (emphasis added) (citations omitted).

The Restatement commentary explains this type of employer liability for the conduct of an independent contractor in these words:

> It is not . . . necessary to the employer's liability that the work be of a kind which cannot be done without a risk of harm to others . . . . *It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself*, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, *or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done*.[142]

The sweep of this definition of what constitutes an "inherently dangerous" activity is soberingly broad. Although a number of recent cases have imposed liability under the rule,[143] no case has involved a study abroad program. If program-related activities in a dangerous country were held to be inherently dangerous because material risks could not be eliminated through the exercise of reasonable care, the provider might nevertheless avoid liability to a student based on a defense of primary assumption of the risk.[144] That is, it could be argued, with legal plausibility, that a student's voluntary participation in a study abroad program in a dangerous country is an assumption of inherent risks. There is support for this type of argument in decided cases. Some courts have said that "the inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity."[145] However, other courts have held that

142. RESTATEMENT (SECOND) OF TORTS § 427 cmt. b (1965) (emphasis added).

143. By far, the greater number of courts that have considered the inherently-dangerous-activity exception have found it inapplicable to the facts before them. However, several recent cases have applied the exception. *See* McMillian v. United States, 112 F.3d 1040, 1047 (9th Cir. 1997) (holding that activity of felling all of the trees in a right-of-way corridor was inherently dangerous); Maldonado v. Gateway Hotel Holdings, L.L.C., 154 S.W.3d 303, 310 (E.D. Mo. 2003) (holding that a boxing match was an inherently dangerous activity, and therefore a hotel was liable for the negligence of an independent contractor who failed to provide post-fight medical care); Hatch v. V.P. Fair Found., Inc., 990 S.W.2d 126, 135–36 (Mo. Ct. App. 1999) (finding that bungee jumping was an inherently dangerous activity); Beckman v. Butte-Silver Bow County, 1 P.3d 348 (Mont. 2000) (holding that trenching is an inherently dangerous activity because the risks of death or serious bodily injury are well recognized and special precautions are required to prevent a cave-in that could bury a worker); Enriquez v. Cochran, 967 P.2d 1136, 1162 (N.M. Ct. App. 1998) (holding that felling dead trees is an inherently dangerous activity); Pusey v. Bator, 762 N.E.2d 968, 975 (Ohio 2002) (holding that if an employer hires independent contractor to provide armed security guards to protect property, the inherently-dangerous-work exception is triggered, and that if someone is injured by the weapon as result of a guard's negligence, the employer is vicariously liable even though the guard is an employee of the independent contractor).

144. *See generally* Coleman v. Ramada Hotel Operating Co., 933 F.2d 470, 476–77 (7th Cir. 1991) (differentiating express assumption of risk, primary implied assumption of risk, and secondary implied assumption of risk). "In primary implied assumption of risk, the plaintiff assumes risks inherent in the nature of the activity" and is completely barred from recovery. *Id.* at 477. *See infra* text accompanying note 161.

145. DeShambo v. Nielsen, 684 N.W.2d 332, 339 (Mich. 2004) (involving an employee of independent contractor who was injured while cutting timber). *See also* Apostal v. Oliveri Constr. Co., 678 N.E.2d 756, 761 (Ill. Ct. App. 1997) (stating, in the context of a similar non-

voluntary participants in inherently dangerous activities, such as logging, were not barred from recovery based on their participation, although their conduct might constitute comparative negligence that would reduce their recovery.[146] The application of these theories to injuries arising in connection with study abroad has yet to be charted. Obviously, there are many unanswered questions and plenty of room for dispute.[147] Among the numerous uncertainties is the fact that whether an activity is 'inherently dangerous' is ordinarily a question for the jury, not the court.[148]

D. Ostensible Agency

Fourth, liability may be imposed on a program provider based on an ostensible agency theory.[149] Thus, even if the person is not actually an agent or employee acting within the scope of employment, a program provider might be subject to liability essentially on estoppel grounds if its conduct led the injured person (e.g., a student) to believe that the tortfeasor was acting on behalf of the provider and thereby induced reliance. This theory of liability may have considerable applicability to a foreign program where the lines of responsibility are blurred and

delegable duty argument, that the "nondelegable duty, . . . runs to third parties, not to employees of the independent contractor").

146. *See, e.g.*, McMillian v. United States, 112 F.3d 1040, 1047 (9th Cir. 1997) (reducing the damages awarded to a logging contractor's employee based on the employee's comparative negligence).

147. *See* Dexter v. Town of Norway, 715 A.2d 169, 172 (Me. 1998) (holding, in a case arising from a fire, that the defendant might be liable for negligent selection of an independent contractor, but "[w]e are far less certain whether and under what circumstances we would recognize the doctrine variously described as involving 'a peculiar unreasonable risk' (section 413), 'a peculiar risk' (section 416) or 'a special danger' (section 427)").

148. *See* Fry v. Diamond Constr., Inc., 659 A.2d 241, 249 (D.C. 1995) (holding, in a suit for personal injuries sustained when the plaintiff fell off of a ladder that had been placed on a scaffold, that for purposes of the rule, an employer is liable for injuries caused by negligence of independent contractor if the activity is inherently dangerous. The existence of danger and knowledge of it by employer are normally questions of fact for jury). *See also* Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282, 286 (Colo. 1992) (finding that it was for the jury to determine whether it was inherently dangerous for a charter airline to fly passengers in winter to the mountains in an unpressurized plane that was uncertified for flights into icy conditions); Bohme, Inc. v. Sprint Int'l Commc'n, 686 N.E.2d 300, 309 (Ohio Ct. App. 1996) (holding that a fact issue existed as to whether installation and maintenance work by the defendant's independent contractors on a ten ton rooftop air conditioning unit was inherently dangerous). *But see Hatch*, 990 S.W.2d at 135–36 ("To initially determine whether an activity is inherently dangerous, the trial judge should begin by ascertaining the nature of the activity and the manner in which the activity is ordinarily performed. If after considering these factors the trial court concludes the activity does not involve some peculiar risk of harm, then the activity is not inherently dangerous as a matter of law. If the trial court does not so find, then the question should be submitted to the jury.") (citations omitted).

149. *See generally* RESTATEMENT (SECOND) OF AGENCY § 267 (1958) (providing that a party asserting ostensible agency must demonstrate that the principal, by its conduct, caused the party to reasonably believe that the putative agent was an employee or agent of the principal, and that the party justifiably relied on the appearance of the agency relationship). *See also* Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 949 (Tex. 1998) (applying an ostensible-agency analysis to a claim based on the conduct of a physician staffing a hospital emergency room).

shifting. A visiting faculty member hired only to teach a course may be enlisted to lead a field trip to the local courts or to drive an ill student to the hospital. If the conduct results in an accidental injury, it will probably be no defense for the program provider to argue that the faculty member was not hired or paid to perform that job. If the program's information booklet for students lists white-water rafting companies as an available form of recreation, or if fliers for hang-gliding vendors are posted in the student dormitory, it may be legally advantageous to inform students that those enterprises operate independently, not as agents for the program provider or with the provider's endorsement.[150]

VI. NEGLIGENCE

A. Reasonable Care and Foreseeability

At the beginning of the twenty-first century, the general rule in American tort law is that all persons are required to exercise reasonable care in their activities to protect other persons from physical harm.[151] The duty of reasonable care means that an actor must employ cost-effective measures to prevent injuries.[152] On the home campus this may mean that a college or university will be held liable for "failure to install simple, inexpensive locks or latches on the shower doors."[153] Similarly, at both home and foreign campuses, a program provider may have a duty to disclose a variety of risks which are known to the provider but unlikely to be discovered by students,[154] assuming it is inexpensive and useful for the provider

150. *But see* McClure v. Fairfield Univ., 35 Conn. L. Rptr. 169, 169 (Super. Ct. 2003) (finding that a university had assumed a duty to provide safe transportation between the campus and a beach where drinking took place. The court noted that "the university's providing information about the beach area housing in the student binder was an imprimatur").

151. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); *see generally* Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. CHINA L. REV. 237, 241 (2000) (discussing the general rule).

152. *See generally* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating that if the probability of harm is called P, the gravity of the threatened injury or loss called L, and the burden of preventing the loss called B, "liability depends upon whether B is less than L multiplied by P," in other words, whether B is less than PL); JOHNSON & GUNN, *supra* note 33, at 250 (stating that the B < L x P formula "suggests . . . that if the chance of an accident is high, it makes more sense to devote resources to safety than if the chance of an accident is low, other things being equal. . . . And the formula teaches that, other things being equal, resources spent to prevent accidents that threaten serious injury are better spent than if they had gone to reduce minor scrapes").

153. Shivers v. Univ. of Cincinnati, No. 2000-02461, 2005 WL 517450, at *4 (Ohio Ct. Cl. Jan. 6, 2005) (holding that a university's failure to install locks or latches was a breach of the duty of care that proximately caused plaintiff's injury).

154. *Cf.* Sy v. Bd. of Trs. of Cal. State Univ., No. B172235, 2005 WL 950006, at *4 (Cal. Ct. App. Apr. 26, 2005) (finding a university not liable for failure to warn because while "[h]idden or obscured dangers of property may require the responsible landowner to warn of those conditions . . . there are no allegations that the presence of trains on this track was hidden or obscured").

to give such warning.[155] For example, if the director of a foreign program knows that in recent years students have been harassed or molested while walking in a certain area near the program's dormitories, reasonable care may require disclosure of that information.[156]

155. *See* Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 276 (2005) ("In addressing questions of duty in unsettled areas of the law, courts often ask whether imposition of duty makes sense as a matter of public policy. They consider, for example, whether obligating the defendant to exercise care would tend to minimize harm to potential plaintiffs without being unduly burdensome to the defendant or disruptive to the community."); *see, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976) (holding that where a patient confided an intention to kill another student to a psychologist employed by the university hospital, and the psychologist referred the matter to police but did not actually warn the other student, who was then killed, the complaint of the victim's parents stated a cause of action against the university. "If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment"); Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 87 (Fla. 2000) (stating that a "university may be found liable in tort where it assigns a student to an internship site which it knows to be unreasonably dangerous but gives no warning, or inadequate warning"); Stanton v. Univ. of Me., 773 A.2d 1045 (Me. 2001) (holding that a university owed a duty to a seventeen-year-old student-athlete, as a business invitee attending a pre-season soccer program, to advise the student of steps she could take to improve her personal safety; the student was sexually assaulted by a companion she had admitted into her dormitory); *see also* Mostert v. CBL & Assoc., 741 P.2d 1090, 1094–95 (Wyo. 1987) (recognizing a duty to warn theater patrons of off-premises dangers posed by a developing storm of great severity because, among other things, the "burden of passing [that] superior knowledge on to patrons regarding the flood appears to be minimal"). Under the law of deceit, there is a similar duty to reveal facts not reasonably discoverable by the plaintiff, for otherwise the plaintiff would "simply be relegated to making a potentially bad decision without access to material information." Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 539–43 (2004).

156. The issue here is complex—at least when viewed from a premises-liability perspective. A business has a duty to protect business invitees from hazards on property over which the business exercises control. *See supra* note 112. That rule may apply to a foreign campus over which a program exercises control. The question would then be whether there was a duty to warn of dangers in proximity to that foreign premises. Some cases—but certainly not all—say that a duty to warn invitees of dangers extends to hazards outside the premises which the invitee may foreseeably encounter. *Compare* Ember v. B.F.D., Inc., 490 N.E.2d 764, 772 (Ind. Ct. App. 1986) (stating that a duty of reasonable care extends "beyond the business premises when it is reasonable for the invitees to believe the invitor controls premises adjacent to his own or where the invitor knows his invitees customarily use the adjacent premises in connection with the invitation"), *and* Mulraney v. Auletto's Catering, 680 A.2d 793, 795 (N.J. 1996) (recognizing a duty to protect customers from dangers in an area neither owned nor controlled by the proprietor, but which the proprietor knew or should have known its customers would use for parking), *with* Frampton v. Hutcherson, 784 N.E.2d 993, 997 (Ind. Ct. App. 2003) (holding that homeowners were not liable for negligence to a pedestrian who was injured on a sidewalk in front of their home because the sidewalk was owned by the city), Rhudy v. Bottlecaps Inc., 830 A.2d 402, 406–07 (Del. 2003) (holding that a business that advertised the availability of nearby free public parking was not liable for harm caused at that location by a robber because the business did not control the lot or increase the risk of harm to patrons parking there), *and* Kuzmicz v. Ivy Hill Park Apts., Inc., 688 A.2d 1018, 1024 (N.J. 1997) (holding that a landlord did not owe a duty to tenants to protect them from criminal assaults on a city-owned vacant lot located between the complex and a shopping center, either by warning them of the risks of assault on the lot, or by

There is generally no duty to warn college or university students of known or obvious dangers, such as a pothole in a parking lot,[157] snow or ice on exterior steps,[158] discovered water in a hallway,[159] or the risk of falling from a high bluff.[160] This is because it is reasonable to expect persons who have reached maturity to guard against risks that are already known or obvious. Similarly, there is no duty to protect others against risks that are such an inherent and foreseeable part of an activity that they are deemed to be assumed by voluntary participation.[161] A student who engages in rock climbing while participating in an educational program need not be told of the risk of falling, since "[f]alling, whether because of one's own slip, a co-climber's stumble, or an anchor system giving way, is the very risk inherent in the sport of mountain climbing and cannot

making more exhaustive efforts to mend the fence that separated the complex from the lot). *See also* Udy v. Calvary Corp., 780 P.2d 1055, 1062 (Ariz. Ct. App. 1989) (finding that a landlord could be liable for injuries to a child which occurred beyond the boundaries of the landlord's property where the child's parents had repeatedly asked the landlord to erect a fence to keep their small children off a busy street); Walton v. Spindle, 484 N.E.2d 469, 472–73 (Ill. App. Ct. 1985) (holding a tavern owner not liable for injuries sustained outside the tavern in a fight which began in the tavern).

157. *See* White v. Univ. of Toledo, No. 2004-03772-AD, 2004 WL 2804875, at *2 (Ohio Ct. Cl. Aug. 24, 2004) (finding that a student failed to establish that a pothole in a university parking lot was not open, obvious, and readily discernable, and therefore could not recover in a premises liability action).

158. *See* Cory v. Davenport Coll. of Bus., 649 N.W.2d 392, 394 (Mich. Ct. App. 2002) (holding that snowy and icy steps leading up to a dormitory constitutes an open and obvious danger); Lee v. Univ. of Akron, No. 2003–03132–AD, 2003 WL 21694740, at *2 (Ohio Ct. Cl. July 11, 2003) (finding that no action for negligence was stated because the plaintiff "should have realized the steps would have been slippery from a natural accumulation of falling snow and climatic conditions").

159. *See* Conrad v. Miami Univ., No. 2002-10364-AD, 2003 WL 1985214, at *2 (Ohio Ct. Cl. Apr. 9, 2003) (finding that two inches of water in a basement hallway was an open and obvious danger); Underwood v. Univ. of Akron, No. 2003-01814-AD, 2003 WL 21540668, at *2 (Ohio Ct. Cl. June 18, 2003) (finding no liability because the water from melted snow was known to the plaintiff).

160. *See* Anderson v. Principia Corp., 202 F. Supp. 2d 950, 960 (E.D. Mo. 2001) (recognizing the open and obvious danger rule and finding that the forgetfulness or distraction exception did not apply in a suit against a college where a student's fall from a bluff while he was intoxicated resulted in his death).

161. *See* Saville v. Sierra Coll., 36 Cal. Rptr. 3d 515, 522 (Ct. App. 2005) (holding that a negligence claim was barred by the doctrine of primary assumption of the risk, which applied to arrest and control techniques that were part of a peace officer training class at a community college). *Compare* Torres v. Univ. of Mass., No. 04-2377, 2005 WL 3629285, at *2 (Mass. Super. Ct. Dec. 19, 2005) (holding that while a "majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety," that rule did not apply in a case involving injuries sustained during cheerleading practice because the "plaintiff was not engaged in competition at the time of her accident, and . . . the supervision she advocates would not interfere with the activity she *was* engaged in, even had it been at a game or a cheerleading competition rather than a practice"), *with* Vistad v. Bd. of Regents of Univ. of Minn., No. A04-2161, 2005 WL 1514633, at *4 (Minn. Ct. App. June 28, 2005) (finding that a cheerleader was barred from recovering for injuries resulting from a fall by primary assumption of risk).

be completely eliminated without destroying the sport itself."[162]

Foreseeability of harm is the single most important concept in the law of negligence.[163] Absent foreseeability of injury, there is no liability for failure to exercise care. In cases against colleges and universities, the decisions often turn on a factual determination as to whether the risk in question—such as an attack by an intruder[164]—was or was not foreseeable.

Of course, the question is not whether someone thinking about an unlikely or far-fetched set of events could have foreseen a risk of harm. (If that were the standard, persons who read novels or watch TV or movies would be able to "foresee" everything and have endless duties under tort law.) Rather, the question is whether a reasonable person familiar with the circumstances would have anticipated a risk of such "weight and moment"[165] as to have fair notice that precautions were required. As courts sometimes say, the question is not whether harm was "possible," but whether it was "probable"[166]—"probable" not in the sense of more likely than not to occur,[167] but in the sense of being sufficiently likely and important as to require evasive action. One recent case found that the mere possibility that one college roommate might "theoretically" cause harm to another was insufficient to support a finding that the university was negligent in assigning the students to live together.[168]

162. Regents of Univ. of Cal. v. Superior Court, 48 Cal. Rptr. 2d 922, 925–26 (Ct. App. 1996) (holding that a university was not liable, under the doctrine of primary assumption of risk, for the death of a student in rock-climbing class).

163. *See generally* W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 921 (2005) ("Foreseeability of a risk of injury has for centuries rested at the heart of court determinations of whether a defendant breached its duty of care."); Edward von Gerichten, *Tort Litigation in Higher Education*, 26 J.C. & U.L. 245, 266 (1999) ("[F]oreseeability of harm is a major issue that will be looked at by the courts in determining whether an institution owes a duty to the student and . . . courts are willing to extend this duty even when the harm occurs at locations off-campus, if the activity being engaged in by the student was directly and causally related to her academic program.").

164. *See, e.g.*, Rogers v. Del. State Univ., No. Civ. A.03C-03-218-PLA, 2005 WL 246, at *6 (Del. Super. Ct. Oct. 5, 2005) (holding that a university could not be liable for failure to prevent an attack that was "planned as an ambush and could not have been reasonably foreseen"); Agnew Scott Coll., Inc. v. Clark, 616 S.E.2d 468, 471 (Ga. Ct. App. 2005) ("[G]eneral crime statistics and student concerns about walking alone in a parking lot at *night* [do not] create an issue of fact regarding the foreseeability of a random attack on a student in broad daylight in the parking lot."); Kleisch v. Cleveland State Univ., No. 2003-05452, 2005 WL 663214, at *3 (Ohio Ct. Cl. Feb. 22, 2005) (holding that a university had no duty to protect student from being raped in a classroom on a weekday morning during final examinations because the rape was not foreseeable since university was unaware of the rapist's presence or motives until after the attack).

165. Gulf Refining Co. v. Williams, 185 So. 234, 236 (Miss. 1938) (stating that negligence requires a "likelihood [of harm that] is of such appreciable weight and moment as to induce . . . action to avoid it on the part of a person of a reasonably prudent mind").

166. *See, e.g.*, Nussbaum v. Lacopo, 265 N.E.2d 762, 767 (N.Y. 1970) (holding that the fact that a golfing accident was "merely possible" was not enough to prove negligence, which must be "probable").

167. *Gulf Refining Co.*, 185 So. at 235 ("[I]t is not necessary that the chances that a damage will result shall be greater than the chances that no damage will occur.").

168. *See* Rhaney v. Univ. Md. E. Shore, 880 A.2d 357, 366 n.10 (Md. 2005) (stating that

Determining whether there is sufficiently foreseeable risk of harm to impose liability for lack of care is a fact-specific task. The assessment requires consideration of the magnitude of the risk, the likelihood that harm will occur, the type of damage that might be caused, and the availability of options for avoiding the risk of harm.[169] For liability to arise, a particular risk must be so clear and probable that a reasonable person would be on notice of what needed to be prevented and have some idea of what to do. The mere fact that Americans traveling abroad might be harmed somewhere in the world by extremists is such a vague risk that it probably imposes no particular duty on any foreign study program. In contrast, notice of serious danger to a limited class of persons may trigger a duty to exercise care.[170] If a terrorist group targets Americans studying in a particular city, a provider operating a program at that location must exercise a degree of care commensurate with the gravity and specificity of the threat. In a given case, the duty of reasonable care may entail the preparation of contingency plans for evacuating students or may even preclude the provider from sending additional students to that site as long as the threat persists.[171]

In some cases, liability depends on whether there have been prior similar incidents of harm.[172] If, absent such events, the risk would not have been

"[o]ne could argue theoretically that some type of harm inevitably would fall upon any future roommate" of a student who had been previously disciplined for fighting, but that "foreseeability is not nearly wide enough to include a *possible* result, but deals more with the *probability* of that result. Without more than the one incident in this record, which involved multiple people in a social setting, . . . the probability of Clark assaulting his prospective roommate at the time [the university assigned them] as roommates was not high," and therefore there was no basis for holding the university liable for negligence).

169. *See generally* RESTATEMENT (SECOND) OF TORTS § 291 cmt. d (1965) (stating that "[t]he magnitude of the risk is to be compared with what the law regards as the utility of the act").

170. *See* Bd. of Trs. of Ball State Univ. v. Strain, 771 N.E.2d 78 (Ind. Ct. App. 2002) (holding that the evidence supported a finding that a state university was negligent in failing to supply a portable dance floor for a performance at a high school because the evidence showed that the university knew that the floor at the high school auditorium was uneven and subject to splintering).

171. *See* Watson, *supra* note 1, at 10 (discussing threats against American colleges and universities operating programs in Florence during the Gulf War); Hoye, *supra* note 20, at 11 (noting a threat of international terrorism that prompted one university to withdraw students from Israel).

172. In a recent case, a court stated:

> In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question. While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. What is required is that the prior incident be sufficient to attract the [landowner's] attention to the dangerous condition which resulted in the litigated incident.

Agnes Scott Coll., Inc. v. Clark, 616 S.E.2d 468, 470–71 (Ga. Ct. App. 2005) (citing Sturbridge Partners v. Walter, 482 S.E.2d 339, 341 (Ga. 1997)). *See also* Rogers v. Del. State Univ., No. Civ. A. 03C-218-PLA, 2005 WL 2462271, at *6 (Del. Super. Ct. Oct. 5, 2005) ("Evidence of only one prior criminal incident, irrespective of a higher crime rate in the area of the property, is insufficient as a matter of law with regard to the issue of foreseeability.").

reasonably foreseeable, liability may depend on such incidents.[173] One court recently held that the lack of evidence of similar criminal incidents involving physical attacks on persons in a college parking lot meant that the kidnapping of a student from the lot was not reasonably foreseeable.[174] The college was therefore not liable for allegedly negligent failure to keep the college premises safe. However, the trigger for liability is whether the harm was foreseeable, not whether there were similar incidents in the past. If it is foreseeable that a student may fall from a window with a low sill and no safety bar, an action for negligence will lie even if no one fell from the window before.[175]

Constructive notice of a danger will establish the basis for liability, if the peril existed long enough that it should have been discovered and addressed through the exercise of reasonable care.[176] There is no hard and fast rule as to how long is long enough. In one recent case, a student's slip-and-fall claim against a college failed because the allegedly dangerous condition of a rug existed only for "a short time" and had not actually been discovered.[177]

173. *See* Fleming v. Lorain Cmty. Coll., No. 04CA008613, 2005 WL 1763609, at *3 (Ohio Ct. App. July 27, 2005) (holding, in an action where a student was injured when the elevator she was entering dropped, that a statement in the student's summary judgment motion that an unidentified maintenance worker told her "they had problems with the elevators all the time" was insufficient to create a triable issue as to whether the college knew of problems with the elevator, because the student presented no evidence that the worker was responsible for elevator or was referring to misleveling problems in particular).

174. *Agnes Scott Coll., Inc.*, 616 S.E.2d at 470.

175. *See* Escobar v. Univ. of S. Cal., No. B166522, 2004 WL 2094602, at *17 (Cal. Ct. App. Sept. 21, 2004) (finding that there was a triable issue of fact as to whether a university maintained property in a dangerous condition that caused harm to a student who fell from a fourth floor window). Addressing the significance to the fact that no one previously had fallen from the building, which was erected decades earlier, the Escobar court explained:

> In the area of landowner liability for third party crime, prior similar incidents play an important role in determining whether injury was foreseeable . . . . In cases involving liability for a dangerous condition of property, however, the existence or non-existence of prior similar incidents do not play this crucial role. . . . If the condition of property is such that the resulting danger can be identified by simple observation, the accident is foreseeable for purposes of duty analysis, and the question becomes whether the landowner took reasonable precautions in light of the observable danger presented.

Id. at *7 (citations omitted).

176. *See, e.g.*, Anjou v. Boston Elevated Ry. Co., 94 N.E. 386, 386 (Mass. 1911) (holding that the discolored condition of a banana peel provided constructive notice of the danger); Mena v. Regents of Univ. of Cal., No. G030447, 2004 WL 352707, at *5 (Cal. Ct. App. Feb. 26, 2004) (holding that there was "ample evidence the accumulated bird droppings had constituted a safety hazard on defendant's property long enough for the jury to consider it a liability factor"). *Cf.* Roddy v. Columbus State Cmty. Coll., No. 20094-03608, 2005 WL 894888, at *2 (Ohio Ct. Cl. Mar. 22, 2005) (holding that a college was not liable for injuries a student sustained in a fall as a result of water on a no-slip mat because there was no evidence the college had actual or constructive knowledge of accumulated water, which was an open and obvious condition that could have been easily avoided).

177. Holliman v. Columbus State Cmty. Coll., No. 2003-05470, 2004 WL 821662, at *2 (Ohio Ct. Cl. Apr. 13, 2004) (denying recovery). *See also* Deal v. State, No. A-01-07, 2003 WL 717672, at *8 (Neb. Ct. App. Mar. 4, 2003) (finding no liability for slip-and-fall on tracked-in water where there was "simply no evidence as to how long the puddle of water had existed . . . or

Some risks are foreseeable simply because of the nature of an enterprise. If the design of a university baseball park makes it foreseeable that foul balls will strike patrons in the ticket line, the university may be held liable even if it produces evidence that no accident of that type previously occurred.[178]

Of course, duty and breach of duty are only part of what a plaintiff must establish in a negligence action. Evidence that the breach caused damage is required. Throwing a book bag in a classroom filled with students may be careless,[179] but unless it strikes a student and causes harm, there is no liability.

B. The Importance of Context

Precisely what must be done to comply with the duty of reasonable care will vary greatly depending on the age and maturity of the participants in the program, as well as the nature of the program itself.[180] Persons who have reached the age of majority may, to a very large extent, be treated as able-bodied adults, capable of protecting their own interests. Courts have held that the doctrine of in loco parentis[181] is obsolete with respect to college and university students.[182] In contrast, there is less reason to indulge assumptions of self-sufficiency in the case of participants who are minors.[183] A useful illustration concerns social host liability for providing alcohol.

Most American states hold that a person who gives alcohol to an adult is not liable for harm that the recipient causes, either to another person or to himself or herself, as a result of intoxication.[184] The assumption, in the eyes of the law, is

that the employees . . . had actual or constructive knowledge of the condition").

178. *See* Reider v. State *ex rel.* La. Bd. of Trs., 897 So. 2d 893, 896–97 (La. Ct. App. 2005) (affirming a judgment against the university).

179. Parsons v. Wash. State Cmty. Coll., No. 2004-04825, 2005 WL 2711216, at *3 (Ohio Ct. Cl. Sept. 29, 2005).

180. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. l (Proposed Final Draft No. 1, 2005) ("[B]ecause of the wide range of students to which it is applicable, what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students.").

181. In loco parentis is a Latin phrase meaning "in the place of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

182. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 516–17 (Del. 1991) ("The concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life where students 'are now regarded as adults in almost every phase of community life.'" (citing Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979))); McNeil v. Wagner Coll., 667 N.Y.S.2d 398 (App. Div. 1998) (stating that "New York has rejected the doctrine of *in loco parentis* at the college level").

183. *See* Stanton v. Univ. of Me., 773 A.2d 1045, 1050 (Me. 2001) (noting that "young people, especially young women, . . . may not be fully conscious of the dangers that are present" and holding that a university owed a duty to a 17-year-old female student to warn her of the danger of sexual assault and advise her of steps she could take to improve her personal safety).

184. *See* Cole v. Rush, 289 P.2d 450, 457 (Cal. 1955) (declining to recognize social host liability); D'Amico v. Christie, 518 N.E.2d 896, 899 (N.Y. 1987) (holding that an employees' association, which provided free beer at a picnic, was not liable under common law for injuries resulting from employee's intoxication).

that in such cases, the recipient is an "able-bodied"[185] adult who can make decisions about how much to drink. However, many states also hold that a social host who gives alcohol to a minor is liable for harm that the intoxicated minor inflicts on another individual or suffers personally.[186] The director of a foreign educational program who encourages American law school students (who are typically age twenty-one or older) to attend a guest lecture at the local gasthaus by offering free beer and pretzels probably is not creating a risk of social host liability for the program provider. However, another director who makes the same offer to students below the age of twenty-one may be venturing into uncertain legal territory.[187] Even if consumption of alcohol by students that age is lawful at the foreign location, there is less reason for an American court to hold that the donor should escape liability for harm resulting from intoxication because the recipient, who was below the age of twenty-one, was an "able-bodied" adult.[188]

Similar issues may arise with respect to medical care for program participants. Suppose that a student becomes ill at the site of the foreign program and needs to be hospitalized. May the director of the program defer to the student's instruction that his or her parents are not to be notified?[189] It is easier to say that the director

185. *See Cole*, 289 P.2d at 455 (holding that a patron's surviving widow and minor children could not recover for alleged negligent furnishing of intoxicating liquor to the patron, who was an "able-bodied man").

186. *See* Ely v. Murphy, 540 A.2d 54, 58 (Conn. 1988) (holding that a minor's consumption of alcohol was not, as matter of law, an intervening cause that would insulate a social host or other provider of liquor from liability for ensuing injury to the minor or a third party); Congini v. Portersville Valve Co., 470 A.2d 515, 518 (Pa. 1983) (holding that social-host liability attaches in cases involving the negligent furnishing of alcoholic beverages to minors, but not to persons of drinking age); Langle v. Kurkul, 510 A.2d 1301, 1306 (Vt. 1986) (holding that a host may be liable for furnishing alcoholic beverages to a visibly intoxicated person who will drive an automobile or to a minor).

187. *See generally* Lake, *supra* note 32, at 626–47 (discussing college and university liability for alcohol-related injuries). The challenges posed by student consumption of alcohol are not new in American higher education. In 1722, the rulebook at Yale University provided that "[i]f any student go into any tavern . . . he shall be obliged to confess his fault and be admonished and for ye second offense of ye same kind be Degraded and for ye third be expelled." Steve Olson, *Half Full and Half Empty*, 69 YALE ALMUNI MAG. 2, 42, 48 (Nov.–Dec. 2005).

188. *See Congini*, 470 A.2d at 518 (holding that a host was negligent *per se* in serving alcohol to the point of intoxication to person less than twenty-one years of age and that an action based on such negligence could be brought by the minor, not only by a third party). In *Congini*, the court found that although there is "no common law liability on the part of a social host for the service of intoxicants to his adult guests" that rule is based on the assumption that the recipient is an "ordinary able bodied man." *Id.* at 517. "However, our legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol" and this legislative judgment compels a different result involving provision of alcohol to a minor "for here we are not dealing with ordinary able bodied men. . . . [W]e are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects of alcohol." *Id.*

189. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000 & Supp. III 2003) imposes important limitations on dissemination of student information. It is not clear that FERPA would apply to this type of student information. *See* Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (E.D. Ky. 1996) (holding that § 1983 would support FERPA claims in an action where the educational records and medical condition of a student were disclosed to a newspaper and printed in an article); Commonwealth v. Buccella, 751 N.E.2d

has acted reasonably in acceding to that direction if the student has reached the age of majority.

C. Customary Practices

In general, conformance with customary practices in a calling or industry raises an inference of reasonableness (non-negligence) and departure from custom raises an inference of unreasonableness (negligence).[190] Therefore, a foreign program that does what similar other foreign programs do (i.e., does what is customary) ordinarily has a reduced risk of liability based on following those practices.[191]

For example, suppose that program providers operating a particular type of program (e.g., on-site study for American law students conducted at a major university in a large western European city) customarily do not staff the foreign program office on weekends. The rule on custom means that, absent unusual facts requiring special precautions, it will be hard to fault the provider for not having weekend staff hours to address student needs. Conversely, if by reason of the age of the student participants, the difficulty of reaching the host country, or of moving between or within foreign cities, other similar programs customarily provide chaperoned transportation for students, it will be easier to argue that a program that fails to do so has fallen below the standard of care.[192]

The rule relating to custom means that it is important for a program provider to be aware of, and act consistently with, the current "state of the art" in administering foreign programs. Moreover, if customary practices have been reduced to writing (e.g., as part of the standards that guide the accreditation of

373, 388 n.3 (Mass. 2001) (Marshall, C.J., concurring) (stating that "FERPA protections do not extend to . . . [certain] records of medical or psychological treatment" (citing 34 C.F.R. § 99.3 (2001))). *See generally* Ethan M. Rosenzweig, Comment, *Please Don't Tell: The Question of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 451–54 (2002) (discussing the history and purpose of FERPA).

190. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 13 (Tentative Draft No. 1, 2001) (discussing custom); RESTATEMENT (SECOND) OF TORTS § 295A cmt. b (1965) ("Evidence of . . . custom is admissible, and is relevant, as indicating a composite judgment as to the risks of the situation and the precautions required to meet them, as well as the feasibility of such precautions, the difficulty of any change in accepted methods, the actor's opportunity to learn what is called for, and the justifiable expectation of others that he will do what is usual, as well as the justifiable expectation of the actor that others will do the same. If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do, there is a possible inference that he is not so conforming.").

191. *But see* RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965) (discussing when custom is not controlling).

192. In *Bloss v. University of Minnesota Board of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999), a student who was raped in Mexico by a taxi driver alleged that the state university which sponsored the cultural immersion program was negligent in failing to provide transportation between the home of the student's host family and the city where the foreign program was located two-and-a-half miles away. *Id.* at 662–63. The appellate court confined its review to the issue of discretionary immunity, and concluded that decisions relating to whether transportation should be provided for program participants were immune from judicial review. *Id.* at 665–66.

programs operating in foreign locations[193]), it is important for those practices to be observed, unless there is good reason for variation or unless the norms are merely aspirational.[194] Of course, the standard for legal liability is not what is customary, but what is reasonable.[195] A widespread customary practice (e.g., jaywalking in busy traffic or talking on a cell phone while driving) may be unduly dangerous, in which case conformance with custom does nothing to reduce the risk of liability.[196]

D. Voluntary Assumption of Duty

The law continues to draw an important distinction between doing something badly (misfeasance) and not doing it at all (nonfeasance).[197] The former often gives rise to liability because one who acts must act reasonably, but the latter may go unpunished on the ground that the defendant had no duty to act to protect the interests of the plaintiff.[198] In two recent cases, for example, institutions of higher education, which had allegedly failed to protect students from harm caused by third persons, were found not liable for negligence. In one case, a college was deemed to have no duty to protect a student from the negligence of an independently operated flight training school.[199] In the other, a university was held

193. *See, e.g.*, SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, AMERICAN BAR ASS'N, FOREIGN SUMMER PROGRAMS—REVISED CRITERIA 6 (2003), *available at* http://www.abanet.org/legaled/accreditation/foreignprogramtf/foreignsummerprogramscriteria.doc ("As part of the registration materials for the program, the school shall supply the U.S. State Department Consular Information Sheet for the country(ies) in which the program will be conducted; 'Areas of Instability' must be included. If the Consular Information Sheet is revised during a program to announce an 'Area of Instability' in the region in which the program is being conducted, the updated information must be distributed promptly to students."). *See also* NAFSA: ASS'N FOR INT'L EDUCATORS, RESPONSIBLE STUDY ABROAD: GOOD PRACTICES FOR HEALTH AND SAFETY, *available at* http://www.secussa.nafsa.org/safetyabroad/goodpractices 2003.html.

194. *See* Varner v. District of Columbia, 891 A.2d 260, 272 (D.C. 2006) (stating that "[a]spirational practices do not establish the standard of care" and "[t]o hold otherwise would create the perverse incentive for [universities and their administrators] to write [their manuals] in such a manner as to impose minimal duties upon [universities] in order to limit civil liability" (quoting Clark v. District of Columbia, 708 A.2d 632, 636 (D.C. 1997))).

195. *See* RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965) ("No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community. If the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety.").

196. *See id.* (stating that "whenever the particular circumstances, the risk, or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent in conforming to it; and whenever a reasonable man would depart from the custom, the actor may be found not to be negligent in so departing").

197. *See* Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311, 311 n.1 (2006) (discussing misfeasance and nonfeasance).

198. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005) (stating general rule of no liability with respect to risks not created by the actor).

199. *See* Ingato v. Beisel, No. Civ. A. 03C05087SCD, 2005 WL 578814, at *1 (Del. Super. Ct. Feb. 28, 2005) (finding no duty despite the fact that the college had a degree requirement

to have no duty to protect one student from injuries sustained while riding in the vehicle of a second sleep-deprived student.[200]

The new Restatement of Torts expressly recognizes that there is a special relationship between a school and a student which imposes on the school a duty to act to protect the student from harm.[201] Case law raises serious doubts as to whether this rule applies to students in higher education.[202] However, the Restatement commentary suggests that it does by noting that "what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students."[203]

In many instances, such as those involving premises liability claims, it may make little difference whether the student-school relationship is regarded as "special." The student will qualify as a business invitee[204] or a tenant[205] and the

which necessitated that services be purchased from such a school).

200. *See* Slone v. Univ. of Cincinnati, No. 2000-02780, 2005 WL 2710720, at *2 (Ohio Ct. Cl. Oct. 13, 2005) (finding no duty).

201. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40(b)(5) (Proposed Final Draft No. 1, 2005) (recognizing a special relationship between a school and its students).

202. *See, e.g.*, Freeman v. Busch, 349 F.3d 582, 587 (8th Cir. 2003) ("[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students."); Schieszler v. Ferrun Coll., 236 F. Supp. 2d 602, 608 (W.D. Va. 2002) ("The Virginia Supreme Court has not yet addressed the issue of whether a special relationship may arise between a university or college and a student. . . . A number of cases in recent years have considered whether colleges and universities have a duty to take steps to protect students who voluntarily become intoxicated. . . . In the vast bulk of these cases, courts have concluded that no special relationship existed."); Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 928 (N.C. Ct. App. 2001) (holding that there was a special relationship between a cheerleader and university, but cautioning that the "holding should not be interpreted as finding a special relationship to exist between a university, college, or other secondary educational institution, and every student attending the school, or even every member of a student group, club, intramural team, or organization"); Johnson v. State, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995) (holding that "the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties" (citing Nero v. Kan. State Univ., 861 P.2d 768, 778 (Kan. 1993))). *But see* Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366 (3d Cir. 1993) (holding that a college owed a student lacrosse player a duty of care based on a special relationship between the college and the student in his capacity as an intercollegiate athlete participating in a college-sponsored activity for which he had been recruited).

203. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. l (Proposed Final Draft No. 1, 2005). *See also id.* §40 reporters' note to cmt. l ("In a number of contexts, [a duty of reasonable care] has been imposed on higher-education institutions, at least with regard to risks from conditions on the college's property or risks created by the acts of others on the confines of college property.").

204. *See* Bell v. Univ. of V.I., No. Civ. 2000-0062, 2003 WL 23517144, at *4 (D.V.I. Nov. 19, 2003) (finding that a student was an invitee and that therefore a claim was stated based on allegedly negligent failure to protect the student from a dangerous professor); Muller v. Wright State Univ., No. 2002-10224-AD, 2003 WL 1735499, at *2 (Ohio Ct. Cl. Mar. 19, 2003) (holding that a student on state university property was an invitee while rehearsing for a play when she was injured by descending scenery, and therefore the university owed the student a duty of reasonable care).

legal principles applicable to persons with that status will entitle the student-invitee or student-tenant to what amounts to reasonable care. However, in other cases, the precise nature of the student-school relationship may drive the legal analysis in a manner that may have important consequences. For example, in a recent case[206] involving a student who was attacked in a dormitory, the court found that while the plaintiff

> may have been a business invitee as a student on the [university] campus generally in its common areas, dining halls, and academic buildings, . . . upon entering his dormitory building his legal status vis à vis [the university] was regulated more specifically by the Residence Hall Agreement, and thus he was a tenant of [the university] at the time of the battery.[207]

Under the rules of premises liability, the court found there was no basis for liability because the roommate was not a dangerous or defective condition on the premises and the attack was unforeseeable.[208]

Regardless of the lens used for viewing a student's claim against a program provider—status based on a business-invitee, landlord-tenant, or school-student relationship—the duties of the provider will be limited in two important respects. First, and most obvious, at some point the matter in question will be beyond the scope of the relationship.[209] With respect to such matters, there is no duty to act. Second, within the scope of the relationship, applicable rules do not require every form of action that might be beneficial to a student. Under one theory or another, the law will recognize certain basic duties, such as obligations to aid a student who is ill or injured,[210] to provide facilities that are not dangerous,[211] and (under some

205. *See, e.g.*, Letsinger v. Drury Coll., 68 S.W.3d 408, 411 (Mo. 2002) (holding that issues of material fact existed as to whether there was a landlord-tenant relationship between summer occupant of a fraternity house and the college that owned the house, which would impose a duty of care).

206. Rhaney v. Univ. Md. E. Shore, 880 A.2d 357 (Md. 2005).

207. *Id.* at 367.

208. *Id.* at 365–66.

209. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. l (Proposed Final Draft No. 1, 2005) (stating that the duty owed by a school to its students by reason of that relationship is "only applicable to risks that occur while the student is at school or otherwise engaged in school activities"); *see also* Vistad v. Bd. of Regents of Univ. of Minn., No. A04-2161, 2005 WL 1514633, at *4 (Minn. Ct. App. June 28, 2005) (finding no special relationship between university and student-athlete in a sports program (basketball cheerleading) for which the university "handled some administrative tasks" but "otherwise exerted minimal control . . . [and] did not provide a coach to direct practices or otherwise impose rules on the participants").

210. *Cf.* RESTATEMENT (SECOND) OF TORTS § 314A (1965) (providing that an innkeeper owes its guest and a landowner owes persons who enter pursuant to a public invitation a duty "to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others"); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 39 (Proposed Final Draft No 1, 2005) (discussing duty based on creating a risk of physical harm); Vilchis v. Miami Univ. of Ohio, 99 F. App'x 743, 745–46 (7th Cir. 2004) (dismissing for lack of personal jurisdiction a claim against a university based on

circumstances) to protect students from attack by third parties.[212] However, beyond these core obligations, there is great freedom of choice on the part of a program provider in electing what should be done. Only if a provider undertakes a particular activity is a duty of care imposed.[213]

For example, there is generally no duty to provide off-campus transportation for college-age students.[214] However, if transportation is provided, care must be

allegedly negligent failure to respond properly to an injured diver's neck injury); Molinari v. Tuskegee Univ., 339 F. Supp. 2d 1293, 1302–03 (M.D. Ala. 2004) (recognizing that tortious or even innocent involvement in an accident may give rise to a duty to render medical care, but finding it unnecessary to resolve that issue on the facts of the case).

211. *See* Ralph D. Mawdsley, *The Community College's Responsibility to Educate and Protect Students*, 189 EDUC. L. REP. 1, 9 (2004) (asserting that "[s]tudents are entitled to a reasonably safe campus environment").

212. *See, e.g.*, Williams v. State, 786 So. 2d 927, 932 (La. Ct. App. 2001) (holding that "a university likewise has a duty to implement reasonable measures to protect its students in dormitories from criminal acts when those acts are foreseeable"); Johnson v. State, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995) (rejecting a university-student theory of duty, but holding that a state university student who was abducted and raped near her dormitory was entitled to invitee status, and therefore the university had a duty to use reasonable care for her safety).

213. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 42 (Proposed Final Draft No. 1, 2005) (discussing duty based on undertaking).

214. *See* Stockinger v. Feather River Cmty. Coll., 4 Cal Rptr. 3d 385, 398 (Ct. App. 2003) (holding that a community college and instructor had no duty to ensure that students had a safe means of transportation for performing an off-campus class assignment that involved mapping and planning of a horse packing trip, and therefore were not liable for injuries sustained by college student who was thrown from back of a pickup truck during the course of the assignment, even if such harm was foreseeable). "College students are adults who, unlike children, are able to make their own responsible decisions about their own transportation." *Id.* Addressing issues not dissimilar from those that might arise in connection with international education programs, the court wrote:

> [T]he duty owed to college students such as plaintiff is different from the duty owed to elementary and high school students. . . .
>
> . . . [A] college must be able to give its students off-campus assignments, without specifying the mode of transportation, and without being saddled with liability for accidents that occur in the process of transportation. A college instructor who gives an assignment requiring a trip to a library, or a tour of a city's unique architectural buildings, should not be required to instruct the students on the need to drive at a safe speed and to wear a seatbelt while completing the assignment. . . .
>
> . . . .
>
> Plaintiff argues she has shown that defendants sent junior college students out into the "wilderness" without proper instruction, did nothing to ascertain that students would be traveling in a safe manner or in proper vehicles, did nothing to check the driving records or insurance information on those who were delegated as drivers, and offered no tutelage regarding safety with respect to the operation of off-road vehicles. However, . . . defendants had no duty to do any of those things.
>
> . . . Even assuming . . . the harm to plaintiff was foreseeable, the connection between defendants' alleged conduct (negligent failure to ensure safe travel) and plaintiff's harm was not particularly close, nor was defendants' conduct morally blameworthy, given that (1) the students were college students training to assume leadership roles in pack trips, and (2) plaintiff admitted she did not need to be told . . . that her actions were dangerous. . . . The extent of the burden on defendants, created by a requirement that it protect every college student from reckless driving by fellow

exercised to protect students from travel-related injuries.[215] So too, a provider need not tell students what vaccines are recommended for persons traveling to a particular country. But if the provider does so, it must exercise care to ensure that the information is accurate and reliable.[216] There is no rule of law that obliges an international education program to require students to have physicals to ensure that they are medically fit to travel. But if the program provider elects to do so, it must exercise care in administering the tests and in collecting, retaining, and using the data that is assembled.[217] Collecting medical information from students participating in a non-strenuous educational program in a foreign country where activities are similar to life in the United States would seem to be particularly unwise. In that case, there are no special risks that would make the data especially useful, the collection of the information might expand the program provider's sphere of negligence liability, and requiring applicants to go to the trouble of arranging a medical examination might be needlessly annoying and in some cases might cause students to not participate in the program or not recommend it to others. (The latter point is important because student-to-student referrals are a major source of study abroad recruitment from one year to another.)

The point here is that duties that do not otherwise exist may be assumed when providers undertake[218] or promise to undertake[219] certain activities. A decision to engage in certain types of conduct—even if well-intended—may create a risk of liability where none would otherwise exist.[220] In *McNeil v. Wagner College*,[221] a

> students during performance of what amounts to homework assignments, would be extraordinary, as would be the likely increase in the college district's insurance premiums.

Id. at 401–02 (citations omitted).

215. *See* McClure v. Fairfield Univ., 35 Conn. L. Rptr. 169 (Super. Ct. 2003) (holding that by "providing information about . . . beach area housing in the student binder" and establishing a "Safe-Rides program in which student volunteers used university-owned vans to provide rides to students traveling between the campus and the beach area" at night, the university "had assumed a responsibility for the safety of students while traveling between the beach area and the university campus").

216. *See* Watson, *supra* note 1, at 8 (describing Pepperdine University's efforts to update health-related information for countries where its students are studying).

217. *Cf.* Coffee v. McDonnell-Douglas Corp. 503 P.2d 1366 (Cal. 1972) (stating that although "[a]n employer generally owes no duty to his prospective employees to ascertain whether they are physically fit for the job they seek, . . . where he assumes such duty, he is liable if he performs it negligently," and therefore an employer could be held liable for administering a blood test and then failing to read and disclose to the applicant the adverse results).

218. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 42 (Proposed Final Draft No. 1, 2005) (discussing duty based on undertaking).

219. *See id.* § 42 cmt. e (discussing promises as undertakings).

220. *See* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (holding that a "[u]niversity's policy against hazing, like its overall commitment to provide security on its campus, . . . constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students'" (quoting Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983))). *See generally* Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?*, 175 EDUC. L. REP. 379, 396 (2003) (stating that by "providing programs and services designed to complement classroom instruction and expand student

student "slipped on ice and broke her ankle in a town in Austria, which she was visiting as part of an overseas program arranged by the defendant" college.[222] In a subsequent lawsuit against the college, the student argued, not implausibly, that the program administrator "assumed the duty to act as an interpreter for her in the Austrian hospital and that she suffered nerve damage due to his failure to inform her of the treating physician's recommendation that she undergo immediate surgery."[223] The court found that assuming, *arguendo*, that a duty was voluntarily undertaken, the suit against the college was without merit because the student had "failed to offer evidentiary proof to support her claim that [the administrator] was told of the recommendation of immediate surgery and negligently withheld that information from her."[224] Nevertheless, the threat of assumed-duty liability is clear. The court noted that, aside from the assumed-duty theory, the defendant college "had no obligation to supervise the plaintiff's health care following her accident."[225]

In another medical-emergency case, *Fay v. Thiel College*,[226] a female student became ill while participating in a study abroad program in Peru. After the student "was admitted to a medical clinic, all of the faculty supervisors and all of the other students left on a prescheduled trip that was to last several days, leaving plaintiff alone at the clinic with only a Lutheran missionary . . . to act as plaintiff's translator."[227] The student subsequently sued the college and others for harm she sustained at the clinic as a result of unnecessary surgery and sexual abuse committed by male personnel at the clinic.[228] The defendants contended "that they had no special relationship with plaintiff beyond the fact that plaintiff was a student at Thiel College."[229] They further asserted that "since there was no special relationship between the parties, defendants owed plaintiff no special duty beyond that of a reasonable standard of care, and that defendants did not violate that reasonable standard of care in leaving plaintiff alone at the Peruvian medical clinic."[230] The court rejected this argument. The college had required the student to sign a consent form that could be used in an emergency to authorize administration of an anesthetic or surgery.[231] The court found that under the terms of the consent form, which assured signatories that the college wanted "to observe

development opportunities [such as study abroad] . . . colleges and universities may inadvertently be expanding a legal duty of care and placing themselves at increased risk for liability").

221. 667 N.Y.S.2d 397 (App. Div. 1998).

222. *Id.* at 398.

223. *Id.*

224. *Id.* Another serious obstacle for the plaintiff was "evidence that her treating physician could speak English." *Id.* at 398.

225. *Id.*

226. 55 Pa. D. & C.4th 353 (Ct. Com. Pl. 2001).

227. *Id.* at 355.

228. *Id.* at 354–56.

229. *Id.* at 361.

230. *Id.*

231. *Id.* at 368.

the utmost precautions for the welfare of each participant,"[232] "the faculty supervisors had a duty to 'secure whatever treatment is deemed necessary, including the administration of an anesthetic and surgery.'"[233] As a result, the court concluded that "Thiel College did owe plaintiff a special duty of care as a result of the special relationship that arose between Thiel College and plaintiff pursuant to the consent form"[234] and could be held liable if "the lack of the presence of one or more of the faculty supervisors with plaintiff at the Peruvian medical clinic increased the risk of the male Peruvian doctors unnecessarily performing surgery on plaintiff and/or sexually assaulting plaintiff."[235] Thus, by reason of its decision to require a student to sign a consent to treatment form, the college inadvertently enlarged its exposure to liability.

Another recent case also suggests that a college or university, by its conduct, may assume a legal duty that would not otherwise exist. *Schieszler v. Ferrum College*[236] involved a student suicide. The court noted that "[w]hile it is unlikely that Virginia would conclude that a special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exist[ed] on the particular facts alleged in this case."[237] The college was aware of the student's emotional problems, "required him to seek anger management counseling before permitting him to return to school for a second semester," and, after finding the student "alone in his room with bruises on his head, . . . required [the student] to sign a statement that he would not hurt himself."[238]

Suppose, for example, that a foreign educational program collects from participants information listing their allergies to medications, but then misplaces the forms, with the result that the information is not available when an injured student who is unconscious needs medical care. That type of negligence is garden-variety misfeasance, and the program provider may be liable for harm caused by administration of medication to which the student was allergic. In contrast, if the provider never collected such information in the first place, a court might well hold that there was no duty to do so and that there is no liability for harm caused by administering the medication to which the student was allergic.

Should a program provider gather information about the prior discipline of students who apply to a study abroad program? That information may make it possible for the program provider to anticipate problems that might arise, but it also is likely to expand the provider's exposure to liability. First, cases often hold

232. *Id.*

233. *Id.* at 363.

234. *Id.*

235. *Id.* at 366.

236. 236 F. Supp. 2d 602 (W.D. Va. 2002). *See also* Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 89 (Fla. 2000) (holding that because a university had "control over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the Hohfeldian correlative duty of acting reasonably in making those assignments").

237. *Schieszler*, 236 F. Supp. 2d at 609.

238. *Id.*

that when information is collected, the collector has a duty to review the data.[239] Second, if the information that is gathered identifies risks that should be addressed, a court is likely to hold that the failure to do so is negligence. Consequently, it can prudently be urged that unless there is a particular need for personal information relating to program participants, that information should not be solicited.

Information relating to disabilities would seem to be particularly problematic. Once a disability is identified, a program provider will be hard pressed to exclude the student from participation in the program or to deny accommodations. Whether the Americans with Disabilities Act (ADA) applies to educational programs operated at foreign sites has not yet been definitively resolved by the courts.[240] However, such a claim is colorable, and a denial of participation or accommodations runs the risk of embroiling a study abroad program in litigation.

VII. MISREPRESENTATION AND BREACH OF FIDUCIARY DUTY

Misrepresentation[241] claims against colleges and universities are not uncommon.[242] Numerous suits against higher education institutions and others

239. *Cf.* Waffen v. U.S. Dep't of Health & Human Servs., 799 F.2d 911, 913–15 (4th Cir. 1996) (indicating that where an x-ray of the plaintiff was misplaced and never reviewed by doctors, the defendant National Institutes of Health stipulated that it violated the applicable standard of care by its negligence), *abrogated by* Hurley v. United States, 923 F.2d 1091, 1095 n.27 (4th Cir. 1991).

240. *See* Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does That Leave Students with Disabilities Studying Abroad*, 14 STAN. L. & POL'Y REV. 291, 291 (2003) ("[T]he extent to which the ADA, or its predecessor statute, the Rehabilitation Act, applies extraterritorially to conduct and Americans overseas remains unresolved.").

241. An action for fraud (sometimes called deceit) offers a remedy for false or misleading statements that are made with "*scienter*"—meaning knowledge of falsity or reckless disregard for the truth. *See* RESTATEMENT (SECOND) OF TORTS §§ 525–51 (1965) (discussing liability for fraudulent misrepresentation). A parallel action for negligent misrepresentation provides compensation for physical harm or economic losses resulting from carelessly false or misleading statements. *See id.* § 552 (discussing liability for negligent misrepresentation). In addition, state consumer protection laws afford students other remedies for misrepresentations made by colleges and universities. *See, e.g.*, Emily Heffter & Nick Perry, *Student Takes on College and Wins*, SEATTLE TIMES, Feb. 24, 2006, at B1 (discussing a jury verdict which found that a for-profit "college violated the state Consumer Protection Act by failing to tell [a student] that her credits wouldn't transfer"). In general, the rules on misrepresentation ignore statements that pose little risk of harm because they are unlikely to be relied upon (e.g., vague "puffing," mere predictions, and personal opinions). *See* Maness v. Reese, 489 S.W.2d 660, 663 (Tex. App. 1972) ("[P]redictions and opinions do not serve as a basis for actionable fraud."); Hedin v. Minneapolis Med. & Surgical Inst., 64 N.W. 158, 159 (Minn. 1895) ("Generally speaking, . . . mere matters of opinion or conjecture . . . are not actionable."); Johnson & Lovorn, *supra* note 155, at 551–52 (discussing the rule that puffing is permissible). The rules also impose liability for misleading representations which, by reason of the source or circumstances, cause harm to others by inducing misplaced reliance (e.g., misstatements of fact, half-truths, expert opinions, and silence by persons who have a legal duty to speak). *Id.* at 536–54 (discussing outright lies, half-truths, opinions, and silence).

242. *See* Harmon v. Sullivan Univ. Sys., Inc., No. Civ. A. 03-738-C, 2005 WL 1353752, at *3–6 (W.D. Ky. June 6, 2005) (holding that a claim was stated with respect to fraud and negligent misrepresentation of the accreditation of the university); Gomes v. Univ. of Me. Sys., 365 F.

have been based on alleged misrepresentations concerning the safety of a facility or neighborhood.[243] In the study abroad context, the easiest way to chart a safe course through the thickets of misrepresentation law is to provide information that is accurate and to make disclosures that a student and his or her family would find useful in deciding whether to participate in the program. A provider operating a foreign program should provide students, in a timely manner, with the current U.S. Department of State's Consular Information Sheet for the country in which the program operates, or should advise students to access that information on the web.[244] Consular Information Sheets contain data about crime and other dangers faced by American travelers. By ensuring that this information is expressly called to the attention of students, a program provider takes an important step in fending off safety-related misrepresentation claims.

In addition, program representatives should never portray a foreign location as safer than they know it to be. A statement made by a person who lacks the confidence or factual basis that the statement implies is a misrepresentation made with *scienter*.[245] If a foreseeable recipient of the statement detrimentally relies upon those false assurances of safety, an action for deceit will lie. The same is true of an intentional half-truth. In a recent case, *Minger v. Green*, the Sixth Circuit held that a cause of action for intentional misrepresentation was stated by the mother of a student who had died in a dormitory fire.[246] The complaint alleged that the associate director of the housing office had failed to tell her, in response to her inquiries regarding an earlier fire, of the possibility that the fire had been intentionally set, and had discouraged the mother from contacting the fire department to further investigate the fire.[247]

Misrepresentation claims have been asserted by students based on statements made in connection with study abroad programs. In *Bird v. Lewis & Clark College*,[248] a student alleged, among other claims,[249] that a college had committed fraud, negligent misrepresentation, and breach of fiduciary duty by inaccurately

Supp. 2d 6, 47–48 (D. Me. 2005) (discussing a failed claim relating to a disciplinary hearing); Shelton v. Trs. of Columbia Univ., No. 04 Civ. 6714(AKH), 2005 WL 2898237, at *5 (S.D.N.Y. Nov. 1, 2005) (discussing a failed claim relating to a plagiarism hearing).

243. *See* Minger v. Green, 239 F.3d 793, 800 (6th Cir. 2001) (finding that a claim for deceit was stated with respect to misrepresentation of the safety of a dormitory); s*ee, e.g.*, O'Hara v. W. Seven Trees Corp. Intercoast Mgmt., 142 Cal. Rptr. 487, 491 (Ct. App. 1977) (holding that a complaint was stated for fraud relating to misrepresentation of the safety of an apartment complex).

244. U.S. Dep't of State, Consular Information Sheets, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1765.html (last visited Apr. 25, 2006).

245. *See* RESTATEMENT (SECOND) OF TORTS § 526 (1965) (providing that a misrepresentation is "fraudulent" if the speaker "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies").

246. *Minger*, 239 F.3d at 800.

247. *Id.*

248. 303 F.3d 1015 (9th Cir. 2002).

249. *Id.* at 1019. *See supra* note 22 (listing the various causes of action alleged by the student).

portraying its ability to accommodate her disabilities in its study abroad program in Australia.[250] The jury found against the student on all claims, except breach of fiduciary duty, for which it awarded $5000 in damages.[251] The Ninth Circuit affirmed, stating:

> Although the College contends that it owed no fiduciary duties to Bird, ample evidence exists in the record for the jury to make a contrary finding. The College assured Bird on a number of occasions that the overseas program would accommodate her disability. Darrow [the faculty director of the program] e-mailed Bird's parents and assured them that Global (the company handling the travel arrangements) and Meyers (the director of the College's overseas program) "commonly handle people both in the field and in home stays that are more physically challenged than [Bird]." Darrow also indicated that adequate facilities would be available in most of the outdoor trips.
>
> Bird also had reason to trust Darrow's assurances. Shortly after her injury, the College worked closely with Bird to ensure that she could navigate comfortably around [the home] campus. It installed ramps at her dormitory, changed its inside doors, and remodeled its bathrooms to make them wheelchair-accessible. It even rebuilt parts of the biology labs where she worked. Based on these facts, the jury could have concluded that a "special relationship" developed between the parties. There was no error in allowing that question to go to the jury.[252]

Bird is a sobering decision. Read at face value it suggests that any time a college or university complies with demands of the ADA or the Rehabilitation Act at the home campus and assures a student that it can do so at a foreign location,[253] the provider opens itself up to a tort claim[254] for breach of fiduciary duty if the accommodations at the foreign site fall short of the student's expectations. It is significant that in *Bird* the Ninth Circuit affirmed the student's breach of fiduciary duty verdict even though it also affirmed jury findings that there was no discrimination on the basis of disability and no violation of the ADA or the Rehabilitation Act.[255] In addition, the existence of a fiduciary relationship between a higher education institution and a student triggers heightened

250. *Bird*, 303 F.3d at 1017. "Bird was informed that she could not participate in several activities due to her disability, but that alternative activities would be arranged. Bird was otherwise assured that the program would be able to accommodate her disability." *Id.*

251. *Id.* at 1019.

252. *Id.* at 1023–24.

253. *See id.* at 1017. Although the college contended that Title III and the Rehabilitation Act do not apply extraterritorially to regulate the administration of overseas programs, the court did not reach that issue in view of its denial of equitable relief. *Id.* at 1021 n.1.

254. According to the American Law Institute, breach of fiduciary duty is a tort. *See* RESTATEMENT (SECOND) OF TORTS § 874 (1965) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

255. *Bird*, 303 F.3d at 1019. The Ninth Circuit found that the college "offered ample evidence of having accommodated Bird's disability." *Id.* at 1021.

obligations under the law of misrepresentation.[256] A fiduciary is readily held liable for failure to disclose material information to the beneficiary of the relationship, particularly where the interests of the fiduciary and beneficiary are adverse.[257] *Bird* means that foreign program providers should exercise considerable caution in the statements they make about being able to accommodate students with disabilities. Otherwise there may be an increased risk of liability both for breach of fiduciary duty and misrepresentation.

VIII. CONCLUSION: WISDOM OF EXPERIENCE

Perhaps the single most important factor in minimizing the risk of legal liability associated with study abroad programs lies in the field of personnel decisions, rather than legal principles. The persons chosen to direct and teach in foreign educational programs must have good judgment, must be willing to work hard, and must have adequate support from colleagues on site to enable the program to succeed. At a foreign study location, there is an endless array of matters—some important, many trivial—that require attention: classroom building access, housing accommodations, travel arrangements, visiting guests, teaching schedules, special events, internet availability, and on and on. If the administrative staff is inexperienced, under-resourced, or not motivated, it is likely that at least some of the issues relating to program participant safety may not be given the attention they deserve.

Continuity of leadership in the administration of a study abroad program can also be a great asset. The "institutional memory" that such persons bring to the enterprise can be the difference between success and failure, or at least between few or no complaints and a merely adequate performance. Past experience at the host site, or even experience with operating foreign programs in other locations, enables those in charge to better anticipate the problems that may arise and to distinguish serious risks from ones that should be accorded less priority. The resources that a program has to succeed—particularly staff time, but also money—must be employed wisely in a manner that optimizes the educational experience (including safety). A foreign program that changes its administration too frequently, that hires persons with little inclination for the endless administrative tasks, or that tries to conduct study abroad programs in too many parts of the globe, may be found trying to surmount the safety learning curve at a moment when action is needed.

Of course, a foreign program is most likely to succeed where the administrative staff and faculty genuinely care about the students. Nothing worse can be said

256. *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1965) ("One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.").

257. *See generally* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 771 (2003) (discussing the disclosure obligations of attorneys as fiduciaries of clients, and stating that the duties are most extensive "where the interests of the attorney and client are adverse"). *See also* Johnson, *supra* note 155, at 295–96 (discussing the disclosure obligations of fiduciaries at they relate to database security).

about a study abroad endeavor than that those running it were not interested in the quality of the educational experience and treated the time abroad as a personal vacation with which students should not interfere. The ultimate goal for every foreign educational program must be to provide students with a first-rate educational experience that could not be duplicated in the United States. Students should return to their home campuses stimulated by their foreign classes, enriched by cultural experiences, and better equipped to assume the role of well-educated world citizens.

Like many laudable activities that were once conducted with little thought of civil liability, international education programs must now be operated with due regard for the legal principles that impose a general duty of reasonable care, that punish misrepresentation, and that award compensation for injuries attributable to blameworthy conduct. This is a good development, for it discourages irresponsible practices and creates incentives for safety. The proper response of program providers to the risk of tort liability is neither to withdraw from the market of international education nor to conduct programs with obsessive concern about the threat of litigation. Rather, program providers must simply exercise reasonable care to prevent unnecessary harm to study abroad participants. That is all that the law requires: reasonably prudent conduct.[258] Adherence to good practices comporting with that duty will neither seriously harm foreign educational ventures nor waste opportunities for achieving optimal safety in the field of international education. Attention to threats of unnecessary harm can improve the study abroad experience for all concerned.

258. *Cf.* Eagleson v. Kent State Univ., No. 2001-06304, 2003 WL 21061358, at *3 (Ohio Ct. Cl. May 5, 2003) (holding that a university was not liable for injuries sustained by a conference attendee when a chair collapsed because there was no actual or constructive notice of a defect and the university's method of inspecting chairs twice a year was reasonable).

"BECAUSE OF SEX": THE EVOLVING LEGAL RIDDLE OF SEXUAL VS. GENDER IDENTITY*

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INTRODUCTION

The American social revolution associated with passage of Title VII of the Civil Rights Act of 1964[1] prompted an examination of the nature of sex and gender, and the extent to which characteristics of each are protected against discrimination

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-1 to -17 (2000)). In 1972, Congress amended this most widely applicable employment discrimination law to cover public and private educational institutions. Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972).

under law. The legal question offers a profound riddle, resolution of which engages fundamental issues of human and civil rights, social and cultural norms, medical assessment, and legislative intent. Although surprisingly little litigation has involved college and university defendants, many campuses serve as the forefront for social activism designed to create new policy boundaries for the protection of gay, lesbian, bisexual, and transgender students and employees.

Section I of this article explores the search for doctrinal coherence in the courts. Necessarily, it examines judicial and scholarly efforts to define key terms such as "sex" and "gender" in federal and/or state non-discrimination laws. When reviewing this discussion of the case law, the reader should keep in mind the medical and sociological definitions of these terms: in sum, "sex" may be defined as an individual's biological identity, including chromosomal and/or reproductive composition, while "gender" may be defined as an individual's social identity, as related or unrelated to sex, encompassing culturally traditional masculine and/or feminine characteristics. These and related definitions are discussed in more detail in Subsection I.B. below. Section I also examines how courts have approached the intersection of sexual orientation and gender identity issues and summarizes the various views of courts and advocates as to whether transgender individuals can, or even should, seek protection under disability laws.

Section II of the article identifies legislative trends at the federal, state, and local levels.[2] It also notes the emerging, and often conflicting, positions of change-advocates who seek to establish legal protection under various rubrics.

The final section of the article discusses the implications of these legal developments for colleges and universities, including non-discrimination policy revisions and their practical implications.

I. THE SEARCH FOR DOCTRINAL COHERENCE

A. Title VII and its Legislative History

As noted by the U.S. Supreme Court, in passing Title VII of the Civil Rights Act of 1964, "Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[3] Although the protected classifications appear

2. For a comparison of European trends, see Betty C. Burke, Note, *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in* Goodwin v. United Kingdom *and Sets the Tone for Future U.S. Reform*, 64 LA. L. REV. 643 (2004); Leslie I. Lax, *Is the U.S. Falling Behind? The Legal Recognition of Post-Operative Transsexuals' Acquired Sex in the U.S. and Abroad*, 7 QUINNIPIAC HEALTH L.J. 123 (2003).

3. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989). The operative section provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

facially self-explanatory, the meaning of the term "sex" has, in particular, sparked judicial, scholarly, and activist debate of noteworthy intensity.

Uncertainty as to meaning is due in part to the absence of legislative history associated with inclusion of sex as a protected classification. One court derived from such legislative history that Congress was concerned primarily with race discrimination, and that "sex was added to the list of prohibited grounds of discrimination by a congressional opponent at the last moment in the hopes that it would dissuade his colleagues from approving the bill; it did not"; thus, the court concluded, "legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII."[4] This paucity of express evidence of intent has led several courts to attempt to divine the scope of "sex" as used in Title VII by reference to what Congress has since chosen *not* to do: that is, amend Title VII to prohibit discrimination based on sexual orientation.[5]

In this uncertain context, one court observed:

> Viewed in the abstract, a prohibition of discrimination based on "sex" is broad and perhaps even undefinable. Arguably, such a prohibition might be read to preclude discrimination based on human psychological and physiological characteristics or on sexual orientation. It might also

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

4. Doe by Doe v. City of Belleville, 119 F.3d 563, 572 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998) (vacated in light of Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)). In support of this proposition, the *Belleville* decision cited *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because Of" Sex*, 27 CUMB. L. REV. 231, 268–69 (1996–97) (citing legislative history, including 110 CONG. REC. 2577–84 (1964), and scholarly sources). In the *Meritor* decision, the Court commented as follows on the lack of pertinent legislative history as to the meaning of "sex" in Title VII:

> The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577–2584 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Meritor, 477 U.S. at 63–64. See also the discussion in *Price Waterhouse*, 490 U.S. at 243 n.9 (citing C. & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–17 (1985)), in which the Court noted the "somewhat bizarre path by which 'sex' came to be included as a forbidden criterion for employment" (it being included in an attempt to *defeat* the bill).

5. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 35–36 (2d Cir. 2000); Ulane v. E. Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984); Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *3 (D. Utah June 24, 2005).

> be read to prohibit all workplace sexual behavior or words and deeds having sexual content. . . .
>
> In the context of Title VII's legislative history, however, it is apparent that Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress, even those most vigorously supporting passage of the Act. Detached from their historical setting, the terms of Title VII's prohibition of discrimination, "because of" an individual's "sex," stand only as "inert language, lifeless words," and, perhaps, even "playthings with which to reconstruct the Act."[6]

From precedent emergent since passage of Title VII, the court ultimately identified a principle on which the American judiciary generally agrees: although inclusion of "sex" as a protected classification was specially intended to ensure equal employment rights for women, its scope encompasses men as well.[7]

Additional developments clarified the contours of the law. In 1986, *Meritor Savings Bank* held that the Title VII prohibition against "discrimination" protects employees against sexual harassment.[8] Furthermore, in 1998, the U.S. Supreme Court ruled in *Oncale v. Sundowner Offshore Services, Inc*.[9] (*Oncale*), that Title VII provides a cause of action for same-sex harassment.[10]

Although these seemingly conclusive pronouncements were themselves rife with ambiguity, the more vexing jurisprudential question of the modern era involves definition of impermissible "sexual stereotyping," and the extent to which the distinction between "sex" and "gender" is relevant to the resolution of this question. The primary genesis for the debate is attributable to *Price Waterhouse v. Hopkins*[11] (*Price Waterhouse*), in which the Court confirmed that, in forbidding employers to discriminate against individuals because of their sex, Congress intended "'to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[12] The Court observed that an employer

6. Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir.) (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959) (Frankfurter, J.)).

7. *Id.* at 749–50 (citing, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983) (finding that insurance plan that provided less extensive pregnancy benefits to married male employees than to married female employees discriminated against males in violation of Title VII)). U.S. Supreme Court confirmation of this principle is found in *Nevada v. Dep't of Human Res.*, 538 U.S. 721 (2003) (holding that the Family and Medical Leave Act aims to protect the right to be free from gender-based discrimination in the workplace and that the FMLA targets mutually-reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities).

8. *Meritor*, 477 U.S. 57.

9. 523 U.S. 75 (1998).

10. *Id.* at 82.

11. 490 U.S. 228 (1989).

12. *Id.* at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, amended Title VII, among other points superseding *Price Waterhouse* with respect to issues of proof and liability in "mixed motive" cases. An unlawful employment practice is now established when the

who objects to aggressiveness in women—but whose positions require this trait—places women in an "intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[13]

The *Price Waterhouse* Court's alternating use of the terms "sex" and "gender," and its featuring of the term of art "sexual stereotyping," precipitated new and vexing debates that are the focus of this article. The debaters variously cite further divination of Congressional intent, medical authorities, and, in some instances, samples from an eclectic literature. This controversy is well-represented by the following observation by the Fourth Circuit:

> Because Congress intended that the term "sex" in Title VII mean simply "man" or "woman," there is no need to distinguish between the terms "sex" and "gender" in Title VII cases. Consequently, courts, speaking in the context of Title VII, have used the term "sex" and "gender" interchangeably to refer simply to the fact that an employee is male or female. *See, e.g.*, *Price Waterhouse v. Hopkins,* 490 U.S. 228, 239–41, 109 S.Ct. 1775, 1784–86, 104 L.Ed.2d 268 (1989) (using "gender" and "sex" interchangeably). Indeed, the use of "sex" and "gender" interchangeably may impose a useful limit on the term "sex," which otherwise might be interpreted to include sexual behavior. Some academic writers, however, seek to maintain or to heighten a distinction between the terms "sex" and "gender," asserting that "gender" connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics. *See, e.g.*, Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence,* 105 Yale L.J. 1 (1995) ("gender [is] to sex what masculine and feminine are to male and female"). *See also JEB v. Alabama,* [511] U.S. [127], [129] n. 1, 114 S.Ct. 1419, 1436 n. 1, 128 L.Ed.2d 89 (1994) (Scalia, J., dissenting). While it may be useful to disaggregate the definition of "gender" from "sex" for some purposes, in this opinion we make no such effort, using the terms interchangeably to refer to whether an employee is a man or a woman.[14]

The distinctions some courts were initially unwilling to make proved to be more than academic exercises. In fact, the ensuing debate has required resolution of whether sexual orientation falls within the ambit of protection against sex discrimination—with most courts concluding it does not. It has also required study of the scope of the "stereotyping" prohibition and whether, at its boundaries,

complaining party demonstrates that the protected characteristic (e.g., sex) was a motivating factor for any employment practice, even though other factors may have motivated it as well. Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-2(m) (2000). *See, e.g.*, Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1306 n.9 (N.D. Cal. 1992).

13. *Meritor*, 490 U.S. at 251.

14. Hopkins, 77 F.3d at 749 n.1. *See also* Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation.").

transgender persons are entitled to Title VII protection as a class or because of their individualized manifestation of nonconforming characteristics and behavior.

B. The Literature of Scholars and Activists

In contrast to the approach of many courts, scholars and activists (and activist-scholars) typically find significant distinction in meaning between "sex" and "gender," and many maintain that Title VII and state fair employment practice acts (FEPAs) should be interpreted to cover discrimination on the basis of sexual orientation and gender identity and expression, including discrimination against transgender persons.[15]

Definitions of the various terms abound. One commentator offers the following:

> [S]ex refers to biological sex. Though the categories involved are complicated by the existence of transgender and intersex individuals, sex generally refers to chromosomal and/or reproductive system composition. Gender refers to one's social identity as related (or not related) to one's sex, specifically, masculine or feminine. . . . Sexual orientation refers to sexual attraction to members of one or both biological sexes.[16]

Apart from state fair employment law amendments that differentiate between these categories, Title VII remains "cast in terms of sex discrimination."[17] Moreover, although some scholars question whether the "traditional binary categories of male and female sex"[18] reflect reality—instead arguing that

15. *See, e.g.*, Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 194 (2005) (arguing, based on sexual harassment theory and social science research, that sex, gender, and sexual orientation are inextricably linked in reality and should be similarly linked in the law). *See also* Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 495–96 (2001) ("Although the scholars draw connections between gender and sex to argue that gender discrimination should already be protected under Title VII, a few also argue that there should be a concomitant analytical distinction between sex and gender. In other words, for the purposes of including protection against gender discrimination under Title VII, there should be an aggregation of sex and gender, but at the same time, there should be a disaggregation of sex and gender as distinct concepts and categories. There is an inherent tension in this framework, and this tension is further complicated when gender identity is added to the mix."); John M. Ohle, *Constructing the Trannie*, 8 J. GENDER RACE & JUST. 237, 243–44 (2004) ("Courts have continually used sex and gender in an interchangeable way: sex is gender, and gender is sex. Wrong. Interchanging these definitions poses many problems for individuals who have worked in theorizing these terms for years and years. There is, of course, no universal definition for sex or gender, at least none that a majority of academics agree upon.") (footnotes omitted).

16. Weiner, *supra* note 15, at 191–92.

17. *Id.* at 192.

18. Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and the Legislatures*, 7 N.Y. CITY L. REV. 161, 167–68 (2004) (citing Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275 (1996–97)); *see also* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization*

differentiations should be seen as a "continuum," "with no exclusive male and female categories and without regard to genitalia"[19]—"lawmaking is generally geared toward categorical explanations and classifications."[20]

With this categorical predisposition of legislators, and the courts that must construe their laws, in mind, this article will assume the following definitions:

Sex: an individual's biological identity, including chromosomal and/or reproductive composition.[21]

Gender: An individual's social identity, as related or unrelated to sex, encompassing culturally traditional masculine and/or feminine characteristics or traits.[22] Gender identity may include "'a person's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's gender assigned at birth.'"[23]

Transgender: An umbrella term encompassing anyone whose gender identity or behavior falls outside of stereotypical gender norms or societal conventions regarding appearance or conduct associated with his or her sex at time of birth, including transsexuals and persons suffering from gender dysphoria.[24]

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of Gender that is More Inclusive of Transgender People, 11 MICH. J. GENDER & L. 253 (2004–05). Vade observes, "Often, when we get past the binary gender system, the notion that there are only two genders, female and male, we do so by seeing gender as a spectrum or line running from female to male." *Id.* at 261. More poetically, Vade also observes that "[t]he separation of gender from sex is a separation of expression from biology, of culture from nature, of emotion from reason, and of subjectivity from objectivity. These are false distinctions, and they are not helpful if we are looking for a world that protects and celebrates difference." *Id.* at 279.

19. Coffey, *supra* note 18, at 170 (citing Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1238 (1996–97)).

20. *Id.* at 170–71.

21. *See* Weiner, *supra* note 15, at 191–92. Among the "biological criteria" generally associated with sex are "genetics/chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, and phenology/secondary sex features." Vade, *supra* note 18, at 280 (quoting Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999)).

22. *See* Vade, *supra* note 18, at 280–87.

23. *Id.* at 312. Vade states that the definition arose out of discussions with the National Center for Lesbian Rights and Transgender Law and Policy Institute. *Id.* at 312 n.246. Also noteworthy is the distinction between gender identity as an "internal experience," also described as "'a person's internal, deeply felt sense of being either male or female,'" and gender expression, which is an "external experience," or "society's perception of 'the external characteristics and behaviors that are socially defined as either masculine or feminine.'" The latter includes how one dresses, speaks, or interacts socially. Samantha J. Levy, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 143–44 (2002) (quoting PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS (2000)).

24. *See* Andrea Gehman & Veronica D. Gray, *Sexuality and Transgender Issues in Employment*, 6 GEO. J. GENDER & L. 575, 577 (2005) (citing Levy, *supra* note 23, at 144); Phyllis R. Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 558–59 (July 2003). It should be noted that transgender persons have the same diversity of sexual orientations as other persons, i.e., from the standpoint that their gender identity may be heterosexual, homosexual, or bisexual. *See* Vade, *supra* note 18, at 270 ("Gender identity is who one is. Sexual orientation is to whom one is attracted."). One author

Transsexual: One who desires "to change one's anatomic characteristics to conform physically with one's perception of sex as a member of the opposite sex."[25]

Intersex: Persons born with mutated, incomplete, or dual genitals; with chromosomal patterns other than XX or XY; or whose gender identity development was affected in some manner by pre-natal hormonal imbalances.[26]

Despite the fact that it used the terms sex and gender interchangeably, *Price Waterhouse* expanded the interpretation of Title VII language to encompass not only the status of an employee based on his or her sex, but discrimination based on notions of traits and characteristics stereotypically attributed to one sex or the other. To this extent, it established that "enforcing a specific sex-gender match may be discrimination."[27] As the next section will demonstrate, however, according to most courts the decision did not further extend the protections of the

states that an increasing number of gay men and lesbians are identifying themselves as transgender "whether because of a nonconforming gender presentation or in recognition of the fact that we violate gender norms simply by virtue of our same-sex orientation, since homo- and bisexuality confound the male-female dyad in which women traditionally have been subordinated to men." Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392–93 & n.3 (2001) (citing Jamison Green, *Introduction* to CURRAH & MINTER, *supra* note 23, at 5).

25. STEDMAN'S MEDICAL DICTIONARY 1841 (26th ed. 1995). As a medical proposition, transsexualism is classified as a psychiatric disorder known as "gender identity disorder," or "gender dysphoria." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (1994) (DSM). Diagnosis of gender identity disorder is based on four criteria: (1) evidence of a strong and persistent cross-gender identification; (2) exhibition of persistent discomfort with his/her assigned sex; (3) the individual must not be intersexed; and (4) the individual must suffer significant distress or impairment in functioning in society. Lax, *supra* note 2, at 124–25. A diagnosis may be confirmed when gender dysphoria exists for at least two years and the feelings of having the wrong sexual identity at birth are alleviated by "cross-gender identification." Coffey, *supra* note 18, at 163. Although gender identity disorder is considered to be a psychiatric disorder, the treatment for the condition typically includes one or more of the following components: (1) hormone therapy; (2) living as a member of the other sex (known as the "real life experience"); (3) sex-reassignment surgeries; and (4) "psychotherapeutic treatments" such as voice therapy and electrolysis. *Id.* at 163. *See also* SHANNON MINTER, REPRESENTING TRANSSEXUAL CLIENTS: SELECTED LEGAL ISSUES (2004), http://www.nclrights.org/publications/pubs/tgclients.pdf (citing HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR THE DIAGNOSIS AND TREATMENT OF GENDER IDENTITY DISORDERS (6th ed. 2001), *available at* http://www.hbigda.org/Documents2/socv6.pdf). One court noted that the terms "transsexual" and "transsexualism" are "comparatively new" as they were first coined in European medical literature in the early- and mid-twentieth century, and gained recognition in the United States following publication of THE TRANSSEXUAL PHENOMENON by Dr. Benjamin in 1964. It further noted that the DSM did not include the disorder until 1980, although medical researchers have documented its existence "dating to antiquity." Rush v. Johnson, 565 F.Supp. 856, 863 (N.D. Ga. 1983).

26. *See* Frye & Rose, *supra* note 24, at 558–59 (citing inter alia website of the Intersex Society of North America, http://isna.org). Frye and Rose note that the term "hermaphrodite," while still in use, is disfavored. *Id.* at 559. They also address cross-dressers and transvestites, stating that "[a]lthough some assert that there are differences between the two, these terms both refer to persons whose gender variance is expressed on a part-time basis, though 'transvestite' is now the less favored term." *Id.*

27. Weiner, *supra* note 15, at 204.

law to gay, lesbian, and transgender persons by virtue of their status, despite the fact that the discrimination they experience is also "grounded in normative gender rules and roles."[28] As one writer notes:

> From a gender-equality perspective, traditional marriage and the patriarchal family, whatever their merits might be, also undeniably function to maintain sex-gender differentiation and inequality. Thus, conservative claims that address same-sex sexuality in terms of the danger it poses to the family also necessarily address gender issues. Those critiques that address sexual behavior adhere to the premise that men must only be sexual with women, and women must be sexual only with men (preferably within monogamous marriage)—a part of the gender role assigned to men and women in our society. Thus, the entire spectrum of gender roles is implicated within the most common conservative arguments against "homosexuality."[29]

Similarly, another commentator states:

> like transsexuals, homosexuals can be seen as extreme gender nonconformers: they do not conform to the stereotype that men ought to desire women sexually or that women ought to desire men sexually. Homosexuality and transsexuality subvert norms and expectations about how women and men should live their lives as sexual beings.[30]

Because the discrimination facing individuals whom Title VII does not encompass is, to many observers, "rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities—i.e., stereotypes about how men and women are 'supposed' to behave and about how male and female bodies are 'supposed' to appear,"[31] it may seem most logical to seek protection under existing laws, rather than through legislation that separately addresses their various circumstances. Due to the generally unfavorable outcomes resulting from litigation under Title VII and FEPAs, however, there is a discernable trend toward legislative initiatives—particularly at the local level—as discussed in Section III of this article.

There is not consensus within the various social and political communities seeking protection against discrimination about the extent to which their movements should merge or whether litigation testing the boundaries of existing legislation provides the best approach. As one commentator offers:

28. Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 605, 612 (2004) (quoting Katherine M. Franke, *The Central Mistake of Employment Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995)).

29. *Id.* at 631–32.

30. Melinda Chow, Smith v. City of Salem: *Transgendered Jurisprudence and an Expanding Menu of Sex Discrimination Under Title VII*, 28 HARV. J.L. & GENDER 207, 215 (2005).

31. Abby Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 153 n.5 (2005) (quoting Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38–39 (2000)).

> It was not until recently that transgender and gender variant individuals came to be included in the "gay" movement, now known as the GLB(T) movement. . . . After a while, many gay men and lesbians decided that working together would be more effective than the separatist and failed identity-based movements of the past. Eventually, gay men and lesbians decided to add bisexual folks in their liberation movement, creating the GLB affiliation. The lesbians then, upset with the order of letters in the acronym, rearranged the letters, creating LGB. Transgender was added much later, creating LGBT; however, this move is still not universally accepted by some members of the movement. For example, it was not until 2001 (after years of open criticism) that one of the major gay rights organizations, The Human Rights Campaign (hereinafter HRC), finally added transgender people to its mission statement. It is not surprising that HRC still refuses to include gender identity in the proposed Employment Non-Discrimination Act (ENDA) (which Congress has yet to pass).[32]

In addition to resistance to the merging of distinctive categories of persons, some activists intensely oppose what has been called the "medicalization" of gender identity[33] and, on a related note, attempts of transgender persons to seek refuge under the aegis of disability discrimination laws.[34] One scholar determined that where medical assessment established a diagnosis of gender dysphoria, courts were more willing to resolve litigation in favor of transgender plaintiffs, thus theorizing that "surgery to align one's psychological and physical sexes may be acceptable in light of courts' tendency to favor congruence."[35]

The next section of this article reviews the case law that emerged following *Price Waterhouse* under Title VII and FEPAs involving gender identity and expression. After that summary, the article provides an overview of related legislative initiatives at the federal, state, and local levels.

C. The Case Law

1. Title VII

a. Sexual Orientation

As noted earlier, the overwhelming weight of authority holds that Title VII does not provide protection against discrimination on the basis of sexual orientation, a conclusion typically justified by congressional rejection of attempts to amend Title VII to provide such coverage. Courts nonetheless wrestle with the difficulty of

32. Ohle, *supra* note 15, at 240–42 (footnotes omitted).

33. *See, e.g.*, Vade, *supra* note 18, at 287 ("[T]he sex-gender distinction sets up the doctor-assigned gender as truth, and the transgender person's self-identified gender as something solely in that person's head.").

34. Disability laws and transgender issues are discussed *infra* Section I.C.3.

35. Coffey, *supra* note 18, at 167 (citing Storrow, *supra* note 18, at 284).

distinguishing sexual orientation discrimination claims from assertions of sexual stereotyping, the latter of which may give rise to Title VII protection under *Price Waterhouse.*

In *Dawson v. Bumble & Bumble*,[36] the Second Circuit concluded that a lesbian former employee failed to establish a "sexual stereotyping claim" under Title VII, reasoning that, while failure to conform to gender stereotypes can be manifested through behavior and/or appearance, the plaintiff had not alleged behavioral non-conformance and the record lacked substantial evidence that she was subjected to adverse employment consequences due to her appearance.[37] Although the court conceded that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality,"[38] it warned that gender stereotyping should not be used "to bootstrap protection for sexual orientation into Title VII."[39] The court recognized, however, that individual employees who face adverse employment actions as a result of an employer's animus toward their exhibition of behavior considered stereotypically inappropriate for their gender may have a claim under Title VII.[40]

Similarly, in *Bibby v. Philadelphia Coca Cola Bottling Co*.,[41] the Third Circuit held that a plaintiff may have a same-sex discrimination claim by showing that the defendant was retaliating against or penalizing the plaintiff for not complying with gender stereotypes, but that Title VII does not prohibit discrimination based on sexual orientation, reasoning that Congress has "repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."[42] The court explained that, following *Oncale*, it is established that Title VII provides a cause of action for same-sex sexual harassment and that, while the question of how to prove that same-sex harassment is "because of sex" is not an easy one to answer, circumstances include: (1) where there is evidence that the harasser sexually desires the victim; (2) where the harasser displays hostility to the presence of a particular sex in the workplace; and/or (3) where there is evidence that the harasser's conduct was motivated by a belief that the victim did not conform to stereotypes because of his or her gender.[43] Once it has been shown that the harassment was motivated by the victim's sex, the court stated, it is no defense that

36. 398 F.3d 211 (2d Cir. 2005).

37. *Id.* at 221–22.

38. *Id.* at 218 (quoting Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)).

39. *Id.* at 218 (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)). The Second Circuit has more than once cautioned plaintiffs and their counsel against attempts to "bootstrap" into the holding of *Price Waterhouse* protection against discrimination on the basis of sexual orientation. In addition to the *Dawson* decision, see *Trigg v. New York City Transit Authority*, 50 Fed. App'x 458 (2d Cir. 2002), *aff'g* No. 99-CV-4730 (ILG), 2001 WL 868336 (E.D.N.Y. July 26, 2001). Concluding that sexual orientation and not gender stereotyping was the "sine qua non" of the grievance, the district court referenced *Simonton*'s admonition against "bootstrapping." *Trigg*, 2001 WL 868336, at *5.

40. *Dawson*, 398 F.3d at 218 (citing the landmark decision in *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2000) (discussed *infra*)).

41. 260 F.3d 257, 261 (3d Cir. 2001).

42. *Id.* at 261.

43. *Id.* at 261–63.

the harassment may also have been motivated by anti-gay or anti-lesbian animus.[44] The court concluded that "[h]arassment on the basis of sexual orientation has no place in our society. . . . Congress has not yet seen fit, however, to provide protection against such harassment."[45]

The Seventh Circuit reviewed this confluence of issues in *Spearman v. Ford Motor Co.*[46] The court held that Congress intended the term "sex" as used in Title VII to mean "biological male or biological female," and not one's sexuality or sexual orientation.[47] The court therefore found that harassment based solely upon a person's sexual orientation, and not on one's sex, is not an unlawful employment practice under Title VII, stating:

> [W]hile sex stereotyping may constitute evidence of sex discrimination, "[r]emarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff's] gender in making its decision." Therefore, according to *Oncale* and *Price Waterhouse*, we must consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole creates a reasonable inference that the plaintiff was discriminated against because of his sex.[48]

The court ultimately determined that the record showed that the plaintiff's co-workers maligned him because of his apparent homosexuality, and not because of his sex.[49]

In *Equal Employment Opportunity Commission v. Grief Brothers Corp.*, [50] the court observed that the Second Circuit has joined other circuits in holding that Title VII does not prohibit discrimination on the basis of sexual orientation, but ruled that the instant record contained sufficient evidence from which a jury could find that harassment occurred not because the plaintiff is homosexual, but because of his sex, male.[51] In so ruling, the court rejected arguments that *Oncale*, which identified three avenues of proof for same-sex harassment claims, had established the only theories under which same-sex harassment claims may be brought.[52] The court also cited cases from the First, Third, Sixth, Seventh, and Ninth Circuits recognizing that nonconformance with gender stereotypes is a viable theory of sex

44. *Id.* at 265.

45. *Id. Bibby* is discussed at length in *Allen v. Mineral Fiber Specialists, Inc.*, No. Civ. A.02-7213, 2004 WL 231293 (E.D. Pa. Jan. 30, 2004) (stating that there was no evidence or argument that co-workers thought that the plaintiff did not subscribe to particular male stereotype).

46. 231 F.3d 1080 (7th Cir. 2000).

47. *Id.* at 1084.

48. *Id.* at 1085 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 109 (1989)).

49. *Id.*

50. No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004).

51. *Id.* at *14.

52. *Id.* at *12.

discrimination, either same-sex or between sexes, under Title VII.[53]

Along similar lines, the court in *Centola v. Potter*[54] denied summary judgment on the basis of evidence that the plaintiff's co-workers had punished him because they perceived him to be "impermissibly feminine" for a man.[55] Noting that while the law is "relatively" clear that discrimination on the basis of sexual orientation is not barred under Title VII—as long as persons discriminating are not also doing so on the basis of a protected characteristic, such as sex or race—the line between sexual orientation and sex discrimination is "hardly clear. Sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions because of that person's gender, assumptions that may or may not be true."[56]

Centola further explained that, if the plaintiff can meet his burden relative to sexual stereotyping, the presence of a "mixed motive"—including sexual orientation discrimination—has no legal significance under Title VII.[57] The court deemed this rule of special importance in cases such as the one at bar, precisely because of the difficulty of differentiating behavior that is prohibited (discrimination on the basis of sex) from behavior that is not prohibited (discrimination on the basis of sexual orientation). The court stated:

> [S]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do.
>
> In this case, however, I need not go so far. Centola never disclosed his sexual orientation to anyone at work. His co-workers made certain assumptions about him, assumptions informed by gender stereotypes.

53. *Id.* at *13. The cited decisions are *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2000) (discussed *infra*); *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998); and *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

54. 183 F. Supp. 2d 403 (D. Mass. 2002).

55. *Id.* at 410.

56. *Id.* at 408–09.

57. *Id.* at 410.

> For example, they placed a picture of Richard Simmons "in pink hot pants" in Centola's work area. Without placing too fine a point on it, Richard Simmons "in pink hot pants" is hardly what most people in our society would consider to be a masculine icon. Certainly, a reasonable jury could interpret this picture, unaccompanied by any text, as evidence that Centola's co-workers harassed him because Centola did not conform with their ideas about what "real" men should look or act like. Just as Ann Hopkins was vilified for not being "feminine" enough, Centola was vilified for not being more "manly."[58]

The judge's observations in *Centola* illustrate that the line between non-cognizable sexual orientation-based claims and cognizable gender-stereotype based claims, to which we will next turn, is thin indeed.

b. Gender Stereotyping

Although the cases discussed in the various subsections of Section I.C.1 of this article necessarily overlap, several decisions specially focus on *Price Waterhouse* themes. In *Doe by Doe v. City of Belleville*,[59] the court held that evidence

58. *Id.* (footnote omitted). *See also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (stating that sexual stereotyping claim is cognizable under Title VII, but plaintiff failed to make sufficient showing that he was harassed because of his sex; distinguishing between failure to adhere to sex stereotypes and discrimination based on sexual orientation may be difficult, especially when a perception of homosexuality may result from an impression of nonconformance with sexual stereotypes); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (holding that Title VII prohibits sexual harassment without regard to the sexual orientation—real or perceived—of the victim, thus protecting openly gay male against physical conduct of sexual nature by male co-workers; concurring opinion also classifies the case as one of actionable gender stereotyping harassing); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) (holding that despite use of phrase "perceived sexual preference," complaint stated a claim for sexual harassment under Title VII based on a hostile work environment; fact that some of the harassment alleged included taunts of being a homosexual did not transform the complaint from one alleging harassment based on sex to one alleging harassment based on sexual orientation); Fischer v. City of Portland, No. CV 02-1728, 2004 WL 2203276 (D. Or. Sept. 27, 2004) (holding that sexual orientation discrimination is not protected under Title VII, but same sex harassment is; similarly, gender stereotyping, whether by the same or opposite sex, is actionable under Title VII); Broadus v. State Farm Ins., No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (stating that "sexual stereotyping which plays a role in an employment decision is actionable under Title VII"; it is nonetheless unclear whether a transsexual is protected from sex discrimination and sexual harassment under the statute, and Title VII protection does not extend to discrimination on basis of sexual orientation or sexual preference); Carrasco v. Lenox Hill Hosp., No. 99Civ. 927(AGS), 2000 WL 520640 (S.D.N.Y. Apr. 28, 2000), *aff'd*, 4 Fed. App'x 29 (2d Cir. 2001) (stating that discrimination based on sexual orientation as opposed to sex or gender are beyond the purview of Title VII; however, the statute does not bar discrimination claims "because of sex" merely because plaintiff and the person charged with acting on behalf of the employer are of the same sex).

59. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998). The rationale for the remand of *Belleville* was questioned in *Bibby*, 260 F.3d at 263 n.5 ("Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question."). *Accord* Equal Employment Opportunity Commission v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641, at *13 n.8 (W.D.N.Y. Sept. 30, 2004)

construed in the plaintiffs' favor permitted an inference that they were harassed because of their sex, citing among other facts that one plaintiff wore an earring, and that a co-worker had repeatedly inquired of a plaintiff whether he was a boy or a girl.[60] The court explained:

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex. . . . Just as in *Price Waterhouse* . . . gender stereotyping establishes the link to the plaintiff's sex that Title VII requires. The contexts of the two cases are admittedly different, but the differences are immaterial. The question in both cases is whether a particular action (in *Price Waterhouse*, the exclusion from partnership, here, the harassment by co-workers) can be attributed to sex; reliance upon stereotypical notions about how men and women should appear and behave (in *Price Waterhouse*, by the partners, here, by H. Doe's tormentors) reasonably suggests that the answer to that question is yes. . . . (Of course, this is ultimately for the factfinder to resolve; we are merely considering what inferences one may reasonably draw from the evidence before us.).[61]

In so ruling, the court rejected as "simply wrong" the defendant's contention that *Price Waterhouse* was inapposite because "[t]he type of stereotyping actionable under *Price Waterhouse* is that of traditionally perceived personality traits, not personal appearance or physical traits."[62] Instead, the court stated, *Price Waterhouse* itself recognizes that "gender discrimination may manifest itself in the employer's stereotypical notions as to how an employee of a given gender should dress and present herself."[63]

The *Belleville* court also rejected as erroneous any inference that the defendant drew from an earlier Seventh Circuit decision[64] that harassment stemming from the employee's failure to meet the stereotypical expectations of his gender is not discrimination "against a man because he is a man,"[65] reasoning that *Price Waterhouse* foreclosed that conclusion. Reviewing *Price Waterhouse*, the court stated:

> Recall that the remarks at issue there did not suggest that the employer believed women as a class were inappropriate candidates for partnership. Rather, they reflected an insistence that female employees

(concluding that gender stereotypes holding of *Belleville* was not disturbed).

60. *Belleville*, 119 F.3d at 566–67.

61. *Id.* at 581–82.

62. *Id.* (quoting from Brief of Defendant at 8).

63. *Id.* at 582. The court in fact noted that, ten years in advance of *Price Waterhouse*, it had recognized that "workplace dress codes founded on cultural stereotypes are not permissible under Title VII." *Id.* (citing Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028 (7th Cir. 1979) (invalidating rule requiring female but not male employees to wear bank-approved uniforms).

64. Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984).

65. *Belleville*, 119 F.3d at 592.

> conform to traditional views of how women should appear and behave. This is precisely the type of biased thinking to which H. Doe attributes his adverse treatment as Belleville's employee. *See* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479, 2516 (1994) (noting that the harassment of men who do not fit neatly within the male stereotype has much in common with the sexual harassment of women).[66]

Finally, relative to mixed-motive issues, the court noted that the possibility that the harassment may have been motivated by more than one type of animus made the case no different from other mixed-motive cases in which an employer may have treated a plaintiff adversely for various reasons, some proscribed by law and some not: the fact that one motive is permissible does not exonerate an employer from liability under Title VII, if a prohibited motive played a role in the employer's action.[67]

The court in *Sturchio v. Ridge*[68] found that the evidence failed to support a Title VII sexual harassment claim made by a U.S. Border Patrol employee who asserted that she was subjected to a hostile workplace environment initially because she had a feminine appearance, and subsequently because she had changed her gender.[69] In so ruling, the court held that Title VII does not apply to grooming and dress standards *unless* they impose unequal burdens on one sex;[70] thus, the employer's prohibition against wearing dresses due to the nature of the job (including safety issues it presented) did not place a greater burden on one sex than another.[71] The court also failed to find actionable defendant's requirement that, after the plaintiff had made her transition, plaintiff use the men's restroom where unisex restrooms were not available, stating:

> The Court is unaware of any requirement imposed on an employer to permit a person in Plaintiff's situation to use the women's restroom. Perhaps, in the future, the law may impose on an employer an obligation to comply with medical directions for an employee who is going through a gender change. However, at this time, there is no such obligation. Moreover, the management had no notice of the protocol in the period in question, and the direction to use the men's restroom in other locations was not discriminatory."[72]

In *Kastl v. Maricopa Community College*[73] (*Kastl*), the court ruled that an allegation that the employer violated Title VII by requiring a biological female believed to possess stereotypically male traits to provide proof of genitalia or face

66. *Id.*
67. *Id.* at 594.
68. No. CV-03-0025-RHW, 2005 WL 1502899 (E.D. Wash. June 23, 2005).
69. *Id.*
70. *Id.* at *16.
71. *Id.*
72. *Id.*
73. No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 30, 2004).

consignment to men's restrooms stated a claim.[74] Assuming all of the plaintiff's allegations to be true for purposes of deciding the defendant's motion to dismiss, the court reasoned as follows:

> "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," whether that stereotype relates to an individual's behavior, appearance, or anatomical features. The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification (BFOQ). Therefore, neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait. Application of this rule may not be avoided merely because restroom availability is the benefit at issue.[75]

The court also stated that "to create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII."[76] Thus, the court concluded that the plaintiff had alleged a set of facts sufficient to create an issue for trial.[77]

The case of *Oiler v. Winn-Dixie Louisiana*,[78] involved an individual discharged because he publicly cross-dressed and impersonated a person of the opposite sex. The plaintiff sought to establish a cause of action under *Price Waterhouse*, arguing that his termination was due to his failure to conform to gender stereotypes, and not his gender identity disorder.[79] The court concluded, however, that the facts did not present a situation where a plaintiff failed to conform to gender stereotypes; rather, "the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity."[80] The court distinguished *Price Waterhouse* by reasoning that while Ann Hopkins may not have behaved as partners thought a woman should, she never pretended to be a man or adopted a male persona. The court felt that the case before it, by contrast, was "not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of one person assuming the role

74. *Id.* at *3.

75. *Id.* at *2–3 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251(1989)) (footnote omitted).

76. *Id.* at *3.

77. Furthermore, the court stated that defendant's argument—that segregating restroom use by genitalia is permissible because doing so cannot be *sex* discrimination—simply created a factual dispute regarding the nature of its restroom policy. The question of whether the policy is segregation of use by "sex" or genitalia was not for the court to decide at the motion to dismiss stage. *Id.*

78. No. Civ.A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

79. *Id.* at *4.

80. *Id.* at *5.

of a person of the opposite sex."[81] The court went on to state its agreement with *Ulane* and its progeny to the effect that Title VII prohibits discrimination on the basis of biological sex and, while that includes sex stereotypes, it does not, in the court's view, include sexual identity or gender identity disorders.[82]

c. Transgender Discrimination

i. Cases Recognizing Title VII Protection

The landmark case in this evolving area of the law is *Smith v. City of Salem*.[83] The dispute involved allegations by a fire department employee, who was born male and subsequently diagnosed with gender identity disorder, that discrimination had occurred based on gender non-conforming behavior and appearance, which the defendant felt was inappropriate for a male.[84]

The *Smith* court preliminarily stated that, to establish a *prima facie* case of employment discrimination pursuant to Title VII, the plaintiff must show (1) membership in a protected class; (2) adverse employment action; (3) qualification for the position in question; and (4) different treatment from similarly situated individuals outside of the protected class.[85]

As to the first element, the court ruled that Smith was a member of a protected class: the complaint asserted that he was a male with gender identity disorder, and Title VII's prohibition of discrimination "because of sex" protected men as well as women.[86]

Regarding the "because of sex" issue, the court determined that the plaintiff adequately stated a claim for sex stereotyping under *Price Waterhouse*, rejecting

81. *Id.* at *6.

82. *Id. See also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 at 261 n.4 (1st Cir. 1999) (suggesting in dicta that a male plaintiff can ground Title VII claims on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity); EEOC v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641, at *13–15 (W.D.N.Y. Sept. 30, 2004) (discussing gender stereotype issues); Martin v. N.Y. State Dep't of Corr. Servs., 115 F. Supp. 2d 307, 313 (N.D.N.Y. 2000) (synthesizing Second Circuit cases to hold that, to prevail on a claim against a union for breach of duty of fair representation based on gender, the plaintiff must show that he was subjected to disadvantageous terms or conditions of representation to which the female staff had not been exposed; the mere statement that he was subjected to discriminatory conduct and that he believes such conduct was motivated by his failure to meet gender stereotypes is insufficient to meet burden of proof for a claim of gender discrimination); EEOC v. Trugreen Ltd. P'ship., 122 F. Supp. 2d 986 (W.D. Wis. 1999) (determining when harassment is "because of" the victim's gender). *Cf.* Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (noting that while Equal Credit Opportunity Act, which is interpreted in light of Title VII, does not cover style of dress or sexual orientation, allegations in the case at bar were that discriminatory actions were taken on the basis of the plaintiff's sex, and the cross-dressing plaintiff states a claim under equal credit law if he was treated differently than a woman dressing as a man would have been).

83. 378 F.3d 566 (6th Cir. 2004).

84. *Id.* at 572–74.

85. *Id.* at 570.

86. *Id.*

the district court's implication that the sexual stereotyping allegation was an "end run" around his real claim, which the lower court stated was "'based on his transsexuality'" and thus not within scope of Title VII.[87] After reviewing the plaintiff's specific factual contentions, the appeals court summarized, and rejected, the rationale of the previous circuit court decisions as follows:

> Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendant's actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.
>
> In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir.1984); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on "gender" rather than "sex"). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). *See, e.g.*, *Ulane*, 742 F.2d at 1084 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); *Holloway*, 566 F.2d at 661–63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex;" and "sex" should be given its traditional definition based on the anatomical characteristics dividing "organisms" and "living beings" into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane, Sommers,* and *Holloway*)—as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity—were denied Title VII protection by courts because they were considered victims of "gender" rather than "sex" discrimination.
>
> However, the approach in *Holloway, Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway*

87. *Id.* at 571–72.

> [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*."). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.[88]

Rather, the court continued, after *Price Waterhouse*, an employer who discriminates against women because they do not wear dresses or makeup is engaging in sex discrimination because the discrimination would not occur but for the victim's sex; it followed that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[89] In so reasoning, it rejected the stance of some courts that the latter form of discrimination was for some reason permissible:

> For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of . . . sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.[90]

In the case at bar, the appeals court noted, the lower court declined to discuss the applicability of *Price Waterhouse*, giving insufficient consideration to Smith's claims regarding "his contra-gender behavior," and instead characterizing the pleadings as an effort to secure protection from discrimination on the basis of his status as a transsexual, which is outside the scope of Title VII's prohibition.[91] The Sixth Circuit concluded:

> Such analyses cannot be reconciled with *Price Waterhouse,* which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.

88. *Id.* at 572–73 (internal citations omitted).
89. *Id.* at 574.
90. *Id.*
91. *Id.*

> Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.[92]

The *Smith* court also found the complaint adequate as to remaining elements of the prima facie case because it alleged that Smith was qualified for the position in question (having been a lieutenant in the fire department for seven years without any negative incidents), and that Smith would not have been treated differently, on account of his non-masculine behavior and gender identity disorder, had he been a woman instead of a man.[93] The Sixth Circuit again endorsed the rationale of its *Smith* decision in *Barnes v. City of Cincinnati*,[94] in which it held that a police officer, a pre-operative transsexual bringing an action under Title VII, was a member of a protected class.[95]

A transsexual plaintiff who may have been fired, at least in part, because her appearance and behavior did not conform to her company's stereotypes—rather than solely because of her transgender status—was deemed to state a claim under Title VII in *Doe v. United Consumer Financial Services*.[96] In so ruling, the court conceded the complexity of the "seemingly straightforward" question of whether Title VII's prohibitions apply to transsexuals.[97] It found *Ulane*'s reliance on congressional intent in rejecting coverage for transsexuals to be at odds with *Oncale*, reasoning that, in holding that male-on-male workplace harassment may be actionable, *Oncale* acknowledged that it was applying Title VII to a situation not likely considered by Congress when it passed the Civil Rights Act.[98]

92. *Id.* at 574–75.

93. *Id.* at 570.

94. 401 F.3d 729, *cert. denied*, 126 S.Ct. 624 (2005).

95. *Id.* at 737. *Barnes* cited the *Smith* rule that sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of the behavior, and that a label, such as "transsexual," is not fatal to a sex discrimination claim on that theory. As in *Smith*, the court held that the plaintiff in the case at bar had established membership in a protected class by alleging discrimination arising out of his failure to conform to sex stereotypes. *Id.*

96. No. 0:01CV1112, 2001 WL 34350174, at *5 (N.D. Ohio Nov. 9, 2001).

97. *Id.* at *2.

98. *Id.* at *1 n.7. *See also* Mitchell v. Axcan Scandipharm, Inc., 2006 WL 456173 (slip copy) (Feb. 17, 2006) (denying a motion to dismiss a state and Title VII sex discrimination claim brought by a pre-operative male-to-female transsexual, based on the gender stereotyping rationale of *Barnes* and *Smith*); Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PhX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (discussed *infra*) (holding that Title VII claim was stated by allegations that the employer required a biological female believed to possess stereotypically male traits to provide proof of genitalia or face consignment to men's restroom); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding that transsexuals are protected under Title VII to the extent discriminated against on basis of sex); Broadus v. State Farm Ins. Co., No. 98-4254CVC50WECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (holding that sex

ii. Cases Refusing to Find Title VII Protection

The rationale of the *Smith* decision has not been accepted universally by post-*Price Waterhouse* decisions. For example, the court in *Etsitty v. Utah Transit Authority*[99] held that the *Price Waterhouse* prohibition against sex stereotyping should not be applied to transsexuals.[100] In so ruling, the *Etsitty* court characterized as "complex" the question of how Title VII's prohibition against discrimination "because of . . . sex" applies to transsexuals,[101] and concluded that all federal courts that have dealt directly with this issue have concluded that Title VII does not prohibit discrimination based on an individual's transsexualism.[102] The court also found support for its conclusion in the failed attempts to amend Title VII, which it considered to be an indication that Congress intended the phrase "because of sex" to be narrowly construed, excluding protection for transsexuals.[103] The court expressly rejected the Sixth Circuit's rationale in *Smith*, stating:

> There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes. An authoritative treatise on Gender Identity Disorder states the following:
>
> > Gender Identity Disorder can be distinguished from simple nonconformity to stereotypical sex role behavior by the extent and pervasiveness of the cross-gender wishes, interests, and activities. This disorder is not meant to describe a child's nonconformity to stereotypic sex-role behavior as, for example, in "tomboyishness" in girls or "sissyish" behavior in boys. Rather, it represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness.
>
> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 564 (4th ed. 1994). Clearly, the medical community does not equate transsexualism with a mere failure to conform to stereotypes.[104]

The *Etsitty* court also stated concerns about practical issues, which it foresaw as emanating from the *Smith v. Salem* approach:

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stereotyping which plays a role in an employment decision is actionable under Title VII, but that it is unclear whether a transsexual is protected from sex discrimination under the statute).

99. No. 2:04CV616DS, 2005 WL 1505610 (D. Utah June 24, 2005).

100. *Id.* at *4–6.

101. *Id.* at *3.

102. *Id.* The court cited *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff'd*, 98 Fed. App'x 461 (6th Cir. 2004), which in turn cited *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and *Sommers v. Budget Marketing, Inc*., 667 F.2d 748 (8th Cir. 1982).

103. *Etsitty*, 2005 WL 1505610, at *3–4.

104. *Id.* at *5.

> Taken to the extreme, the theory in the *Smith* case would mean that if an employer cannot bar a transsexual male from dressing and appearing as a woman (because it would be sex stereotyping under *Price Waterhouse*), then a non-transsexual male must also be allowed to dress and appear as a woman. In fact, if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII. *Price Waterhouse* did not go that far.
>
> This complete rejection of sex-related conventions was never contemplated by the drafters of Title VII and is not required by the language of the statute or the Supreme Court opinion in *Price Waterhouse*.[105]

In *Dobre v. National Railroad Passenger Corp.*,[106] the court ruled that Congress intended the term "sex" in Title VII to refer to biological or anatomical characteristics, not sexual identity or gender.[107] Thus, the court held that Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their "transsexualism."[108] The court recognized that transsexual individuals could pursue claims of discrimination on the basis of biological sex, but concluded in the case at bar that the acts of discrimination alleged were not due to stereotypic concepts about the abilities of women or conditions common to women only.[109] Rather, the court reasoned, if the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become female, which failed, in the court's view, to state a claim.[110]

In a case suggesting that facilities-related issues may be treated differently than more obvious disparate treatment issues, the Sixth Circuit held that a pre-surgical transsexual woman could be fired after she refused to use men's restrooms and refused to return to work, ruling that the employer's action did not violate Title VII.[111] Rejecting the plaintiff's *Price Waterhouse* argument, the federal district court had noted that the employer had not required plaintiff to conform her appearance to a particular gender stereotype, but, rather, had required her to adhere

105. *Id.* at *5–6.

106. 850 F. Supp. 284 (E.D. Pa. 1993).

107. *Id.* at 286 (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)).

108. *Id.* at 286–87 (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); *Holloway*, 566 F.2d at 663).

109. *Id.* at 287.

110. *Id.*

111. Johnson v. Fresh Mark, Inc., 98 Fed. App'x 461 (6th Cir. 2004), *aff'd*, 337 F. Supp. 2d 996 (N.D. Ohio 2003).

to "accepted principles established for gender-distinct public restrooms."[112] The plaintiff had conceded that her driver's license identified her as male, and that the State Bureau of Motor Vehicles refuses to approve assignment of a gender identity incongruent with an individual's birth-designated sex without proof that the individual has undergone sex reassignment surgery.[113] As a result, the court stated, it was not unreasonable for the employer to presume that the plaintiff had not undergone complete sex reassignment surgery.[114] The court also found it important that the plaintiff had declined to provide an opinion from her physician regarding which facilities would be appropriate to use.[115]

Finally, in *Mario v. P & C Food Markets, Inc*.,[116] the court stated in dicta that it was unclear whether plaintiff, a transsexual, is a member of a protected class, and also whether the employer's denial of medical benefits coverage for procedures "closely identified with being female" constitutes an adverse employment action under Title VII.[117]

iii. Other Cases

A federal district court in Minnesota faced a plaintiff alleging sex and religious discrimination claims under Title VII and state law arising out of her having encountered a transgender co-employee (who had transitioned from male to female) in the women's restroom.[118] Granting summary judgment to defendant on

112. *Johnson*, 337 F. Supp. 2d at 1000. After receiving complaints that the plaintiff had used both men's and women's restrooms, the employer told her that she could not return to work until it received a note from her doctor stating whether she was male or female and whether there were any reasons she should be using the restroom of the opposite gender. *Id.*

113. *Id.* at 998.

114. *Id.*

115. *Id.*

116. 313 F.3d 758 (2d Cir. 2002).

117. *Id.* at 767. The *Mario* court declined to reach these issues on the ground that plaintiff had failed to make out a prima facie case that denial of benefits occurred under circumstances giving rise to an inference of discrimination based on his transsexualism or his failure to conform to gender stereotypes; moreover, it stated, even if plaintiff had established a prima facie case, the employer proffered a legitimate, nondiscriminatory reason for its actions: that the surgeries were not medically necessary. Finally, the court noted that the plaintiff had not offered any proof that employer's proffered reason was pretextual. *Id. See also* Schroer v. Billington, 424 F.Supp.2d 203 (D.D.C. 2006) (observing in *dicta*, while denying a motion to dismiss, that the plaintiff (a highly qualified male-to-female transsexual job applicant whose offer was withdrawn after she disclosed her intention to present as a woman when she started work) could not rely upon *Price Waterhouse* and the rationale of the *Smith* and *Barnes* cases if, in light of further factual development, her outward appearance and behavior would have been in conformance with feminine stereotypes, but the employer's discrimination was because she formerly presented as stereotypically male); Sweet v. Mulberry Lutheran Home, No. IP02-0320-C-H/K, 2003 WL 21525058 (S.D. Ind. June 17, 2003) (holding that under *Ulane*, discrimination on basis of sex means discrimination on basis of plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex); Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996) (holding that postoperative transsexual was not protected from discrimination under Title VII).

118. Cruzan v. Minneapolis Pub. Sch. Sys., 165 F. Supp. 2d 964 (D. Minn. 2001).

the sex discrimination claim, the court held that, even assuming proof of other requisites, the plaintiff failed to show that the employer's policy of allowing the transgender co-employee to use the "gender appropriate" restroom following her transition affected a term, condition, or privilege of plaintiff's employment with such severity or pervasiveness as to alter conditions of employment and create an abusive work environment.[119] The court also noted that the plaintiff had the option of using other restrooms in the school not regularly used by the transgender employee.[120]

iv. Summary

While it is difficult to generalize about a body of law that is evolving quickly and affected by the predilections of individual courts, the following themes may be derived. First, the overwhelming weight of authority concludes that sexual orientation discrimination does not fall within the ambit of protection against discrimination "because of sex" under Title VII. Same-sex harassment, however, is under U.S. Supreme Court precedent a violation of the statute. In addition, where sex stereotyping results in discrimination against lesbians or gay men due to their behavior or appearance—and not their status as lesbians or gay men—it is unlawful.

Second, most courts accept that sex-stereotyping, as framed by *Price Waterhouse*, is a form of sex discrimination forbidden by Title VII. There is some skepticism about attempts by plaintiffs and their counsel to make "end-runs" around the absence of protection against sexual orientation discrimination through conclusory invocations of *Price Waterhouse* and sex-stereotyping, and thus courts are inclined not only to scrutinize characterizations in pleadings but the factual underpinnings of claims.

Finally, courts have consistently held that transsexuals are not a subcategory of persons protected under the "sex" classification of Title VII. Nevertheless, a number of courts now consider transsexuals and other transgender persons to be entitled to Title VII protection to the extent that their behavior or appearance results in discrimination based on sex-stereotyping.

d. State Fair Employment Practices Acts and Sex Discrimination

The outcome of litigation under FEPAs is necessarily influenced by variations in their respective statutory language. Most FEPAs, however, expressly prohibit sex discrimination, and state courts are inclined at least to consider Title VII precedent in construing their state laws.

i. State Cases Affording Protection to Transgender Individuals

In *DePiano v. Atlantic County*,[121] the plaintiff, a correctional officer, claimed

119. *Id.* at 968–69.

120. *Id.* at 969.

121. No. Civ.02-5441 RBK, 2005 WL 2143972 (D.N.J. Sept. 2, 2005).

that the warden and staff at the facility created a hostile work environment motivated by gender stereotype-based bias, because he sometimes wore women's clothes while off-duty.[122] Noting that New Jersey law prohibits discrimination on the basis of "affectional or sexual orientation," the court held that that prohibition was not squarely at issue in the case due to a lack of evidence that the plaintiff was perceived as homosexual. The court nonetheless held that the sex-based gender stereotyping theory was itself sufficient to state a claim under New Jersey law.[123]

In another case involving interpretation of state nondiscrimination law, a Massachusetts court first observed that federal law encompasses both biological differences between men and women *and* actions based on failure to conform to socially-prescribed gender expectations.[124] Ultimately, the court held that the male-to-female transsexual plaintiff had set forth a prima facie case of sex discrimination in allegations that she was fired by her employer for failing to wear traditionally male attire.[125]

In *Enriquez v. West Jersey Health Systems*,[126] the court held that the state law prohibiting sex discrimination precluded an employer from discriminating on the basis of gender identity.[127] In so ruling, the court found persuasive the conclusion earlier reached by a state Justice that "'a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character.'"[128] Stating its agreement with the principle that "'sex' embraces an 'individual's gender' and is broader than anatomical sex,"[129] the court held that the word "sex" as used in the state Law Against Discrimination should be interpreted to include gender, protecting the plaintiff from discrimination on the basis of sex or gender.[130] While the case did not involve New Jersey's prohibition on "sexual orientation" discrimination because the plaintiff failed to provide evidence that she was homosexual, bisexual, or perceived to be either, it is noteworthy that the court relied by analogy on the breadth of protections afforded in the state law, reasoning as follows:

> It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the LAD

122. *Id.* at *3.

123. *Id.* at *7–9.

124. Lie v. Sky Publ'n Corp., No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002).

125. *Id.* at *5.

126. 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

127. *Id.* at 373.

128. *Id.* (quoting M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).

129. *Id.*

130. *Id.*

> includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.[131]

Similarly, in 2001, the Massachusetts Commission against Discrimination ruled that discrimination against an individual because she or he is a transsexual violates the state law prohibition against sex discrimination and, in so doing, criticized the logic of decisions that failed to find protection for transsexuals under the rubric of Title VII.[132] Although asserting that transsexuality is sufficiently "sex-linked" to bring it within the scope of sex discrimination law, the commission noted that the current state of federal law is that "discrimination based on *change of sex* is not the same thing as discrimination *based on sex*"—the rationale for which the Commission found "utterly unsatisfying."[133] The commission stated:

> We believe that discrimination against transsexuals is a form of sex discrimination within the conceptual framework of cases such as *Price-Waterhouse* . . . and its progeny; where an individual was subjected to workplace discrimination not because of the anatomical notion of "sex," but because of a broader concept incorporating elements of "gender" and societal expectation. Hopkins was subjected to discrimination because she was "macho" and wore masculine suits. The complainant here contends that she was subjected to harassment because of the kind of man she was—one who wanted to be a woman.[134]

One of the most intriguing cases of recent origin, *Doe ex rel. Doe v. Yunits*[135] (*Yunits*), resulted in an injunction in favor of a transgender student, allowing her to attend school and dress in accordance with her self-proclaimed gender identity.[136] The defendant school had informed the plaintiff, a high school student diagnosed with gender identity disorder, that she could not enroll for the school year if she wore girls' clothes or accessories. The plaintiff sought an injunction on eight bases under Massachusetts law, including asserted rights to freedom of expression, liberty interest in appearance, and sex and disability discrimination.[137] Regarding sex discrimination, the court said:

> Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of

131. *Id.*

132. Millett v. Lutco, Inc., No. 98 BEM 3695, 2001 WL 1602800 (Mass. Comm'n Against Discrim. Oct.10, 2001).

133. *Id.* at *5.

134. *Id.* at *3.

135. No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom*. Doe v. Brockton Sch. Comm, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

136. On appeal, the court denied defendants' petition for interlocutory relief stating, inter alia, that the defendants had not offered substantial evidence in support of their proposition that the plaintiff's attire and disruptive behavior were "so inextricably linked that the behavior cannot be reasonably controlled without also controlling the plaintiff's manner of dress." *Brockton*, 2000 WL 33342399, at *1.

137. *Yunits*, 2000 WL 33162199, at *1–2.

> clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male. Therefore, defendants' reliance on cases holding that discrimination on the basis of sexual orientation, transsexualism, and transvestitism are not controlling in this case because plaintiff is being discriminated against because of her gender.[138]

In response to the defendants' citation of cases upholding gender-specific dress codes predicated on important governmental interests, such as fostering conformity with community standards, the court stated:

> This court cannot allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort. "Our constitution . . . neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 539 (1896) (dissenting opinion of Harlan, J.). Thus, plaintiff in this case is likely to establish that the dress code of South Junior High, even though it is gender-neutral, is being applied to her in a gender discriminatory manner.[139]

The *Yunits* court ultimately granted plaintiff the injunction after balancing the equities,[140] which it determined to weigh in her favor. The court also held that the defendants failed to make an adequate showing of corresponding harm to the public interest.[141]

In *Rentos v. Oce-Office Systems*,[142] the court held that transsexuals are protected from discrimination under state and city human rights laws, but not under Title VII.[143]

Finally, in *Jette v. Honey Farms Mini Market*,[144] an administrative body found that under Massachusetts law, discrimination against transsexuals because of their transsexuality is discrimination based on "sex."[145] It also held, however, that transsexuality is not a "sexual orientation" within the meaning of the state statute at issue.[146]

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138. *Id.* at *6 (footnote omitted).

139. *Id.* at *7.

140. In this regard, the court commented: "[b]ecause the school is empowered to discipline plaintiff for conduct for which any other student would be disciplined, the harm to the school in readmitting plaintiff is minimal. On the other hand, if plaintiff is barred from school, the potential harm to plaintiff's sense of self-worth and social development is irreparable." *Id.* at *8.

141. *Id.*

142. No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996).

143. *Id.* at *7–9. The court observed, "[c]ourts have faced great difficulty in conceptualizing claims for employment discrimination by transsexuals. As one commentator has noted, '[w]hile the law draws lines, a transsexual crosses lines.'" *Id.* at *6 (quoting Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner,* 5 TEMP. POL. & CIV. RTS. L. REV. 27, 27 (Fall 1995).

144. No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrim. Oct. 10, 2001).

145. *Id.* at *1.

146. *Id. See also* Millett v. Lutco, Inc., No. 98 BEM 3695, 2001 WL 1602800 (Mass. Comm'n Against Discrim. Oct. 10, 2001) (administrative holding that "transsexuality" is not a sexual orientation as the term is defined under state law).

ii. State Cases Refusing to Afford Protection to Transgender Individuals

In *Dobre v. National Railroad Passenger Corp*.,[147] discussed above, the court concluded that Title VII did not protect transsexuals from discrimination on the basis of their "transsexualism," and that Pennsylvania non-discrimination law should be similarly interpreted with regard to the definition of "sex."[148] In *Dobre*, the acts of discrimination were not alleged to be due to stereotypic concepts about women's abilities, or due to conditions common to women only. Thus, the court held that if the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become female, which in the court's view failed to state a claim. The court concluded that the term "sex" in the state law "was to be given its plain meaning."[149]

In *Conway v. City of Hartford*,[150] the court held that the state non-discrimination law does not prohibit discrimination against transsexuals.[151]

Finally, in *Underwood v. Archer Management Services, Inc*.,[152] the court held that transsexuality is not included in the definition of "sex" under the District of Columbia non-discrimination law.[153]

iii. Other State Law Decisions of Iinterest

Other decisions construing state law come to various conclusions that are of interest to this discussion. In *Back v. Hastings on the Hudson*,[154] for example, the court held that stereotyping the qualities of mothers is a form of gender discrimination unlawful under the Equal Protection Clause and state law applicable in that case.[155]

In *Goins v. West Group*,[156] the court held that the employer's designation of employee restroom use based on biological gender did not constitute sexual orientation-based discrimination in violation of state law.[157]

147. 850 F. Supp. 284 (E.D. Pa. 1993).

148. *Id.* at 286–88.

149. *Id.* at 288.

150. No. CV 950553003, 1997 WL 78585 (Conn. Super. Ct. Feb. 4, 1997).

151. *Id.* at *7.

152. 857 F. Supp. 96 (D.D.C. 1994).

153. *Id.* at 97–99.

154. 365 F.3d 107 (2d Cir. 2004).

155. *Id.* The court observed that *Price Waterhouse* suggested that the question of what constitutes a gender-based stereotype "must be answered in the particular context in which it arises, and without undue formalization," and that stereotyped remarks can be evidence that gender played a part in an adverse employment decision. *Id.* at 120. It also noted that discrimination based on gender, once proven, can only be tolerated if the state provides "an 'exceedingly persuasive justification' for the rule or practice." *Id.* at 118 (quoting United States v. Virginia, 518 U.S. 515, 524 (1996)).

156. 635 N.W.2d 717 (Minn. 2001).

157. *Id.* The employee self-identified as transgender, and state law defined sexual orientation to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." *Id.* at 722.

Finally, in *Nichols v. Azteca Restaurant Enterprises, Inc*.,[158] the court held that harassment based on the perception that the plaintiff was effeminate, and thus did not conform to a male stereotype, was sexual harassment "because of sex" in violation of Title VII and Washington state law.[159]

iv. Summary

In sum, courts construing FEPAs face challenges similar to those arising under Title VII, and outcomes are likewise unpredictable. Under some state nondiscrimination laws, additional classes of persons are covered, causing associated results. Under others, such as those discussed *infra* regarding disability discrimination, certain courts have found protection for persons diagnosed with gender identity disorder based on state legislative decisions not to import otherwise relevant exclusions found in federal disability laws.

Although some commentators discern a "gradual progression" at the state level toward recognition of transgender rights,[160] change-advocates express frustration. As one observed:

> [C]ourts do not simply identify transgenderism as a distinct category from sexual orientation and operate consistently on this premise. Instead, the categories of transgenderism and sexual orientation are conflated when doing so serves to exclude transgender people from protection and are distinguished when doing so serves to exclude transgender people from protection. This produces what Currah and Minter call the "double bind." For example, in jurisdictions that do not proscribe discrimination on the basis of sexual orientation, courts have stressed the similarity of gay and transgender people in order to rely on decisions that have excluded lesbians and gay men from protection under Title VII as a rationale for also excluding transgender people. Yet, simultaneously, courts in jurisdictions that protect gays and lesbians have held that transgenderism is a distinct category from sexual orientation and have dismissed sexual orientation claims by transgender plaintiffs on that basis.[161]

As these comments suggest, change-advocates often perceive the results the courts reach as value-laden in resolving cases involving transgender issues. Regardless of the cause of the differential outcomes, the nature of the issues tends to generate unusually strident judicial opinions.

e. Title IX

Courts examining claims under Title IX of the Education Amendments of

158. 256 F.3d 864 (9th Cir. 2001) (overruling DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979)).

159. *Id.* at 874–75.

160. *See, e.g.*, Levy, *supra* note 23, at 142 (noting that transgender litigants are "resorting to state law for relief").

161. Lloyd, *supra* note 31, at 191–92.

1972[162] have applied Title VII analysis, including that of *Price Waterhouse*, when examining sex discrimination sex-stereotyping claims.

In *Howell v. North Central College*,[163] the court noted that differentiating between discrimination or harassment motivated by gender stereotyping—which is actionable—and discrimination or harassment motivated by sexual orientation—which is not—requires making "not always obvious" distinctions.[164] In fact, the court stated:

> filtering discrimination based on failure to adhere to gender stereotypes and discrimination based on sexual orientation renders the picture of what might constitute a claim for gender stereotyping anything but focused. Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.[165]

Applying Title VII analysis to a Title IX-based claim, the court in *Montgomery v. School Dist. No. 709*,[166] held that harassment based on stereotyped notions of masculinity constituted sex discrimination prohibited by Title IX, even though Title IX does not protect against sexual orientation discrimination.[167] The court also noted that "[u]nder *Oncale* the principles established in *Price Waterhouse* apply with equal force when the individual engaging in discriminatory conduct is of the same sex as the claimant."[168]

The case of *Miles v. New York University*[169] involved a student admitted to the university as female, but who was a male-to-female transsexual in the process of becoming female at the time of a professor's alleged sexual harassment.[170] The court found that the student was subject to discrimination because of sex, and thus protected under Title IX.[171] In so ruling, it distinguished cases standing for the proposition that Title VII "and hence Title IX" did not prohibit discriminatory acts

162. 20 U.S.C. § 1681 (2000). It should be noted that the Title IX sexual harassment guidance document promulgated by the Department of Education's Office for Civil Rights, while not addressing the topic at length, observes that "it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity." U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES v, 3 n.16 (2001), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).

163. 320 F. Supp. 2d 717 (N.D. Ill. 2004).

164. *Id.* at 722.

165. *Id.* at 723 (citing Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065 n.5 (7th Cir. 2003)). The court ultimately declined to find either that gender stereotyping sexual harassment is actionable or that a discrimination claim existed based on the facts alleged. *Id.* at 723–24.

166. 109 F. Supp. 2d 1081 (D. Minn. 2000).

167. *Id.* at 1092.

168. *Id.*

169. 979 F. Supp. 248 (S.D.N.Y. 1997).

170. *Id.* at 248.

171. *Id.* at 250.

against persons transitioning from one gender to another.[172] The court stated:

> The simple facts are, as the university was forced to admit, that Professor Eisen was engaged in indefensible sexual conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the university, plaintiff was not a biological female.[173]

2. Section 1983 Actions and Miscellaneous Constitutional Law Claims

a. Equal Protection

In addition to asserting claims under Titles VII and IX, plaintiffs have filed actions under 42 U.S.C. § 1983, claiming protection under various amendments to the U.S. Constitution, especially the Fourteenth Amendment's Equal Protection Clause.

As the U.S. Supreme Court has stated, "[t]he guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity."[174] A threshold issue in equal protection cases is the level of scrutiny applicable to persons in the class in which the plaintiffs claim membership. To date, courts generally have been unwilling to identify transsexuals as a "suspect class" for purposes of applying heightened judicial scrutiny to the challenged action.[175] This conclusion results in the application of the state action-deferential "rational relationship" test.[176]

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172. *Id.* at 249.

173. *Id. See also* Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869 (N.D. Ohio 2003) (holding that a jury could determine that harassment based on perceived sexual orientation and defendants' failure to punish it was motivated by plaintiff's sex, within scope of Title IX); Snelling v. Fall Mountain Reg'l Sch. Dist., No. Civ. 99-448-JD, 2001 WL 276975 (D.N.H. Mar. 21, 2001) (holding actionable under Title IX allegations that perpetrators' harassment arose out of sex-based stereotypes of masculinity); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (holding that allegation of harassment by classmates was due to his perceived homosexuality was sufficient to satisfy "sexual harassment" element of student's Title IX claim).

174. Harris v. McRae, 448 U.S. 297, 322 (1980). *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION § 3.3.2.7 (3d ed. 1995).

175. *See, e.g.*, Gomez v. Maass, 918 F.2d 181 (9th Cir. 1990) (unpublished table decision); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663–64 (9th Cir. 1977); *In Re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Rush v. Johnson, 565 F. Supp. 856, 868–69 (N.D. Ga. 1983); Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981). Also see generally the discussion in Ohle, *supra* note 15, 276–77, and the extensive discussion of related issues in a case involving same-sex marriage, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). Indicia for suspect classification are identified in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

176. *See*, *e.g.*, *Holloway*, 566 F.2d at 663–64; *Rush*, 565 F. Supp. at 868–69. Since these decisions precede *Price Waterhouse*, it is unclear whether the evolution of sex-stereotyping into a form of sex discrimination places behavior and appearances disputes into the realm of the

Moreover, courts have consistently held that gays and lesbians do not constitute a suspect or quasi-suspect group for purposes of equal protection analysis, although state actors may not disadvantage persons on the basis of such status for reasons lacking a rational relationship to legitimate governmental aims.[177]

Cases of more recent vintage see courts integrating *Price Waterhouse* principles into their analysis of equal protection violation claims. In *Zalewska v. County of Sullivan*,[178] a female employee challenged on various grounds a transit authority rule prohibiting the wearing of skirts.[179] The court began its analysis by noting that "[s]tate action is impermissible if it perpetuates old gender stereotypes by the disparate treatment of similarly situated men and women based on sex."[180] The plaintiff argued that the county was subjecting her to discrimination by forcing her to "dress more masculinely" in a way that was demeaning to women.[181] In response, the court observed: "[a]sking us to accept the proposition that a woman wearing pants dresses more masculinely requires a perpetuation of the very stereotypes that courts are supposed to suppress."[182] Ultimately, the court declined to find in the county's policy, the kind of purposeful discrimination that would trigger the Equal Protection Clause.[183]

The *Kastl* decision, discussed above, involved a challenge by a plaintiff to the defendant community college's requirement that she use the men's restroom until she provided proof that she had completed sex reassignment surgery.[184] The court

intermediate scrutiny otherwise applied to "sex." *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (scrutinizing classifications on the basis of sex closely); Craig v. Boren, 429 U.S. 190, 97 (1976) (applying close scrutiny to sex-based classifications); s*ee also infra* text accompanying notes 186–194.

177. *See* Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004). *See also* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002) (holding that discrimination against homosexuals will only constitute violation of equal protection if it lacks a rational basis); *Kandu*, 315 B.R. 123 (holding that homosexuals are not a suspect or quasi-suspect class); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183 (D. Wyo. 2004) (holding that inmate of ambiguous gender was not a member of a quasi-suspect class); Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319 (E.D.N.Y. 2002) (holding that discrimination based on sexual orientation is actionable under Equal Protection Clause); Zavatsky v. Anderson, 130 F. Supp. 2d 349 (D. Conn. 2001) (holding that homosexuals are not a suspect class and are entitled only to rational basis scrutiny).

178. 316 F.3d 314 (2d Cir. 2003).

179. *Id.* at 317–18.

180. *Id.* at 323.

181. *Id.*

182. *Id.*

183. *Id.* In conjunction with its ruling, the court acknowledged that the "county's policy of disallowing skirts will affect women more than men because women will be prohibited from wearing an article of clothing they might choose to wear while men will not." *Id.* [S]uch incidental burden alone [did] not[, however, in the court's view,] trigger a heightened level of scrutiny where . . . the policy [was] gender-neutral." *Id.* Rather, the court stated, "In the absence of discriminatory intent, gender-neutral classifications that burden one sex more than the other are subject only to rational basis review." *Id.* The court noted that "[I]t [was] undisputed that the county's policy [was] gender-neutral," and that plaintiff had not alleged discriminatory intent. Thus, the court concluded, "the county's rule [was] subject only to rational basis review," and held "that the dress code did not violate [plaintiff's] right to equal protection of the law." *Id.*

184. Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PhX-SRB, 2004 WL

initially noted that the plaintiff had predicated her equal protection claim on the theory that she was a biological woman who did not conform to the defendant's sex stereotypes; she had *not* asserted that her status as a transsexual placed her within a protected class.[185]

Noting that classifications on the basis of sex are closely scrutinized, the *Kastl* court stated that "[w]hether discrimination on the basis of nonconformity with sex stereotypes constitutes discrimination on the basis of sex for the purposes of equal protection [analysis] is an open question."[186] The court observed that, while previous cases held that transsexuals are not a protected class, more recent jurisprudence recognizes that medical science may now support a finding that transsexuality is an "immutable characteristic determined solely by the accident of birth," in which case it would be a "suspect" classification subject to the highest level of scrutiny.[187]

While the *Kastl* court left open the question of whether transsexuals were entitled to protected class status, it nonetheless found that, "regardless of whether [the] defendant discriminated against [the p]laintiff on the basis of her sex, its actions . . . created a classification which must be rationally related to a legitimate state interest in order to survive judicial scrutiny."[188] While agreeing that the "[d]efendant possesse[d] a legitimate interest in protecting the privacy and safety of its patrons, the [c]ourt [ultimately] fail[ed] to see . . . how . . . implementation of that policy in a manner which single[d] out nonconforming individuals, including transsexuals, for a greater intrusion upon their privacy [was] rationally related to such an interest."[189]

The *Kastl* court further stated that, although government action may be upheld if its connection to a legitimate interest is tenuous or the action is unwise, where "'the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.'"[190] The plaintiff had alleged that the disputed restroom policy was created specifically in response to complaints about transsexuals; only she and another transsexual were required to provide proof of biological sex in order to use the women's restrooms; she was instructed to use the men's restroom if she could not or would not provide evidence that she lacked male genitalia; and her proffer of her state-issued identification as evidence of her biological sex was rejected.[191] "Contrary to the [d]efendant's suggestion that the justification for the policy was 'readily apparent,'" the court could only identify the following possible justifications: "1) transsexuals posed a greater risk to minors' and others' safety than any other group; 2) a biological woman can never have lived or presented herself as a man; and 3) the presence of a biological woman with male genitalia invades the privacy and/or threatens the safety of other

2008954, at *8 (D. Ariz. June 3, 2004).

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 632–33 (1996)).
191. *Id.*

women."[192] The court characterized each of these assumptions as "baseless."[193] Therefore, the court concluded that the "[p]laintiff ha[d] stated facts which overcame the presumption of rationality applied to government classifications, and her . . . equal protection claim survives the [d]efendant's [m]otion to [d]ismiss."[194]

Addressing a § 1983 claim asserting an Equal Protection Clause violation, the court in *Schroeder ex rel. Schroeder v. Maumee Board of Education*,[195] ruled that "[i]ndividuals who are homosexual or who are perceived to be homosexual, and who are discriminated against on that basis, are members of an identifiable, protected class."[196] The plaintiff was thus required to "show that school administrators discriminated against him 'because of his membership in this particular class, not merely that he was treated unfairly as an individual,'"[197] and that the "officials' discriminatory conduct had no 'rational relationship to a legitimate governmental purpose.'"[198] The court stated, however, that "[t]he desire to 'effectuate one's animus' against homosexuals can never be a legitimate governmental purpose, [and that] . . . state action based on that animus alone violates the Equal Protection Clause."[199]

In *Montgomery v. Independent School District No. 709*,[200] a sexual harassment case, the court discussed the extent to which the Equal Protection Clause protects persons of a particular sexual orientation or perceived sexual orientation.[201] The court held that the Equal Protection Clause "protects all persons, whether they can prove membership in a specially protected class or not" although the nature of the class membership will affect the level of scrutiny relative to governmental classifications.[202] In this respect, it noted that "the Eighth Circuit had held that discrimination based on homosexuality is subject only to rational basis review,"[203] but also cited *Romer v. Evans* for the proposition that even if legislation does not target a suspect class, it may fail even the most permissive level of "rational basis" review.[204]

Other cases discussed above include some analysis of equal protection claims. For example, in *Smith v. City of Salem*, the Sixth Circuit held that the plaintiff (a male-to-female transsexual subjected to disparate treatment based on gender non-

192. *Id.*

193. *Id.*

194. *Id.*

195. 296 F. Supp. 2d 869 (N.D. Ohio 2003).

196. *Id.* at 874.

197. *Id.* (quoting Bass v. Robinson, 167 F.3d 1041, 1050 (6th Cir. 1999)).

198. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 635 (1996)). The plaintiff's burden of proof also included a showing that defendants intentionally discriminated against him or acted with deliberate indifference. *Id.*

199. *Id.* (quoting Stemler v. City of Florence, 126 F.3d 856, 873–74 (6th Cir. 1997)).

200. 109 F. Supp. 2d 1081 (D. Minn. 2000).

201. *Id.* at 1088–89.

202. *Id.* at 1088.

203. *Id.* at 1089 (citing Richenberg v. Perry, 97 F.3d 256, 260–61 (8th Cir. 1996)).

204. *Id.* *Romer* held that a Colorado law prohibiting any state legislative, executive, or judicial act designed to protect individuals based on their homosexual or bisexual orientation violated the Equal Protection Clause. 517 U.S. 620, 635–36 (1996).

conforming behavior and appearance) stated a sex discrimination claim grounded in the Equal Protection Clause.[205] The *Smith* court relied upon the decision in *Back v. Hastings on Hudson Union Free School District*, in which the Second Circuit held that stereotypical remarks about the incompatability of motherhood and employment may be evidence that gender played an unlawful role in an employment decision, in violation of equal protection principles.[206]

b. Other Constitutional Grounds

Claims associated with gender identity and expression issues are also being advanced on other constitutional bases,[207] including freedom of expression, liberty interests, and rights to privacy.[208]

In the *Yunits* case addressed earlier, a transgender student-plaintiff challenging dress restrictions asserted violations of her rights to free expression under state law.[209] Considering the request for an injunction, the court determined that the plaintiff was likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she was expressing her identification with that gender.[210] In this connection, the court observed that the plaintiff's ability to express herself and her gender identity through dress was important to her health and well-being, as attested to by her treating therapist; thus, her expression was not merely a "personal preference but a necessary symbol of

205. 378 F.3d 566, 577 (6th Cir. 2004).

206. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117–21 (2d Cir. 2004).

207. There is a large body of cases involving prisoners' rights, including claimed violations of the Eighth Amendment to the U.S. Constitution, and rights to privacy, which are beyond the scope of this article. *See generally* Ohle, *supra* note 15, at 258–61; Minter, *supra* note 25, § VI. *See also*, Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (involving a pre-operative male-to-female transsexual); Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) (involving a prisoner seeking estrogen therapy for gender dysphoria); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183 (D. Wyo. 2004) (involving a prisoner with ambiguous gender). Also beyond the scope of this article are immigration cases involving transgender persons; however, the status of the law, and a recent decision of significance, are discussed in Minter, *supra* note 25, § VIII. *See, e.g.*, Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000) (holding transgender youth entitled to asylum); Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237 (2005); Rachel D. Lorenz, Note, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. REV. 523 (2005). Another universe of disputes and cases beyond the scope of this article are those relating to marriage and parental rights. *See* Minter, *supra* note 25, § III.

208. In *Cruzan*, discussed above, the plaintiff alleged that the school system's decision to allow her transgender co-employee to use the restroom associated with her post-transition gender constituted religious discrimination against the plaintiff. The court granted summary judgment to the defendant on this claim, holding that the plaintiff neither established notice to the school district nor an adverse employment action. Cruzan v. Minneapolis Pub. Sch. Sys., 165 F. Supp. 2d 964, 967 (D. Minn. 2001).

209. Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

210. *Id.* at *3.

her very identity."[211] Further, the court determined that the plaintiff had a likelihood of fulfilling the *Texas v. Johnson* test[212] by showing that her expressive conduct conveyed a "particularized message understood by others," and that the defendants' actions were meant to suppress that speech.[213]

Turning to the issue of whether the plaintiff's speech "materially and substantially interfere[d] with the work of the school,"[214] the *Yunits* court stated:

> The line between expression and flagrant behavior can blur, thereby rendering this case difficult for the court. It seems, however, that expression of gender identity through dress can be divorced from conduct in school that warrants punishment, regardless of the gender or gender identity of the offender. Therefore, a school should not be allowed to bar or discipline a student because of gender-identified dress but should be permitted to ban clothing that would be inappropriate if worn by any student, such as a theatrical costume, and to punish conduct that would be deemed offensive if committed by any student, such as harassing, threatening, or obscene behavior.[215]

The court also ruled that the plaintiff was likely to prevail on her "liberty interest" claim under Massachusetts law, noting that a liberty interest under the First Amendment has been recognized to protect a male student's right to wear his hair as he wishes.[216]

The *Zalewska* decision, discussed earlier, held that a transit regulation prohibiting the wearing of skirts did not implicate the type of expressive conduct required to invoke the free speech clause.[217] The court stated:

> We realize that for Zalewska—as for most people—clothing and personal appearance are important forms of self-expression. For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles, flamboyancy, gender identity, and social status. From the nun's habit to the judge's robes, clothing may often tell something about the person so garbed.

211. *Id.*

212. *Texas v. Johnson* was a flag-burning case in which the Court held that the government may not prohibit the expression of an idea simply because society finds the idea disagreeable or offensive. 491 U.S. 397 (1989).

213. *Yunits*, 2000 WL 33162199, at *4.

214. *Id.* (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

215. *Id.* at *5 (citing Bethel v. Fraser, 478 U.S. 675 (1986)). The court also rejected the defendants' citation of instances where the principal became aware of threats by students to beat up the "boy who dressed like a girl" to support the notion that the plaintiff's dress alone was disruptive, stating that, to rule in the defendants' favor in this regard would grant contentious students a "heckler's veto." *Id.* at *5 (citing Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980)).

216. *Id.* at * 6 (citing Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970)).

217. Zalewska v. County of Sullivan, 316 F.3d 314, 319 (quoting United States v. O'Brien, 391 U.S. 367 (1968)).

> Yet, the fact that something is in some way communicative does not automatically afford it constitutional protection. For purposes of the First Amendment, the Supreme Court has repeatedly rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[218]

Observing that the message plaintiff intended to convey was not a specific, particularized message, but rather "a broad statement of cultural values," the court said that action attempting to communicate such a "vague and unfocused" message is afforded minimal if any First Amendment protection.[219] It went on, however, to recognize the existence of "contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection."[220] Ultimately, the court concluded that the plaintiff's activity did not have the legally requisite characteristics.[221]

Plaintiffs have also alleged infringement of privacy interests. In *DePiano v. Atlantic County*,[222] discussed above, the court denied the defendants' motion for summary judgment relative to their dissemination of photographs of the plaintiff, a correctional officer, dressed in women's clothing.[223]

In addition, *Kastl* examined a claimed violation of rights to privacy in relation to the defendant's restroom use policy; the court ruled that the defendant's demand for information regarding the state of the plaintiff's genitalia was neither necessary nor narrowly tailored to maintaining sex-based restroom designations (as to which the employer argued it had a compelling interest to preserve the safety and privacy of all users), reasoning that, were the information truly necessary to serve the employer's objectives, the employer would have sought information from each person prior to granting restroom access.[224]

3. Medical Treatment and Disability Issues

This article earlier noted that transsexualism is recognized as a psychiatric disorder (known as "gender identity disorder" or "gender dysphoria" (hereinafter "transsexualism")), attention to which may involve medical as well as psychiatric

218. *Id.*

219. *Id.* (quoting E. Hartford Educ. Ass'n v. Bd. of Educ., 562 F.2d 838, 858 (2d Cir. 1977)).

220. *Id.* at 320 (citing *Yunits*, 2000 WL 33162199). The court also ruled that plaintiff's claimed liberty interest in appearance did not implicate a fundamental right, thus subjecting the transit rule to a "rational basis" standard of review. It found that the county had a rational basis to believe that skirts posed a safety concern, and that safety, professionalism, and a positive public image were legitimate county interests. *Id.* at 321–22.

221. *Id.* at 320–21.

222. No. Civ. 02-5441 RBK, 2005 WL 2143972, at *3 (D.N.J. Sept. 2, 2005).

223. In so ruling, the court cited *Powell v. Shriver*, 175 F.3d 107, 111 (2d Cir. 1999), in which the court held that the "excruciatingly private and intimate nature of transsexualism, for persons who wish privacy in the matter, is really beyond debate." *DePiano*, 2005 WL 2143972, at *12.

224. Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *6 (D. Ariz. June 3, 2004).

treatment.[225] Nevertheless, the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 each expressly exclude "transsexualism" and gender identity disorders not resulting from physical impairments.[226]

Both the inclusion of transsexualism as a psychiatric disorder in the DSM and its exclusion from protection against disability discrimination under federal law and some state statutes are controversial.[227] Some advocates argue that disability discrimination protection should not be sought by transsexuals on the ground that characterization of the status as a disability is stigmatizing and results in its "medicalization" (thus requiring, to obtain protection, access to health care and a diagnosis, and potentially covering only transsexuals as a subgroup of transgender people).[228]

Other advocates, however, maintain that transsexuals should use all available avenues for the protection of their rights, disability laws should not carry a stigma, and transsexuals should not be concerned about association with another class of persons who are "different from a mythical norm."[229] In the latter camp are those incensed by transsexuals being excluded under the ADA along with felons and other wrongdoers.[230]

Commenting on these issues, one writer states:

> [C]onceptualizing transgenderism as a mental disability and relying on the respectability of medicine in order to gain civil rights protection comes at a cost. In particular, the strategy almost entirely excludes people . . . who either cannot afford to obtain a psychiatric diagnosis and "treatment," or who chose not to for personal or political reasons. Disability laws privilege people who can afford to buy the legal identity required for protection. This has particularly devastating consequences for low-income transgender people, who may comprise the majority of transgender people.
>
> Arguably, the disability model also pathologizes transgender identities and dampens consciousness of transgenderism and the normalizing regime as a political issue. Courts ambivalent about the naturalness and equal humanity of transgender people seem to find the language of disability and medicine less foreign and unpalatable than identifying the discrimination transgender people experience as a form

225. *See* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 25.

226. 42 U.S.C. § 12211(b)(1) (2000) (ADA); 29 U.S.C. § 705(20)(F)(i) (2000) (Rehabilitation Act).

227. *See, e.g.*, Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 104–107 (2002).

228. As Levy states, "[m]ost transgenders have come to terms with the internal clash between their bodies and their gender identities. Transgenders or gender variants are less troubled by that contradiction and therefore, do not often show up in doctors' offices for diagnosis and treatment." Levy, *supra* note 23, at 165.

229. Vade, *supra* note 18, at 295 n.143.

230. Among the excluded conditions are pedophilia, exhibitionism, and voyeurism. One writer observes that these exclusions "[create] the false implication that gender identity disorders involve criminal activity and are thereby unworthy of protection." Levy, *supra* note 23, at 150.

of sex discrimination.[231]

Another observer comments:

> The trans-population exists on a wide spectrum. On one end are those individuals who completely reassign their sex through [sex reassignment surgery], while on the other end of the spectrum are individuals who simply appear too feminine or masculine with respect to their anatomical sex. It is permissible, under certain circumstances, to argue disability discrimination for those trans-people who qualify due to their physical circumstances. However, it is detrimental and demeaning to advocate for the placement of the entire transgender population among disabled people. It is unlikely the majority of trans-people would even qualify. It is also questionable whether trans-advocates would desire the handicap classification; especially those who consider transgender discrimination to overlap sexual orientation discrimination. Would a gay man or a lesbian consider their circumstances a handicap?
>
> Unless a trans-plaintiff willingly accepts the "disability" label and meets certain criteria within the statute, a wide majority of trans-plaintiffs will be unquestionably denied relief under a disability discrimination law. Trans-people need consistency, and arguments under the disability class are too unpredictable.[232]

With this backdrop in mind, decisions interpreting federal law, other aspects of which are discussed above, include *Johnson v. Fresh Mark, Inc*.,[233] in which the court affirmed a ruling that the discharge of a pre-surgical transsexual woman after she refused to use men's restrooms and refused to return to work did not violate the ADA.[234]

In *Kastl*, the court assumed *arguendo* that the plaintiff's gender identity disorder was the result of a physical impairment and would fall within ADA coverage, but concluded that the plaintiff failed to allege that her disorder substantially limited at least one major life activity.[235]

In *Doe v. United Consumer Financial Services*,[236] the court rejected the plaintiff's ADA claim because the ADA plainly states that transsexualism is excluded from the definition of "disability" no matter how it is characterized,

231. Lloyd, *supra* note 31, at 185–86 (footnotes omitted).

232. Levy, *supra* note 23, at 165–66.

233. 337 F. Supp. 2d 996 (N.D. Ohio 2003).

234. *Id.* at 1001–02. The court rejected an argument that gender identity disorder results from a physical impairment and should thus not be excluded, finding that it is an excluded condition regardless of characterization. The court also found that the plaintiff failed to state a claim because she did not specify what major life activities were affected by her condition. Regarding an argument that the plaintiff had a protected disability as an intersexed individual, the court stated that the record lacked adequate evidence of notice of the condition to the employer. *Id.*

235. Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *6 (D. Ariz. June 3, 2004).

236. No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio 2001).

whether as a physical impairment, a mental disorder, or some combination of both.[237]

Finally, in *Rentos v. Oce-Office Systems*, [238] the court held that the ADA did not protect a postoperative transsexual from discrimination.[239]

Decisions construing state disability discrimination laws[240] include *Doe v. Bell*,[241] in which the court held that a policy that barred residents of an all-male foster care facility from wearing skirts or dresses did not discriminate against a resident with gender identity disorder, reasoning that the policy was neutral on its face and applied to all persons at the facility who wished to wear feminine clothing, regardless of whether they had the disorder.[242]

In *Enriquez v. West Jersey Health Systems*,[243] the court held that gender dysphoria is a handicap under New Jersey's non-discrimination law.[244]

In *Lie v. Sky Publishing Corp.*,[245] the court found "compelling" the fact that the Massachusetts legislature declined to amend the state disability nondiscrimination law to adopt the ADA's exclusion of protection for individuals with gender identity disorders, and thus held that the plaintiff had established a *prima facie* case of disability discrimination, including substantial limitation of major life activities.[246]

In *Conway v. City of Hartford*,[247] the court held that transsexualism is not a physical disability within the scope of Connecticut's disability discrimination law, but denied the defendant's motion to strike a claim of disability discrimination on theory that gender dysphoria is a "mental disorder."[248]

In *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*,[249] the court dismissed disability discrimination claims for failure to allege that transsexualism affects any bodily function or limits major life activities.[250]

237. *Id.* at *6.

238. No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. 1996).

239. *Id.* at *8.

240. For discussion of state disability discrimination laws, see Lloyd, *supra* note 31, at 182–86, and Minter, *supra* note 25, § II[1][b].

241. 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).

242. *Id.* at 851.

243. 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

244. *Id.* at 376.

245. No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. 2002).

246. *Id.* at *6–7. *See also* Jette v. Honey Farms Mini Mkt., No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrim. Oct. 10, 2001) (finding that transsexuality is not explicitly excluded from coverage under Massachusetts law, and that because there was no evident legislative intent to exclude it, and legislature was aware of the federal exclusions, the legislature must have intended to include it). *But see* Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *7 (Mass. Super. Ct. Oct. 11, 2000) (finding that analysis of federal disability laws was instructive due to the absence of authority to support the notion that gender identity disorder was a protected disability under Massachusetts law).

247. No. CV 950553003, 1997 WL 78585 (Conn. Super. Ct. 1997).

248. *Id.* at *4–5.

249. 694 A.2d 1134 (Pa. Commw. Ct. 1997).

250. *Id.* at 1139.

Finally, in *Dobre*, discussed above, the court held that transsexualism did not qualify as a disability under Pennsylvania law because it was not a condition that was "inherently prone" to limitation of major life activities, and therefore the plaintiff could not state a claim that she was disabled or "perceived as" disabled on that basis.[251]

In sum, due to their express exclusions, federal disability discrimination laws are uniformly interpreted not to afford protection to transgender persons, including transsexuals. The outcome under state laws vary, depending upon either the language of the statutes or state court or administrative agency inferences from the absence of express exclusions and/or other inferences of legislative intent.

A review of health insurance coverage available for treatment of transgender medical issues, whether under private insurance or Medicaid, is beyond the scope of this article. In general, however, the literature suggests that insurance carriers typically exclude coverage for procedures relating to medical treatment of transgender health issues, although some employers offer health care plans that are more inclusive.[252] There is also a substantial line of cases holding that per se exclusions of surgical procedures associated with sex reassignment are unlawful.[253]

II. LEGISLATIVE TRENDS

As noted earlier, federal courts often cite the failure of attempts to amend Title VII to include sexual orientation as evidence of legislative intent to exclude gays and lesbians as protected classes of persons.[254] A significant initiative of recent vintage is the proposed Employment Non-Discrimination Act, which would amend Title VII to prohibit workplace discrimination based on sexual orientation. One analyst notes that the bill would define sexual orientation as "homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived,"[255] thus protecting persons based on their sexual orientation—a status unrelated to a person's gender identity or gender expression. Thus, it would appear that transgender persons would be protected under the proposed legislation only if the basis of an employer's discrimination is its perception that the gender expression is, or is perceived to be, gay, lesbian, or bisexual—not due to an individual's transgender status. For this reason, transgender protection advocates wish to see the bill amended to include transgender persons as a protected class.[256]

251. Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 289–90 (E.D. Pa. 1993).

252. *See, e.g.*, Vade, *supra* note 13, at 269 & nn. 54–55; Ohle, *supra* note 8, at 261–63; Minter, *supra* note 20, § V.

253. See cases cited in Ohle, *supra* note 15, at 261 n.132; Minter, *supra* note 25, § V & n.49; *but see* Minter, *supra* note 25, § V at n.50.

254. One writer cites 1975 as the year in which efforts to amend the statute began. Courtney Joslin, *Protection for Lesbian, Gay, Bisexual and Transgender Employees Under Title VII of the 1964 Civil Rights Act*, 31 HUM. RTS. 14 (Summer 2004).

255. Coffey, *supra* note 18, at 180 (quoting Employment Non-Discrimination Act of 1999, H.R., 2355, 106th Cong. § 3(9) (1999)).

256. *See id.*; *see also* Ohle, *supra* note 15, at 241–43. For a discussion of a federal legislative initiative designed to address sexual orientation issues in schools, see Weiner, *supra*

State laws reflect several approaches to this set of issues.[257] A few states expressly prohibit discrimination on the basis of gender identity. Those that accord such protection variously do so as a matter of legislative drafting: some identify "gender identity" as a freestanding category; others list gender identity or transgender status as a subset under the definition of "sex" or "sexual orientation." Statutes that afford protection to transgender persons typically confine their scope to specific sectors of activity, such as fair employment and housing, foster care, public contracts, schools, public accommodations, access to credit, or housing and real property. A significant number of state statutes address hate crimes motivated by transgender status, and therein provide for enhanced sanctions.[258]

Unquestionably, the most active legislative realm is at the municipal level. Ordinances are being amended to include transgender persons under existing definitions or classifications; others establish a new category of protection on the basis of transgender status, transsexualism, or manifestations of "gender identity and expression."[259] The scope of such initiatives again varies; examples of affected activities include employment practices, rental housing and real estate, city facilities and services, educational institutions, business establishments and public accommodations, and credit transactions.

As might be inferred from earlier discussion, advocates for transgender status protection do not agree on the optimal legislative strategy. Some maintain that the proliferation of protected class categories fails "to get at the underlying structure of the discrimination," which derives from cultural norms and stereotypes.[260] As one

note 15, at 217–18.

257. Questions such as comity between the states, and state requirements for legalization of gender changes, are beyond the scope of this article. *See, e.g.*, Vade, *supra* note 18, at 271 n.62 (listing states requiring surgery to change gender marker on birth certificates); Flynn, *supra* note 24, at 418 & n.148 (noting courts that rule that post-operative transsexuals remain legally defined by their anatomical sex at birth); *see generally* Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819 (2005) (discussing constitutional implications of various approaches to determine legal sex).

258. For overviews and lists of state and local nondiscrimination laws relevant to these issues, see Minter, *supra* note 25, § II[3]–[6]; Coffey, *supra* note 18, at 168–69, 185–93; Levy, *supra* note 23, at 159–60 & nn.160–65; Lloyd, *supra* note 31, at 190–92 & nn.202–03; Vade, *supra* note 18, at 296 & nn.144–45; Dunson, *supra* note 15, at 486–94; and advocacy group websites such as the Transgender Law & Policy Institute, http://www.transgenderlaw.org (last visited Apr. 15, 2006) and those cited *infra*, notes 190 & 210.

259. For illustrative decisions addressing municipal ordinances, see, e.g., *Hartman v. City of Allentown*, 880 A.2d 737 (Pa. Commw. Ct. 2005) (challenging an ordinance prohibiting discrimination on basis of gender identity and sexual orientation); *Rentos v. Oce-Office Systems*, No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. 1996) (holding that transsexuals are protected from discrimination under city human rights laws); and *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (considering transsexual's rights under city administrative code). *See also* McGrath v. Toys "R" Us, Inc. 821 N.E.2d 579 (N.Y. 2004) (discussing attorney's fees award under New York City Human Rights Law); Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994) (concluding that transsexuality is not included in definition of "sex" for purposes of D.C. non-discrimination law).

260. Weiner, *supra* note 15, at 217. Weiner writes:

> [I]n schools, where gender norms have such power in molding gender identity, it is

commentator observes:

> Far from being outliers on the edge of civil rights advocacy, transgender rights cases promise to play a central role in advancing a broad movement for equality that encompasses the rights of women, gay men and lesbians, and gender variant persons within its scope. . . . By contesting the social and jurisprudential reliance on biological sex as the fixed marker of gender identity, trans litigation holds the potential to defuse the power of gender as a mechanism for discrimination."[261]

Based on judicial precedent, however, others argue that more generic protection, such as reliance on the terms "sex" or "gender," will continue to generate rulings that deem transgender status outside the scope of protected classifications.[262]

In sum, advocates seeking protection for transgender persons through the legislative process have pursued multiple avenues. Some seek expansion of existing classifications, such as sex, gender, or sexual orientation, to cover articulations of gender identity. Increasingly, state and local initiatives seek to establish a separate category of protection for "gender identity and expression," with definitional variations in those terms.[263] As discussed in the next section, paralleling those trends are efforts on the part of campus activists to amend college and university non-discrimination statements to include protection for "gender identity and expression" or a variant thereof.

III. IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

At last examination, the authors identified over fifty colleges and universities, both public and private, granting non-discrimination policy protection to gender identity or gender identity and expression.[264] Although some policy revisions are

> crucial to attack the whole system of sex/gender/sexual orientation inequalities, instead of just one piece of it, so as not to risk perpetuating that system and its inequalities indefinitely. While judges may be slow to interpret current law holistically, removing the urgency of doing so through sexual orientation-specific legislation would make advocacy for such interpretation virtually impossible.

Id. at 219. *See also*, Farrell, *supra* note 28, at 646 ("[C]ourts must recognize that the wrong of sex discrimination is that individuals are forced into gendered roles, and a remedy for sex discrimination must reach all instances in which gender norms and hierarchies are enforced against individuals who transgress them—including norms touching upon sexuality. Thus, aspects of individuals that we now delineate as gender or sexuality are inherently a part of sex.").

261. Flynn, *supra* note 24, at 419–20.

262. *See, e.g.*, Dunson, *supra* note 15, at 499–502 (suggesting that adding "gender identity" to existing anti-discrimination laws serves a dual purpose, explicitly to protect transgenders and explicitly to recognize the transgender community as a separate and identifiable class of people, not just a subset of the larger class of "gendered" people, i.e. every member of society); *see also* Levy, *supra* note 23, at 161–63 (finding that sexual orientation is inherently distinguishable from issues of gender identity).

263. *See generally* Coffey, *supra* note 18, at 186–87 (discussing non-discrimination legislation in San Francisco and Rhode Island).

264. Although the existence and status of policies should be verified with the respective institutions, see the list and hyperlinks accessible by means of the Gender Public Advocacy

responsive to changes in state or local law, overall these policy amendments represent a significant trend.

Some of the foreseeable practical implications of these developments—largely the province of administrators, and not legal counsel—are summarized below. From a legal perspective, whether policy amendments are made voluntarily or to comply with state or local legislation, college and university counsel will be asked to assess associated new liability exposure. This exposure may include not only additional bases for internal grievances, but contractual or quasi-contractual liability for failure to accord whatever protections are explicitly or implicitly promised by such amendments. Where institutional policies are amended in response to changes in ordinances or state laws, colleges and universities may also be called upon to respond in administrative or judicial proceedings to alleged civil rights violations.

This liability exposure may be avoidable if colleges and universities institute proactive measures conventionally effective in civil rights contexts. First, institutions can augment anti-discrimination and diversity training to address gender identity and expression—training that encompasses established *Price Waterhouse* principles as well as transgender issues. It is also important to establish comprehensive protocols for addressing the needs of employees and students who are in gender transition, as well as the needs of those who interact with such individuals, such as co-workers and fellow students.[265]

There are numerous practical implications of affording new protections through policy changes. Readily identifiable issues include the following:

Forms and Recordkeeping: Employees and students are routinely asked on institutional forms to identify themselves by name and "sex." Transgender persons may adopt a name different than their birth names, and may in fact transition during the period of their employment or enrollment. Colleges and universities may therefore wish to consider under what conditions institutional records and documents will (and can legally) be changed to reflect a person's gender self-identification.[266]

Coalition, http://www.gpac.org/youth/eeocampuses.html (last visited Apr. 29, 2006), and the Gender Equality National Index for Universities & Schools, http://www.gpac.org/genius (last visited Apr. 18, 2006). Another list is available through the Transgender Law & Policy Institute, http://www.transgenderlaw.org/college/index.htm (last visited Apr. 18, 2006).

265. *See infra* notes 196 & 210; *see also*, Esra A. Hudson & Laura T. Johnson, *Gender Identity Issues: Transgender, Transsexual, and Transitioning Employees*, paper presented at NACUA Spring CLE Workshop, San Francisco, Cal., Mar. 15–17, 2006. These protocols will ideally address issues including the primary point of contact, or case manager, responsible for assisting the transitioning employee or student; the schedule for implementing changes in the workplace or student life environment, including records change issues; any individualized accommodations; and available campus resources. *See* HUMAN RIGHTS CAMPAIGN FOUNDATION, TRANSGENDER ISSUES IN THE WORKPLACE: A TOOL FOR MANAGERS (2004), *available at* http://nmmstream.net/hrc/downloads/publications/tgtool.pdf. Although most change-advocates recommend engaging co-workers in some manner with respect to transitioning employees, colleges and universities must also be mindful of statutory and common law privacy interests in relation to medical treatment and status issues. *See id.* at 17 (Policy Recommendations: Ensure Employee Privacy).

266. See *supra* note 257, regarding state laws and birth name changes associated with

Health Insurance and Medical Treatment: As noted above, many private insurance plans exclude coverage for surgical and/or medical treatment related to sexual reassignment.[267] Consideration should be given to the implications of the coverage of existing plans in light of possible claims of entitlement under newly applicable law or as a quasi-contractual matter under a revised non-discrimination policy statement. Administrators may also wish to explore, as a business decision, whether to seek to expand plan coverage where insurance carriers and plan administrators are willing to do so as a matter of contract negotiation.[268]

As to medical treatment, one advocacy organization notes that some colleges and universities are beginning to require or strongly encourage health and counseling center staff to undergo training on transgender issues. In addition, some centers are instituting options described elsewhere in this section, such as private, gender-neutral restrooms and changing rooms, and use of preferred names on medical records. At least one university also offers women's health examinations outside of the women's health services facility.[269]

Restrooms: Employers and the courts seem especially to struggle with questions involving restroom issues associated with transgender persons.[270] Transgender employees and students may be subjected to harassment or violence when using restrooms that conform to their gender identity and its expression but not to their ostensible appearance or physiology. Non-transgender employees and students may experience discomfort sharing such facilities with transgender individuals.[271] Although requiring transgender persons to utilize restrooms

elective sexual reassignment, as well as issues relating to full faith and credit between the states. Regarding approaches in use at several colleges and universities, see description in Transgender Law & Policy Inst., Ways that Colleges and Universities Meet the Needs of Transgender Students, http://www.transgenderlaw.org/college/guidelines.htm (last visited Apr. 29, 2006). *See also* Hudson & Johnson, *supra* note 265.

267. *See supra* note 252 and accompanying text.

268. Coverage issues include, without limitation, psychotherapy, hormone therapy, cosmetic and appearance treatments (e.g., voice therapy, electrolysis), and gender reassignment surgery.

269. See description in Transgender Law & Policy Institute, *supra* note 266.

270. Transgender advocates commonly recommend that employers/schools allow persons to use the restroom appropriate to their gender identity (and not require medical verification of the applicable "sex" post-transition, which may constitute an invasion of privacy if not harassment). However, litigation and anecdotal evidence suggest that this approach does not always protect the safety of such persons or allay complaints from co-workers or fellow students. Advocates also recommend that plans for new construction include gender-neutral, single-stall restrooms, and, where appropriate, private changing facilities and single-person showers. *See generally* Lisa Mottet, *Access to Gender-Appropriate Bathrooms: A Frustrating Diversion on the Path to Transgender Equality*, 4 GEO. J. GENDER & L. 739 (2003); Vade, *supra* note 18, at 304 nn.205–06 (citing Jenifer M. Ross-Amato, *Transgender Employees and Restroom Designation*—Goins v. West Group, Inc., 29 WM. MITCHELL L. REV. 569, 588–90 (2002); CURRAH & MINTER, *supra* note 23, at 58–60.

271. *See, e.g.*, Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410, 1421 (N.D. Ill. 1984) (rejecting female washroom attendant's claim of sex discrimination following employer's denial of her application for men's room attendant position, citing "fundamental concern" over exposure of one's body in presence of member of opposite sex); Brooks v. ACF Indus., Inc., 537 F. Supp. 1122, 1133 (S.D. W. Va. 1982) (holding, on similar rationale, that male gender was a *bona fide* occupational qualification for position of janitor in men's bathhouses). Some

allocated to disabled persons creates its own controversies, institutions may wish to consider designating certain restrooms unisex and/or single-occupancy.[272]

There are several reported decisions addressing restroom issues, but general legal principles have yet to emerge. In *Hispanic AIDS Forum v. Estate of Bruno*,[273] the court held that the plaintiff failed to state a claim on behalf of its transgender clients under state and city human rights laws, reasoning that such individuals were not selectively excluded from bathrooms, but rather were excluded from certain bathrooms—as were all tenants—based on their biological sex.[274] The court cited *Goins*, *infra*, as "instructive" for the proposition that the defendants' designation of restroom use, applied uniformly on the basis of biological gender (rather than biological self-image), was not discrimination, although the court implied that selective exclusion of transgender individuals might trigger one or both discrimination laws under review.[275]

The *Sturchio v. Ridge* case, discussed above, involved a U.S. Border Patrol employee who asserted that she had been subjected to a hostile workplace in violation of Title VII. The court declined to find a discriminatory hostile or sex-stereotyping work environment where, inter alia, the defendant required the plaintiff to use the men's restroom where unisex restrooms were not available.[276]

In *Kastl*,[277] discussed at length above, the court held that an allegation that the employer violated Title VII by requiring a biological female believed to possess stereotypically male traits to provide proof of genitalia or face consignment to the men's restroom stated a claim.[278]

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transgender advocates suggest that an objecting co-worker, and not the transgender employee, be offered the use of a single-person restroom.

272. The New York University Office of Lesbian Gay Bisexual Transgender Student Services, for example, publishes a single occupancy restroom list "to ensure safety and comfort for the transgender community." Single Occupancy Restroom List, http://www.nyu.edu/lgbt/restroom.htm (last visited Apr. 17, 2006). Moreover, under compliance guidelines to prohibit gender identity discrimination issued in 2003, the City and County of San Francisco Human Rights Commission "strongly urges" that all single-use bathrooms be designated gender neutral (or "unisex") and that all places of public accommodation provide a gender neutral bathroom option. CITY & COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMM'N, COMPLIANCE RULES AND REGULATIONS REGARDING GENDER IDENTITY DISCRIMINATION (2003), http://www.sfgov.org/site/sfhumanrights_page.asp?id=6274 [hereinafter SAN FRANCSISCO COMPLIANCE RULES]. *See also* BASIC RIGHTS EDUCATION FUND, FAIR WORKPLACE PROJECT, http://www.basicrights.org/downloads/fwp/ fwp_main.pdf (last visited Apr. 29, 2006) (including options for single-seat unisex restrooms and giving a transitioning employee an "in use" sign for the restroom door).

273. 792 N.Y.S.2d 43 (N.Y. App. Div. 2005).

274. *Id.* at 47.

275. *Id.* at 47–48.

276. Sturchio v. Ridge, No. CV-03-0025-RHW, 2005 WL 1502899, at *16. (E.D. Wash. June 23, 2005).

277. Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004).

278. In so ruling, the court stated that the defendant's argument that segregating restroom use by genitalia is permissible because doing so cannot be *sex* discrimination simply created a factual dispute regarding the nature of its restroom policy, while noting that whether the policy involved segregation of use by "sex" or genitalia was not for the court to decide at the motion to dismiss

Finally, in *Goins v. West Group*,[279] the court concluded that "absent more express guidance from the legislature," the employer's designation of employee restroom use based on biological gender was not sexual orientation discrimination under the state human rights law.[280]

Student Housing: Colleges and universities typically make residence hall assignments based on a student's sex at birth, and designate single-sex dorms, floors, hallways, or rooms. Transgender students, including those who are in transition or who may have completed transitions, thus may not have safe, suitable, or comfortable housing options under traditional approaches. Institutions have adopted a variety of strategies (with various degrees of success) with which to approach gender and student housing, including gender-neutral hallways, all-gender or "gender blind" residence halls, and mixed-gender suites.[281] In general, institutions characterized by the Transgender Law & Policy Institute as having "model" transgender-related housing policies typically ask students to articulate their specific needs to residential life programs, which then seek to accommodate those needs on a case-by-case basis insofar as possible.

Locker Rooms: Locker rooms may present intimidating situations for transgender persons who fear compromising their privacy and/or threats to personal safety when using the facilities. Again, institutions may wish to designate private unisex facilities to address such issues.[282] It is often recommended that, in planning new facilities, provision be made for private changing rooms and showers.[283] Other suggestions include creation of a private area within the facility, such as a bathroom stall with a door, an area separated by a curtain, or a physical education instructor's office; or establishment of a separate changing schedule, such as access to a locker room before or after use by other students.[284]

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stage. *Id.* at *3.

279. 635 N.W.2d 717 (Minn. 2001).

280. *Id.* at 723. State law defined sexual orientation to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." *Id.* at 722 (quoting MINN. STAT. § 363.01, subd. 41a (2000)). The plaintiff had argued that state law prohibited the defendant-employer's policy of designating restroom use according to biological gender and required instead that such designation be based on self-image of gender. The parties had agreed that plaintiff consistently presented herself as a woman. *Id.*

281. *See, e.g.*, Transgender Law & Policy Inst., *supra* note 266; *see also* Ohio State University, Transgender Guide & Resources, http://multiculturalcenter.osu.edu/glbtss/page.asp?ID=96 (last visited Apr. 29, 2006) [hereinafter OSU Guide]; University of California Riverside, Housing Policies Related to Gender Identity/Expression, http://out.ucr.edu/transpolicy.html (last visited Apr. 17, 2006); Ithaca College, Res Life Room Assignments, http://www.ithaca.edu/reslife/ roomassignments.htm (last visited Apr. 17, 2006).

282. Another question for college and university administrators to ponder before the need for decision arises is how best to address requests for varsity and intramural athletic team memberships from transgender students. Conference and other external rules may affect institutional options.

283. *See*, *e.g.*, OSU Guide, *supra* note 281 (noting new recreation center includes private changing rooms with showers). *See also* SAN FRANCISCO COMPLIANCE RULES, *supra* note 272 (discussing "sex-specific facilities with unavoidable nudity").

284. *See* NAT'L CENTER FOR LESBIAN RIGHTS & TRANSGENDER LAW CENTER, LGBT LEGAL ISSUES FOR SCHOOL ATTORNEYS, Attachment F, http://www.transgenderlawcenter.org/

Dress Codes: Another set of practical issues involves dress code standards. Although challenges to such standards are often unsuccessful,[285] college and university campuses typically do not establish codes for students and most employees. Additionally, in the wake of decisions analyzing gender expression issues under the rubrics of free expression and equal protection, it is possible that constitutional as well as statutory and policy rights will be implicated by restrictions specific to transgender persons. Minimally, as to public institutions, the law requires that code standards be non-discriminatory in impact and serve a legitimate business purpose (such as safety).

CONCLUSION

The legal, political, religious, and cultural controversies that ensued in the 1960s regarding sex and the role of men and women in American society continue. In the midst of ongoing disputes regarding gender stereotyping and sexual orientation issues, a significant and far-reaching battle rages regarding the cultural norms that underlie matters of gender identity and expression.

College and university counsel should be aware of legislative and judicial developments in this area. In addition, so as to assist administrators in resolving the difficult and often emotional practical issues that arise in their wake, review of advocates' "best practice" approaches may yield insight into wishes and expectations of transgender persons, if not always ideal solutions.[286] It is hoped

pdf/lgbt_school_law_101.pdf (last visited Apr. 29, 2006); HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 265.

285. *See* Farrell, *supra* note 28, at 655 n.173. *See also* Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004), *reh'g en banc granted*, 409 F.3d 1061 (9th Cir. 2005) (deciding that although appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex, imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination and must be BFOQ, even where such standards regulate only "mutable" characteristics, e.g., weight; however, court declined to apply *Price Waterhouse* rationale of gender stereotyping in the context of appearance and grooming standards cases); Zalewska v. County of Sullivan, 316 F.3d 314, 319–20 (1968). (holding that regulation prohibiting wearing of skirts did not implicate type of "expressive conduct" required to invoke free speech clause; claim that a liberty interest in appearance was violated did not implicate a fundamental right and was thus subject to rational basis review, and county had rational basis to believe skirts posed a safety concern; and rule did not violate Equal Protection Clause); Sturchio v. Ridge, No. CV-03-0025-RHW, 2005 WL 1502899, at *16 (E.D. Wash. June 23, 2005) (holding that Title VII does not apply to grooming and dress standards unless the standards impose unequal burdens on one sex, and that employer's prohibition against wearing dresses due to nature of job, including safety issues, did not place greater burden on one sex than another).

286. *See*, *e.g.*, NAT'L CENTER FOR LESBIAN RIGHTS/TRANSGENDER LAW CENTER, LGBT LEGAL ISSUES FOR SCHOOL ATTORNEYS, *supra* note 284; CURRAH, *supra* note 270; HUMAN RIGHTS CAMPAIGN, TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING, *available at* http://www.hrc.org; HUMAN RIGHTS CAMPAIGN FOUNDATION REPORT, TRANSGENDER ISSUES IN THE WORKPLACE: A TOOL FOR MANAGERS (June 2004), http://nmmstream.net/hrc/downloads/ publications/tgtool.pdf; GENDER PUBLIC ADVOCACY COALITION, WORKPLACE FAIRNESS, http://www.gpac.org/workplace/WorkplaceFairness.pdf. *See generally* RONNI L. SANLO, GENDER IDENTITY AND SEXUAL ORIENTATION: RESEARCH, POLICY, AND PERSONAL PERSPECTIVES: NEW DIRECTIONS FOR STUDENT SERVICES (2005); Transgender Law & Policy Inst., *supra* note 266. *See also* NYC COMM'N ON CIVIL RIGHTS,

that compassion and common sense will minimize conflict and promote good outcomes for all parties involved in this rapidly-evolving context.

GUIDELINES REGARDING "GENDER IDENTITY" DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW (Dec. 2004), *available at* http://nyc.gov/html/cchr/pdf/trans_guide.pdf; SAN FRANCISCO COMPLIANCE RULES, *supra* note 272; MARY ANN HORTON, CHECKLIST FOR TRANSITIONING IN THE WORKPLACE, TRANSGENDER AT WORK (2001), http://www.tgender.net/taw/tggl/checklist.html.

DEGREES OF DECEPTION: ARE CONSUMERS AND EMPLOYERS BEING DUPED BY ONLINE UNIVERSITIES AND DIPLOMA MILLS?

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INTRODUCTION

Two high school teachers recently lost an arbitration dispute in which they sought from a Michigan school district pay increases of more than $13,000 for doctorate degrees obtained from an online school.[1] The teachers, who had obtained the superintendent's approval prior to enrolling in Cambridge State University, claimed that they deserved raises based on their completion of 30 credit hours of coursework and a dissertation for doctorate degrees from Cambridge.[2] Unfortunately, Cambridge is an online unaccredited school not recognized by the State of Michigan because according to state regulators, it is, at best, of sub-standard quality.[3] With words of rebuke, an arbiter determined that the superintendent only "approved" the degrees sought, not the institution itself, and that the school district correctly denied the teachers pay increases:

> The grievants are bright women who have achieved well in several colleges. The non-rigorous program at the "distant" school, the lack of feedback, the absence of professorial oversight and communications all should have been "red flags" to the grievants that to get a Ph.D. this way was "too good to be true." The grievants may have been "Victims," but on the other had, they should have known what a "real"

1. *See* Jackie Harrison-Martin, *Arbitration Will Settle Teachers' Degree Dispute*, NEWS-HERALD (Southgate, MI), June 15, 2005, *available at* http://www.thenewsherald.com/stories/061505/loc_20050615002.shtml (stating that the teachers sought an increase in pay from $69,369 to $83,243 and that school district and the union tried unsuccessfully for months to resolve the dispute and stating that the teachers, prior to enrollment, obtained permission from the district to take the courses in order to later receive increased compensation based on the degree earned); Huron Educ. Ass'n v. Huron Sch. Dist., Case No. 54-390-00578-05, 21 (2006) (Brown, Arb.) [hereinafter Huron Arbitration Award] (unpublished arbitration opinion and award on file with Huron School District).

2. *See* Dorothy Bourdet, *2 Teacher's Degrees Under Fire; Huron Schools Disputes Awarding of Doctorates from Online, Unaccredited College*, DETROIT NEWS, July 31, 2005, at 1B (reporting that the credit hours completed by the teachers are only half the credit hours expected to be completed for such degrees by the National Council for Accreditation of Teacher Education); Huron Arbitration Award, *supra* note 1, at 18 (The superintendent for the school district "acknowledged that the grievants were good teachers and 'educational leaders'" despite having obtained invalid degrees.).

3. *See* Bourdet, *supra* note 2.*; see also* STATE OF MICHIGAN, NON-ACCREDITED COLLEGES/UNIVERSITIES, (2005), *available at* http://www.michigan.gov/documents/Non-accreditedSchools_78090_7.pdf [hereinafter MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES] (identifying Cambridge State University along with hundreds of unaccredited schools that "will not be accepted by the [Michigan] Department of Civil Service as satisfying any educational requirements indicated on job specifications").

doctoral program required.[4]

The teachers' dispute highlights the dark side of the Internet's role in the rapid growth of higher education institutions offering degrees entirely online as a less-expensive way to obtain a career-advancing education.[5] The dispute raises important questions, such as when is the work required by an online unaccredited school like Cambridge considered substandard, when are employees "victims" of or "co-conspirators" with substandard unaccredited schools in perpetrating degree fraud on their employers and the public at large, and what role should employers play in verifying the legitimacy of online schools?

The increase in access, use, and popularity of the Internet has encouraged a record-breaking number of consumers to complete coursework and even earn degrees online.[6] The Internet, combined with high-speed connections, video camcorders, email systems, and other technologies, has widened access to higher education—freeing non-traditional students from the typical hindrances to degree attainment.[7] Students enrolled in asynchronous online courses can complete coursework when their schedules permit, maintain current employment and income, avoid long, hazardous, and costly commutes, and sustain vital family relationships.[8] In addition to bringing higher education to students who lack access to brick-and-mortar universities, online classes can reproduce synchronous classroom discussions in ways that some students find more engaging and inclusive than face-to-face discussions.[9] Some research shows that no significant differences exist in learning outcomes between students taught in online courses and those taught in traditional classrooms.[10]

4. *See* Huron Arbitration Award, *supra* note 1, at 20-21.

5. Unquestionably, education is the primary key to employment opportunities. *See* U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, (2004), *available at* http://www.census.gov/prod/2004pubs/p20-550.pdf; David B. Bills, *Education Credentials and Promotions: Does Schooling do More than Get You in the Door?*, 61 SOC. OF EDUC. 52, 52–53 (1988); and Arlene Dohm & Ian Wyatt, *College at Work: Outlook and Earnings for College Graduates, 2000-10*, 46 OCCUPATIONAL OUTLOOK Q. 2,4 (Fall 2002) ("When it comes to work, having a college degree is one of the best ways to gain and maintain a competitive edge. On average, college graduates enjoy advantages—ranging from more job opportunities to better salaries—over their non-college-educated counterparts."). Notably, the University of Phoenix Online is the largest for-profit university. *See* University of Phoenix Online, Benefits of University of Phoenix Online, http://www.uopxonline.com/aboutus.asp (last visited May 16, 2006) (describing the numerous benefits of obtaining an online degree from Phoenix).

6. *See* TIFFANY WAITS & LAURIE LEWIS, NATIONAL CENTER FOR EDUCATION STATISTICS, DISTANCE EDUCATION AT DEGREE-GRANTING POSTSECONDARY INSTITUTIONS: 2000-2001, (2003) [hereinafter NCES DISTANCE-EDUCATION REPORT], *available at* http://nces.ed.gov/pubs2003/2003017.pdf (During the 2000-2001 school year, over three million students nationwide were enrolled in distance education offered by two- and four-year, degree-granting institutions, with 2.876 million of these taking college-level courses for credit).

7. *See infra* Part I.

8. *See id.*

9. *See id.*

10. *See id.* (discussing studies assessing the quality of learning and instruction in online schools). While some educators continue to debate over the academic quality of online courses and degree programs, brick-and-mortar universities such as New York University have embraced

While online higher education has promising potential, web courses and web-only institutions face strong skepticism as some employers and academics at traditional institutions question whether online instruction imparts the same quality of education as a traditional college or university.[11] Most web-only degree-granting institutions are for-profit and lack accreditation from any accrediting agency recognized by the United States Department of Education (the "ED" or "Education Department").[12] Some of these online schools are nothing more than "diploma mills," companies that sell degrees to consumers without requiring any substantial coursework.[13] Some for-profit schools do require completion of substantial coursework, but some have curricula and degree completion requirements that are inferior when compared to traditional on-campus degree programs.[14] A few unaccredited schools do require the completion of academic work that is comparable to traditional accredited schools,[15] and lack of accreditation does not automatically mean the education a student receives is inferior.[16] However, a degree from a school possessing accreditation from an ED-recognized accrediting agency is generally the only degree that counts in the public and private sectors for obtaining jobs, promotions, raises, and tuition reimbursements.[17]

virtual instruction and offer several degrees online. Press Release, New York University, NYU Launches Its First Online Bachelor's Degree Programs for Adult Students in Fall 2005 (Feb. 8, 2005), http://www.nyu.edu/public.affairs/releases/detail/183. *See also* NCES DISTANCE EDUCATION REPORT, *supra* note 6 (During the 2000-2001 school year, nineteen percent of all two and four-year Title IV-eligible degree-granting institutions offered degree or certificate programs designed to be completed totally through distance education, forty-eight percent of all such institutions offered undergraduate-level distance education courses, twenty-two percent of all such institutions offered graduate-level distance education course, and a significant number of such institutions planned to start offering distance education within the following three years.).

11. *See infra* Part I (describing criticisms of, and objections to, online higher education).

12. The Education Department does not accredit universities, but instead recognizes several accrediting agencies which are charged with the responsibility of accrediting universities that meet certain minimum standards. *See* U.S. DEP'T OF EDUC., COLLEGE ACCREDITATION IN THE UNITED STATES [hereinafter OVERVIEW OF ACCREDITATION], *available at* http://www.ed.gov/admins/finaid/ accred/accreditation.html. *See also* JOHN BEAR & MARIAH BEAR, BEARS' GUIDE TO EARNING DEGREES BY DISTANCE LEARNING, at 40–44, 64–65 (15th ed. Ten Speed Press, 2003) [hereinafter BEARS' GUIDE] (stating that most unaccredited schools have very little chance of obtaining accreditation).

13. *See infra* note 29 (discussing hearings that refer to schools that require little or no work as diploma mills); ALLEN EZELL & JOHN BEAR, DEGREE MILLS 20–21, 60 (2005) (expressing a preference for the term "degree mill" over "diploma mill" and stating that while no universal definition exists, the term includes schools that require completion of a small amount of academic work in comparison to traditionally-accredited schools).

14. *See id.* at 20–22 (explaining how to tell the difference between a diploma mill and an unaccredited school requiring enough academic work to be considered legitimate).

15. *See* BEARS' GUIDE, *supra* note 12, at 63. *See also infra* Part II.B.1 (describing Concord Law School as an example of an e-institution that presumably offers quality education).

16. *See infra* Part II.A (providing legitimate reasons why an unaccredited school may lack accreditation).

17. *See* BEARS' GUIDE, *supra* note 12, at 63 (treating "schools with accreditation claimed from an unrecognized accreditor as equivalent to unaccredited, for that is how such schools are almost certain to be treated by evaluators and decision makers").

Besides the potential to defraud employers, online diploma mills and substandard unaccredited schools put the public at risk of danger from their "graduates" who perform professional services, such as when a mother watched her eight-year old daughter die after a doctor with fake degrees advised taking her off insulin. [18] These online fake and substandard schools have become a billion-dollar industry that has issued more than a million degrees and is expected to continue to grow rapidly, thereby spreading the risk of harm to the public. [19]

In addition to posing a risk of harm to the public, numerous online degree providers actively deceive *unsophisticated* consumers about their accreditation status and their degree-granting practices. Many of these degree providers confer degrees to consumers by heavily crediting their prior life experiences—such as employment history and previous education—and requiring them to complete substantially less academic work than is required at traditional accredited universities.[20] Playing on working adults' desperation for increases in wages and employment opportunities,[21] substandard degree providers assure prospective students that their practices are perfectly legal.[22] These degree providers are technically correct because no state or federal law mandates that any degree-granting institution obtain ED-recognized accreditation.[23] Moreover, in most states, it is not a crime to obtain or use a fake or unaccredited degree for employment purposes.[24] While decried by most well-educated professionals and traditionally-accredited institutions, the practice of substantially crediting life experiences is not illegal.[25] Furthermore, when an unaccredited school is shut down by one state's enforcement agency for breaking state law (*e.g.*, operating

18. *See* Stephanie Armour, *Diploma Mills Insert Degree of Fraud into Job Market*, USA TODAY, Sept. 28, 2003, at B1 (Laurence Perry, who displayed in his office medical degrees from Internet universities that required little or no study, caused a diabetic girl's death and was subsequently convicted of manslaughter and practicing medicine without a license.).

19. *See infra* notes 332-38 and accompanying text (discussing the estimated number of holders of fake and unaccredited degrees).

20. *See* BEARS' GUIDE, *supra* note 12, at 80. *See infra* Part II.B (providing examples of the education practices of unaccredited schools).

21. *See infra* Part I.B (describing labor market conditions that may make some consumers susceptible to advertising from substandard degree providers).

22. *See, e.g.,* Email from Flora Reese, to Katherine Delaney, Law Student, (June 25, 2005, 02:09 EST) [hereinafter Fast Track University Degree Program] (spam email, with subject line of: information) ("These are real, genuine degrees that include Bachelors, Masters, and Doctorate degrees. They are verifiable and student records and transcripts are also available. This little known secret has been kept quiet for years. The opportunity exists due to a legal loophole allowing some established colleges to award degrees at their discretion. With all of the attention that this news has been generating, I wouldn't be surprised to see this loophole closed very soon.").

23. *See infra* Part II.A (describing the accreditation process in America).

24. *See infra* Part IV.A (discussing state laws that criminalize users of fraudulent degrees).

25. *See infra* Part II.B.4 (describing the practice of giving academic credit for prior life/learning experiences). *See also* EZELL & BEAR, *supra* note 13, at 23–24 (stating that only three accredited schools will heavily credit prior learning experiences "if there is a great deal of it").

without a license),[26] its officers usually resume operations in another state with either weak education statutes or weak enforcement activities.[27]

Rapid changes in online higher education are raising complex issues for education policymakers to address.[28] Rather than examine those issues, this article probes a neglected aspect of the proliferation of online substandard schools: these schools have created a consumer protection problem that affects the public and many honest, but unsophisticated, consumers.[29] Because online degree providers market to attract those lacking bachelor's and graduate degrees, some of their prospective students will be new to higher education and, by definition, lack the sophistication to understand the importance of accreditation, discern whether a school has ED-recognized accreditation, and distinguish between quality and substandard education requirements. As a result of deceptive practices, many unaccredited online schools mislead not only consumers, but also employers and the public, thereby inflicting significant economic and personal harm.[30]

Part I of this article describes the proliferation in online education as a result of the Internet and supporting technologies,[31] outlines the demographics and motivation of people seeking online degrees, and addresses the obstacles these students face in obtaining traditional higher education.[32] Part II describes the

26. The states, not the federal government, have the authority to issue licenses that enable a school to be a legitimate degree-granting institution; however, a school's receipt of accreditation by an ED-recognized agency is considered by most to be the assurance of quality education. *See infra* Part II.A. For numerous jobs, Michigan will allow them to be filled only by persons with accredited degrees. *See, e.g.,* MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3 (identifying hundreds of unaccredited schools that are unacceptable by Michigan's Department of Civil Service for employment purposes).

27. *See infra* notes 242-52 and accompanying text (discussing American World University, an online unaccredited school, being enjoined from operating in Hawaii and now operating from Mississippi).

28. Those issues, including accreditation, access, financial aid, legislation, retention, and outcomes, are beyond the scope this article.

29. *See, e.g.*, *Bogus Degrees and Unmet Expectations: Are Taxpayer Dollars Subsidizing Diploma Mills: Hearings before the Committee on Governmental Affairs*, 108th Cong. 63 (2004) [hereinafter *Bogus Degree Hearings*] (Testimony of Robert J. Crahier, Managing Director, Office of Special Investigations), *available at* http://a257.g.akamaitech.net/7/257/2422/07sep20041200 /www.access.gpo.gov/congress/senate/pdf/108hrg/94487.pdf (In hearings about diploma mills, Senator Susan Collins reported: "We found from our investigation that many of those individuals who are the true victims of diploma mills feel that they don't have an easy way to check on whether an institution like Columbia State University or Kennedy-Western is a legitimate academic institution.").

30. *See, e.g.,* Press Release, Office of the Attorney General, Nevada Dep't of Just. Fake Doctor Sentenced to Four Months Imprisonment, (Aug. 18, 2005), http://ag.state.nv.us/menu/top/ newsroom/press_release/archived/2005/August2005.pdf (Andrew Michael was sentenced to prison for four months after pleading guilty to practicing medicine without a license. "Michael had received a bachelor's degree from the now-defunct Hamilton University, an on-line school based in Wyoming, and was enrolled in St. Luke's School of Medicine, a correspondence medical school based in Liberia, Africa, that has since been shut down by African authorities.").

31. *See infra* Part I.A.

32. *See infra* Part I.B.

traditional accreditation process, the types of degree-granting institutions,[33] and the tricks that many online substandard unaccredited schools use to persuade consumers and employers that their degree programs are accredited[34] and their academic work is substantive.[35]

Parts III and IV analyze what federal and state laws exist to curb the supply[36] and demand[37] for fake and substandard unaccredited degrees and propose legal and non-legal solutions.[38] For example, to deter the supply of fake and substandard unaccredited degrees, the article proposes enactment of the Authentic Credentials in Higher Education Act as a federal statute which would impose criminal liability on anyone selling fake degrees and on all principals of inferior-quality unaccredited schools that fail to make certain disclosures.[39] To deter demand for fake and unaccredited degrees, federal legislation is recommended to establish a standard for disciplining current employees holding such degrees[40] and to implement a mass media awareness campaign to warn people about them.[41]

I. EXPLOSION IN ONLINE EDUCATION

Use of the Internet has led to an explosion in the number of online courses offered by traditional colleges and universities and by for-profit web-only institutions.[42] While some educators remain critical of all online education, a growing number of academics agree that online instruction, when provided by qualified educators, offers greater access to postsecondary education to people who have been unable to enroll in traditional on-campus courses because of time, distance, family, work, or physical constraints.[43] Employers, like academics, are divided over the value of online education; some employers have started to accept online degrees, but a majority still view even accredited online education programs as inferior to traditional in-classroom degree programs.[44]

Some prospective students are less equivocal about the value of online degrees. Online education appeals strongly to older, working, and non-traditional

33. *See infra* Part II.A (describing the accreditation process and degree-granting institutions).

34. *See infra* Part II.B.

35. *See infra* Part II.B.3.

36. *See generally infra* Part III.

37. *See generally infra* Part IV.

38. *See generally infra* Parts III and IV.

39. *See infra* Part III.C.

40. *See infra* Part IV.C.

41. *See infra* Part IV.B.

42. Higher education gave birth to the Internet, and now the Internet is transforming higher education. *See* Ronald Roach, *Technology: Riding the Waves of Change*, BLACK ISSUES HIGHER EDUC., June 17, 2004, at 92; James V. Corbelli & Stephen L. Korbel, *Jurisdiction, Domain Names, Privacy and Security: How the Digital Age Has Changed Business*, 22 ENERGY & MINERAL L. FOUND. 117, 140-157 (2002).

43. *See infra* Part I.B.

44. *See infra* notes 72-78 and accompanying text.

students.[45] The growing need for a college degree to obtain a well-paying job,[46] combined with the escalating costs of traditional higher education,[47] has enhanced the attraction of online degree programs. The challenge for policymakers is to respond to the needs of nontraditional students by supporting the growth of quality online programs, while protecting consumers from substandard programs that will drain their resources and leave them further behind in the workplace.

A. Supply of Online Degrees: Revolution in Higher Education

Online education has enriched traditional classroom instruction in numerous ways. Electronic bulletin boards, chat rooms, and email permit synchronous and asynchronous communication between teacher and students and among students.[48] Such communications, along with courses designed to include interactive learning activities, enable students to participate at a level substantially greater than in the lecture-formatted traditional classroom.[49] Online education can also create more diverse discussions than many traditional classrooms support.[50] Online students may come from different countries, represent different ages, and have varying life experiences and political views.[51] An online discussion may also include an expert who would not otherwise have had the time or geographic mobility to join a traditional classroom discussion. Even asynchronous online instruction holds numerous benefits.[52] Sophisticated courses and program instruction can be tailored to the needs of the students more effectively than large lecture-style courses.[53] Moreover, online tutors may be more accessible to students than are professors and teaching assistants. [54] Some tutors may be better trained in both

45. *See infra* Part I.B.

46. *See infra* Part I.B.

47. *See infra* Part I.B.

48. *See* Julia Shovein, et al., *Challenging Traditional Teaching and Learning Paradigms: Online Learning and Emancipatory Teaching*, 26 NURSING EDUC. PERSPECTIVES 340, 341 (2005).

49. *Id.*

50. *See*, *e.g., Mississippi Professor Goes Online, Makes Music Heard Worldwide,* EDUC. TECH. NEWS, June 1, 2004, at 57 *available at* 2004 WLNR 6620090 (stating that in an online music class at Mississippi State University, students experience more musical diversity and mentioning that one Korean student wrote a review of a piano concert he saw in Seoul).

51. *See, e.g,.* Justin Pope, *Education: Head of the Class: Online Courses Are Becoming Popular Among Traditional College Students*, MIAMI HERALD, Feb. 7, 2006, at C8 (stating that Miami-Dade College's "virtual college" has between 4,000 and 5,000 students enrolled each semester and that students come from different states and countries, including a military person fighting in Iraq).

52. *See* Lucilla Crosta, *Beyond the Use of New Technologies in Adult Distance Courses: An Ethical Approach,* 3 INT'L. J. ON E-LEARNING 48, 48-60 (2004) (discussing benefits of asynchronous communication).

53. *See id.* (discussing research using asynchronous communication: "as a group conference, where a 'many-to-many communication' will prevail: messages posted by someone, and stored in a virtual locus, can be read by all the participants of the conversation. It allows people to share works, information, messages, and experiences in a collaborative and cooperative learning situation, where the leader is not the tutor itself but the group of individuals.").

54. Tranette Ledford, *Online Tutoring; Help for College is Just a Click Away*, DECISION

their subject and pedagogy than the classic, first-time teaching assistant at a large university. [55]

Greater enrichment of classroom experiences and wider access to higher education has driven huge increases in the number of online courses and degrees offered. According to the National Center for Education Statistics (NCES) in the Education Department, distance education[56] courses for credit are offered by 55 percent of all two- and four-year colleges and universities in the United States.[57] The NCES concludes that the prevalence of online courses and programs "indicates that institutions are seeking to build upon the convenience, flexibility, and improved access" of online courses and programs to increase enrollment.[58] Record-breaking enrollments may be further explained by preliminary research that shows online education may be on par with education in the traditional classroom setting.[59] Proponents of online education report experiencing an increase in the quality of student interaction online in comparison to in-class instruction.[60]

The growth in online education is not without criticism. Although the majority of online course enrollments are at public higher education institutions,[61] enrollments at private for-profit institutions are quickly growing.[62] Even at

TIMES (ARMY), Nov. 14, 2005, at 4.

55. *Id.* (stating that students can pay for online tutorial services from private companies such as Realtimetutor.com, which "offers college tutoring services for undergraduates and graduates in a number of fields, particularly in math subjects like algebra, statistics, probability, calculus, pre-calculus and engineering math").

56. Distance education is defined as "education or training courses delivered to remote (off-campus) sites via audio, video (live or prerecorded), or computer technologies, including both synchronous (i.e., simultaneous) and asynchronous (i.e., not simultaneous) instruction." *See* NCES DISTANCE-EDUCATION REPORT, *supra* note 6, at 1.

57. *See id.* at iii.

58. *See* Vincent Tinerella, *Encyclopedia of Distributed Learning*, 44 REFERENCE & USER SERVICES Q. 84, 84 (Fall, 2004) (book review).

59. *See, e.g.*, Michaela Driver, *Investigating the Benefits of Web-Centric Instruction for Student Learning—An Exploratory Study of an MBA Course*, 77 J. EDUC. FOR BUS. 236, 244 (2002) ("[R]esults of [an] exploratory study [of an MBA course] indicate, at least tentatively, that Webcentric learning environments have a positive effect on student social interaction, involvement with course content, technical skills, and overall learning experience."). *But see generally* DAVID F. NOBLE, DIGITAL DIPLOMA MILLS: THE AUTOMATION OF HIGHER EDUCATION (2002).

60. *See* Gary Wyatt, *Satisfaction*, *Academic Rigor and Interaction: Perceptions of Online Instruction*, 125 EDUC. 460, 470 (2005) (stating that online interaction is better because "students have the ability to think about responses before posting them and are often freed from the constraints of 'stage fright'" so that they contribute to class discussion).

61. *See* Patrick Garmoe, *New Acceptance of Online Learning*, CHI. DAILY HERALD, Mar. 20, 2004, at 1 ("Illinois Virtual Campus, a part of the University of Illinois that tracks online statistics at 68 public and private Illinois colleges and universities, recorded 125,074 online course enrollments in the 2002-03 school year."); Illinois Virtual Campus, Illinois Distance Education Enrollment Reports (Fall 2005), http://www.ivc.illinois.edu/pubs/enrollment.html.

62. *See, e.g.,* Cynthia Schreiber, *For-Profit Education Faces Tough Course*, AP ONLINE, Sept. 1, 2003, ("Apollo Group, parent of the University of Phoenix Online . . . has seen its enrollments rise 163 percent to 187,495 online and onsite students in 2003, from about 71,400 in 1998."); *see also* I. ELAINE ALLEN & JEFF SEAMAN, THE SLOAN CONSORTIUM, ENTERING THE

traditional institutions, critics charge that administrators are replacing high-quality, but expensive, classroom instruction with lower-cost, poorly-executed, computerized online instruction.[63] Budget woes, as much as innovative pedagogy, may be driving the growth of online instruction. Critics also point to specific pedagogic flaws in online courses. Ninety percent of the schools providing online instruction use asynchronous methods that deprive students of the immediate contact with instructors.[64] Lack of "immediate" face-to-face communication means an instructor may not be able to determine whether students are understanding the subject matter.[65] Research shows that effective learning and student satisfaction are greatest in a synchronous or semi-synchronous learning environment, a context missing from the majority of online courses.[66]

Educators also point to technology constraints, high attrition rates, and honesty issues as drawbacks of online education. Although institutions have invested heavily in software platforms for instruction, high-speed internet access, and advanced video capabilities, their online students are not always on par technologically and often lack the most up-to-date equipment.[67] Very high attrition rates mark online programs, raising questions about quality and student

MAINSTREAM: THE QUALITY AND EXTENT OF ONLINE EDUCATION IN THE UNITED STATES, 2003 AND 2004, 5-6 (2004), *available at* http://www.sloan-c.org/resources/entering_mainstream.pdf ("The percentage of Private, for-profit schools offering at least one online course increased from 44.9% in last year's study to 88.6% this year.").

63. *See* Gary Wyatt, *supra* note 60 (College administrators are driven to embrace online instruction as a way to increase enrollment and are influenced "by software corporations motivated to colonize higher education for financial gain.").

64. The majority (ninety percent) of schools that provide distance education offer Internet courses using asynchronous (non-simultaneous) computer-based instruction. NCES DISTANCE-EDUCATION REPORT, *supra* note 6, at v.

65. Students are somewhat isolated in the virtual learning environment. *See* Chee Meng Tham, & Jon Werner, *Designing and Evaluating E-learning in Higher Education: a Review and Recommendations; Online Learning*, 11 J. LEADERSHIP & ORG. STUDIES 15, 17 (2005) (Evidence documenting that the quality of online learning is comparable if not better than the quality of learning in traditional classrooms.). *Cf.* INST. FOR HIGHER EDUC. POL'Y, QUALITY ON THE LINE: BENCHMARKS FOR SUCCESS IN INTERNET-BASED DISTANCE EDUCATION 2, 13-14 (2000) [hereinafter QUALITY ON THE LINE] (identifying and tracking the success of institutional benchmarks, such as electronic security measures and institutional records for effective teaching of distance learning courses, in distance learning programs for six institutions).

66. *See* Ben Arbaugh, *Virtual Classroom Versus Physical Classroom: An Exploratory Study of Class Discussion Patterns and Student Learning in an Asynchronous Internet-Based MBA Course*, 24 J. MGMT. EDUC. 213, 215 (2000); Robert Schramm, et al., *Student Perceptions of the Effectiveness of Web-Based Courses*, 27 NABTE REVIEW 54, 60 (2001) (concluding that student satisfaction with online courses was substantially higher when students felt they had received sufficient training to use the necessary technology); Anna C. McFadden, et al., *Why Do Educators Embrace High-Cost Technologies?*, 2 ONLINE J. DISTANCE LEARNING ADMIN. (Winter, 1999), *available at* http://www.westga.edu/~distance/mcfadden24.html (stating that the "synchronous model of distance education is closely related to a professor's regular habits, experiences, and expectations").

67. *See* QUALITY ON THE LINE, *supra* note 65, at 15 (stating that many students have computers with limited memory and video capabilities and have slow Internet connections not designed to handle large audio and video files).

commitment.[68] And many educators worry that online education poses unique honesty issues.[69] The relative anonymity and physical separation of student and instructor lead most to believe that it is easier to cheat in an online course than in a traditional classroom.[70] Universities can combat the temptation to cheat by using video-conferencing technology or hiring proctors and providing physical examination sites proximately available to their distance students.[71] These safeguards, however, raise the cost of online education.

Whatever the pedagogic value of online education, it is clear that employers remain skeptical of online degrees. In a survey about the attitudes of those working in library systems towards students obtaining an online master's degree in library science ("MLS"), a researcher found the majority of respondents preferred hiring graduates with traditional MLS degrees.[72] Most respondents questioned the rigor of online academic work[73] and were concerned with the lack of face-to-face

68. *See id.* at 21 (Online students generally fall at one of two extremes – they excel or they fail). *See, e.g.*, Thomas Valasek, *Student Persistence in Web-based Courses: Identifying a Profile for Success* (2001), *available at* http://www.raritanval.edu/ departments/CommLanguage/full-time/valasek/MCF%20research.final.htm (observing that, in a report formally published, the attrition rate for online course students at Raritan Valley Community College is as high as two to three times that for its traditional face-to-face courses).

69. *See Academic Integrity in Online Education*, 2 SLOAN-C VIEW 3, 3 (Oct. 2003), *available at* http://www.sloan-c.org/publications/view/v2n7/pdf/v2n7.pdf (Sloan Consortium article noting that the potential for cheating online is an enormous obstacle to faculty acceptance of online education).

70. *See* Virgil E. Varvel, Jr., *Honesty in Online Education*, 6 POINTERS & CLICKERS, 1, 1–4 (2005), *available at* http://illinois.online.uillinois.edu/resourus/pointersclickers/2005_01/ VarvelChentPoint2005.pdf (stating that cheating in higher education is so pervasive across forums—as high as eighty-five percent according to some surveys—that any differences between traditional and online courses would be difficult to detect). Students who submit their work or take exams completely online may utilize books, notes, friends, paid helpers and even the Internet itself to assist them. *Id.* at 4. Also, an increasing number of commercial sites actually sell research papers over the Internet. *See* James E. Kasprzak and Mary Anne Nixon, *Cheating in Cyberspace: Maintaining Quality in Online Education*, 12 ASS'N FOR ADVANCEMENT OF COMPUTING IN EDUC. 85, 86 (2004) (arguing that susceptibility to fraud may be the most damning argument against the quality of online education, and discussing empirical study that revealed approximately nine percent of students in a University of Virginia Physics program had committed some form of plagiarism). *See also* J.D. Heyman et al., [P]*sssst… What's the Answer?*, PEOPLE Mag., Jan. 24, 2005, at 108 (alleging that the Wal-Mart heiress may have utilized technological resources in cheating her way through a bachelor's degree at the University of Southern California).

71. *See Academic Integrity in Online Education*, *supra* note 69, at 3 (stating that schools such as Florida State University and Pace University have developed such distance proctoring programs for administering exams to their students).

72. *See* Maureen Wynkoop, Camden County Library System, Hiring Preferences in Libraries: Perceptions of MLS Graduates with Online Degrees (2003), http://www.camden.lib.nj.us/survey/default.htm (last visited July 18, 2006) (unpublished survey of library employees performed in furtherance of MLS degree at Southern Connecticut State University) ("Of the 58 [MLS] programs currently accredited . . . 21 offer at least some web-based courses. And of these 21, eleven offer a degree that can be earned either completely online or predominantly online with brief campus visits.").

73. *See id.* at 1-2.

interactions and interpersonal relationships involved in obtaining a degree online.[74] Likewise, another study revealed a bias against online degrees among human resource professionals.[75] In response to the question "Does it matter if the employee's degree was obtained through a program offered totally over the Internet?", 14 percent of the respondents replied that an online degree was "OK," 57 percent gave a neutral response, and 29 percent rejected online degrees as "Not OK."[76] The study "further confirmed that HR professionals have a strong preference for [schools with] institutional accreditation from a regional accrediting body as well as accreditation of the individual [degree] programs."[77] Consequently, some students who obtain online degrees, especially degrees from unaccredited schools, will be disappointed with the response of employers when they begin their job searches.[78]

In summary, while the demand for online education continues to grow, many educators and employers still view even *accredited* online education programs as inferior to the traditional classroom alternative. This skepticism is likely to increase as the public becomes more aware of today's proliferation of fake and substandard online degree schools.

B. Demand for Online Education: The Intersection of Labor and Education Markets

In an earlier time, hard work and on-the-job training were the tickets to well-paying jobs and career advancements. But today, American workers increasingly need college degrees to secure good positions.[79] Faced with regular media reports of lackluster job growth, layoffs, and plant closings, workers realize that investment in human capital—attainment of a college degree—is the solution to job insecurity.[80]

74. *See id.* at 2-4 (One survey respondent said that because the social interaction element of traditional education is largely lacking in online education that "[i]f a person plans on working solo, i.e. freelancing, . . . perhaps distance learning will suffice, but if a person plans to work directly with the public, they are by nature social and distance learning can be a disservice to them.").

75. *See* Alan Tuchtenhagen, New Providers in Higher Education: Higher Education for the Workforce in the New Economy, (May 2002), (unpublished Ph.D. dissertation, Hamline University), *available at* http://proquest.umi.com.proxy.lib.ohio-state.edu/dissertations/preview_all/3067756 (stating that fifty-seven percent "didn't care" if the degree was obtained online). Additionally, when asked to rank traditional degree programs and "nontraditional formats, such as online," on a scale of one to five, traditional degrees scored 4.35, while online degrees received a 3.3. *Id.*

76. *See id.*

77. *Id.*

78. *See, e.g., Bogus Degree Hearings*, *supra* note 29, at 51 (stating that some graduates of unaccredited Kennedy-Western University were questioned about the school's legitimacy when they applied for jobs and had to ultimately remove the school from their resumes).

79. *See* U.S. DEP'T OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 6 (2004–05) (discussing labor data showing that "all but 1 of the 50 highest paying occupations" require a applicants with at least a college degree).

80. *See infra* Section I.B.

Students who pursue college degrees through online degree programs differ from those who attend traditional campuses. In a 1999-2000 survey, the NCES found that students who worked full-time and had family responsibilities were more likely to participate in both undergraduate and graduate distance education programs.[81] These students also value the time and space flexibility of online classes.[82] Flexibility is so important that the vast majority of online students report a satisfactory experience with online education[83] even though some complain that online courses actually require *more* time and effort than traditional instruction and that interpersonal contact with instructors and fellow students is lacking.[84]

Unfortunately, the very students most attracted to online education are those most vulnerable to its shortcomings. Handling full-time jobs and family responsibilities, these students are most likely to suffer *high rates of attrition*[85] and suffer disappointment when employers display little enthusiasm for their online degrees. [86]

Already handicapped by their educational backgrounds and having to fight in an increasingly competitive workplace, these non-traditional students need the highest quality online education and the most supportive educational environment their limited dollars can buy.

Given the drawbacks of online education, working adults may be incorrect about pursuing a degree over the internet as opposed to in the traditional classroom, but they are correct in perceiving higher education attainment as the key to increasing their wages and employment opportunities.[87] In comparison to

81. *See* NAT'L CTR. FOR EDUC. STATISTICS, A PROFILE OF PARTICIPATION IN DISTANCE EDUCATION: 1999-2000 iv, v (2003) (This group includes students who are financially independent, older, married, and/or have dependents.).

82. *See* QUALITY ON THE LINE, *supra* note 65, at 6.

83. *See* Valasek, *supra* note 68 (discussing an online student survey indicating satisfaction with the flexibility of taking courses online).

84. *See* ALLEN & SEAMAN, *supra* note 62, at 10 (stating that the large majority of educational institutions agree that students are as satisfied with online courses as they are with traditional face-to-face instruction). *See also* Valasek, *supra* note 68 (reporting, on a scale of one to five (five being the most positive response), an average response of 4.4 regarding responsiveness of online instructors to students' questions and concerns; an average response of 4.2 regarding the overall level of online instruction; and an average response of 3.9 regarding recommending online courses to other students).

85. *See Academic Integrity in Online Education*, *supra* note 69 and accompanying text.

86. *See supra* notes 72-78 and accompanying text (reviewing surveys where employer rejection of and skepticism about online higher education was substantially high).

87. *See* Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOSFTRA LAB. & EMP. L.J. 269, 292-98 (forthcoming 2006) (discussing labor economic theories that explain the correlation between degree attainment and subsequent increased earnings). *See generally* JOHN IMMERWAHR & TONY FOLENO, NAT'L CTR. FOR PUB. POL'Y AND HIGHER EDUC, GREAT EXPECTATIONS: HOW THE PUBLIC AND PARENTS—WHITE, AFRICAN AMERICAN AND HISPANIC—VIEW HIGHER EDUCATION 3 (2000), *available at* http://www.highereducation.org/reports/expectations/expectations5.shtml (stating that 85 percent of the general public believe "a college education has become as important as a high school diploma used to be" and 77 percent of the general public believe that getting a college education today is more important than it was ten years ago).

the college-educated, employees lacking a college education are more likely to earn the minimum hourly wage,[88] suffer from unemployment,[89] and earn salaries near or below the poverty level.[90] A college graduate will earn $1 million more over his career than will a worker lacking higher education.[91]

Workers lacking college degrees are also losing many well-paying jobs with benefits because of corporate restructuring and outsourcing to other countries.[92] Intense global competition has led America's executives to close factories, cut workforces to the barest minimum, and/or move operations overseas.[93] Of the jobs remaining in America for those lacking a college education, a growing number are lower-paying full- or part-time jobs that offer no benefits.[94] Recent data reveal a

88. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2002, 8 (2005), *available at* http://www.bls.gov/cps/minwage2002pdf.pdf (reporting that 655,000 workers possessing only a high school diploma earned minimum wage of $5.15 per hour or less); *see id.*, at 5 tbl.3 note (providing reasons why payment of wages below the minimum are not necessarily illegal). Even with a bachelors degree 149,000 workers earned minimum wage or less. *See id.* at 8 tbl.6 (reporting that 14,000 workers with only a bachelor's degree earned minimum wage and 135,000 earned less than minimum wage).

89. According to census data, 78.5 percent of men ages twenty-five to thirty-four who failed to complete high school were employed in 1998, while 85 percent of men with a high school diploma and 94 percent of men with a bachelor's degree were employed. NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 1999 22 (1999) *available at* http://nces.ed.gov/pubs99/condition99/pdf/1999022.pdf. The disparity in employment rates among women is even greater. *See id.* 22.

90. As an example, "a minimum-wage employee who works 40 hours a week, 52 weeks a year, earns only $10,712 a year---$5,000 below the 2004 poverty line for a family of three." *See* Amy Chasanov & Jeff Chapman, *A Long Overdue Increase in the Minimum Wage is Needed to Restore Lost Ground,* ECON. POL'Y INST., (April 28, 2004), *available at* http://www.epinet.org/ content.cfm/ webfeatures_snapshots_04282004.

91. According to 2002 census data, the average earnings by highest level of education were: for those with advanced degrees, $72,824; for bachelor's degree-holders, $51,194; for high school graduates, $27,280; and for nongraduates, $18,826. *See* U.S. CENSUS, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, 7 (June 2004) [hereinafter EDUCATIONAL ATTAINMENT IN THE UNITED STATES], *available at* http://www.census.gov/prod/2004pubs/p20-550.pdf.

92. Long-term restructuring in the manufacturing and service sectors has made permanent job cuts of over three million since 2001. *See* AFL-CIO, JOB LOSS AND JOBLESSNESS DURING THE BUSH ADMINISTRATION: A DISMAL RECORD UNPARALLELED IN THE PAST HALF-CENTURY, 2 (Aug. 5, 2003). According to the Labor Department, holders of bachelor's degrees saw a growth of 1.8 million jobs during the past ten years while holders of high school diplomas saw a loss of nearly 700,000 jobs. *See* DEP'T OF LABOR, FAMILIES AND EMPLOYERS IN A CHANGING ECONOMY (2001).

93. *See* Kate Bronfenbrenner & Stephanie Luce, The Changing Nature of Corporate Global Restructuring: The Impact of Production Shifts on Jobs In the US, China, and Around the Globe, (Oct. 14, 2004), (unpublished submission to the US-China Economic and Security Review Commission), *available at* http://www.uscc.gov/researchpapers/ 2004/cornell_u_mass_report.pdf.

94. *See* Richard Johnson & Stephen Crystal, *Health Insurance Coverage at Midlife: Characteristics, Costs, and Dynamics*, 18 HEALTH CARE FIN. REV. 123, 129 (1997) (One 1997 study found that fifty-six percent of employees who never attended college have employer-provided health benefits while seventy-six percent of college graduates have such benefits.) More good-paying, full-time jobs are being filled by workers hired by employment agencies to do

disturbing trend of the lowest-paying jobs providing the least health care coverage.[95] In 2003, private-sector employers provided health care benefits only 45 percent of the time, down from 52 percent in 2000, and 66 percent in 1990.[96] Thus, an increasing number of workers, especially those lacking college education, do not have employer-sponsored health care benefits.[97]

The outlook for the future is even more grim: Americans without college degrees face a labor market that is creating few new jobs that pay well. Employers are adding jobs primarily in administrative services and accommodations/food services, two lower-wage sectors.[98] The United States Department of Labor projects that employment in service occupations will increase by 5.3 million, or 19

temporary, seasonal, and part-time jobs, most of which do not normally have health and retirement benefits. *See, e.g.,* Shirleen Holt, *Job Seekers "Just in Time" to be Temps*, SEATTLE TIMES, Nov. 16, 2004, at A1; Laurie Winslow*, Tulsa, Okla., Is Key in IBM's Outsourcing Strategy, Officials Say*, TULSA WORLD (Okla.), June 3, 2004, at A1 (stating that Tulsa-based Williams Cos. Inc., was being bought out by IBM Corp., resulting in the loss of jobs, some completely lost to outsourcing while others would be filled by ex-Williams' workers hired under temporary employment).

95. *See* BUREAU OF LABOR STATISTICS, U.S DEP'T OF LABOR, EMPLOYEE BENEFITS IN PRIVATE INDUSTRY 2003 6, tbl.3 (2004) [hereinafter BUREAU OF LABOR STATISTICS], *available at* http://www.bls.gov/ncs/ebs/sp/ebnr 0003.pdf (reporting forty-nine percent of blue-collar workers in private industry had no health insurance). *See* KAISER COMMISSION ON MEDICAID AND THE UNINSURED, KAISER FOUNDATION, CHALLENGES AND TRADEOFFS IN LOW-INCOME FAMILY BUDGETS: IMPLICATIONS FOR HEALTH COVERAGE 7 (2004), *available at* http://www.kff.org/medicaid/upload/Challenges-and-Tradeoffs-in-Low-Income-Family-Budgets-Implications-for-Health-Coverage.pdf (According to a Medicaid study, "[a]lmost none of the working families profiled here have employer-sponsored coverage," and those with such coverage "report trouble paying their part of the premium and tend to cycle off and on coverage.").

96. WILLIAM J. WIATROWSKI, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, DOCUMENTING BENEFITS COVERAGE FOR ALL WORKERS tbl.2 (2006), http://www.bls.gov/opub/cwc/cm20040518ar01p1.htm (last visited July 21, 2006). From 2000 to 2004, the employee-paid premiums for employer-sponsored coverage grew by 35.9 percent, while average earnings for the same period grew by only 12.4 percent. FAMILIES USA, HEALTH CARE: ARE YOU BETTER OFF TODAY THAN YOU WERE FOUR YEARS AGO? 3 (2004) [hereinafter FAMILIES USA], *available at*: http://www.familiesusa.org/assets/pdfs/Are_you_better_off_ final5354 .pdf.

97. For workers with benefits, those workers paid substantially more for health care plans in 2004 than in 2000. *See* FAMILIES USA, *supra* note 96, at 2.

98. *Id.* In the retail industry, sales and related occupations are expected to add 1.9 million new jobs by 2010, a growth of 11.9 percent. The majority of new jobs are projected to be among retail sales persons and cashiers. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK 2002-2003, BULLETIN 2540, 353 (2002) [hereinafter OCCUPATIONAL OUTLOOK]. While these occupations are expected to add jobs, they tend to pay lower wages. *Id.* at 354, 364–65. The starting wage for many cashiers/salespersons is the federal minimum wage. *Id.* at 364-365. The median hourly wage of cashiers in 2000 was $6.95 and the middle fifty percent earned between $6.14 and $8.27 an hour. *Id.* at 364-365. From November 2001 to November 2003, jobs were lost in information service, technical services, and manufacturing, all sectors that pay above-average wages. *See* Jared Bernstein, *Job Growth Up, Job Quality Down*, ECON. POL'Y INST. (Dec. 17, 2003), *available at* http://www.epi.org/printer.cfm?id=1563&content_type=1&nice_name=webfeatures_snapshots_archive_12172003 (reporting 1.3 million jobs in the manufacturing sector were lost, 272,000 jobs in information services, and 93,000 jobs in professional technical services).

percent, between the years 2004 and 2014,[99] and that this growth in primarily service occupations will require workers with "lower-than-average education levels."[100] At the other end of the spectrum, labor statistics show that "all but 1 of the 50 highest paying occupations" will require a "college degree or higher."[101]

Recognizing that the foregoing labor market realities paint a grim picture for those lacking college degrees, providers of online degrees effectively advertise attainment of an online degree as the quickest way for employees to qualify for well-paying jobs, promotions, and raises.[102] They pay search engine companies (*e.g.*, Google) a fee to guarantee their schools will have a high ranking in search results, usually in response to specific search terms like "PhD in psychology," and these engines make no distinctions among advertisers so that the consumer cannot tell whether the school is real or fake.[103] Fake and unaccredited schools also pay search engines as well as reputable websites for keyword-linked advertisements so that when a user is electronically identified, the user will see graphical banner ads or pop-up ads from fake and unaccredited schools.[104]

Some of their marketing techniques, such as this recent email promising a genuine college degree in 2 weeks, are outlandish:

> Have you ever thought that the only thing stopping you from a great job and better pay was a few letters behind your name?
>
> Well now you can get them!
>
> BA BSc MA MSc MBA PhD
>
> Within 2 weeks! No Study Required! 100% Verifiable!
>
> These are real, genuine non accredited [sic] degrees that include

99. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, TOMORROW'S JOBS (2004), *available at* http://www.bls.gov/oco/oco2003.htm [hereinafter TOMORROW'S JOBS]. *See* Michael Ettlinger & Jeff Chapman, ECON. POL'Y INST., JOBS SHIFT FROM HIGHER-PAYING TO LOWER-PAYING INDUSTRIES, Jan. 21, 2004, *available at* http://www.epinet.org/content.cfm/webfeatures_snapshots_archive_01212004 ("In 48 of the 50 states, jobs in higher-paying industries have given way to jobs in lower-paying industries since the recession ended in November 2001.").

100. *See* OCCUPATIONAL OUTLOOK, *supra* note 98, at 7 ("[T]wo broad groups of occupations are projected to grow most rapidly in the future . . .occupations that disproportionately require higher-than-average education levels, such as managerial, administrative, and professional jobs; and occupations that disproportionately require lower-than-average education levels, primarily service jobs.").

101. *See* TOMORROW'S JOBS, *supra* note 99. *See also* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, PROJECTED EMPLOYMENT IN HIGH-PAYING OCCUPATIONS REQUIRING A BACHELOR'S OR GRADUATE DEGREE 4 (2004), *available at* http://www.bls.gov/opub/ted/2004/mar/wk3/art03.htm; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BLS RELEASES 2004-14 EMPLOYMENT PROJECTIONS (2005), *available at* http://www.bls.gov/news.release/pdf/ecopro.pdf ("An associate or bachelor's degree is the most significant source of postsecondary education or training for six of the ten fastest growing occupations.").

102. *See* EZELL & BEAR, *supra* note 13, at 92–93 (discussing email offers stating that the consumer will "'become the envy of your friends' by acquiring a degree").

103. *See id.*

104. *Id.*

> Bachelors, Masters and Doctorate degrees.
>
> They are verifiable and student records and transcripts are also available.
>
> This little known secret has been kept quiet for years. The opportunity exists due to a legal loophole allowing some established colleges to award degrees at their discretion.[105]

These type of messages appeal to deep-rooted fears and frustrations among workers aspiring to improve their lot.[106] While most well-educated individuals would dismiss these email messages as absurd, some employees will be desperate enough to bypass a traditional education and opt for a degree from a fake or substandard unaccredited school in order to obtain more income and job security

In addition to the labor market conditions, trends in traditional higher education further buttress the appeal of online degree programs. Just as college degrees are becoming more essential to job success, classroom education at four-year institutions is becoming more inaccessible and unaffordable.[107] In 2002, the Lumina Foundation for Education published a nationwide study of two components of postsecondary institutions: affordability[108] and accessibility.[109]

105. *Id.*; Fast Track University Degree Program, *supra* note 22.

106. *See* Fast Track University Degree Program, *supra* note 22; *see also* Email Randy Odonnell to johnson.1805@osu.edu (Aug. 19, 2005 16:29 EST) (containing similar spam mail message except that nothing in the message indicates that the degrees are unaccredited); Email from Lorenzo Morgan, to Larry Garvin, Professor of Law, Michael E. Moritz College of Law (Apr. 15, 2006 17:44 EST) (mass spam email) ("According to the U.S. Census Bureau, with the following degrees, here's how much you can expect to make in your lifetime: High School Diploma: $1,100,000[,] Bachelor's Degree: $2,100,000[,] Master's Degree: $2,500,000[,] Doctorate: $4,400,000[.] You Need a Better Degree, and we can Help! Obtain degrees from Prestigious non-accredited Universities based on you[r] life experience. NO ONE is turned down.").

107. *See* ADVISORY COMM. ON STUDENT FINANCIAL ASSISTANCE, ACCESS DENIED: RESTORING THE NATION'S COMMITMENT TO EQUAL EDUCATIONAL OPPORTUNITY 1-2 (2001), *available at* http://www.ed.gov/about/bdscomm/list/acsfa/access_denied.pdf. In 1998–99, the average yearly in-state undergraduate tuition at a public four-year college or university was approximately $3,200. *See* LAURA J. HORN, ET AL., NAT'L CTR. FOR EDUC. STATISTICS, GETTING READY FOR COLLEGE: WHAT STUDENTS AND THEIR PARENTS KNOW ABOUT THE COST OF COLLEGE TUITION AND WHAT THEY ARE DOING TO FIND OUT 5 (2003), *available at* http://nces.ed.gov/pubs2003/2003030.pdf. While tuition rates may seem reasonable, rates at a more prestigious public school may run over $12,000, and a private education may run $25,000 or more. *Id.*

108. *See* Samuel M. Kipp III, et al., *Unequal Opportunity: Disparities in College Access Among the Fifty States*, 4 LUMINA FOUND. FOR EDUC. NEW AGENDA SERIES 5 (Jan. 2002), *available at* http://www.luminafoundation.org/publications/monographs/pdfs/monograph.pdf [hereinafter *Unequal Opportunity*]. This study excluded the following: "non-degree-granting institutions; for-profit, proprietary vocational/technical schools and colleges; narrowly sectarian, religious colleges; freestanding graduate or professional schools or specialty schools that provide only limited undergraduate curricular offering." *Id.* at 43 n.1. In determining "affordability," the Foundation looked to three factors: "(1) the expenses that students . . . faced at a particular college; (2) the estimated amounts that the student and family could reasonably contribute toward those expenses (generally called the "Expected Family Contribution" or "EFC"), and (3) the amounts and kinds of financial aid available to the students. *Id.* at 2. If the sum of a student's

With respect to affordability, the study showed that most states have two-year institutions that are affordable to low- and median-income traditional age (dependent) students.[110] But there are fewer states with four-year institutions that are "affordable" for low- and median-income traditional students without the students being forced to borrow money.[111] Except for some public two-year institutions, most universities are no longer "affordable" for low-income independent (non-traditional adult) students.[112]

Even if a low-income student qualifies for income-based funding, private and public four-year institutions are making it increasingly difficult to gain admission.[113] As enrollment in higher education booms, many four-year colleges and universities are increasing grade point averages and exam scores needed for admission.[114] Thus, students lacking sufficient academic achievement will have to

EFC and the average financial aid available to that student was equal to or greater than their estimated annual expenses at a particular college, the college was deemed "affordable." *Id.* at 2.

109. *See id*. at 1. To be classified as "admissible," the institution must enroll students with admission test scores consistent with the middle range (twenty-fifth to seventy-fifth percentile) of scores for all test takers in the particular state. *Id.* at 1, 5. If an institution is classified as "inadmissible," it is selective (i.e. it generally enrolls only more highly qualified applicants) and it is unlikely to be accessible to typical college-bound high school students. *Id.* at 2.

110. *See id.* at 28; *See also* Scott Powers, *Florida Legislature May Cut Back on Scholarship Program,* ORLANDO SENTINEL, Mar. 30, 2003, at B1. ("Besides raising alarms about long-term costs [of higher education in Florida], critics charge that most of the scholarships wind up going to students whose families already can afford college, while Florida provides little support for financially needy students.") *But see* David L. Warren, *The Lumina Foundation Misses Its Opportunity*, 5 U. BUS. 56 (Mar. 2002), *available at* http://www.universitybusiness.com/page.cfm?p=73 (criticizing the methodology of the authors of *Unequal Opportunity* and its conclusions regarding affordability).

111. *See Unequal Opportunity, supra* note 108, at 39.

112. *See id.* at 42. The average twenty-five to thirty-four year-old male high school graduate earns $34,611 annually, working full time. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2004-2005 (2005), *available at* http://www.census.gov/prod/2004pubs/04statab/educ.pdf. The average yearly tuition, room, and board charges for a public 4-year college came to $10,660 in 2003, and the rates for a private college reached $31,051. *Id.* Presumably, these rates will increase each year. Moreover, the decision to attend one of these schools most likely means that the employee will not be able to work full time during the four years of education.

113. *See, e.g.,* Patti Ghezzi & David A. Milleron, *Holding On To Hope: HOPE Award Hinges on a Fickle Standard; Students' Struggle to Stay Eligible Suggests Some High Schools Too Generous with Grades,* ATLANTA J. CONST., Nov. 10, 2003, at A1 (stating that to qualify for state scholarship, highs school graduates in West Virginia must have at least a 3.0 GPA and obtain at least 1000 on the SAT or the ACT equivalent). Most states that offer grants are awarding grants to the middle class, not to the students who can least afford a college education. *See also Unequal Opportunity*, *supra* note 108, at 42 (finding that most colleges and universities are not accessible to low-income independent students even if those students borrow money).

114. *See, e.g.,* Eric Eyre, *Making the Cut: New ACT Standard Could Block 1,500 from 4-year State Colleges*, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), Oct. 30, 2005, at 1B, (quoting West Virginia's acting higher education chancellor as stating that 1,500 students will be unable to get into a state college based on new admissions standards, set to take effect in 2008, that will require a student to "score at least 18 on the ACT and graduate with a 2.0 grade point average or higher"); Jenna Russell, *Students Say UMass Being Too Selective: Goals at Amherst Spur Strong Debate*, BOSTON GLOBE, May 5, 2005, at A1 (stating that minority enrollment

begin their higher education in community colleges and, after proving themselves academically, may be able to transfer to four-year colleges or universities.[115] Thus, a full-time worker wanting to improve his salary and job position through traditional higher education is likely to have significant financial and academic obstacles to overcome.

Unlike traditional four-year institutions, many online unaccredited schools charge relatively low-to-moderate tuition fees and do not condition admission upon the applicant's taking of standardized tests such as the SAT or the GRE.[116] Online schools, unlike traditional four-year colleges and universities, are able to highlight accessibility and affordability as advantages of their degree programs. Traditional community colleges can match online schools' claims of accessibility and affordability,[117] but these colleges, which still largely follow the classroom model of instruction, cannot match the flexibility of online degree programs. The triple pull of flexibility, accessibility, and affordability make online degree programs very tempting. Unscrupulous schools can manipulate these legitimate advantages of online education to draw unsophisticated consumers into worthless degree programs—especially if these schools cleverly misrepresent their accreditation status and mislead consumers to believe that heavily crediting prior life experiences is legitimate.[118] This discussion now turns to the deceptive practices employed by substandard degree providers to convince consumers and employers that they provide legitimate postsecondary education.

II. FRAMING THE DEBATE AS DECEPTION

Online education has provoked intense academic debate over effective pedagogy and the most effective ways of harnessing the Internet's capabilities to benefit the greatest number of students.[119] Yet, the debate over online education has largely ignored the pervasive deception and the consumer protection issues

decreased at the University of Massachusetts, after the state's board of higher education "phased in new admissions standards requiring that accepted students have a 3.0 high school grade-point average or SAT scores high enough to compensate for lower grades").

115. For an adult with a GED who is interested in technical fields, community college may enhance his or her ability to gain entrance into a traditional four-year university. *See* Lisa Tabachnick Hotta, The GED: How do Colleges and Employers Regard It?, http://adulted.about.com/cs/ged/a/ged_value.htm (last visited Aug. 2, 2005).

116. *See, e.g., infra* Part II.B.3 (discussing Kennedy-Western's operation, which charges roughly $6,000 to obtain a master's degree and does not require the taking of any standardized test for admission).

117. *See Unequal Opportunity supra* note 108, at 1-3 (reporting that two-year schools are considered affordable and have open admission policies).

118. *See infra* notes 206-09 and accompanying text (discussing how Trinity College & University falsely claims that its practice of crediting prior learning experiences is in accordance with federal standards).

119. *See supra* Part I.A (discussing advantages and disadvantages of online instruction and learning); Katie Hafner, *Lessons Learned At Dot-Com U.,* N.Y. TIMES, May 2, 2002, at G1 (discussing numerous closings of online course/degree programs and suggesting such closures stemmed from administrators mistaken "belief that students need not be physically present to receive a high-quality education").

raised by online education. Generally, consumer law seeks to assure that consumers receive sufficient, accurate information to make informed purchasing decisions.[120] Creating a marketplace with accurate information is especially important for complex and expensive products like online higher education because consumers are likely to lack sufficient insight to make intelligent self-maximizing choices. Restricting false advertising is also essential when the product has the potential to harm the purchaser and third parties.[121] Degrees based on inferior or bogus education have just that potential in various fields such as medicine, law, accounting, and engineering.[122]

By framing the debate as a matter of deception, one can combine consumer law theory with the quality standards developed by education experts through their accrediting agencies. Those standards embody both the criteria that educators believe are essential for a quality education and the indicia that prospective employers value. The focus on deception also allows schools to function outside those accreditation guidelines,[123] a flexibility sometimes necessary for innovation, as long as appropriate disclosures are made to students.[124]

The remainder of this section outlines the accreditation process in the United States, catalogues the four types of online programs that have raised consumer protection issues, and provides examples of some of their abusive practices.

A. America's Accreditation Process and the Importance of Accreditation

Unlike many countries, the United States government does not accredit higher education institutions but instead relies on a lengthy process by which experts from private agencies[125] evaluate a school to determine if it meets minimum standards

120. The United Nations General Assembly has adopted Guidelines for Consumer Protection, which obligate governments to prohibit manufacturers, distributors, and others from engaging in practices that are "damaging to the economic interests of consumers" and requiring the "provision of the information necessary to enable consumers to make informed and independent decisions." *See* U.N. ECON. & SOC. COUNCIL [ECOSC], COMM'N OF SUSTAINABLE DEF., UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION, ¶¶ 16, 22 (1999) ("Promotional marketing and sales practices should be guided by the principle of fair treatment of consumers and should meet legal requirements. This requires the provision of the information necessary to enable consumers to take [sic] informed and independent decisions, as well as measures to ensure that the information provided is accurate.").

121. *See id.* at ¶ 16.

122. *See, e.g.,* Matthew Chapman, *"Fake Doctor Factory" Awards Degrees,* BBC NEWS ONLINE, Nov. 26, 2000, http://news.bbc.co.uk/2/low/uk_news/education/1039562.stm (describing the practices of a fake doctor and describing a British diploma mill, the Metropolitan Collegiate Institute, which operates with the fictional "Sussex General Hospital" to sell fraudulent medical degrees and provide references to Americans and citizens of third world countries); *Patient Dies, Fake Doctor Held,* THE HINDU, June 7, 2004, *available at* http://www.hindu.com/2004/06/07/stories/2004060712020300.htm (reporting that a fake doctor killed a 16-year-old girl while attempting an operation on her tongue to correct stuttering).

123. *See infra* Part II.A (describing the accreditation process).

124. *See infra* Part III.C.3 (proposing that unaccredited degree providers be required to make certain disclosures to all prospective students and providing a table summarizing prohibited acts).

125. *See* COUNCIL FOR HIGHER EDUCATION ACCREDITATION, THE FUNDAMENTALS OF ACCREDITATION: WHAT DO YOU NEED TO KNOW? 1 (2002) [hereinafter FUNDAMENTALS OF

of quality education.[126] Accrediting agencies themselves are approved (i.e. recognized) by[127] the Secretary of the United States Education Department after showing they have met certain rigorous requirements.[128] These ED-recognized accrediting agencies fall in two general categories: institutional accrediting agencies which accredit entire institutions, such as traditional all-degree-granting colleges and universities, and programmatic accrediting agencies that accredit particular degree programs, which are generally part of broader institutions.[129]

Accreditation does not have the same meaning as authorized, registered, chartered, recognized, licensed, approved, or "pursuing accreditation," all of which are common terms used by diploma mills and some unaccredited schools to misrepresent their legitimacy.[130] Under various state laws, before an entity can begin operations and call itself a college, university, or higher education

ACCREDITATION], *available at* http://www.chea.org/pdf/fund_accred_20ques_02.pdf ("In the U.S., accreditation is carried out by private, nonprofit organizations designed for this purpose.").

126. *Id*. at 6. Accrediting agencies serve two primary purposes: "to ensure the quality of an institution or program, and to improve the institution or program." *See* Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61, 65 (1994) (arguing that because of the increasingly intertwined relationship between governmental bodies and accrediting agencies, due process is needed in certain situations, especially when decisions of accreditation have an impact on government funding for schools).

127. *See* OVERVIEW OF ACCREDITATION, *supra* note 12.

128. *See* The Secretary's Recognition of Accrediting Agencies, 34 C.F.R. § 602 (2003); U.S. DEP'T OF EDUC., NATIONAL RECOGNITION OF ACCREDITING AGENCIES BY THE U.S. SECRETARY OF EDUCATION, http://www.ed.gov/admins/finaid/accred/accreditation _pg3.html (last visited May 1, 2006); Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 194 (2000) ("The government has turned over much of the oversight function to private accrediting agencies by requiring institutions receiving federal funds to be accredited by federally approved and recognized accrediting agencies.").

129. *See* Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 LAW & CONTEMP. PROBS. 121, 122 (1994) (describing issues arising from the relationships among the federal government, accrediting agencies, and post-secondary education institutions and stating that an example of a programmatic accrediting agency is the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association which accredits law schools). The Secretary of Education periodically publishes a list of recognized accrediting agencies in the Federal Register, together with each agency's scope of recognition. *See* 34 C.F.R. § 602.2(a) (2003). A copy of the list may be obtained from the ED at any time and is also available on the ED's website. In addition to the ED, the Council for Higher Education Accreditation (CHEA) recognizes accrediting agencies. *See* Council for Higher Educ. Ass'n, About CHEA: CHEA at a Glance, (2000) http://www.chea.org (last visited July 21, 2006). In general, a higher education institution's eligibility for federal funding is based on institutional accreditation by ED-recognized, not CHEA-recognized, accrediting agencies, *id.;* COUNCIL FOR HIGHER EDUC. ASS'N, CHEA RECOGNITION POLICY, (1998) http://www.chea.org/recognition/CHEA_Recognition_ Policy_and_Procedures.pdf. Consequently, providers of legitimate higher education seek accreditation for a number of reasons, including eligibility to participate in the student loan program. *See* COUNCIL FOR HIGHER EDUCATION ACCREDITATION, CHEA FACT SHEETS #1-5, *available at* http://www.chea.org/Research/#CHEAfactsheets (last visited May 1, 2006), and COUNCIL FOR HIGHER EDUCATION ACCREDITATION, CHEA RECOGNITION POLICY, 3-4 (1998), *available at* http://www.chea.org/About/Recognition.asp.

130. *See* BEARS' GUIDE, *supra* note 12, at 61.

institution, it must file an application with the appropriate governmental agency and meet certain qualifications,[131] which are often inferior to traditional accreditation standards.[132] Upon meeting the state's qualifications, the entity can call itself authorized,[133] or whatever term is established by statute, but it cannot call itself accredited unless it is accredited by an ED-recognized accrediting agency.[134]

With the exception of Western Governors University, schools that exist only on the Internet have only one realistic hope of receiving accreditation by an ED-recognized accrediting agency and that is through the Distance Education and Training Council ("DETC").[135] The Accrediting Commission of DETC is the ED-recognized accrediting agency[136] that accredits postsecondary institutions that educate primarily through distance learning.[137] However, degree-granting institutions that are accredited by DETC are not eligible to participate in federal financial aid programs administered by the Education Department except for a small number of institutions allowed participation through a pilot program.[138] This

131. *See, e.g.*, N.J. STAT. ANN. § 18A:68-5 (2003) (requiring private institutions to file a certificate of incorporation with the state and obtain a license from the state commission on higher education before offering courses that lead to a degree).

132. Experts state that the number of legitimate but unrecognized accrediting agencies is "a very, very small number." *See* BEARS' GUIDE, *supra* note 12, at 40. Most unaccredited schools have very little chance of obtaining accreditation. *Id.* at 40–44, 64–65.

133. *See* OR. ADMIN. R. § 583-030-0016 (2003) ("Any entity that calls itself 'university' without authorization but with serious intent will be referred to the Department of Justice for enforcement of the statute that defines such deceptive representations as unlawful trade practices."); OR. REV. STAT. §§ 348.594, 348.606 (Supp. 2003).

134. *See supra* note 26.

135. Western Governors University ("WGU") is a private, non-profit online university founded and supported by 19 governors from western states, and because of its support, WGU is in the unique position of having received accreditation not only from the DETC but from four ED-recognized accrediting agencies. *See* Douglas Johnstone, *A Competency Alternative: Western Governors University*, 37 CHANGE 24, 24 (Jul/Aug 2005), *available at* 2005 WLNR 21080083 ("No other institution in the history of American higher education has received multi-regional accreditation, and, given the complexities of the undertaking, WGU achieved that milestone in a remarkably short time."). In order for a school to be considered as "predominantly at a distance" more than half the school's instruction must be taught by distance education. *See* THE DISTANCE EDUC. AND TRAINING COUNCIL, DETC ACCREDITATION HANDBOOK 16 (2006) [hereinafter DETC ACCREDITATION HANDBOOK], *available at* http://www.detc.org/ acredditHandbk.html.

136. *See* U.S. DEP'T OF EDUC., NATIONAL INSTITUTIONAL AND SPECIALIZED ACCREDITING BODIES [hereinafter SPECIALIZED ACCREDITING BODIES], *available at* http://www.ed.gov/admins/finaid/accred/accreditation_pg6.html (listing all regional and national accrediting agencies recognized by the U.S. Secretary of Education as reliable authorities concerning quality of education and training).

137. DETC accredits institutions that predominantly offer distance education programs up to the first professional degree level. *See* SPECIALIZED ACCREDITING BODIES, *supra* note 136; DETC ACCREDITATION HANDBOOK, *supra* note 135, at 16 (Institutions that are eligible to apply for accreditation from DETC are those that are "bona fide distance education institution" meeting certain requirements.).

138. *See* U.S. DEP'T OF EDUC., ACCREDITING AGENCIES RECOGNIZED FOR TITLE IV PURPOSES, http://www.ed.gov/admins/finaid/accred/accreditation_pg10. Html (last visited July, 28, 2005).

is because the DETC only accredits institutions that predominately instruct by distance education, and such institutions do not fall within the definition of higher education institutions for purposes of participation in student financial aid programs under Title IV of the Higher Education Act of 1965.[139]

Eligibility for online schools to participate in Title IV-funding and the quality of online education is being hotly debated; however, this article takes no position as to whether Title-IV funding should be extended to DETC-accredited institutions.[140] This article accepts the following. First, distance education is an excellent way to open wider the door of educational opportunities if done correctly and by people possessing authentic academic credentials.[141] Second, because of the history of dubious correspondence schools in this country, and the existence of an enormous number of diploma mills and unaccredited schools of questionable quality,[142] education officials have reason to proceed very cautiously in deciding whether to extend funding to predominantly-online education providers.[143] Third, because of the thoroughness of the accreditation process, accreditation, even with adjustments to better evaluate quality online degree programs, remains the proven way to ensure that traditional and online institutions provide consumers with a basic level of quality online education.[144]

The lack of accreditation does not necessarily mean that an online school's

139. *Id*. Financial aid programs under Title IV include the Federal Family Loan programs, Federal Subsidized and Unsubsidized Stafford Loans, Federal Subsidized and Unsubsidized Direct Loans, Federal Parent Loans for Undergraduate Students ("PLUS"), and Federal Direct PLUS Loans, Federal Perkins Loans, Federal Pell Grants, Federal Supplemental Educational Opportunity Grants, and Federal Work-Study. *See* Higher Education Act of 1965, 20 U.S.C. §§ 1070–1099 (2001).

140. Some consider the exclusion of DETC from Title-IV funding to reflect a continued reluctance by the ED to conclude that the quality of education at DETC-accredited institutions is equal to the quality at traditionally-accredited institutions. While current Title-IV financial aid rules penalize students pursuing degrees at online universities, the ED Secretary created in 1999 the Distance Education Demonstration Project, which exempts school participants from the Title IV rules and allows them to participate in Title IV financial aid programs. *See* U.S. DEP'T OF EDUC., THIRD REPORT TO CONGRESS ON THE DISTANCE EDUCATION DEMONSTRATION PROGRAMS 24 (April 2005) [hereinafter DEP'T OF EDUC. DEMONSTRATION REPORT] *available at* http://www.ed.gov/offices/OPE/PPI/DistEd/index.html.

141. *See generally* NCES DISTANCE-EDUCATION REPORT, *supra* note 6, at 1.

142. *See* BEARS' GUIDE, *supra* note 12, at 29–57.

143. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-279, DISTANCE EDUCATION: IMPROVED DATA AND PROGRAM COSTS AND GUIDELINES ON QUALITY ASSESSMENTS NEEDED TO INFORM FEDERAL POLICY 20 (2004), *available at* www.gao.gov/new.items/d04279.pdf (reporting a lack of consistency in standards used by accrediting agencies to assess the quality of distance education providers and recommending measures be taken to prevent fraud and abuse by degree-providers who will benefit from the elimination of the 50-percent rules, which exclude distance education providers from being an "institution of higher education"). Some academics argue that abolishing "[t]he 50 percent rules would eliminate any constraints on the developing distance education field—a direction in which more proprietary schools are headed—and potentially put federal funds at a high level of risk of fraud and abuse through the Internet." NAT'L ASS'N OF INDEPENDENT COLLEGES AND UNIVERSITIES, ISSUE SUMMARY AND STATUS: INTEGRITY PROVISIONS 2 (2005), *available at* http://www.naicu.edu/hea/2005Issues-Integrity.pdf.

144. *See* OVERVIEW OF ACCREDITATION, *supra* note 12.

education is inferior. An online school may be an innovator, pushing the frontiers of a stagnant field. It may be a new institution undertaking the process of accreditation. It may eschew accreditation for other reasons, such as a reluctance to submit religious training to secular review.[145] The lack of accreditation itself, however, often diminishes the value of these degrees—or at least raises questions that consumers should consider. Employers view degrees from unaccredited institutions with suspicion.[146] Promotions, pay raises, and tuition reimbursements are usually reserved for employees who obtain accredited degrees.[147] Moreover, numerous occupations deny licenses to graduates obtaining degrees from unaccredited institutions.[148] Unsophisticated students lack knowledge about the importance of accreditation. Expecting these students to understand not only the process of accrediting, but the importance of accreditation, would require too much from individuals who—by definition—are new to higher education and especially from those drawn by the flexibility, accessibility, and affordability of online education. Using deceptive practices, many unaccredited institutions exploit this lack of sophistication to hoodwink prospective students.[149] Therefore, advertising and disclosures made by online schools about accreditation must be scrutinized.

B. Categories of Online Schools that Raise Consumer Protection Issues

When offered by accredited institutions, online education programs have the potential to advance learning. However, four types of schools and programs have shown significant potential to mislead the public about their accreditation status and educational quality. These are:

> (1) traditional or online institutions possessing accreditation by an ED-recognized accrediting agency, but lacking accreditation by the relevant/appropriate ED-recognized accrediting agency for the degree programs offered ("accredited schools with unaccredited degree programs");
>
> (2) unaccredited colleges or universities requiring some level of coursework but lacking accreditation by an ED-recognized accrediting agency ("unaccredited schools");
>
> (3) colleges or universities lacking accreditation by an ED-recognized accrediting agency and requiring course work that pales in comparison to coursework required at traditional schools ("substandard

145. *See infra* notes 231-41 and accompanying text (discussing Tyndale Theological Seminary and Biblical Institute, which refused, due to religious "doctrinal" reasons, to seek either accreditation or a state certificate of authority to operate as a degree-granting institution).

146. *See supra* notes 74-78 and accompanying text.

147. For example, under federal law, the federal government can reimburse federal employees for cost incurred in obtaining degrees only from colleges or universities accredited by "a nationally recognized body." *See* 5 U.S.C. § 4107(a) (2000).

148. *See infra* notes 153-69 and accompanying text.

149. *See infra* Part II.B (discussing various practices, including the practice of unaccredited schools falsely claiming accreditation, obtaining accreditation from organizations not recognized by the Department of Education, or obfuscating the importance of accreditation).

unaccredited schools"); and

(4) companies selling degrees for a fee and that require very little or no coursework or that confer degrees based almost exclusively on the buyer's prior life experiences ("diploma mills").

Examples of these types of institutions and their practices are discussed briefly below.

1. Accredited Schools Offering Unaccredited Degrees

Concord Law School is an example of an accredited institution of higher education with an unaccredited degree program. Although several unaccredited law schools exist, the fact that Concord exists *only* over the Internet allows one to explore the extent to which a school's website representations have the potential to deceive prospective students. Concord is accredited by the DETC,[150] but it is not accredited by the American Bar Association ("ABA"), the only ED-recognized accrediting agency for law degree programs and schools.[151] The quality of Concord's legal education is not called into question. It clearly seeks to broaden access to legal education. Furthermore, given that its current dean and faculty come from traditional accredited law schools,[152] one can reasonably assume that Concord requires significant academic work comparable to that required by ABA-accredited law schools. However, Concord's representations about its approval and accreditation could be misleading to *some* prospective students hoping to use a Concord law degree to chart a path to the traditional practice of law.

While Concord's website discloses its lack of ABA-accreditation, it fails to state that the lack of ABA-accreditation makes its graduates, relying solely on the law degree, ineligible to take the bar exam in most states.[153] This means that

150. *See supra* note 135 and accompanying text (discussing DETC, the only ED-recognized accreditor for schools that educate primarily through distance learning).

151. *See* Concord Law School, School Information: Institutional Approval, [hereinafter School Information] *at* http://www.concordlaw.com/info/custom/concord/schoolinfo/ approval.asp? (last visited May 12, 2006); U.S. Dep't of Educ., College Accreditation in the United States, http://www.ed.gov/admins/finaid/accred/accreditation_pg6.html#law (last visited July 21, 2006).

152. *See* Concord Law School, Faculty and Lecturers, http://www.concordlawschool.com/info/custom/concord/faculty/visitinglecturers.asp?GUID=6F5F97532BEA4C09A9D760F41ADADAE0239327749634620320 (last visited July 14, 2006).

153. *See* School Information, *supra* note 151. The discussion of accreditation and the bar exam reads as follows:

> Concord's unique method of delivering instruction- via the Internet without a fixed classroom facility -places it in the correspondence school category under California law. While the California Committee of Bar Examiners and the American Bar Association do not accredit correspondence schools, the California Committee of Bar Examiners registers correspondence schools. Concord Law School is registered with the California Committee of Bar Examiners permitting its graduates to apply for admission to the California Bar.

Id. *See* ABA SEC. LEGAL EDUC. & ADMISSIONS TO BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2004 10–13 (2004), *available at* http://www.ncbex.org/pubs/pdf/2004CompGuide.pdf (stating that bar exam eligibility in the following states is limited to graduates of ABA-approved schools: Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Iowa,

Concord's graduates cannot obtain a license to practice law in most states and, therefore, are severely limited in their ability to use the degree for the conventional purpose of practicing law. [154] Concord's disclosure of its lack of ABA-accreditation together with positive representations about its DETC-accreditation and the ability of its graduates to take the bar exam in California may mislead some students lacking experience about the legal profession.

Presumably schools like Concord do not actually intend to deceive anyone; nevertheless, an unintended material misrepresentation or omission is deceptive if it is likely to mislead a consumer acting reasonably under the circumstances.[155] Because Concord is a virtual law school, it is attracting students from around the United States and some of these students will want to practice law in numerous states. When any accredited school offering unaccredited degrees fails to accurately state the known limitations of its degree (e.g. inability of a graduate to take the bar exam in most states), it deprives consumers of information relevant to their decision regarding whether they should spend thousands of dollars pursuing an unaccredited degree.[156] To combat this problem, legislation requiring accredited schools with unaccredited degree programs to make relevant disclosures is recommended later in this article.[157]

2. Unaccredited Schools Lacking Any Recognized Accreditation

In addition to failing to explicitly state the known limitations of their unaccredited degree programs, some online schools provide misleading and false statements about their accreditation status and often claim accreditation from

Kansas, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Virgin Islands). Moreover, in the District of Columbia and all other states except California, a Concord graduate wanting to take the bar exam and/or to become a licensed attorney must *first* satisfy additional requirements, such as completing additional legal education, completing a pre-approved apprenticeship, and/or passing an educational equivalency evaluation. *Id.* at 10–16.

154. *See* School Information, *supra* note 151; Robert J. Salzer, *Juris Doctor.com: Are Full-time Internet Law Schools the Beginning of the End for Traditional Legal Education?*, 12 COMMLAW CONSPECTUS 101, 109 (2004) ("While states vary with regard to their qualifications for legal practice, most require passing a state bar exam, which is predicated on having graduated from an accredited law school.").

155. Section 5(a) of the Federal Trade Commission Act provides in pertinent part that "deceptive acts or practices in or affecting commerce" are unlawful. 15 U.S.C. §45(a)(1)–(2) (2004). To establish that an act or practice is deceptive, the FTC must show that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material. *See* FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988). *See infra* Part III.B (discussing various ways an unaccredited online school can violate the FTC Act).

156. The public is relying more and more on accreditors and education providers to supply them with accurate information about "what a college education is worth in return for what it costs." AM. COUNCIL ON EDUC. CTR. FOR POL'Y ANALYSIS, DISTRIBUTED EDUCATION: SUMMARY OF A SIX PART SERIES 6 (2003), *available at* http://www.acenet.edu/bookstore/pdf/distributed-learning/summary/dist-learn-exec-summary.pdf.

157. *See infra* Part III.C.

agencies not recognized by the Education Department.[158] For example, American World University (AWU), which has no physical location,[159] boasts a purported enrollment of thousands of students from more than twenty-five countries[160] and requires its students to complete some academic work, the quality of which is considered unacceptable by some state agencies and education experts.[161] AWU's founder, Maxine Asher, is a leading figure in the world of online schools lacking ED-recognized accreditation.[162] In 1993, Asher established the World Association of Universities and Colleges ("WAUC"), an accrediting agency that gives its imprimatur to dozens of schools but is expressly disapproved of by some state educational authorities[163] and is not an ED-recognized accrediting agency.[164]

AWU's accreditation statement downplays the importance of having accreditation from an ED-recognized agency, suggests that America's lack of a ministry of education is out of step with the rest of the world, and leaves the impression that the American accreditation process has been hijacked by private organizations that oppose online schools because they pose a threat to traditional

158. Such agencies are known as "accrediting mills." *See* COUNCIL FOR HIGHER EDUC. ACCREDITATION, FACT SHEET #6: IMPORTANT QUESTIONS ABOUT "DIPLOMA MILLS" AND "ACCREDITATION MILLS" 1 (2003) *available at* http://www.chea.org/pdf/fact_ sheet_6_diploma _mills.pdf.

159. AWU lists as its address, "1126 Jackson Avenue, Suite 307, Pascagoula, Mississippi 39567 USA." American World University, About AWU: Accreditation, http://www.awu.edu/ about/accreditation.htm (last visited May 12, 2006). AWU is operating lawfully in the state of Mississippi due to Mississippi's lack of laws to deal with substandard unaccredited schools. *See* Karen Nelson, *Mississippi is One of Four States Still Lacking Accreditation Laws,* SUN HERALD (Biloxi, Miss.), Jan. 25, 2004, at 1 (stating that Asher's AWU is "an answering service in Pascagoula"); *see* Thomas Bartlett & Scott Smallwood, *Maxine Asher Has a Degree for You*, 50 CHRON. HIGHER EDUC., June 25, 2004, at A12.

160. Bartlett & Smallwood, *supra* note 159. (stating that AWU has an enrollment of 7000, includes 2,000 from China, and 1,000 in the West Bank and Gaza Strip); American World University, AWU: History of the University, http://www.awu.edu/about/history_of_the_ university.htm (last visited May 12, 2006) ("DR. ASHER'S EXPERIENCE HAS HELPED FORM THE NUCLEUS OF AMERICAN WORLD UNIVERSITY, ENSURING SUCCESS FOR ALL OF ITS 12,000 STUDENTS. American World University offers the Bachelor's, Master's and Doctor's degree to students in the U.S.A. and in more than 25 countries, including extensive programs in Palestine, Japan, Indonesia, China, Brazil, Spain, the Philippines and Western Europe.") (emphasis in original).

161. *See* MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3 (identifying AWU along with hundreds of unaccredited schools that "will not be accepted by [Michigan's] Department of Civil Service as satisfying any educational requirements indicated on job specifications"); OREGON OFFICE OF DEGREE AUTHORIZATION (ODA), STUDENT ASSISTANCE COMMISSION: OFFICE OF DEGREE AUTHORIZATION, (2005) [hereinafter OREGON OFFICE OF DEGREE AUTHORIZATION], *available at* http://www.osac.state.or.us/oda/unaccredited. html (listing AMU as an unaccredited institution from which a degree is invalid for use in state or licensed employment in Oregon).

162. *See* Bartlett & Smallwood, *supra* note 159.

163. *Id.* (stating that some schools accredited by WAUC have been identified as "diploma mills"); *See* MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3 (Michigan lists WAUC among a number of unapproved accrediting agencies.).

164. *See* Bartlett & Smallwood, *supra* note 159; MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3.

schools:

> Accreditation is the validation off [sic] a university's instructional program by an agency authorized to render an academic evaluation of the institution's degree granting process. Accreditation is not generally practiced in countries outside of the United States, since Ministries of education in the various countries regulate their own colleges and universities. In the United States, there are regional accreditation associations, in addition to selected private organizations, which accredit specific subject areas (e.g. business, nursing). There is also a distance learning accreditation association which primarily accredits trade schools and a few regular degree granting correspondence universities. What is not known to most students is that the United States government does not control or regulate colleges, universities, or accreditation associations except in connection with the reimbursement of tuition fees to students who qualify for these funds. *In a general legal sense, therefore, there are no federal enabling laws which allow colleges or accreditation associations to function. There are only for-profit and nonprofit organizations who make their own rules and regulations and who frequently "screen out" institutions of higher learning which are competitive with the larger residence schools in terms of student enrollment.*[165]

Despite this extensive accreditation discussion, AWU's discussion fails to inform prospective students in two significant ways. First, contrary to federal law and several state statutes,[166] AWU's lengthy disclosure fails to state that it lacks ED-recognized accreditation. Recently, Hawaii's Office of Consumer Protection obtained injunctions permanently enjoining AWU from operating in Hawaii because AWU violated several provisions of Hawaii law,[167] including failure to disclose AWU's lack of any ED-recognized accreditation.[168] Second, although not

165. American World University, *supra* note 159 (emphasis supplied). The AWU's explanation of accreditation also states:

> Additionally, prior to the advent of WAUC (a global accreditation association) in 1993, few valid associations exist [sic] to authenticate degree programs of colleges and universities worldwide. In 1992, several forward thinking educators decided to solicit colleges and universities around the world to ascertain their interest in forming a global accreditation association. So voluminous was the response, that the first meeting of the WAUC in . . . Switzerland hosted eleven universities. Thus, the World Association of Universities and Colleges was born and today has a membership of forty universities, with dozens of other worthy institutions in the process of application.

Id.

166. *See infra* Parts III.A-B.

167. Statutes like these prohibit unfair or deceptive acts or practices and are commonly referred to as UDAPs (Unfair and Deceptive Acts or Practices). Because state UDAP statutes are patterned after the Federal Trade Commission Act, a discussion of what practices constitute unlawful deception is delayed until Part III.B.

168. *See* Hawaii v. Am. World U., No. 03-1-1648-08 (1st Cir. Aug. 12, 2004), *available at* http://www.hawaii.gov/dcca/areas/ocp/udgi/lawsuits/AWU/american_world_u_c.pdf (suing defendants American World University of Iowa and American World University of Louisiana,

currently prohibited by any law, AWU's accreditation disclosure fails to state that accreditation from an ED-recognized agency is essential for many of the reasons that students seek a degree.[169] As experts have found, "[a]cceptance [of unaccredited degrees] is very low in the academic world and the government world, [and] somewhat higher in the business world."[170]

3. Unaccredited Schools Deceiving Consumers About the Amount and Quality of Work

In addition to misrepresenting their accreditation and claiming accreditation from unrecognized agencies, some unaccredited online schools are accused of going to great lengths to convince a potential student that substantial work is involved when it is not. Some unaccredited schools would have great difficulty obtaining accreditation because their educational practices fall far below the level that educators at accredited institutions find reasonable.[171] One of these practices is the liberal granting of academic credit for prior "life experiences," frequently basing that credit on the most cursory review.[172] Credit for "coursework" often rests on limited reading, writing, or other academic work.[173] Furthermore, exams may test general knowledge rather than the specialized training represented by the degree.[174]

Take, for example, Kennedy-Western University, an online unaccredited school

both doing business as American World University, and stating that other education statutory violations included issuing degrees even though the schools lacked an office location in Hawaii, lacking the minimum requirement of an enrollment of twenty-five students, and accepting tuition payments from students even though they had not complied with statutory provisions).

169. People who obtain unaccredited degrees may suffer a number of negative consequences including ineligibility to apply for certain jobs or to obtain a license to practice certain professions. *See, e.g.*, CAL. BUS. & PROF. CODE § 2650 (WEST 2003) (mandating that "each applicant for a license as a physical therapist shall be a graduate of a professional degree program of an accredited postsecondary institution or institutions approved" by the governing regulatory board).

170. *See* BEARS' GUIDE, *supra* note 12, at 63 (stating that while some have made good use of their unaccredited degrees, "we hear from many more who have had significant problems with such degrees, in terms of acceptance by employers, admission to other schools, or simply bad publicity"). *See also supra* notes 72-78 and accompanying text (reviewing surveys where employer rejection of and skepticism about online higher education was substantially high).

171. *See* BEARS' GUIDE, *supra* note 12, at 40–44 (stating that most unaccredited schools have very little chance of obtaining accreditation).

172. *Id.*; EZELL & BEAR, *supra* note 13, at 24 ("It is a common approach for degree mills to look at an applicant's C.V. or resume and say, 'Ah, yes, you've been selling life insurance for three years. That is the equivalent of an MBA.'").

173. *See infra* notes 174–78 and accompanying text; EZELL & BEAR, *supra* note 13, at 24 (describing an arbitration dispute in which a teacher with a dubious doctorate degree from an unaccredited school sued for increased wages, the arbitration committee looked at the teacher's seventeen-page dissertation, found it to be "nothing more than a book report," and denied his claim for increased wages).

174. *See infra* notes 187-88 and accompanying text; EZELL & BEAR, *supra* note 13, at 24 (questioning whether a "three-page paper and one short open-book quiz is sufficient for a master's degree").

licensed by the state of Wyoming.[175] Kennedy-Western came under scrutiny after an investigation by the United States General Accounting Office ("GAO")[176] revealed 463 federal employees had obtained degrees from diploma mills and unaccredited schools, and that federal agencies had reimbursed employees over $169,000 for tuition fees paid to obtain these degrees.[177] Even though federal law allows tuition reimbursement *only* for accredited degree programs,[178] Kennedy-Western along with another unaccredited school provided records to the GAO that confirm these schools had received over $150,000 from federal agencies, and that the figures reported by Kennedy-Western were actually understated.[179] Before considering the specific criticisms against Kennedy-Western, the reader should be aware that no court has specifically held that Kennedy-Western is a substandard unaccredited school or diploma mill, but Kennedy-Western lacks any ED-recognized accreditation and its degrees are expressly rejected as unacceptable in a few states.[180]

175. *See* Kennedy-Western University, About KWU, http://www.kw.edu/ default.asp (last visited July 21, 2006).

176. Despite a name change to the Government Accountability Office, some reports cited in this paper refer to it as the General Accounting Office because at the time the reports were created that was the office's title. *See* Gov't Accountability Office, GAO's Name Change and Other Provisions of the GAO Human Capital Reform Act of 2004, http://www.gao.gov/about/namechange.html (last visited July 21, 2006).

177. *See* ROBERT J. CRAMER, U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-04-1096T, DIPLOMA MILLS: DIPLOMA MILLS ARE EASILY CREATED AND SOME HAVE ISSUED BOGUS DEGREES TO FEDERAL EMPLOYEES AT GOVERNMENT EXPENSE, 4 (2004) (separate publication of testimony at: *Are Current Safeguards Protecting Taxpayers Against Diploma Mills?: Hearing Before the Subcommittee on 21st Century Competitiveness, H. Committee on Education and Workforce* 108th Cong. (2004) [hereinafter GAO REPORT NO. 2] *available at* http://www.gao.gov/new.items/d041096t.pdf); ROBERT J. CRAMER, U.S. GEN. ACCOUNTING OFFICE, GAO REPORT NO. GAO-04-771T, DIPLOMA MILLS: FEDERAL EMPLOYEES HAVE OBTAINED DEGREES FROM DIPLOMA MILLS AND OTHER UNACCREDITED SCHOOLS, SOME AT GOVERNMENT EXPENSE 2 (2004) [hereinafter GAO REPORT NO. 1] (separate publication of testimony at *Bogus Degree Hearings supra* note 29), *available at* http://www.gao.gov/new.items/d04771t.pdf.

178. Federal law permits the federal government to pay for the cost of federal employees to obtain degrees from only a college or university accredited by a nationally recognized body. *See* 5 U.S.C. § 4107(a) (2000).

179. *See* GAO REPORT NO. 1, *supra* note 177, at 4 ("California Coast University and Kennedy-Western University provided records indicating that they had received $150,387.80 from federal agencies for 14 California Coast University students and 50 Kennedy-Western University students."); *Bogus Degree Hearings*, *supra* note 29 ("[T]he records provided by the schools understate the extent of Federal payments. It is very difficult to get an accurate snapshot of the true extent of Federal payments to the schools."). The GAO believes records provided by Kennedy-Western understate the amount of federal dollars actually received. GAO REPORT NO. 1, *supra* note 177, at 6. For example, "Kennedy-Western reported total payments of $13,500 from the Energy Department" but the GAO calculated that "Energy [had] made payments of at least $28,000 to Kennedy-Western." *Id.*

180. *See, e.g.*, OREGON OFFICE OF DEGREE AUTHORIZATION, *supra* note 1601 (stating that Kennedy-Western is unaccredited and its degree is invalid for use in state or licensed employment in Oregon); MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3 (identifying Kennedy-Western along with hundreds of unacceptable unaccredited schools); *Bogus Degree Hearings*, *supra* note 29, at 28 (testimony of Alan Contreras).

United States Senator Susan Collins, chair of the Senate Committee on Governmental Affairs, ordered additional investigations, conducted hearings, and accepted testimony that raises concerns about level of work required at Kennedy-Western.[181] As part of an undercover investigation of Kennedy-Western, Coast Guard Lieutenant Commander Claudia Gelzer enrolled in Kennedy-Western to obtain a master's degree in environmental engineering.[182] She did not have to take any standardized test, such as the GRE, to enroll in the master's degree program.[183] Although Gelzer had never taken any environmental courses, Kennedy-Western waived six master's-level courses by giving her prior-learning-experience credit for unrelated professional training courses taken during her career.[184] That meant Gelzer only had to take five courses to obtain a master's degree. [185] The liberal granting of academic credit for prior life or learning experiences is not a practice followed by reputable traditionally-accredited schools and is a practice closely related to the issue of determining whether unaccredited schools require completion of rigorous academic work.[186]

In addition to receiving from Kennedy-Western substantial credit for prior experiences, Gelzer enrolled in two required courses, purchased and reviewed the assigned textbook for each course, and took a test for each.[187] *Without* having read

181. *Bogus Degree Hearings*, *supra* note 29, at 31-32, 38 (Senator Collins' committee decided to investigate Kennedy-Western after discovering that its catalog boasted that over twenty federal agencies had paid for their employees' education at Kennedy-Western.). Sadly, this representation was confirmed by GAO Report No. 1. *See* GAO REPORT NO. 1, *supra* note 177, at 5. The U.S. Senate Committee on Governmental Affairs has been renamed the U.S. Senate Committee on Homeland Security and Governmental Affairs. Press Release, S. Comm. of Homeland Sec. and Gov't Aff., Senator Collins Re-elected as Chairman of S. Comm. of Homeland Sec. and Gov't Aff. (Jan. 5, 2005), http://www.senate.gov/~gov_affairs/index.cfm?FuseAction=PressReleases.Detail&Affiliation=C&PressRelease_id=878&Month=1&Year=2005.

182. *See Bogus Degree Hearings*, *supra* note 29, at 38.

183. *Id.* at 46.

184. *See id.* at 39.

185. *See id.* (stating that Kennedy-Western "waive[d] six Master's level classes in engineering based solely on my claims of professional experience").

186. *See id.* at 2 (statement of Senator Susan Collins) ("All of the [diploma mill or unaccredited] schools we investigated gave credit for prior work or life experience, even for advanced degrees, which is very rare among accredited institutions."). Kennedy-Western's credit-granting practices are woefully substandard. For example, some credits given to Gelzer were for her attendance at unrelated previous seminars. *Id.* at 39. In contrast, in a survey of "20 accredited schools that offer a Master's degree in environmental engineering[,] [n]one of them offer credit for life experience." *Id.* A survey of 1,100 accredited institutions revealed "only 6 percent of these schools offer credit for life experience at the [m]aster's level." *Id.* Also, as part of the investigation of Kennedy-Western, the Council for Adult and Experiential Learning ("CAEL") determined that Kennedy-Western's practice of giving academic credit falls very short of the recognized standards for granting credit. *Id.* at 48. CAEL is an organization which establishes widely-consulted and accepted criteria for giving academic credit for non-collegiate experiences. For more information on guidelines for colleges granting credit for non-coursework such as life experience, *see* AM. COUNCIL ON EDUC., 2003-2004 GUIDE TO EDUCATIONAL CREDIT BY EXAMINATION (Jo Ann Robinson, et al. eds., 2003); AM. COUNCIL ON EDUC., 2002 NATIONAL GUIDE TO EDUCATIONAL CREDIT FOR TRAINING PROGRAMS (Jo Ann Robinson & Jacqueline E. Taylor eds., 2002).

187. *See Bogus Degree Hearings*, *supra* note 29, at 40 ("No papers, homework assignments,

the book, Gelzer testified that she learned from other students that exam answers could be found in the glossaries of the textbooks and that she passed two courses with a total of 16 hours of study for both courses:

> As for my first-hand experience with Kennedy-Western courses and passing the tests, I found that basic familiarity with the textbook was all I needed. I was able to find exam answers without having read a single chapter of the text. As for what I learned, the answer is very little. The coursework provided only a cursory insight into management of hazardous waste or environmental regulations and laws, certainly not at the level one would expect from an environmental engineer.
>
> Aside from a multiple-choice exam and someone to grade it, based on my experience, a student at Kennedy-Western receives little value for their roughly $6,000 in tuition. I think that is why I found so many who expressed disillusionment on the school's chat room. Having stood in their shoes for a few months, I can understand why they feel betrayed.[188]

Schools like Kennedy-Western do not merely offer different academic experiences, but they work aggressively to sell students on the school. Andrew Columbe, a former admissions counselor for Kennedy-Western, told members of the Senate Committee on Governmental Affairs that, shortly after beginning his job, he realized that he "had been hired to be a telemarketer, using a script to sell Kennedy-Western just like any other product."[189] Columbe testified that Kennedy-Western relies on high-pressure, shady telemarketing tactics to attract students and to get the tuition payment from them before the students realize how little work will be required of them:

> As an admissions counselor, I was required to call between 120 and 125 prospective students per day, trying to convince them that they should apply to Kennedy-Western. If I convinced a student to apply, he was then handed over to a "senior admissions specialist" who tried to get the student to enroll and to pay for his degree. These senior admissions specialists were generally regarded as the experienced, hard-core "closers" who would close the sale and bring in the money. *Once the student paid,* he was turned over to the student services department to select his classes.[190]

online discussions, or interaction with the professor was required.").

188. *Id.* at 42–43. Gelzer testified that "[w]ith just 16 hours of study, I had completed 40 percent of the course requirements for my Master's degree." *Id.* at 42. As indicated in Gelzer's testimony, some consider students enrolled in schools like Kennedy-Western to be victims*, id.* at 58. Others feel such students are dishonest. *Id.* (Sally Stroup, Assistant Secretary for Postsecondary Education, discusses at length the ramifications of whether a student is a victim or a participant.). *See infra* Part IV.C (discussing disciplinary standards for determining when an employee with a fake or unaccredited degree should be disciplined).

189. *See Bogus Degree Hearings*, *supra* note 29, at 43 (statement of Andrew Colombe before the U.S. Senate Committee on Governmental Affairs).

190. *See Bogus Degree Hearings*, *supra* note 29, at 44 (stating that "counselors work[ed] in a boiler room atmosphere, where we were under significant pressure to meet lofty sales goals" and

The testimony of Columbe, Gelzer, and others[191] caused Senator Collins and others on the Senate Committee on Governmental Affairs to question the legitimacy of Kennedy-Western and to call for action to shut down schools like it or to run them out of business.[192] Unfortunately, the testimony presented to this committee and other relevant information about unaccredited schools is relatively unknown except to those knowledgeable about the problems posed by the rapid growth in online unaccredited schools.[193] To make sure students can make a fully-informed decision about whether to obtain a degree from an unaccredited school, Part III of this article proposes legislative action requiring unaccredited schools to disclose in writing, before receiving any tuition payment, the precise academic work required to earn the degree sought. [194]

In summary, as part of high-pressure recruiting tactics, many unaccredited schools often falsely claim accreditation, downplay the importance of ED-recognized accreditation, mislead consumers about the academic work required, and represent that the degrees sought can legitimately be merited based on a person's prior life and learning experiences.[195] The combination of these

were paid a low base salary and a commission of $15 per each student application completed).

191. *Id.* Columbe also stated that much of the sales pitch was completely false, and his testimony corroborated Gelzer's testimony about the inferior quality of a Kennedy-Western's education. *Id.* Gelzer's statement: "I can tell you that there is no value to a Kennedy-Western education. Anything you learn there can be learned by buying a book and reading it on your own." *Id*. at 45 (summarizing the testimony of three former employees of Kennedy-Western as further evidence that students obtain very little education). Gelzer emphasized that numerous schools like Kennedy-Western exist so no one should conclude that the Kennedy-Western's operation is an aberration. *Id.* at 38.

192. *See id.* at 50–56. Senator Collins stated that "Kennedy-Western provided the Committee with a listing of its current employees and the list indicated that they have 119 employees. Sixty-nine of them, almost 60 percent, work in admissions. I can't imagine a legitimate college having 60 percent of its employees working in admissions." *Id*. at 55. After hearing the testimonies of Gelzer and Columbe, Senator Joseph Lieberman stated that these type of schools "ought to be closed down, or life ought to be made difficult enough for them . . . that they can no longer afford to go forward," and that if he and Senator Mark Pryor were attorney general, "that is exactly what we would be doing." *Id.* at 53.

193. *See, e.g., id.* at 63 (Senator Susan Collins reported: "We found from our investigation that many of those individuals who are the true victims of diploma mills feel that they don't have an easy way to check on whether an institution like Columbia State University or Kennedy-Western is a legitimate academic institution. . . . [T]he Department of Education receives many questions from the public, including potential employers who are trying to figure out whether various institutions are legitimate.").

194. *See infra* Part III.C.3 (discussing legislative proposal requiring unaccredited schools to make several relevant disclosures to all prospective students and providing a table summarizing the same). As for employees who knowingly obtain degrees from schools that are unaccredited and know the work required is substandard, Part IV recommends standards for disciplining those who have used such degrees to obtain jobs, raises, or promotions.

195. Although Kennedy-Western never claimed to be accredited, it went to great length to down play the importance of accreditation. *See Bogus Degree Hearings*, *supra* note 29, at 51, 53–54 (Lieutenant Commander Gelzer testified that "if you didn't know any better, you would be convinced that accreditation was more of an administrative designation."). Many unaccredited schools seek to appeal to a person's sense of entitlement when trying to persuade them to enroll in their degree programs. *See, e.g.*, *id.* at 19 ("Many individuals with superior talent, ability and

techniques can dupe unsophisticated consumers into pursuing and paying for degrees that are substantially inferior to traditional degrees.

4. Diploma Mills Selling Degrees and Providing Phony Transcripts

While some experts on degree fraud would include unaccredited schools like Kennedy-Western in the definition of diploma mills, other educators and policymakers restrict the definition of diploma mills to sham schools that award degrees based almost exclusively on an individual's life experiences, or sell degrees to individuals who complete very little or no academic work to earn them.[196] Trinity Southern University, which offers a bachelor's degree for $299,[197] is a good example of an online diploma mill. Trinity Southern University received much media coverage after Pennsylvania's attorney general purchased a degree for Colby Nolan—a pet cat.[198] Because Trinity Southern University was suspected of awarding degrees based on the applicant's prior experiences, the information provided in Colby's online application claimed that Colby completed three courses at a community college and worked as a manager at two different retailers.[199] Colby's other previous work experience included food preparer at a fast food restaurant, babysitter, and paperboy.[200] Trinity Southern University emailed Colby to inform him that his work experience qualified him to receive an Executive MBA, not the bachelor's degree that was requested.[201] Within several weeks after payment of the required fee, an official looking diploma arrived on professional stock paper and included an embossed gold seal from Trinity Southern University with the signatures of the dean and university president.[202] For an additional $99 fee, the attorney general obtained a transcript that included

training are being denied raises, promotions, new jobs or the prestige they deserved just because they have not obtained the appropriate degree. Your intelligent decision, however, will not permit this travesty to happen to you.").

196. *See* EZELL & BEAR, *supra* note 13, at 20–22 (stating that David Stewart and Henry Spille assert that "a diploma mill is a person or an organization selling degrees or awarding degrees without an appropriate academic base and without requiring a sufficient degree of post-secondary-level academic achievement.").

197. Stephen Barrett, Trinity Southern University Sued by Pennsylvania Attorney General, www.quackwatch.org/02ConsumerProtection/AG/PA/tsu.html (last visited May 12, 2006).

198. *See* Daniel Engber, *One Smart Cat*, CHRON. HIGHER EDUC., Jan. 7, 2005, at A6; Press Release, Pa. Attorney Gen., AG Pappert Names Defendants in Elaborate E-mail Scheme to Sell Bogus Academic Degrees; PA Private Industry IP Addresses Hijacked to Promote Scam (Dec. 6, 2004) [hereinafter Pennsylvania Press Release], *available at* http://www.attorneygeneral.gov/prtxt/06Dec2004-ag_pappert_ names_defandants_in_elaborate_e-mail_scheme_to_se.html (citing the Unsolicited Telecommunication Advertisement Act as the anti-spam law violated); Complaint and Petition for a Permanent Injunction, Commonwealth v. Poe, No. 796 MD 2004 (Pa. Commw. Ct. filed Dec. 2004) [hereinafter Pennsylvania Complaint].

199. *See* Silla Brush, *9 Lives - and 1 MBA[:] Cat Gets Degree From Diploma Mill, and Frisco Man Gets Sued*, DALLAS MORNING NEWS, Dec. 9, 2004, at A1.

200. *Id.*

201. *Id.*

202. *Id.*

Colby's courses taken and a GPA of 3.5.[203] Despite its website representations, Trinity Southern University was obviously selling degrees as it did not bother to confirm whether Colby the cat was an actual person or had any of the work and educational experiences he claimed.[204] As of this date, Trinity Southern University and its principals are permanently enjoined from operating in Texas and Pennsylvania and have been ordered to pay hefty fines for bilking consumers.[205]

Despite the implausibility of earning a legitimate bachelor's degree based on life experiences or minimal academic work, diploma mills take great pains to assure applicants that their practices are acceptable. For example, another "Trinity" school, Trinity College & University,[206] offers undergraduate degrees for $675 in as little as two days and informs prospective students that "College credit is NOT and is NEVER awarded for life experience," attempting to draw a meaningful distinction between "life experience" and prior "learning experiences."[207] Trinity College & University also claims to "practice the standards of PLA [prior learning assessment] in compliance with the recommendations of the U.S. Department of Education."[208] No such recommendations exist. These misleading statements give false assurances that it is somehow possible to legitimately earn a college degree in two days if the applicant's prior life experiences are so exceptional that he or she already has obtained an enormous amount of "learning experiences."[209] The principals of Trinity College & University are now permanently enjoined from using the name "Trinity" because it is too similar to Trinity University, a reputable accredited school in San Antonio, Texas.[210]

203. *Id.*

204. *Id.*

205. *See* Commonwealth v. Poe, Order Granting Application Relief, No. 796 MD 2004 (Pa. Commw. Ct. Sept. 8, 2005) ("Defendants are permanently enjoined from conducting business in the Cmwlth. of Pa. & must pay a civil penalty; costs for investigation, prosecution & fees, restitution for consumers and attorneys fee to the Cmwlth. within 60 days of the date of this Order."); Texas v. Trinity S. U., No. 04-12386 (160th Dis. Ct. Mar. 14, 2005).

206. This Trinity is unrelated to Trinity Southern University, mentioned previously in the text. Trinity College & University is considered by the US Army and the State of Oregon to be a diploma mill and recently settled a copyright infringement lawsuit with Trinity University, a reputable traditional school in San Antonio, Texas. *See* Guillermo Contreras, *Trinity Sues To Protect Name*, SAN ANTONIO EXPRESS-NEWS, Apr. 16, 2004, at B1 [hereinafter *Trinity Sues*]; Guillermo Contreras, *Trinity Trademark Lawsuit is Settled;* SAN ANTONIO EXPRESS-NEWS, Oct. 27, 2004, at B3[hereinafter *Trinity Settlement*].

207. Trinity College & University, Credit For Prior Learning, http://www.trinity-college.edu/credit_exp.html (last visited May 12, 2006). Trinity offers these degrees in "as little as two days…depending on the quality of the application and cooperation of the applicant in gathering documentation requested." Trinity College & University, Frequently Asked Questions, http://www.trinity-college.edu/faq.html (last visited May 12, 2006).

208. *See* Trinity College & University, Trinity Fees, [hereinafter Assessment of Fees] http://www.trinity-college.edu/fees.html (last visited May 12, 2006).

209. EZELL & BEAR, *supra* note 13, at 23–24 ("While there are three regionally accredited U.S. schools that will consider awarding their bachelor's degree totally based on prior learning (if there is a great deal of it), the vast majority of schools require at least one year of new work, no matter what the student has done before.").

210. *See* Trinity U. v. Trinity Coll., No. 04-CV-313, (W.D. Tx Nov. 12, 2004) (Final

Diploma mills also engage in fraudulent academic verification services. Southeastern University, a diploma mill located in the living room and two bedrooms of Dr. Alfred Jarrett's home, was the subject of an investigation that led to it being shut down.[211] During the investigation, the FBI uncovered 620 "graduates" and the phony transcripts and verification services provided to them by Jarrett.[212] No doubt, Jarrett's verification practices played a role in the hiring of some of the 171 graduates that the FBI discovered were employed in positions at the local, state, and federal government levels.[213] Since the shutting down of Southeastern University, diploma mills have gotten more sophisticated in their provision of verification services.[214] To test the verification services of Degrees-R-Us for degrees purchased for Senator Susan Collins, a GAO investigator, as part of a sting operation, contacted Degrees-R-Us and pretended to be a potential employer.[215] The GAO had previously purchased three fake degrees from Degrees-R-Us for Senator Collins.[216] According to the instruction sheet included in her degree packet from Degrees-R-Us, Senator Collins could give a prospective employer her password information to view her transcript online at www.lexingtonuniversity.org.[217] Moreover, when the GAO investigator called the

Judgment and Order of Permanent Injunction); *Trinity Settlement, supra* note 206, at B3. ("[T]he confusion 'diminished' the value of a degree from Trinity University" and that "President Thomas P. Williams agreed to a permanent injunction requiring his business to destroy all materials - mugs, pens, pencils, sweatshirts, book bags, bumper stickers, and other items - bearing 'Trinity' in the logo."); Joseph Gidjunis, *One Trinity Too Many*, CHRON. HIGHER EDUC., Nov. 26, 2004, at A6 ("No fewer than 14 American institutions of higher education use 'Trinity' in their names, but only the one located in San Antonio shall be known as Trinity University.").

211. *See* Louis Ariano, Registrar, McMaster U., *Not for Novelty Purposes Only: Fake Degrees, Phony Transcripts and Verification Services, Presentation at the Conference of the Association of Registrars of the Universities and Colleges of Canada* (June 28, 2004) at 2, *available at* http://arucc2004.centennialcollege.ca/documents/A3.pdf.

212. *Id.* at 2–3.

213. *Id.* at 3.

214. Entities that provide fraudulent academic verification services are considered a threat to legitimate registrars at accredited institutions. For example, the American Association of Collegiate Registrars and Admissions Officers ("AACRAO"), the leading trade association for registrar and admissions professionals at higher education institutions, recently filed a trademark infringement lawsuit against the American Universities Admission Program ("AUAP"), allegedly the largest provider of dubious academic verification services. *See* Complaint and Application for a Temporary Restraining Order at 11-13, American Ass'n of Collegiate Registrars and Admissions Officers v. American Universities Admission Program, No. 1:06CV00137 (D.D.C. Jan. 25, 2006), *available at* http://www.aacrao.org/reporting/complaint.pdf (seeking to enjoin AUAP from misappropriating AACRAO's name and engaging in any other practices that deceive the public and students into believing AUAP is associated with AACRAO).

215. *See Bogus Degree Hearings*, *supra* note 29, at 1–2; GAO REPORT NO. 2, *supra* note 177, at 1; ROBERT J. CRAMER, GEN. ACCOUNTING OFF., PURCHASE OF DEGREES FROM DIPLOMA MILLS, (2004) (GAO Report No. GAO-03-269R) (publication of: Letter from Robert J. Cramer, Managing Dir., Off. Of Spec. Investigations, GAO, to Susan M. Collins, Ranking Min. Member, Perm. Subcomm. on Investigations, Comm. On Gov't Affairs, US S. (Nov. 21, 2002)) [hereinafter GAO'S PURCHASE OF DEGREES FROM DIPLOMA MILLS], *available at* http://www.gao.gov/new.items/d03269r.pdf.

216. *See* GAO'S PURCHASE OF DEGREES FROM DIPLOMA MILLS, *supra* note 215, at 2

217. *Id.* at 4

registrar's toll free number, a person associated with Degrees-R-Us confirmed Ms. Collins' award of a bachelor's and a master's degree from Lexington University.[218] In a realistic-looking transcript showing courses taken by Senator Collins, the diploma mill listed grades such as an "A" in Introduction to Sociology and a "B" in Spanish II, and reported an overall grade-point average of 3.80.[219]

The foregoing discussion demonstrates that online diploma mills, along with many unaccredited schools and accredited schools offering unaccredited degrees, follow practices that can deceive unsophisticated consumers and seriously harm them. Because many consumers pursuing online degrees only have a high school education, they lack the higher education experience that might make them more sophisticated about legitimate educational practices, accrediting agencies, and degrees.[220] Some, no doubt, lack family members or friends with such sophistication. Moreover, many see themselves as desperate—pushed by a tight job market, family constraints and declining access to traditional education—to pursue online degrees as their only hope of getting ahead. Under these circumstances, a significant number of these consumers cannot protect themselves against deceptive practices. As discussed in the next section, current state and federal laws provide some measure of protection.

III. GOVERNMENTAL ROLE IN CURBING THE SUPPLY OF SUBSTANDARD DEGREES

Unsophisticated consumers and employers suffer from the deceptive practices of fake and substandard online degree providers.[221] Members of the public have suffered when lawyers, doctors, and others sporting fake or substandard degrees have offered them inferior advice—sometimes with tragic outcomes.[222] Under these circumstances, both enforcement agencies and lawmakers have recognized the need for governmental action to halt the supply of harmful practices and deceptive advertising.[223] This section details the steps that state and federal governments have already taken to reduce harm from inferior online degrees.

218. *Id.* at 2

219. *Id.* at 7; *Nightly News: Government Employees Using Fake Degrees Paid For With Tax Dollars To Get Better Jobs And Pay Raises* (NBC television broadcast May 10, 2004).

220. In response to Senator Joseph Lieberman's question: "Do you think most of the students [enrolled in Kennedy-Western] were . . . willing participants in what was essentially a fraud, or were they deceived?," Lieutenant Commander Gelzer stated: "I would say I saw more evidence of students who were surprised and seemed a little deceived that all of a sudden, they realized their company [employer] wouldn't reimburse them, or they put [the Kennedy-Western] degree on a resume and they went to apply for a job and they were questioned about it and they had to ultimately take it off their resume." *See Bogus Degree Hearings*, *supra* note 269, at 51.

221. Employers have spent millions of dollars reimbursing employers for participating in dubious degree programs. Some have also promoted employees into positions that the employee could not handle effectively. *See infra* notes 345-52 and accompanying text.

222. *See supra* notes 18 and 122 (discussing victims who died after following the instructions of fake doctors).

223. *See, e.g.*, *Bogus Degree Hearings*, *supra* note 29, at 1–2 (Senator Frank Lautenberg stated: "Some people want to cut corners to meet the criteria needed to get a job or be promoted. Others are well-meaning in their pursuit of a degree, but they get duped. Either way, we need to crack down on diploma mills to protect consumers and taxpayers.").

Unfortunately, as the discussion below demonstrates,[224] most states have tolerated fake and unaccredited schools.[225] Federal laws have been used somewhat more effectively to criminally penalize the operators of diploma mills but have left most other unaccredited schools and programs untouched.[226] To more effectively curb the practices of fake and unaccredited degree providers, this Article proposes enactment of a statute, the Authentic Credentials in Higher Education Act.[227] The final section of this part discusses this proposed act in detail.

A. Existing State Laws

Some states currently regulate degree providers by setting minimum standards for authority to issue degrees and by fining and imposing injunctions against companies operating without a license or in violation of other statutes.[228] Only a few states have been actively involved in shutting down diploma mills and forcing unaccredited schools to comply with state law.[229] These states rely on statutes regulating post-secondary education as well as general statutes prohibiting deceptive acts and practices.[230]

HEB Ministries v. Texas Higher Education Coordinating Board offers one of the few examples of a state attempting to restrict practices of an educational institution operating in violation of state law.[231] In that case, the Texas Higher Education Coordinating Board ("Board") sought an injunction against, and imposed fines on, Tyndale Theological Seminary and Biblical Institute ("Tyndale") for using the word "seminary" and issuing theological degrees without government approval or accreditation.[232] In response, Tyndale challenged the Texas law that requires all religious postsecondary institutions in the state to obtain authority from the Board to issue degrees or to obtain accreditation from the state's educational agency.[233] Tyndale claimed it did not seek accreditation or a state

224. States have specific laws aimed at or regulating the creation and operation of providers of higher education, and such laws vary greatly from state to state. *See* The Education Commission of the States, What is the State's Licensing Approval Authority Over Higher Ed Institutions?, http://www.ecs.org/dbsearches/Search_Info/StateNarrativeReports.asp?tbl=table6 (listing every state's agency having the authority to license or approve higher education institutions) (last visited June 15, 2005).

225. *See infra* notes 249-52 and accompanying text; EZELL & BEAR, *supra* note 13, at 168 (identifying which states provide a haven for substandard schools and which states have weak or non-existent enforcement).

226. *See infra* Part III.B.

227. *See infra* Part III.C.

228. *See* JODY FEDER, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICES, DIPLOMA MILLS: A LEGAL OVERVIEW 7 (Nov. 10, 2003) (a CRS Report for Congress); (discussing several states with weak enforcement and stating that "Idaho properly regulates most schools but intentionally ignores some dreadful Idaho-based schools as long as they do not enroll students living in that state").

229. *See infra* notes 231-49 and 361-63 and accompanying text.

230. *See id.*

231. 114 S.W.3d 617 (Tex. App. 2003).

232. *Id*. at 624–25.

233. *Id.* at 627.

certificate of authority because of religious "doctrinal" reasons.[234]

The Texas Court of Appeals noted that the Texas law was a "response to the emergence and proliferation of 'degree mills' . . . that undermined the value and integrity of degrees granted by legitimate institutions."[235] Rejecting Tyndale's arguments that the law violated the First Amendment, the court found no establishment clause violation because the regulation of degree granting institutions was only a minor and unobtrusive form of supervision that had a secular purpose—preventing public deception and confusion.[236] The court likewise rejected Tyndale's argument that the government's prohibition on using the words "associate, bachelor's, master's, doctor's and their equivalents" constituted a restriction of free speech in violation of the U.S. Constitution.[237] This prohibition the court found was "not a complete ban on speech but rather a restriction on speech in an effort to prevent the conferral of fraudulent or substandard degrees."[238] Quoting a U.S. Supreme Court decision, the court observed that "[c]ommercial speech that is not false, deceptive or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest."[239] The court held that Texas had a substantial interest in preventing harm from private postsecondary institutions conferring fraudulent or substandard degrees and that the regulation of academic terminology was narrowly tailored.[240] The court upheld the Board's administrative penalties of $173,000 assessed against Tyndale.[241]

By bringing enforcement actions against dozens of online schools, Hawaii has also attempted to rein in unscrupulous practices by educational institutions.[242] Its Office of Consumer Protection sued American World University of Iowa and American World University of Louisiana, two schools operated by the previously-mentioned Maxine Asher.[243] The complaint alleges that Asher's schools violated Hawaii's consumer protection statute[244] and specific laws regulating unaccredited

234. *Id.* at 624.

235. *Id.* at 622.

236. *Id.* at 628.

237. *Id.* at 631.

238. *Id.*

239. *Id.* (citing Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142 (1994)).

240. *Id.* at 636 ("By restricting the degree-granting powers of all private postsecondary institutions and restricting the use of certain academic terms in the names of such institutions, the Texas Legislature has assured the Texas public that all such institutions, *regardless of the content of their message*, have met basic postsecondary educational standards.") (emphasis supplied).

241. *Id.* at 636–37.

242. *See* Hawaii Dep't of Commerce & Consumer Affairs, Civil Enforcement Lawsuits, http://www.hawaii.gov/dcca/areas/ocp/udgi/lawsuits/ (last visited May 12, 2006).

243. *See* State v. Am. World U. of Iowa Inc., No. 03-1-1648-08 VSM, (Haw. Cir. Ct. Feb. 12, 2004) [hereinafter Judgment Against AWU] (granting summary judgment against defendants American World University of Iowa, Inc., and American World University), *available at* http://www.hawaii.gov/dcca/areas/ocp/udgi/lawsuits/AWU/american_world_u_sj-defense.pdf.

244. *See supra* note 168.

schools, including failing to disclose their lack of any ED-recognized accreditation.[245] AWU's answer conceded that it had never had any ED-recognized accreditation.[246] A court permanently enjoined these schools from operating in Hawaii, ordered them to refund all tuition payments to any student requesting a refund, and assessed $125,000 as civil penalties against each school.[247] The right-to-refund letter that Asher was ordered to send to all students must inform each student of his or her right to bring a private action and, if a favorable judgment is obtained, the right to collect $1,000 or treble damages, whichever is greater.[248]

A few other states have attempted to curb the supply of fake and unaccredited degrees through similar actions.[249] However, most states, either lacking the resources or the interest to prosecute, simply tolerate these schools.[250] Once ordered to shutdown in a state with aggressive enforcement activities, Asher and degree providers like her simply resume business in other states that tolerate their business activities.[251] Asher, in fact, has never paid the $250,000 in judgments rendered against her unaccredited schools, and Hawaii has deemed them uncollectible.[252]

States could adopt more laws to deter the growth of fake and substandard unaccredited schools. Because the laws in all fifty states and the District of Columbia vary greatly,[253] it would be helpful for an organization like the Education Commission of the States[254] to take the leadership role on this issue.[255]

245. *See* Complaint, State v. Am. World U., No. 03-1-1648-08 (Haw. Cir. Ct. Aug. 12, 2004), *available at* http://www.hawaii.gov/dcca/areas/ocp/udgi/lawsuits/AWU/american_world_u_c.pdf (stating that the other education statutory violations included issuing degrees even though the schools lacked an office location in Hawaii and lacked the minimum requirement of an enrollment of twenty-five students and accepting tuition payments from students even though they had not complied with statutory provisions).

246. *Compare* Judgment Against AMU, *supra* note 243 with Response to Complaint, Am. World U. of Iowa, Inc., No. 03-1-1648-08VSM (Haw. Cir. Ct. Sept. 22, 2003).

247. *See* Judgment Against AWU, *supra* note 243, at 2–3.

248. *Id.* at Ex. No.1.

249. Attorneys general in Pennsylvania and Texas are also aggressively trying to shut down unaccredited online providers. *See* EZELL & BEAR, *supra* note 13, at 17.

250. *Id.* at 168 (identifying several states, including Montana for having a "decent school-licensing law but intentionally [choosing] not to enforce it" and Louisiana for "exempt[ing] religious schools from the need for state licensing but then agree[ing] that religious schools could offer degrees in nonreligious subjects").

251. *See* James Varney, *MAILBOX U.: After Louisiana Cracked Down On Diploma Mills, Several Distance-Learning Institutions Moved to Mississippi, Where They Continue to Churn Out Degrees*, TIMES-PICAYUNE (New Orleans), Aug. 1, 2004, at 1 (discussing several diploma mills operating out of Mississippi that used to operate from Louisiana).

252. *See* Hawaii Dep't of Commerce & Consumer Affairs, American World University, http://www.hawaii.gov/dcca/areas/ocp/udgi/lawsuits/AWU (last visited May 12, 2006) ("The judgment remains completely unsatisfied and has been deemed uncollectible within the state of Hawaii. AWU's two Hawaii foreign corporation registrations were dissolved by court order on February 12, 2004.").

253. *See* Feder, *supra* note 228, at 9. Because the laws vary greatly, it is beyond the scope of this article to recommend details about what each state higher education agency should do.

254. The Education Commission of the States is a nonprofit, nonpartisan organization that

Also, states, for example, could follow Hawaii's lead by enacting statutes that specifically regulate the practices of unaccredited schools and make violations of these statutes *per se* violations of a state's consumer protection statutes.[256] If providers of bogus and unaccredited degrees had to face civil fines for these violations,[257] make restitution to their students, and risk treble damage liability in private actions, they might legitimize or cease their operations.[258] Each state, moreover, could enact statutes that make it a felony for anyone to sell fake degrees. If such statutes were enforced, some fraudulent degree providers would get out of the business rather than risk imprisonment.

States, however, are unlikely to deal effectively with online fake and substandard schools. Limited state enforcement actions suggest that most states fail to police these schools.[259] Furthermore, once an online unaccredited school (like Kennedy-Western or American World University) is licensed to operate in a single state, other states have great difficulty making such a licensed school cease operations in their states for failing to meet their standards of quality education.[260] For these reasons, effective regulation of online schools almost certainly will depend on federal law.

B. Federal Laws and Aggressive Enforcement Actions

Several federal agencies have jurisdictional authority to curtail the deceptive practices of online degree providers. Because the heart of substandard online education is fraud, the Federal Trade Commission (FTC) is the most logical starting point for enforcement actions against online schools.[261] Indeed, recognizing the potential of unaccredited schools to deceive consumers seeking post-secondary education, the FTC adopted in 1998 special rules prohibiting

facilitates the "exchange of information, ideas and experiences among state policymakers and education leaders" and involves "key leaders from all levels of the education system." *See* Education Commission of the States, About ECS, http://www.ecs.org/ecsmain.asp?page=/html/aboutECS/home_aboutECS.htm (last visited May 12, 2006).

255. *See supra* note 224 and accompanying text.

256. *See, e.g.*, HAW. REV. STAT. ANN. § 446E-5 (LexisNexis 2005) (listing several prohibited practices, including unaccredited institutions cannot indicate or suggest that the State of Hawaii licenses, approves, or regulates their operations). Violations of the provisions of Chapter 446E are deemed to be per se "unfair or deceptive" acts or practices. HAW. REV. STAT. ANN. 446E-3 (LexisNexis 2005).

257. *See, e.g.*, HAW. REV. STAT. Ann. § 480-3.1 (LexisNexis 2005) (stating that anyone found "violating any of the provisions of section 480-2 [related to unfair or deceptive acts or practices] shall be fined a sum of not less than $500 nor more than $10,000 for each violation").

258. *See supra* notes 242-48 and accompanying text (discussing penalties imposed on unaccredited schools for violating Hawaii law).

259. *See supra* note 250.

260. *See, e.g., infra* notes 350-53 and accompanying text (discussing Oregon's attempt to prevent substandard degrees from being used in its jurisdiction and Oregon's ultimate settlement of a lawsuit with Kennedy-Western on terms unfavorable to Oregon).

261. The FTC may itself initiate an investigation (16 C.F.R. § 2.1 (2003)), or initiate one at the request of "[a]ny individual, partnership, corporation, association, or organization" (16 C.F.R. § 2.2(a), (2006)).

various practices, including misrepresentations of accreditation if the education provider is a for-profit vocational or distance learning school.[262] While online schools are not specifically mentioned in these rules,[263] the regulatory language encompasses most online unaccredited schools because they are for-profit distance education providers.[264]

The FTC defines "accredited" to mean "[a] school or course has been evaluated and found to meet established criteria by an accrediting agency or association recognized for such purposes by the U.S. Department of Education."[265] Even if an online unaccredited school has met a state's qualifications to be a degree-granting institution, the school cannot call itself accredited[266] but can only refer to itself as authorized.[267]

To combat deception, the FTC rules impose upon unaccredited distance education schools an affirmative duty to disclose their lack of accreditation.[268] Moreover, schools that do not have state approval to be a degree-granting institution commit a deceptive practice if they claim such approval; additionally, they have an affirmative duty to "clearly and conspicuously disclose[], in all

262. *See* FEDERAL TRADE COMMISSION, FTC VOTES TO UPDATE VOCATIONAL SCHOOLS GUIDES (1998), *available at* http://www.ftc.gov/opa/1998/08/vocguide.htm.

263. These false advertising prohibitions apply to "persons, firms, corporations, or organizations engaged in the operation of privately owned schools that offer resident or distance courses." *See* 16 C.F.R. § 254.c(a) (2006). These schools can be degree-granting institutions. *Id.* (These rules "do not apply to resident primary or secondary schools or institutions of higher education offering at least a 2-year program of accredited college level studies generally acceptable for credit toward a bachelor's degree.").

264. *See id.*

265. *Id.* § 254.1(a).

266. The FTC makes the following representation regarding accrediting an unlawful misrepresentation:

> (a) It is deceptive for an industry member to misrepresent, directly or indirectly, the extent or nature of any approval by a State agency or accreditation by an accrediting agency or association. For example, an industry member should not:
>
> > (1) Represent, without qualification, that its school is accredited unless all programs of instruction have been accredited by an accrediting agency recognized by the U.S. Department of Education. If an accredited school offers courses or programs of instruction that are not accredited, all advertisements or promotional materials pertaining to those courses or programs, and making reference to the accreditation of the school, should clearly and conspicuously disclose that those particular courses or programs are not accredited.

16 C.F.R. § 254.3 (2005).

267. "Authorized" or whatever term is mandated under state law simply means the entity can operate as degree-granting institution. *See supra* notes 130-34 and accompanying. For example, Oregon regulates the use of the term "university":

> The term "university" refers exclusively to a school that is authorized to offer bachelor's degrees together with graduate or first professional degrees, or to an organization that constitutes a formal consortium of schools so authorized. Any entity that calls itself "university" without authorization but with serious intent will be referred to the Department of Justice for enforcement of the statute that defines such deceptive representations as unlawful trade practices. No religious exemption applies.

OR. ADMIN. R. § 583-030-0016 (2003).

268. 16 C.F.R. §254.3 (2006).

advertising and promotional materials that contain a reference to such degree, that its [degree] award has not been authorized or approved by such an agency."[269] Therefore, online for-profit unaccredited schools commit deceptive practices under the FTC Act and are subject to civil liability if they claim accreditation from an accrediting body not recognized by the Education Department or that falsely claim state authorization to operate.

Online unaccredited schools misrepresenting their status, however, have no reason to fear enforcement action from the FTC. The FTC expects distance education providers to comply voluntarily with these rules.[270] According to experts, the FTC enforcement against unaccredited schools has a very low priority.[271] Research has not revealed any FTC enforcement actions involving violations of the accreditation and approval provisions of the FTC rules.[272] Yet, one can easily find numerous violators of these rules within a few minutes of surfing the web or reading classified ads.[273]

The FTC has brought enforcement actions against a few schools that outright sell degrees without requiring any academic work. Using its power to bring enforcement actions against anyone committing "unfair or deceptive" acts or practices[274] or falsely advertising,[275] the FTC recently sued "One or More Unknown Parties" marketing and selling international driver's licenses and college degrees from "fictitious universities via unsolicited commercial email and the Internet."[276] This case demonstrates how difficult obtaining the exact identities of

269. *Id.* § 254.6(b); *see also* 16 C.F.R. § 254.1(b) (2006) ("Approved" means a "school or course has been recognized by a State or Federal agency as meeting educational standards or other related qualifications as prescribed by that agency for the school or course to which the term is applied. The term is not and should not be used interchangeably with 'accredited.' The term 'approved' is not justified by the mere grant of a corporate charter to operate or license to do business as a school and should not be used unless the represented 'approval' has been affirmatively required or authorized by State or Federal law.").

270. *See* 16 C.F.R. § 254.0(b) (2006).

271. *See* EZELL & BEAR, *supra* note 13, at 148–49 ("[I]n the last decades, the FTC has done little, even though some senior administrators there have knowledge of, and concern for, degree mills.").

272. The author did not find any cases involving FTC enforcement action based solely on an entity's violations of FTC accreditation rules. Perhaps this is because the FTC leaves it up to schools to voluntarily comply with these rules. *See* EZELL & BEAR, *supra* note 13, at 151 ("[T]he FTC has a bit of Pollyanna philosophy: the FTC hopes and expects that everyone will do the right thing. And so it depends heavily on 'voluntary compliance' with its [r]ules.").

273. *See, e.g.*, *id.* at 151 ("Every one of the thirty unaccredited schools that have advertised in the past year in *USA Today, The Economist,* and other major publications is in violation of this [accreditation] Rule. If they couldn't make their useless accreditation claims, these unaccredited schools would get far fewer customers.").

274. *See* 15 U.S.C. § 45(a) (2003); 15 U.S.C. § 57b-1 (2002).

275. *See* Guides for Private Vocational and Distance Education Schools, 16 C.F.R. § 254 (2006).

276. *See* FTC v. One or More Unknown Parties, No. 1:03-CV-00021-RMC, (D.D.C. filed Jan. 16, 2003), *available at* http://www.ftc.gov/os/2003/01/aladdincmp.pdf; FTC v. Mountain View Sys., Ltd., No. 03-CV-00021-RMC, (D.D.C. Nov. 25, 2003), *available at* http://www.ftc.gov/os/caselist/mountainview/031125mountainviewstip.pdf; *see also* Second Amended Complaint for Injunctive and Other Equitable Relief, at 6, FTC v. Mountain View Sys.,

the offending parties can be because of the technological capabilities of operating a business primarily over the Internet.[277] The FTC eventually discovered the identities of the principals and their companies and amended its complaint naming Mountain View Systems as the first of seven defendants,[278] located in Jerusalem, Israel; Nassau, Bahamas; Bucharest, Romania; and North Carolina (Raleigh), United States.[279]

One might argue that these defendants' practices are not deceptive because their buyers know they are buying phony sheepskins, not earning degrees. Clearly stating in their spam mail[280] that their schools were not accredited, the Mountain View defendants awarded degrees based solely on a buyer's prior knowledge and life experiences[281] and advertised that a buyer could use the degrees for purposes of obtaining employment and business.[282] However, courts have long held that when a defendant provides the "means and instrumentalities for the commission of

Ltd., No. 03-CV-00021-RMC (D.D.C. filed Nov. 1, 2003), [hereinafter Second Amended Complaint] *available at* http://www.ftc.gov/os/caselist/mountainview/031125 amendedcomp mountainview.pdf.

277. GAO REPORT NO. *2*, *supra* note 177 (showing how easily one can create a fake school over the Internet when it create a website for Y'Hica Institute for the Visual Arts, a fake school purportedly located in London, England). *See* Johnson, *supra* note 87, at 280-82 (explaining how fake degree providers can use the Internet, spam mail, printers, and other electronic technology to easily create profitable businesses while maintaining anonymity).

278. *See* Amended Complaint for Injunctive and Other Equitable Relief, FTC v. Mountain View Sys., Ltd., No. 1:03-CV-00021-RMC, at 1-2 (D.D.C. Feb. 21, 2003), *available at* http://www.ftc.gov/os/2003/02/mvslamdcmp.htm (naming the following defendants: Jason Abraham, Caroline Shallon, Charles Fogel, Mountain View Systems, Ltd., Aladdin Travel, Inc., Wheelie International, Ltd., and S.C. Hyacinth S.R.L.).

279. Second Amended Complaint, *supra* note 276 at 2–3. The Mountain View principals follow the trend of many individuals seeking to avoid the jurisdictional reach of U.S. law enforcement agencies by relocating their businesses to other countries which have few, if any, laws applicable to diploma mills. *See* EZELL & BEAR, *supra* note 13, at 56.

280. Defendants spam mail usually provided the following:

> UNIVERSITY DIPLOMAS
>
> Obtain a prosperous future, money earning power, and the admiration of all.
>
> Diplomas from prestigious non-accredited universities based on your present knowledge and life experience.
>
> No required tests, classes, books or interviews.
>
> Bachelors, masters, MBA, and doctorate (PhD) diplomas available in the field of your choice.
>
> No one is turned down.
>
> Confidentiality is assured.
>
> CALL NOW to receive your diploma in days!!!
>
> [Telephone Number]
>
> Call 24 hours a day, 7 days a week including Sundays and holidays.

Second Amended Complaint, *supra* note 276, at 11–12.

281. *See id.* at 14–15 (Defendants selling degree packages ranging from $500 to $8,000 that included extensive verification services, such as providing transcripts and letters of recommendation from purported professors at non-existent universities.).

282. *Id*.

deceptive acts and practices," a deceptive act in violation of the FTC Act occurs.[283] Therefore, the public has been harmed and a defendant has been unjustly enriched.[284] As a result, the FTC did not have to prove the Mountain View defendants intended to deceive with their claims but only that the defendants, by selling fake degrees, gave their buyers the means of deceiving employers and the public.[285] Without admitting violation of the FTC Act, the Mountain View defendants entered into a settlement where they agreed to shut down their websites, pay the FTC $57,000, stop marketing and selling degrees, and stop providing verification materials and services.[286]

Unfortunately, the FTC's victory in *Mountain View* was short-lived. Because the FTC generally pursues only civil enforcement actions,[287] unscrupulous providers may treat the fines assessed as simply a cost of doing business. Reportedly, some individuals formerly associated with the defendants in the *Mountain View* case did just that, resuming operations under different names.[288] Thus, the finding of an FTC violation is not likely to have any significant impact on the supply of phony or inferior-quality degrees.[289] However, other federal agencies with prosecutorial authority have an effective means to shut down some diploma mills—individuals who fear imprisonment have an incentive to comply with the law.

The United States Federal Bureau of Investigations (FBI), the United States Postal Inspection Service (USPIS), and the United States Internal Revenue Service (IRS) all have broad powers to seek criminal prosecutions.[290] These agencies can shut down diploma mills and other deceptive online schools more effectively than the FTC can. What follows is an analysis of what laws these agencies can and have used to criminally prosecute operators of diploma mills.

In addition to its power to seek criminal prosecutions, the FBI has the authority

283. Second Amended Complaint, *supra* note 276, at 14; *see* Waltham Watch Co. v. FTC, 318 F.2d 28, 32 (7th Cir. 1993), *cert. denied*, 375 U.S. 944 (1963) ("Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.") (citation omitted).

284. *See* Second Amended Complaint, *supra* note 276, at 14–15.

285. *See* FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988).

286. *See* Stipulated Final Order for Permanent Injunction and Settlement of Claims at 3, FTC v. Mountain View Sys., Ltd., No. 03-CV-00021-RMC, (D.D.C. Nov. 25, 2003) [hereinafter Mountain View Stipulated Final Order], *available at* http://www.ftc.gov/os/caselist/mountainview/031125mountainviewstip.pdf; Press Release, Federal Trade Commission, Court Order Puts Brakes on International License Marketers (Nov. 25, 2003), http://www.ftc.gov/opa/2003/11/mountainview.htm (last visited July 22, 2006). *See supra* notes 211-19 and accompanying text (describing verification services and materials).

287. *See* Judith L. Oldham & Ann M. Plaza, *Informed Consent: How to Negotiate a Consumer Protection Order You Can Live With,* 12 ANTITRUST 45, 48 (Summer 2002) ("Although criminal penalties are rare, the [FTC'S] Enforcement Division may seek other remedies in lieu of, or in addition to, civil penalties.").

288. *See* EZELL & BEAR, *supra* note 13, at 202–03.

289. *See ABC: 20/20*, *Scam Schools Colleges that Issue Meaningless Degrees*, (ABC television broadcast Dec. 9, 1998) [hereinafter *Scam Schools*], *available at* 1998 WL 5433829.

290. *See infra* notes 291-98 and accompanying text.

to conduct investigations,[291] carry firearms,[292] serve warrants and subpoenas,[293] make arrests,[294] and seize assets.[295] The USPIS has similar powers except that USPIS's powers may be exercised only in matters involving mail or the United States Postal Service (USPS).[296] The USPIS also has the power to conduct mail covers and to detain mail.[297] Likewise, the IRS has the same authority as the FBI except that it is limited to exercising its powers in matters involving violations of tax law.[298] The IRS also has the authority to compel testimony and examination of books and records, to use summonses for criminal investigations, and to conduct undercover operations in certain circumstances.[299]

Two prosecutions demonstrate the power of these agencies to work together against fraudulent educational providers. The first involves Ronald Dante (a.k.a. "Ronald Pellar"), a former stage hypnotist,[300] operating Columbia State University (CSU), a purported university in Louisiana where students could obtain degrees in twenty-seven days.[301] Pursuant to its authority to investigate violations of U.S.

291. *See* 28 U.S.C. § 531 (2001); 28 U.S.C. §§ 532-533 (2002); 28 C.F.R. § 0.85 (2003) (authorizing the FBI to investigate for possible violations of the law). *See generally*, John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785 (1984) (discussing guidelines that establish procedures and standards for FBI investigations).

292. *See* 18 U.S.C. § 3052 (2002).

293. *Id.*

294. *Id.*

295. *See* 18 U.S.C. § 3107 (2002); 28 C.F.R. § 0.85(a) (2003).

296. 18 U.S.C. § 3061(a) (2004) "Postal Inspectors and other agents of the United States Postal Service" have the power to investigate criminal matters related to the mails and the Postal Service and may also serve warrants and subpoenas, make arrests in certain circumstances, carry firearms, and seize property as provided by law. *Id.*; *see also* 39 C.F.R. § 233.1(a) (2002). *See generally*, United States v. Unverzagt, 424 F.2d 396, 398 n. 1 (8th Cir. 1970) ("Postal inspectors under 18 U.S.C.A. § 3061 are given power to make arrests for postal offenses upon probable cause but are given no power to make arrests for state offenses by either state or federal statute.").

297. *See* 39 C.F.R. § 233.3(c)(1) (2002) (defining "mail cover" as "the process by which a nonconsensual record is made of any data appearing on the outside cover of any sealed or unsealed class of mail"); 39 C.F.R. § 233.3(e)(1) (2002) (explaining that a mail cover may be initiated when a law enforcement agent has reasonable grounds to believe a mail cover is necessary to obtain information regarding the commission of a crime); 39 C.F.R. § 233.1(d) (2002) ("In conducting any investigation, Postal Inspectors are authorized to accept, maintain custody of, and deliver mail.").

298. *See* 26 U.S.C. § 7608 (2001).

299. A criminal investigator charged with investigating the criminal provisions of tax law may "execute and serve search warrants and arrest warrants, and serve subpoenas and summonses," make arrests in certain circumstances, seize "property subject to forfeiture under the internal revenue laws." *See* 26 U.S.C. § 7608(b) (2001); 26 U.S.C. § 7602(a) (2001) (granting power to "examine any books, papers, records, or other data which may be relevant or material to such inquiry" and to "summon the person liable for tax or required to perform the act"); 26 U.S.C. § 7608(c) (2002) (describing "rules relating to undercover operations"). *See*, *also*, Michael I. Saltzman, *Tax Controversies: What to Do When the IRS Calls*[:] *Strategies for Dealing with the IRS*, 501 PLI/TAX 145, 168 (2001) (describing investigative techniques employed by criminal investigators that include "wire taps, mail covers, and use of informants").

300. *See Scam Schools*, *supra* note 22189 (stating that "authorities consider [Pellar] the godfather of the diploma mill scam").

301. *See* Judi Russell, *AG Looking into Columbia State's 27-day Degrees*, NEW ORLEANS

law,[302] the FBI began investigating CSU. Aided by evidence obtained by the FTC[303] and Louisiana's attorney general,[304] the FBI and USPIS obtained an order shutting down CSU and seizing its assets.[305]

Using the USPIS's jurisdiction to fight fraud when the mail system is involved,[306] prosecutors charged Dante with mail fraud.[307] Under the criminal mail fraud statute,[308] the government must prove the following: "(1) a scheme to defraud; (2) use of the mails using 'private or commercial interstate carrier[s]'[309] to execute that scheme; and (3) the specific intent to defraud."[310] To prove wire fraud,

CITY BUS., Nov. 17, 1997, at 20.

302. *See supra* notes 291-95 and accompanying text.

303. In order to obtain a warrant to arrest Dante, the FBI could have simply relied on the FTC to share the evidence it collected in another open case against him. *See* 28 C.F.R. § 0.85(a) (2003) (stating that the FBI has the authority to investigate violations of U.S. laws and is charged with collecting evidence in cases in which the U.S. is or could become a party); 18 U.S.C. § 3052 (2002) (The FBI can arrest anyone who has committed a felony cognizable under U.S. law.). The FTC's policy is "to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions." *See* 16 C.F.R § 4.6 (2004). Dante came under the FTC's radar screen when the FTC received complaints about Dante doing business as Perma-Derm Academy and the American Dermatology Association. *See* Robert L. Goldemberg, *Odor Impact*, DRUG & COSM. INDUST., Dec.1, 1990, at 28 (stating that FTC brought suit against Pellar after the legitimate American Academy of Dermatology complained). He offered workshops (for $1,750) that purportedly trained students how to tattoo eyeliner and lipliner and represented falsely to the graduates that they would become licensed "dermatologists," board certified by the American Dermatologists Association. *Id.* Dante was enjoined permanently from making these false representations and engaging in other practices, but later held in contempt for violating the injunction. *See "College" Founder Pleads Guilty to $2M Diploma Fraud*, 18 White-Collar Crime Rep. (Andrews Publ'n) No. 5, 17 (2003) [hereinafter "*College" Founder Pleads Guilty*].

304. *See* Russell, *supra* note 301, at 20. The attorney general for Louisiana and the state's board of regents began investigating CSU after receiving complaints from non-Louisiana residents. *Id.* In August 1998, after the attorney general for Louisiana filed a petition listing several reasons why CSU was nothing more than a diploma mill, a court declared CSU a fraud and issued a permanent injunction barring it from operating in Louisiana. *See* Stephanie Grace, *Degrees of Deception*, TIMES-PICAYUNE (New Orleans), Aug. 9, 1998, at A1. CSU's brochure pictured a historic mansion that did not exist at CSU's address. *See* Stephanie Grace, *Judge Orders Phony College out of State Litany of Abuses Persuades Judge*, TIMES-PICAYUNE (New Orleans), Aug. 14, 1998, at B2 (listing a number of indicia justifying the shutdown of CSU including providing "transcripts for students listing courses they never took, complete with grades").

305. *See* Russell, *supra* note 301, at 20.

306. "[T]he Postal Inspection Service [is] the investigative arm of the U.S. Postal Service." *Use of Mass Mail to Defraud Customers: Hearing Before the Subcommittee on International Security, Proliferation, and Federal Services of the Senate Committee on Governmental Affairs,* 105th Cong. 10 (1998) (statement of Kenneth Hunter, Chief Postal Inspector), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=51102.pdf&directory=/diskc/wais/data/105_senate_hearings.

307. *See infra* note 315 and accompanying text.

308. *See* 18 U.S.C. § 1341 (2000); Kann v. United States, 323 U.S. 88, 95 (1944) ("The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud.").

309. *See, e.g.*, Senior Citizens Against Marketing Scams Act, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (1994) (codified at 18 U.S.C. § 1341 (2003)).

310. *See* United States v. Bieganowski, 313 F.3d 264, 275 (5th Cir. 2002) (citing 18 U.S.C.

the elements are the same except that the scheme must be done using wire communications (e.g., the Internet) instead of mail.[311] Reliance by the victims on the fraud does not need to be established.[312]

Dante clearly perpetrated fraud by falsely representing that CSU was an accredited university fully competent to confer bachelor's, master's, and doctoral degrees via correspondence.[313] Even though CSU had no faculty members, no academic curricula, no educational facilities, and no ED-recognized accreditation, it mailed a degree to any student who paid a fee (starting at $1,500) and submitted a book summary based on the student's reading of one single book supplied by CSU.[314] Dante-Pellar used the mail system to further his scheme to deceive students into thinking CSU was a real institution.[315] In his two-year operation of CSU, he generated roughly $20 million, with $4 million paid directly to him.[316] In 2004, Dante-Pellar, then seventy-five years old and already serving a sixty-seven-month sentence for criminal contempt, pled guilty to nine counts of mail fraud.[317]

Even these aggressive actions, however, were only partly successful. Dante-Pellar received only a nine-month prison sentence.[318] And although Dante-Pellar forfeited his $1.5 million yacht and was ordered under the Mandatory Restitution Act[319] to pay $45,835.50 in compensation to twenty-seven identified victims,[320]

§1341 (2000)). For a case interpreting the elements, *see*, for example, United States v. Autuori, 212 F.3d 105, 115 (2d Cir. 2000) (wire and mail fraud).

311. *See* 18 USC § 1343 (2002). Although the wire fraud statute explicitly applies to the use of television, radio, and wire communications, the statute has been applied to other popular modes of communication, such as facsimile machines, computer modems, and telephones. *See*, *e.g.,* United States v. Gabriel, 125 F.3d 89, 92 (2d Cir. 1997) (affirming conviction for wire fraud scheme involving fax transmission); United States v. Otto, 103 F.3d 134, 134 (7th Cir. 1996) (affirming conviction for wire fraud scheme involving computer modem transmission).

312. *See*, *e.g.*, United States v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989) (stating that "the government does not have to prove actual reliance upon the defendant's misrepresentations").

313. *See* Russell, *supra* note 301, at 20.

314. *See Bogus Degree Hearings*, *supra* note 29, at 18–19 (statement of Laurie Gerald Former Employee of Columbia State University). Included in the CSU catalog packet was a reference book, created and paid for by Dante-Pellar, entitled "University Degrees by Mail." *See* Grace, *supra* note 304, at A1 (listing "Dr. Jonas Salk, who discovered the polio vaccine, and two Nobel laureates as holders of Columbia State honorary doctorates"). This book ranked CSU as number one among 700 universities around the world offering correspondence study programs, including distance education programs offered at Harvard and UCLA. *Id.*

315. Using the alias "Phil Harris," Pellar rented office space from a service company in Metarie, Louisiana. United States v. Ronald Pellar, No. 03-CR-089, 3, (C.D. Cal. Apr. 17, 2003) [hereinafter Pellar Indictment] (Indictment) (stating that service company simply forwarded the mail for CSU to a post office box, located in San Clemete, California).

316. *See* Judgment and Probation/Commitment Order, SA CR 03-89-AHS, USDC (C.D. Cal. Apr. 16, 2004) [hereinafter Probation/Commitment Order].

317. *See* Probation/Commitment Order, *supra* note 316. The charges against him carried a potential maximum sentence of 45 years imprisonment and fines up to $2.25 million. *See* Press Release, U.S. Dep't of Justice, Operator of Orange County 'Diploma Mill' Indicted on Federal Mail Fraud Charges (Apr. 18, 2003), http://losangeles.fbi.gov/pressrel/2003/ la041803.htm (last visited July 22, 2006).

318. *See* Probation/Commitment Order, *supra* note 316.

319. *See* 18 U.S.C. § 3663(a)(1)(A) (2003); 18 U.S.C. § 3663A (2003) (stating that mail

these amounts pale in comparison to the $20 million he generated from operating CSU and the $4 million paid directly to him.

In another case, the USPIS, the FBI, and the IRS coordinated their efforts to shut down LaSalle University and obtain convictions against several individuals for mail fraud and tax evasion.[321] To prove tax evasion, the government had to establish the existence of a tax deficiency, willfulness to evade the taxes due, and an affirmative act constituting evasion.[322] Thomas Kirk, the founder of LaSalle University, established LaSalle as part of the World Christian Church, a bogus non-profit organization that he created in order to avoid regulatory oversight and taxes.[323] In the end, Kirk pleaded guilty to tax evasion, was fined $125,000, and received a five-year prison sentence.[324] As part of the plea bargain, Kirk forfeited a $1.5 million mansion, and the university forfeited more than $10.7 million in cash as well as three luxury automobiles.[325] The cash and proceeds from the sale of assets were used to refund fees paid by LaSalle students seeking compensation.[326] Several of Kirk's associates were convicted of other crimes.[327] Although LaSalle University came under new leadership and changed its

fraud offenses involving property are subject to the Mandatory Restitution Act).

320. *See* Probation/Commitment Order, *supra* note 316. *See also* News Release, Broadcast News, A California Man Who Sold Phony Diplomas to a Fictitious University Has Been Sentenced (Apr. 6, 2004), *available at* 2004 WLNR 13315622.

321. *See* Sara Shipley, *Former LaSalle Leader Gets 5 Years, Kirk Ordered to Pay $125,000 Fine*, TIMES-PICAYUNE (New Orleans), Jan. 30, 1997, at B3.

322. *See* 26 U.S.C. § 7201 (2002); United States v. Hook, 781 F.2d 1166, 1171 n.4 (6th Cir. 1986).

323. *See* Shipley, *supra* note 321, at B3.

324. *Id.* (stating that he also pled guilty to wire fraud and credit card fraud).

325. *Id. See also* Jason Bullock & Bill Voelker, *Former LaSalle Official To Do Time; LaSalle: Third Person Is Imprisoned In Scandal*, TIMES-PICAYUNE (New Orleans), June 26, 1997, at A1 ("Though both Turow [Kirk's ex-wife] and Kirk had taken vows of poverty as part of the church ministry, they used church money to purchase extravagant items, including Kirk's $1.75 million Madisonville mansion, luxury cars and furnishings."). *See also Former College President Weds In Louisiana Jail*, DALLAS MORNING NEWS, Aug. 15, 1997, at A17 (stating that Kirk forfeited the mansion and three automobiles)

326. *See* Shipley, *supra* note 321.

327. Two former directors pleaded guilty to tax evasion and were given prison sentences and ordered to make restitution. *Id.* A former board member was fined and put on probation after pleading guilty to concealing a felony because he lied to investigators about his knowledge of Kirk's diversion of money from LaSalle for personal use. Terri Turow, ex-wife of Kirk and former director of LaSalle University, pleaded guilty to tax evasion for failing to report more than $185,000 in income she earned during 1990 and 1991; she was ordered to pay $50,000 in taxes, and was sentenced to four months in prison and four months on house arrest. *See* Bullock & Voelker, *supra* note 325 at A1; Correction, *Sentence Incorrect*, TIMES-PICAYUNE (New Orleans), June 27, 1997, at A2. Polly Zar, a former executive director of the World Christian Church, pled guilty to tax evasion and was ordered to pay the IRS $8,744 in restitution, and sentenced to house arrest for six months in addition to three years of probation. Jarvis DeBerry, *Former Church Exec Gets Sentence[,] She Avoids Prison in LaSalle Matter*, TIMES-PICAYUNE (New Orleans), May 28, 1998, at B1. Stanley Foster pleaded guilty to "misprison of a felony" for failing to disclose Kirk's diversion of $384,000 from LaSalle for his personal use and Kirk's failure to pay income taxes on it. *See* Bullock & Voelker, *supra* note 325, at A1, (stating that Foster was sentenced to two years' probation and was fined $500).

operations,[328] it applied for, but never received, ED-recognized accreditation.[329]

Neither the payment of fines nor imprisonment deterred Kirk from further fraudulent behavior. After getting out of prison, he helped his wife start Novus University, a reputed diploma mill located in Mississippi and accredited by Maxine Asher's unrecognized accrediting agency.[330] Diploma mills and the individuals who operate them are difficult to stymie, requiring enactment of a new federal law—imposing stiffer penalties and longer prison sentences—would empower federal and state law enforcement agencies to curb the supply of bogus degrees.

C. The Proposed Authentic Credentials in Higher Education Act

Under existing law, state and federal agencies have had difficulty restraining the deceptive practices of online diploma mills and other substandard unaccredited programs. Moreover, the federal agencies active in this field have ceased to cooperate in efforts to shut down diploma mills, and no agency makes the prosecution of diploma mill operators a priority.[331] A new regulatory approach, based on a targeted federal statute, is necessary to revitalize oversight in this field. The first subsection below recaps the arguments in favor of stronger regulation. The second defines the covered degree providers and prohibited acts. Section three sets forth the required disclosures in detail, and section four considers a variety of concerns that might be raised about the statute.

1. The Case for Federal Regulation of Online Schools

Online diploma mills and unaccredited schools have been growing rapidly. Evidence suggests that millions of Americans have bogus and unaccredited degrees.[332] The number of fake degree holders was estimated to be two million in the 1980s.[333] The number in 2006 has to be much larger due to the advent of the

328. Stacey MacGlashan, *LaSalle University Works to Remake Troubled Image*, TIMES-PICAYUNE (New Orleans), Oct. 26, 1998, at A1. *See also* Sara Shipley, *LaSalle Recruits Man for Top Job[;] Ohio University Exec Takes Post*, TIMES-PICAYUNE (New Orleans), Apr. 12, 1997, at A1 (explaining that LaSalle's board members chose as president John Scarpitti, former university administrator at the University of Findlay, a small, private college in Findlay, Ohio).

329. Stephanie A. Stanley, *LaSalle Official Lied, Woman Says in Suit She Thought School's Accreditation Was Near*, TIMES-PICAYUNE (New Orleans), Mar. 9, 2000, at B1 ("After more than three years of trying to distance itself from federal charges that it falsely claimed accreditation and defrauded thousands of students, LaSalle University is again facing accusations that it misled a student by telling her she would receive a doctorate degree from an accredited school.").

330. *See* Thomas Bartlett & Scott Smallwood, *A Small World*, CHRON. OF HIGHER EDUC., June 25, 2004, at A10, A11 (stating that Novus University is located in Mississippi, is accredited by the World Association of Universities and Colleges, and is granting "degrees on the basis of life experience, multiple-choice exams, and a thesis").

331. *See* EZELL & BEAR, *supra* note 13, at 145–47. The author discussed this shift with several law enforcement individuals who would not go on record. The essence of these discussions was to identify terrorism and identity theft as the current priorities of the federal law enforcement agencies discussed in this paper.

332. *Id.* at 78.

333. *Id.* at 32.

Internet and given the revenue such operations can generate.[334] A GAO investigation uncovered five unaccredited schools that had revenue exceeding $110 million.[335] Another online school shut down by the FTC earned over $400 million in sales of over 200,000 bogus degrees primarily to consumers living in the United States and Canada.[336] While estimates exist about the number of phony degrees, no one knows how many people have obtained unaccredited degrees from schools that require the completion of some academic work.[337] The number could be quite large because of the numerous online unaccredited schools and their aggressive email marketing.[338]

Given the likely existence of millions of fake and unaccredited degrees, operators of fake or unaccredited online programs can inflict serious harm on the students they attract.[339] The attrition rate among students enrolled in online degree programs is high, which means many students are wasting their money and time pursuing unaccredited degrees.[340] This is especially true given that online degrees—even ones from accredited schools—are viewed with suspicion by many employers.[341] While operators of online degree programs attract consumers of all types, unsophisticated consumers with limited education experience and who feel trapped in their employment situation are particularly easy prey for unscrupulous operators.[342] These consumers not only waste their money, but can lose their jobs and suffer other economic loss and embarrassment once their employers learn about their dubious degrees.[343] The degrees have inferior value at best and are

334. One way to estimate the number of fake and unaccredited degrees is to look at the gross revenues of the degree providers.

335. *See Bogus degree hearings*, *supra* note 29 (testimony of Senator Susan M. Collins, chairwoman, Committee on Senate Governmental Affairs) (reporting that a GAO audit of 450,000 resumes revealed that more than 1,200 of them included degrees from fourteen different diploma mills, that a school investigated by the FBI grossed a "pure profit" of $12 million in a 18-month period, and that "Kennedy-Western University, an unaccredited school that requires completion of academic work, earned short of $25 million in 2003 and currently has almost 10,000 students enrolled").

336. *See* Press Release, Federal Trade Commission, Court Order Puts Brakes on International License Marketers (Nov. 25, 2003), http://www.ftc.gov/opa/2003/11/mountainview.htm (last visited July 21, 2006).

337. No one knows exactly how many fake degrees have been sold because buyers and sellers are not going to freely share their involvement in the proliferation of fake degrees. *See* EZELL & BEAR, *supra* note 13, at 32–33 (contending that at least one million fake degrees exist based on the operations of various diploma mills that have been shut down over the years and providing estimates of up to two million fake degrees).

338. *See* BEARS' GUIDE, *supra* note 12, at 40–44, 64–65 (stating that college degree solicitations are among the top ten spam mail topics). Of those responding to spam mail, one in three may buy a fake degree. *See* EZELL & BEAR, *supra* note 13, at 14.

339. *See supra* Part III.B.

340. *See supra* notes 68-71 and accompanying text.

341. *See supra* notes 72-78 and accompanying text.

342. *See supra* notes 79-106 and accompanying text.

343. *See infra* note 345; Johnson, *supra* note 87, at 284 n.85; EZELL & BEAR, *supra* note 13, at 116 (stating that a popular television consultant who called herself "The Love Doctor" was fired after her doctorate degree from a diploma mill came to light and that a Colorado state official was not only fired for having a fake degree, but his "green card" was revoked and he was

bogus at worst. [344]

In addition to consumers, the workforce at large also suffers from the proliferation of bogus and substandard degrees. In a global, dynamic marketplace, employment skills are no longer a matter of concern for the individual worker alone; they are vital to America's ability to compete globally. Employers have unwittingly promoted and hired employees with dubious degrees and reimbursed them for dollars spent to obtain degrees from substandard or unaccredited degree providers.[345] By wasting time and economic resources on inferior online education, operators of online schools harm individual workers and the workforce as a whole.

While no research has indicated how much money from private employers has been used to subsidize the purchase of bogus and substandard degrees, it is clear that public dollars are being used to pay for them.[346] A 2004 GAO report found that nearly $170,000 in federal funds have been used to reimburse government employees for the cost of obtaining such degrees.[347] This figure is only the tip of the iceberg, as the 2004 GAO report indicates the figure is likely to be substantially lower than the actual cost of reimbursement programs.[348] Other research estimates have suggested that more than $7.5 million have been used to pay tuition reimbursements for questionable degrees.[349] The costs of these degrees

deported back to his native country).

344. *See supra* Part II.B (discussing various types of degree providers and the work required to obtain their degrees).

345. *See*, *e.g.,* Matthew Pinzur, *School Board: Six Teachers Are Fired, 26 Quit in Credit Scandal Six Miami-Dade Teachers Were Fired, the First Punishments Handed down since Allegations of Continuing-Education Credit-Buying Began*, MIAMI HERALD, Mar. 16, 2006, at B3, *available at* 2006 WLNR 4355737 (discussing the firing of one teacher who had been paid by a local school board to take continuing-education classes from diploma mill Moving On Toward Education and describing disciplinary action taken by the school board against 31 other teachers who took classes from the diploma mill). Charles Abell was appointed by President George Bush as the Principal Deputy Under Secretary of Defense for Personnel and Readiness after obtaining a master's degree in human resource management from Columbus University, an unaccredited school shut down by Louisiana's attorney general. *See* Margie Boule, *These Folks Should Feel Sheepish About Getting Fraudulent Sheepskins*, PORTLAND OREGONIAN, June 20, 2004, at L1, *available at* 2004 WLNR 17955076; U.S. Dep't of Def., Biography – Charles S. Abell, http://www.defenselink.mil/bios/abell_bio.html (last visited July 27, 2005). *See also* EZELL & BEAR, *supra* note 13, at 258-266 (mentioning other people who benefited from their bogus degrees).

346. *See, e.g.*, Stephanie Armour, *28 Top Officials Have Fake Degrees; Senator Sees It as "Tip of the Iceberg,"* USA TODAY, May 12, 2004, at B5 [hereinafter *28 Top Officials*].

347. *See* GAO REPORT NO. 1, *supra* note 177, at 9.

348. *Id.* Reasons given for concluding the $170,000 figure is understated include: (1) "the way in which some agencies maintain records of payments for employee education makes such information inaccessible," and (2) "diploma mills and other unaccredited schools modify their billing practices so students can obtain payments for degrees by the federal government" without the government knowing the schools are unaccredited. *Id.* at 3. Federal dollars have also been used to buy diploma mill degrees for workers employed in federal Head Start programs. *See Bogus degree hearings*, *supra* note 29 (stating that "three checks from federal Head Start program grantees in three different states [were] made out to Kennedy-Western University").

349. *See* Helena Andrews, *Diploma Mills Provide Phony Credentials; Web Sites Push Fake Degrees,* WIS. ST. J. (Madison, Wis.), Feb. 14, 2005, at A7 (calling the federal government "the

mount even higher when one considers the pubic resources spent on salaries and raises for holders of unaccredited degrees. From teachers to elected officials, millions of tax dollars are paying the salaries and raises of federal, state, and local government employees who have obtained fake or unaccredited degrees.[350]

Besides harm to the public purse, fake and unaccredited schools pose risks of harm when inadequately trained workers attempt to practice medicine, give tax advice, pilot planes, or work in numerous professions that usually require employees with specialized higher education or training.[351] Individuals in a host of positions have been caught practicing without the proper education and license credentials and, therefore, pose a real and present danger to the public.[352]

The post-9/11 era offers another reason to pass federal legislation to clamp down on fake degrees and unaccredited schools. These schools could enable the work of terrorists. To show how easily a terrorist could get a degree, a news correspondent recently purchased a Master of Science degree in chemistry for $500 over the Internet from Rochville University[353] under the name of Abu Salsabil Hasan Omar, who is an alleged terrorist with a $5 million bounty on his head.[354] One way for terrorists to enter and remain in the country is to obtain

largest supplier of diploma mills in our country"); *Are Current Safeguards Protecting Taxpayers Against Diploma Mills?: Hearing Before the Subcomm. On 21st Century Competitiveness of the H. Comm. On Education and the Workforce*, 108th Cong. 9 (2004) (statement of retired FBI Agent Allen Ezell: "Most probably, over one million Americans have purchased (and probably use) fictitious credentials."). The GAO report discovered that federal agencies, in violation of a federal statute, paid over $169,000 for the cost of employees obtaining bogus and unaccredited degrees. *See* GAO REPORT NO. 1, *supra* note 177, at 3–4 (stating that actual costs are probably higher due to a number of limitations, including the practice of diploma mills changing their billing practice to make it look like the employee was enrolled in a course rather than paying a flat fee for the degree). Workers facing layoffs at an Indiana auto plant spent at least $42,000 in federal educational retraining money on purchases of advanced degrees from St. Regis University, a diploma mill currently being sued by the legitimate Regis University. *See* Bill Morlin, *School Sues 'Diploma Mill' Participants; Jesuit University in Denver Claims its Reputation Being Damaged*, SPOKESMAN-REV. (Spokane, Wash.), Dec. 10, 2004, at B1.

350. *See*, *e.g.*, EZELL & BEAR, *supra* note 13, at 185 (stating that co-author John Bear testified at the trial of a former state psychologist who had purchased a doctorate degree and "had been earning doctoral pay for six years"); *Bogus degree hearings*, *supra* note 29, at 37 (Statement by Alan Contreras, Administrator for the Office of Degree Authorization, Oregon Student Assistance Commission) (stating that fake degrees were commonly held by numerous professionals, including professionals serving as K-12 teachers and administrators, police and corrections officers, fire and emergency employees, and public administrators).

351. *See*, *e.g.*, Second Amended Complaint, *supra* note 276, at 11–12 ("Defendants sell bachelors degrees, masters degrees, MBA's, and Ph.D.'s in a variety of fields including many medical related fields such as anesthesia, cardiology, cardiovascular surgery, dentistry, . . emergency medicine, endocrinology . . . .").

352. *See* Varney, *supra* note 251 (naming several professionals disciplined or terminated for holding fake degrees).

353. Rochville is considered by state education agencies and experts to be a diploma mill. *See*, *e.g.*, OREGON OFFICE OF DEGREE AUTHORIZATION, *supra* note 161; MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3 (identifying Rochville as one of many unacceptable unaccredited schools).

354. *Paula Zahn NOW: Diploma Mills Represent Security Threat to United States?* (CNN television broadcast Dec. 15, 2005).

student visas to enroll in unaccredited schools.[355] Experts point out that some unaccredited schools have permission to use I-20 student visas, which allow foreigners to enter the country to further their education, and that operators of one of the largest diploma mills have possible links to terrorism.[356]

All of the foregoing concerns require a federal, rather than a state, solution. Online unaccredited schools easily evade state laws designed to regulate them by moving from states where their businesses are enjoined and relocating to other states that tolerate them.[357] No federal or state law requires an unaccredited school to obtain or even seek accreditation.[358] Consider again Kennedy-Western University, which has authorization from Wyoming to be a degree-granting institution.[359] It does not claim to be accredited, and it is not technically a diploma mill because it does not sell degrees but instead requires the completion of some academic work.[360] Therefore, it cannot be shutdown as a diploma mill by the FTC or any of the other federal agencies previously discussed. While overwhelming congressional testimony may lead one to reasonably conclude that Kennedy-Western is a substandard unaccredited school,[361] Oregon, though it tried, could not stop Kennedy-Western from issuing degrees to its residents and had to settle litigation initiated by Kennedy-Western on terms most favorable to this unaccredited school.[362] States lack the resources to police multi-state ventures, and interstate differences in licensing standards make enforcement against an unaccredited school practically impossible. [363] Just as most educational fields have formulated national accrediting standards, and federal agencies have been most effective in regulating interstate fraud of bogus degree providers,[364] federal regulation is essential in higher education to deal with both bogus and substandard unaccredited degree providers. The following section outlines the proposed federal regulation.

355. *See* EZELL & BEAR, *supra* note 13, at 148.

356. *Id.* Another concern is that foreign terrorists can obtain visas to attend legitimate doctoral programs by relying on undergraduate degrees from diploma mills operating outside the United States. *See 28 Top Officials*, *supra* note 346.

357. *See supra* Part II.B.2 (explaining how Maxine Asher simply relocated operations of her unaccredited schools).

358. *See supra* Part I (describing the accreditation process in America).

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

360. *See supra* note 180 and accompanying text.

361. *See supra* notes 181-94 and accompanying text (discussing testimony from various persons about Kennedy-Western's operations).

362. Settlement Agreement, Kennedy-Western U. v. Contreras, No. 04-CV-1023-HU (D. Or. 2004); Settlement Agreement Addendum, Kennedy Western U. v. Contreras, No. 04-CV-1023-HU (D. Or. 2004); *See also Oregon Settles Federal Lawsuit Filed by Kennedy-Western University; State Officials Will Seek Changes to State Law Regulating the Use of Degrees from Unaccredited Universities*, BUSINESS WIRE, Dec. 21, 2004, *available at* http://www.forbes.com/businesswire/feeds/businesswire/2004/12/22/businesswire200412210057 28r1.html.

363. *See supra* Part III.A (discussing the possibilities of and impediments to state policing of substandard and unaccredited schools).

364. *See supra* Part III.B (discussing how the FBI, FTC, IRS, and USPIS have shut down diploma mills).

2. Defining Covered Degree Providers and Prohibited Acts

This article proposes a federal statute to hold fake degree providers and unaccredited schools civilly liable and to establish criminal penalties for fake degree providers and unaccredited schools who fail to make relevant disclosures about lack of accreditation. Under current FTC rules that prohibit misleading information about accreditation,[365] victims of such misrepresentations have no private right of action to sue online unaccredited degree providers and, therefore, must rely on state law to force compliance.[366] Since that strategy has proven to be ineffective, [367] the proposed act gives any student the right to seek treble damages and attorneys' fees in a civil suit against any unaccredited school that gives misleading information about its accreditation or fails to disclose its lack of ED-recognized accreditation. The proposed law also imposes affirmative disclosure requirements and authorizes criminal prosecution under specified circumstances.

The proposed Authentic Credentials in Higher Education Act ("proposed act") is aimed at the following degree providers: diploma mills, unaccredited schools, and accredited schools with unrecognized degree programs. The following discussion defines each type of degree provider and explains the prohibited practices and potential liability. A summary of the same is provided in the table below.

365. *See supra* notes 261-73 and accompanying text.

366. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1303–04 (2002).

367. *See supra* notes 261-73 and accompanying text.

Degree Providers Covered under the Authentic Credentials in Higher Education Act			
	Type of Degree Provider		
	Diploma Mill	Unaccredited School	Accredited School with Unaccredited Degree Program
Prohibited Conduct:	(1) Selling degrees;	(1) Providing false or misleading statements about accreditation status;	(1) Providing false or misleading statements about accreditation status of unaccredited degree program;
	(2) Issuing degrees based exclusively (or an amount greater than 70%) on life experiences;	(2) Failing to disclose in detail the academic work that is required to obtain a particular degree sought;	(2) Failing to disclose in detail the academic work that is required to obtain a particular degree sought;
	(3) Providing academic verification materials or services; and	(3) Failing to make required disclosures about the consequences of obtaining an unaccredited degree; and	(3) Failing to make required disclosures about the consequences of obtaining an unaccredited degree; and
	(4) Assisting in the operation of a diploma mill	(4) Failing to acquire and maintain on file a student's signed disclosure statement	(4) Failing to acquire and maintain on file a student's signed disclosure statement
Liability Imposed:	Criminal: Imposed upon operators of diploma mills or persons assisting in their operation	Criminal: Imposed if held in contempt under the Act for failure to make mandated disclosures	Criminal: Imposed if held in contempt under the Act for failure to make mandated disclosures
	Civil: Including a private right of action for consumers deceived by diploma mill	Civil: Including a private right of action for consumers affected by violations	Civil: Including a private right of action for consumers affected by violations
Penalties/Damages for Violations under the Act:			
Criminal Penalties:	Violations classified as a felony; penalties include imprisonment of at least 5 years, a fine of $500,000, or both	Violations classified as a felony; penalties include imprisonment of at least 1 year, a fine of $100,000, or both	Violations classified as a felony; penalties include imprisonment of at least 1 year, a fine of $100,000, or both
Civil Damages Recoverable:	Treble damages and reasonable attorney's fees can be recovered in a successful cause of action by the affected consumer	Treble damages and reasonable attorney's fees can be recovered in a successful cause of action by the affected consumer	Treble damages and reasonable attorney's fees can be recovered in a successful cause of action by the affected consumer

Under the proposed law, a "diploma mill" is defined as:

> Any corporation, institution, association, company, person, or entity operating without accreditation from any entity recognized as an accrediting agency by the United States Department of Education or without any licensing, approval, or authorization recognized by the state in which operations are headquartered, located, or conducted *and* that knowingly does any *one* of the following:
>
> > A. Issues degrees, whether denoted as a real or novelty items, without requiring any student academic work;
> >
> > B. Issues degrees, whether denoted as a real or novelty items, based solely on the student's life experience or portfolio without requiring any college-level work be submitted to and evaluated by faculty with appropriate academic degrees from accredited institutions; or
> >
> > C. Issues degrees, whether denoted as a real or novelty items, by basing more than seventy percent of required course credits on the student's life and/or learning experiences.

This definition draws upon previous legislative and enforcement efforts,[368] and adopts the seventy percent line because of the short amount of time in which one can complete academic work at a diploma mill.[369] Recall Trinity College & University, which offered a bachelor's degree for only $675,[370] and provided that if a person's prior *learning* experiences were sufficient, earning a degree "can take as little as two days or as long as a year or more, depending upon the quality of the application and cooperation of the applicant in gathering documentation requested."[371] Because obtaining an undergraduate degree usually takes four or more years, Trinity's suggested time frame—two days or as long as a year—means a student is getting academic credit for seventy percent or more of the courses required to obtain a degree at a reputable accredited school.[372] Under the proposed act, any school following this practice of heavily granting academic credit is prima

368. This definition of "diploma mill" expands on definitions of "diploma mill" and "degree mill" given by the Maine House of Representatives. ME. REV. STAT. ANN. 20-A § 10801 (2005) (Table 1) [hereinafter ME. STATUTE]. Diploma mills issue degrees based almost exclusively on life experience and the payment of a fee, but, to the extent that they do require some academic work, the amount is not likely to make up more than seventy percent of the credits "earned." *See* EZELL & BEAR, *supra* note 13.

369. *See* EZELL & BEAR, *supra* note 13, at 23–24 (stating that diploma mills award degrees by granting academic credit based almost entirely on experiences represented in a person's resume).

370. Trinity College & University, Degree Fees, http://www.trinity-college.edu/fees.html (last visited June 10, 2005). Trinity is considered by the U.S. Army and the State of Oregon to be a diploma mill and has been sued for copyright infringement for using a name too similar to Trinity University, a reputable traditional school in Texas. *See Trinity Sues, supra* note 206 at B1.

371. Trinity College & University, http://www.trinity-college.edu/faq.html (last visited June 10, 2005) ("College credit is NOT and shall NEVER be offered for life experience.").

372. *See supra* note 209.

facie evidence that the school is a diploma mill.

The proposed act makes it a crime for a diploma mill to issue *any* degrees,[373] novelty or otherwise. The greatest harms to the public come from these empty degrees; holders of fake degrees have deceived employers and thereby gained undeserved jobs, promotions, and raises,[374] and have deceived the public and harmed it with their negligent services. For example, diploma mill operators have issued numerous fake degrees in various medical fields.[375] Purported psychologists, physicians, and other medical professionals with fake degrees have been caught practicing without the proper education and license credentials.[376] This has resulted in tragic consequences.[377] Thus, the extent of fraud inherent in diploma mill degrees, combined with the public harm, justifies criminal liability being imposed on operators of diploma mills.

In addition to making the issuance of bogus degrees a crime, the proposed act subjects diploma mills to criminal prosecution for issuing academic verification materials or providing academic verification services. In the proposed law, the phrase "academic verification materials" means any transcript, letter of recommendation or other document issued or purported to be issued by any college, university, community college, or any other educational institution or any professor, teacher, instructor, dean, or other individual associated therewith, for the purpose of evidencing or confirming any academic degree, or that any person has completed, wholly or partially, a particular course of instruction.[378] A prohibition on academic verification materials and services is necessary because these practices are used by diploma mill operators to deceive employers.[379]

373. Mountain View Stipulated Final Order, *supra* note 286 at 3 (describing in detail the proscribed conduct).

374. *See supra* note 177 and accompanying text (discussing a GAO investigation that uncovered 463 federal employees with degrees from schools alleged to be diploma mills). As part of its investigation of diploma mills, the GAO compared a government-sponsored Internet résumé service to a list of unaccredited universities provided by the Oregon State Office of Degree Authorization ("ODA") and discovered that, from a database of more than 1,200 résumés, fourteen different diploma mills and unaccredited schools were listed and approximately 200 employees who listed one of these degree providers applied for or held "a position of trust and responsibility." GAO'S PURCHASE OF DEGREES FROM DIPLOMA MILLS, *supra* note 215 at 2-3. When GAO investigators interviewed four applicants who purchased fake degrees, they found the individuals "intended to use the bogus degrees to benefit financially or defraud employers" because "they purchased the degrees either to enhance their résumé or to be considered for certain positions." *Id.* at 3.

375. *See supra* note 351.

376. *See* EZELL & BEAR, *supra* note 13, at 121 (stating that "patients at Lincoln hospital in New York . . . were treated by an accountant who bought a medical degree and was employed as an emergency room physician" and couples got divorces "following 'treatment' at a New York 'sex therapy' clinic run by a high school dropout whose only degree was a PhD purchased from a California degree mill").

377. *See, e.g.,* Armour, *supra* note 18; *see also Patient Dies, Fake Doctor Held, supra* note 122.

378. This is a modification of the FTC's definition of the term "academic verification material." *See* Mountain View Stipulated Final Order, *supra* note 286, at 3.

379. *See supra* note 281. *See* EZELL & BEAR, *supra* note 13, at 201–02.

Southeastern University, described previously, offers one example of the extent of this deception because 171 of its "graduates" with phony transcripts obtained jobs in all levels of government.[380]

Finally, along with criminalizing the providing of academic verification materials and services, the proposed bill makes it a crime for any individual to knowingly assist in the operation of a diploma mill. "Assisting" means providing:

> Any of the following goods or services to a diploma mill: (a) performing customer service functions, including but not limited to receiving or responding to employer inquiries or consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other written marketing material, including the text of any Internet website, email or other electronic communication; (c) providing names of, or assisting in the generation of, potential customers; (d) performing marketing services of any kind; (e) acting as an officer or director of a diploma mill; (f) creating websites purporting to be the address of a diploma mill, or (g) supplying degrees, academic verification material, or related material, information or services.[381]

Those who assist in the operation of diploma mills should be subject to criminal prosecution because they aid in the fraud being perpetrated on the public.[382] Furthermore, the criminalization of those performing support activities has the potential to create investigative and prosecutorial leverage. The proverbial "little fish" in diploma mill operations can be encouraged to cooperate in criminal investigations when they themselves face criminal prosecution. If criminal convictions of such individuals receive sufficient media attention, they may have a deterrent impact on the supply of diploma mills.

In addition to regulating diploma mills, the Authentic Credentials Act imposes obligations on unaccredited schools. According to the proposed act, an "unaccredited school" is defined as "an institution that has received the licensing, approval, or authorization required by the appropriate state agency to be a degree-granting institution in the state in which it is located or headquartered *but* lacks accreditation from an agency recognized by the U.S. Department of Education."[383] While a wide range of substandard unaccredited institutions are covered by this definition, the proposed act operates on the assumption that many unaccredited institutions may actually offer appropriately-designed and rigorous academic work but nevertheless have legitimate reasons for not seeking ED-recognized accreditation,[384] or may have sought it but not yet received it.[385] Although lack of

380. *See* Ariano, *supra* note 211, at 2–3.

381. The definition is an expansion of the FTC's definition of the term "assisting others." *See* Mountain View Stipulated Final Order, *supra* note 286, at 4.

382. *See supra* note 190 and accompanying text.

383. This definition is a modified version of "[d]uly authorized institution of higher learning" as contemplated by the State of Maine's House General Assembly. *See* ME. STATUTE, *supra* note 368.

384. *See* BEARS' GUIDE, *supra* note 12, at 20.

accreditation does not mean the education provided is automatically substandard, the existence of accreditation is an important mark of educational quality and affects the degree's value regardless of the underlying educational quality.

Substandard unaccredited schools tend to require completion of some academic work, but they follow educational practices that make their work fall substantially below the standards of quality education as measured by ED-recognized accrediting agencies.[386] Because being able to distinguish a substandard unaccredited school from other unaccredited schools is a fact-intensive inquiry and, therefore, likely to be a very expensive aspect of litigation against an unaccredited school, the proposed act seeks to regulate the content of disclosures made by unaccredited schools to consumers. The goal of the proposed act is not to dictate educational standards but to prevent deception. Thus, requiring honest disclosures about the significance of a lack of accreditation is appropriate for all unaccredited institutions. As a result, those charged with enforcing the proposed act will not have to invest resources into proving that an unaccredited school provides substandard education. If an unaccredited school's disclosures fail to meet the standards established by the proposed act, the school is liable even if the education it provides is on par with accredited schools. The proposed act thus regulates an easily defined category of unaccredited schools which must provide detailed disclosures to their prospective students about the limitations of graduating from an unaccredited school.

Finally, the proposed act seeks to regulate accredited schools offering unaccredited degrees. An "accredited school with an unaccredited degree program" is defined as:

> an institution that (1) has received the licensing, approval, or authorization required by the appropriate state agency to be a degree-granting institution in the state in which it is located or headquartered, (2) has received accreditation from an agency recognized by the United States Department of Education, and (3) has not received accreditation from an agency recognized by the Department [of Education] for a particular degree program offered by the institution.

This category, like the unaccredited schools category, is easy to describe. Adequate disclosure is the primary concern for these accredited schools because, presumably, they have a reputation to preserve and will likely do everything possible to eventually obtain accreditation for their unaccredited degree programs.[387]

385. Tyndale Theological Seminary and Biblical Institute may be an example of such an unaccredited institution. *See supra* notes 231-41 and accompanying text. Nothing in the facts of the case suggested that Tyndale provided a substandard education; however, due to religious "doctrinal" reasons, Tyndale refused to seek either accreditation or a state certificate of authority to operate a degree granting institution. HEB Minorities, Inc. v. Texas Higher Educ. Coordinating Bd., 114 S.W.3d 617, 624, 627 (Tex. App. 2003).

386. *See supra* notes 180-88 and accompanying text.

387. *See supra* Part II.B.1 (discussing Concord Law School, which is accredited by a ED-recognized accrediting agency but lacks accreditation by the American Bar Association, the only ED-recognized accrediting agency for law schools).

3. Required Disclosures Under the Authentic Credentials Act

While the proposed act does not prohibit unaccredited schools or accredited schools with unaccredited degree programs from operating altogether, as it does for diploma mills, it does require that such schools make certain disclosures designed to inform their potential students of the nature of the education and likely consequences of obtaining an unaccredited degree. Failure to make these disclosures and maintain the records described below will subject the schools to civil liability. Criminal liability would arise only if these schools fail to comply with contempt orders arising from civil judgments.

A principal purpose of the proposed act is to deter the supply (and ultimately the demand) for inferior education by prohibiting unaccredited schools from providing any false or misleading statements about accreditation status,[388] and requiring schools to make affirmative disclosures about the potential consequences of obtaining an unaccredited degree. These aspects of the proposed act are intended to supplement the FTC regulations discussed previously.[389] The required disclosures will enable prospective students to make informed decisions about the value of an unaccredited degree.

The proposed act also requires unaccredited schools to disclose to potential students the type and amount of coursework truly required for a student to earn a degree. To illustrate why such a disclosure is important, consider again the congressional testimony against Kennedy-Western University.[390] One former admissions counselors testified that he had to follow high-pressure telemarketing tactics to get prospective students to pay the tuition fee *before* the students could discover what academic work would be required of them.[391] As part of an undercover GAO investigation against Kennedy-Western, Lieutenant Commander Claudia Gelzer testified that in her interactions with other students in a Kennedy-Western-sponsored chat room several students expressed their dismay about the amount of required academic work[392] and about their exams.[393] If these

388. *See, e.g.*, *supra* note 161 and accompanying text (providing an example of misleading statements by American World University that were designed to downplay the importance of accreditation recognized by the U.S. Department of Education).

389. *See supra* notes 261-73 and accompanying text.

390. *See Bogus degree hearings*, *supra* note 29, at 50 (statement of Andrew Coulombe, Former Employee, Kennedy-Western University).

391. *Id.* at 43–44.

392. *Id.* at 42. Specifically, Lieutenant Commander Gelzer noted:

> In reviewing student dialogue in the school's online chat room, I found numerous postings about the quality of Kennedy-Western's program and its lack of accreditation. I sensed genuine disappointment and even desperation from some students, questioning whether they had made a mistake. Many admitted they hadn't understood the importance of accreditation when they enrolled. Some students spoke of feeling duped by the school. Several questioned why it seemed like so many students at Kennedy-Western had to take only four or five classes.
>
> On the other hand, there were students who seemed completely at ease with the lack of program exams. The chat room included regular exchanges about how to prepare for Kennedy-Western exams. It was openly acknowledged that test answers could often be found in the textbook glossaries.

allegations are true, a disappointed student could assert under tort law a claim of educational malpractice against Kennedy-Western. However, case law is currently on the side of schools accused of providing substandard post-secondary education: courts have thrown out complaints by former students and "graduates" asserting educational malpractice claims against the schools based on substandard instruction.[394]

In view of this, the proposed act will have the impact of putting the burden on online unaccredited schools to disclose exactly what academic work is required to obtain a degree. The Internet and email are being used to perpetrate all types of deception to entice consumers to part with their money, making it difficult for consumers to know whether they are getting legitimate, quality higher education, prior to paying tuition.[395] In transactions involving the sale of goods, consumers can avoid becoming victims of online fraud by using an escrow system designed to protect sellers and buyers.[396] No such mechanism exists for students enrolling in online schools. Thus, the proposed act recognizes that some unaccredited schools may be offering substandard education and imposes civil liability on any unaccredited school that fails to disclose, before receiving payment, to prospective students a written description of the academic work required for completion of the particular degree sought.

In most cases, violations of disclosure requirements invoke civil liability only, but if unaccredited degree providers are found to be in contempt of civil injunction orders, their principals would be subject to criminal sanctions, including imprisonment. Criminal liability would also arise if an unaccredited school fails to comply with the law of the state of its residency by failing to obtain authorization to be a degree-granting institution. Nothing in the proposed federal statute would

Id. Gelzer also testified that many of her fellow Kennedy-Western students felt "betrayed" since their education turned out not to be worth what they were paying for it. *Id.* at 43.

393. *Id.* at 41-43. She also noted that:

> In this chart you can see one student who said, "I do not know about yours, but some of my exams were terrible. One referred to a diagram that was not on the test, and others you can barely read because of very poor English.'" Another student said, "My advice to those who are studying hard is to recheck their exam results and challenge the score if you believe you have the right answers. I was surprised to find out that all my exams contained some errors, which I had to challenge and correct. I guess a lot of us are experiencing similar issues across different majors."

Id. at 41 (footnotes omitted).

394. *See, e.g.*, Miller v. Loyola U. of New Orleans, 829 So.2d 1057, 1060 (La. Ct. App. 2002) (dismissing the claim of a law student alleging educational malpractice and noting a "great weight of authority" against such claims for alleged poor instruction and other forms of supposed educational malpractice).

395. *See* Fast Track University Degree Program, *supra* note 22. *See also* BEARS' GUIDE *supra* note 12, at 40–44, 64–65 (identifying degree solicitations as among the top ten spam mail messages).

396. *See* David E. Sorkin, *Payment Methods for Consumer-to-Consumer Online Transactions*, 35 AKRON L. REV. 1, 14 (2001) ("[T]here are several online escrow services, the best known of which is Tradenable (formerly i-Escrow). Escrow services generally operate like PayPal and Billpoint, except that an escrow service holds the buyer's payment until after the goods have been shipped and the buyer has had an opportunity to inspect them.").

excuse a degree provider from complying with state law requirements for legitimately operating in the state where the degree provider is located. Accredited schools with unaccredited degree programs would be subject to civil penalties only if they failed to make the accreditation disclosures explained below.

All unaccredited schools must make the following disclosures:

> A. A statement explicitly stating that the particular degree granting institution is not accredited by an agency recognized by the United States Department of Education;
>
> B. A statement explaining the potential impact of lack of accreditation on a graduate's ability to obtain employment using an unaccredited degree;
>
> C. A statement explaining the potential impact of lack of accreditation on a student's current employment, including, but not limited to, the student potentially facing discipline, demotion, or termination;
>
> D. A statement explaining the impact and/or potential impact of lack of accreditation on a student's ability to qualify for an employer's tuition reimbursement program;
>
> E. A statement explaining the potential impact of lack of accreditation on a graduate's ability to obtain a license to practice in his or her field of educational expertise;
>
> F. A statement explaining the impact and/or potential impact of lack of accreditation on a student's eligibility for federal, state, and private financial aid;
>
> G. A statement explaining the impact and/or potential impact on a student's ability to transfer credits earned from an unaccredited institution to an accredited institution;
>
> H. A statement explaining that a student or graduate may be subject to civil and criminal prosecution if the student or graduate attempts to use the degree to seek employment or licensing in states that make such use unlawful; and
>
> I. A statement directing potential students to the U.S. Department of Education's website and toll free number for questions concerning accreditation.

The above accreditation disclosure statement must be in language plain enough for a high school student to understand and in large-size font so that it is clear and conspicuous and prominently featured on the front page of any websites and all written and electronic materials.[397] Moreover, unaccredited schools would be obligated to get a signed disclosure statement from each student applying, whether electronically, verbally, or in writing, for enrollment. As with any meaningful

397. The disclosure shall be made in at least fourteen-point, bold-faced font, and shall be presented in a manner reasonably calculated to draw the attention of the reader and be understood by a reader with a typical high-school education.

disclosure statute, the disclosure statement must be given when the student initially contacts the school and long before any tuition is paid so that the consumer has enough information to make a meaningful decision about the merit in pursuing an unaccredited degree. Moreover, unaccredited schools must maintain records of all signed disclosure statements from each applicant. These records would provide a paper trail for an enforcement agency to audit compliance with the proposed act.

There are three goals in requiring schools to disclose the consequences of obtaining an unaccredited degree and in subjecting them to criminal sanctions if they fail to make the disclosures. The first is to cause unaccredited schools operating in contempt of civil orders to fear criminal prosecution and thereby deter the supply of such substandard degrees. For some unscrupulous degree providers, the risk of incurring a civil penalty has not had a deterrent effect,[398] but fear of imprisonment may cause some to get out of the business. The second is to discourage consumers and the public from wasting precious resources on substandard degrees. If the proposed disclosure influences more people to attend accredited schools, society will benefit from a more-appropriately educated population.[399] Because all accredited schools were once unaccredited, the disclosure statement should arm consumers pursuing legitimate credentials with accurate information to help them determine when an unaccredited degree is nevertheless worth pursuing.[400] Finally, because the proposed disclosure statement may be viewed as sufficiently burdensome and may drive away some prospective students, the disclosure statement may also motivate some unaccredited schools to expeditiously pursue accreditation to keep their revenue from being negatively impacted.

In order to meet the foregoing goals, many factors need to be taken into account when creating an effective affirmative disclosure. The first important factor is that the disclosure statement must gain the consumer's attention.[401] That can be accomplished by using certain spacing, size, color, and symbols to attract the consumer's attention.[402] Here, the author proposes an accreditation seal that is prominently featured at the school's website and forces the visitor of the website to acknowledge a disclosure statement by mandating entry through a splash or gateway page.[403] Once a disclosure statement grabs a consumer's attention, it

398. *See, e.g.*, *supra* note 242-252 and accompanying text (showing Maxine Asher's relocation of American World University to Mississippi after being shut down in Hawaii).

399. *See* David W. Stewart & Ingrid M. Martin, *Advertising Disclosures: Clear and Conspicuous or Understood and Used?*, 23 J. PUB. POL'Y & MKTG. 183, 184 (2004) (identifying the policy objectives of disclosures and the outcomes sought from disclosures, noting that changing consumer behavior is "difficult to achieve with disclosure alone").

400. Information about an unaccredited degree is particularly relevant in light of research showing employers continue to value degrees from traditional schools over degrees obtained from online degree programs. *See supra* Part I.B.

401. *See* Jennifer J. Argo & Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*, 23 J. PUB. POL'Y & MKTG. 193, 194 (2004).

402. *See id*. at 194–195 ("The use of vividness-enhancing characteristics . . . increases the likelihood that consumers will see a warning.").

403. A splash page is "the gateway page that a user must access (cannot skip) to get to the content beyond." Letter from Jill Lesser, Vice President for Domestic Policy, America Online, to

must be relevant to the consumer's goals and be understandable because, otherwise, the consumer is likely to dismiss the information.[404]

Thus, in the context of unaccredited schools, the disclosure should state the ramifications of receiving an unaccredited degree in a way that clearly has bearing on a potential student's goals. For example, the disclosure statement would have to inform prospective students about the existence of state laws that make it a crime to use an unaccredited degree to seek employment or transact business. Apart from being relevant, research shows that the disclosure statement's language must be clear and simple and not written in highly technical language if it is to have the desired effect of informing the reader.[405] This is especially important as research also demonstrates that those most at risk of being confused or misled are those who are the least educated.[406] The drafter must also limit the message to important facts, and not include superfluous information which can clutter or distract from the key points of concern.[407]

The timing of the disclosure is another factor in the effectiveness of such warnings.[408] In the case of online colleges, the advertisement typically consists of a pop-up window or an email message that directs the potential student to the school's website. Here, the proposed disclosure statement could be required in this initial contact with the consumer. Disclosure at various points prior to starting the enrollment process may be more effective than one single disclosure.[409]

The following sample disclosure statement conforms to the requirements of the proposed act described above:

> (Name of Degree Granting Institution) IS NOT ACCREDITED BY AN ACCREDITING AGENCY RECOGNIZED BY THE UNITED STATES SECRETARY OF EDUCATION.
>
> Courses, programs, and degrees offered by this institution may not be recognized by employers, licensing authorities, government agencies, and accredited colleges and universities. This means that:
>
> 1. Potential employers may consider a degree from this institution to be illegitimate or substandard.

Donald S. Clark, Secretary of the Commission, Federal Trade Commission, (June 11, 1999), *available at* http://www.ftc.gov/privacy/comments/ americaonlineinc.htm (entitled Re: Proposed Rulemaking to Implement the Children's Online Privacy Protection Act of 1998—Comment PP994504) (discussing privacy policies that the FTC would like to establish)

404. *See* Stewart & Martin, *supra* note 399.

405. *See* G. Ray Funkhouser, *An Empirical Study of Consumers' Sensitivity to the Wording of Affirmative Disclosure Messages*, 3 J. PUB. POL'Y & MKTG. 26, 31–32 (1984).

406. *Id.* at 33 (finding that those with a college degree scored better on a comprehension test than those who had no more than an eighth grade education).

407. *See* Stewart & Martin, *supra* note 399, at 186 (discussing how individuals have differing goals and perspectives and use information differently).

408. *Id.* at 186 (explaining that the timing of disclosure to achieve maximum effect can be a subtle and nuanced art; while mandated guidelines assume that disclosure should take place at the time of advertisement, here, the authors note that it is important that "relevant disclosure occurs in a meaningful and salient way before the consumer acts").

409. *Id*. (discussing the benefits and trade offs of message timing and frequency).

> 2. Listing a degree from this institution as a qualification for employment or promotion may result in potential disciplinary action, demotion, or termination from employment, depending on your state of employment.
>
> 3. Earning a degree from this institution and using it to seek employment may expose you to civil or criminal liability (e.g., fines or imprisonment) in some states, where use of unaccredited degrees is unlawful.
>
> 4. Enrollment in this institution may not qualify for an employer's tuition reimbursement program.
>
> 5. Earning a degree from this institution may not be sufficient to obtain a license to practice in your field of education.
>
> 6. Enrollment in this institution may not allow you to qualify for federal or state financial aid.
>
> 7. Credits earned at this institution may not be transferable to accredited institutions, causing credits to be lost when transferring to another college or university.
>
> To learn more about accreditation and the consequences of acquiring an unaccredited degree, please contact the U.S. Department of Education at www.ed.gov/ or 1-800-USA-LEARN (1-800-872-5327). Go to http://ope.ed.gov/accreditation/Search.aspf to determine if any higher education school, college, or university is accredited.
>
> I have read and understood the above disclosure:
>
> [Student's name, signature, and date of signing]

This disclosure statement provides the information necessary to protect consumers looking to obtain degrees from unaccredited institutions. At the very least, full disclosure will provide consumers with basic information and direct them to resources that can help them make an informed decision about where to obtain a college degree.

Finally, the proposed act applies similar disclosure requirements to accredited institutions offering unaccredited degrees. These requirements are designed to protect prospective students who, when assessing a degree program, might otherwise fail to make the distinction between an accredited school and an unaccredited degree program and incorrectly assume a particular degree has ED-recognized accreditation. Under the proposed act, an accredited school or institution of higher education with an unaccredited degree program would be required to make a disclosure that includes the following:

> A. A statement that the particular educational program is not accredited by any agency recognized by the U.S. Department of Education for such a program.
>
> B. A statement explaining that lack of accreditation for the degree sought:

> 1. May prevent a graduate of the unaccredited degree program from obtaining a license to practice in that particular field or profession;
>
> 2. May negatively affect a graduate's search for employment;
>
> 3. May have a negative impact on the student's current employment, including but not limited to the student being disciplined, demoted, or terminated;
>
> 4. May prevent a student from qualifying for an employer's tuition reimbursement program;
>
> 5. May prevent a student from qualifying for federal, state, or private financial aid;
>
> 6. May negatively impact a student's ability to transfer credits to an accredited program; and
>
> 7. May subject a student or graduate to civil or criminal prosecution (e.g., fines or imprisonment) if the student or graduate attempts to use the unaccredited degree to seek employment or licensing in states that make such use unlawful.
>
> C. A statement directing potential students to the nationally recognized accrediting agency for the unaccredited program for more information.
>
> D. A statement directing potential students to the U.S. Department of Education's website and toll free number for questions concerning accreditation.

The disclosure statement must be signed by the student and must be made in accordance with the format described with respect to unaccredited institutions.[410]

Such disclosures will help protect consumers like Mary Muller. In 1993, Muller applied to the Illinois Department of Professional Regulation for a license as a registered nurse after earning an associate's degree in applied nursing from Regents College External Degree Program in New York.[411] The department rejected her license application because she had graduated from an unaccredited professional nursing education program, stating:

> Illinois does not accept the New York Regents External Degree as meeting the requirements for licensure . . . . The New York Regents External Degree Program does not meet the nursing education program standards, and is, therefore, not approved. Basically, the program is a correspondence program which the Illinois Nursing Act identifies as not satisfying the education requirements.[412]

410. *See supra* notes 397-409 and accompanying text.

411. Muller v. Zollar, 642 N.E.2d 860, 862 (Ill. App. Ct. 3d 1994).

412. *Id*. at 869. When Muller challenged the department's ruling, the court concluded that the department's decision to deny licensure to Muller was legal and held that Muller had no standing to challenge the accreditation status of the Regents College External Degree Program.

Had Muller been required to read and sign a statement disclosing the significance of Regents' lack of accreditation of its nursing program before she completed the application, she would have known that the program might not equip her to meet Illinois' requirements for a nursing license. Muller could then have elected to enroll in an accredited nursing program, saving herself considerable heartache, time, and expense in obtaining a relatively worthless nursing degree.

In sum, the proposed act protects students, employers, and third parties by giving law enforcement authorities the tools to convict operators of diploma mills and by giving authorities and consumers the authority to impose civil liability on operators of unaccredited schools and unaccredited degree programs if they fail to make certain disclosures.

4. Consideration of Arguments Against the Proposed Act

The current proposal to enact a statute criminalizing fake and substandard degree providers may be troubling to many concerned about the move towards "over-criminalization" in this post-Enron, post-9/11 era.[413] Some scholars have noted a dramatic increase in the number of federal criminal legislation over the last few decades,[414] particularly emphasizing how many of these new offenses hinge upon a rather low standard of proving crimes—requiring proof of a low *mens rea* and some even applying strict liability.[415] Moreover, scholars are concerned about regulatory crimes that define criminal conduct (i.e., the *actus reas* element) as merely the failure to perform some required act:

> [T]he common law has recognized that in certain limited circumstances one may be held criminally liable without having done an affirmative act, precisely because the failure may be said to be a cause of the resulting harm . . . [but] [g]eneral failure by the Courts [sic] to read regulatory crime statutes narrowly, proscribing conduct when "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." (citation omitted)).[416]

Although the proposed act is arguably regulatory in nature and provides for criminal liability under certain circumstances, such criminal liability is justified in light of the harms perpetrated by fake and substandard degree providers. First, it is necessary to adopt the proposed act on a federal level because the providers of such degrees are transient.[417] "Virtual universities" not only make it difficult to

Id. at 863. "The plaintiff was not a party to the Department's decision to deny Regents' program accreditation and thus may not contest Regents' accreditation status." *Id.*

413. *See, e.g.,* Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM, No. 7, June 25, 2003, *available at* http://www.heritage.org/Research/LegalIssues/lm7.cfm; *see generally* Ellen S. Podger, *Jose Padilla and Martha Stewart: Who Should be Charged with Criminal Conduct?*, 109 PENN. ST. L. REV. 1059 (2005).

414. *See* Rosenzweig, *supra* note 413, at 2; Podger, *supra* note 413, at 1060.

415. *See* Rosenzweig, *supra* note 413, at 3, 6.

416. *Id.* at 5, 13.

417. *See, e.g., supra* notes 159-68 and accompanying text (discussing American World University, which relocated to Mississippi after being shut down in Hawaii).

determine their providers' specific location, but also make it easy for them to relocate to another state or even leave the country if one state challenges them.[418] Consequently, aggrieved graduates cannot find these operators to obtain refunds. Second, the proposed act requires a violation to be performed "knowingly" for it to constitute criminal conduct.[419] The proposed act's criminal sections are meant to supplement deceptive practices already proscribed by the FTC.[420] Coupled with a mass media campaign that will educate the public regarding the scope of the statute and the consequences of obtaining a degree from a diploma mill or substandard school,[421] the criminal sections of the proposed act should result in the prosecution of only those who knowingly sell or assist in the selling of fake degrees.

Finally, the statute criminalizes certain failures to act for the same reason that omissions have traditionally been recognized as criminal—the omissions actually cause harm. As explained throughout this article, students and employers are misled by the failure of a substandard school to inform its potential students regarding the school's accreditation status, the nature and amount of work necessary for obtaining a degree, and the potential real-world consequences of obtaining such a degree.[422]

IV. GOVERNMENTAL ROLE IN CURBING DEMAND

This article not only recommends federal legislation to regulate the providers of bogus and unaccredited degrees, but federal action to deter consumers from obtaining these degrees. The prevailing view is that one can curb demand for bogus and unaccredited degrees by criminally prosecuting those who use them.[423] The existing burden on the criminal justice system alone makes such an idea tenuous, except when prosecution is sought against uncredentialed individuals performing the type of work that is already covered by state criminal statutes.[424] This article rejects any criminal prosecution of employees found to hold bogus or unaccredited degrees, except prosecution of uncredentialed individuals acting in

418. *See supra* notes 276-79 and accompanying text (discussing litigation involving defendants whose identity was unknown at the time the lawsuit was initially filed). Even though Ronal Pellar, a diploma mill operator, had been convicted of criminal contempt and sentenced to prison, he managed to flee to Mexico and began living on a yacht that he obtained with the profits from his schools. *See* "*College" Founder Pleads Guilty, supra* note 303; *Scam Schools*, *supra* note 289.

419. *See supra* Part III.C.2.

420. *See supra* notes 261-67 and accompanying text (reviewing FTC rules regulating the use of the word "accreditation").

421. *See infra* Part IV.B (proposing mass media campaign).

422. *See supra* Part II.B.3 (describing how Kennedy-Western deceives students regarding the amount and quality of work required to obtain a degree).

423. *See* EZELL & BEAR, *supra* note 13, at 186 (arguing that demand for fake degrees can be curbed "by prosecuting the users [of the degrees] and publicizing the prosecution").

424. For example, it is generally a crime to practice medicine without the proper credentials. A person with a bogus medical degree would already be subject to criminal prosecution. *See, e.g.,* Armour, *supra* note 18.

violation of existing state criminal statutes.[425] A broad criminal sanction is wrong in light of the level of deception perpetrated by providers of dubious degrees,[426] the over-reliance by employers on educational credentials,[427] the ability of employers to easily identify bogus and unaccredited degrees in job applicants' credentials,[428] the education market realities that make it difficult to qualify for or afford traditional college degrees,[429] and the labor market realities that make it very difficult for a high school graduate to obtain a well-paying job.[430] A few states, as explained below, have laws that impose civil or criminal liability on persons with bogus and unaccredited degrees who represent them as legitimate education credentials. To deter demand for such degrees, this article proposes educating consumers on how to tell the difference between illegitimate and legitimate providers of higher education and empowering employers with an objective standard for determining what type of discipline is appropriate for employees who have bogus or unaccredited degrees.

A. Existing State Laws Criminalize Users of Bogus and Unaccredited Degrees

A few states, including Florida, Illinois, Indiana, Iowa, Michigan, New Jersey, North Dakota, Oregon, and Washington, have statutes that prohibit a person from representing that he or she has a legitimate academic degree if the degree is bogus or if the degree is from a school that lacks ED-recognized accreditation or approval from the state in which the representations are directed.[431] These statutes prohibit certain uses, such as using an "academic degree for the purpose of obtaining employment or admission to an institution of higher learning or admission to an advanced degree program . . . or for the purpose of obtaining a promotion or higher compensation in employment."[432] In addition to prohibiting fraudulent academic degree claims, some states prohibit the use of titles and other insignia that falsely signify that a person has a doctorate degree or other similar recognition of

425. *See* WEST'S ANN. CAL. BUS. & PROF. CODE, *supra* note 169 (requiring a physical therapist to have an accredited degree prior to licensing).

426. *See supra* Part II.

427. *See* Johnson, *supra* note 87, at 288-300.

428. In addition to a plethora of available Internet sources for researching the validity and quality of degrees from specific institutions, a hard copy directory of accredited institutions is published each year by Higher Education Publications, Inc. *See, e.g.*, 2003 HIGHER EDUCATION DIRECTORY (2003) (Jeanne M. Burke, ed.) (listing all U.S. post-secondary, degree-granting institutions that are accredited by regional, national, professional and specialized agencies recognized as accrediting bodies by the U.S. Department of Education).

429. *See supra* Part I.B.

430. *See id.*

431. FLA. STAT. ANN. § 817.567 (West Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/17-2.5 (West Supp. 2005); IND. CODE ANN. § 24-5-0.5-12 (West 2006); IOWA CODE ANN. § 715A.6A (West 2003); MICH. COMP. LAWS ANN. § 390.1604 (West Supp. 2006); N.J. STAT. ANN. §§ 18A:3-15.1–15.3, 15.5 (West 1999); N.D. CENT. CODE § 15-20.4-15 (2003); OR. REV. STAT. § 348.609 (2005); WASH. REV. CODE ANN. § 28A.415.024 (West Supp. 2006).

432. 720 ILL. COMP. STAT. ANN. 5/17-2.5 (West Supp. 2005).

professional credentials.[433] Washington prohibits teachers from using fraudulent or unaccredited degrees to obtain promotions or raises.[434] Some states classify these acts as misdemeanors,[435] while others impose civil penalties[436] on the people who have obtained such degrees.[437]

Oregon has been particularly aggressive in the fight against bogus and unaccredited schools. It maintains a website with a list of these schools and provides a wealth of information about diploma mills and other educational matters.[438] In Oregon, a person who continues to represent that he has a degree, even when he or she has been warned that the degree does not satisfy any recognized accreditation standards,[439] is subject to civil penalties.[440] A civil suit may be brought against the person in the circuit court for legal or equitable remedies, including injunctive relief, to enforce compliance with state law.[441] In addition, attorneys' fees and court costs may be recovered by the state for these actions.[442] A person claiming an unrecognized degree also commits the crime of falsely claiming possession of a degree, a Class B misdemeanor.[443]

Oregon's enforcement was recently challenged in a lawsuit filed by Kennedy-

433. *See, e.g.,* N.J. STAT. ANN. § 18A:3-15.3 (West 1999) ("A person shall not append to his name any letters . . . unless the person has received from a duly authorized institution of higher education the degree or certificate for which the letters are registered."); IND. CODE ANN. § 24-5-0.5-12(b) (West Supp. 2004) (declaring that it "is an incurable deceptive act for an individual, while soliciting or performing a consumer transaction, to claim to be a: (1) physician . . . (2) chiropractic physician . . . (3) podiatric physician" unless the person holds a license, as authorized, under a specific Indiana statute).

434. WASH. REV. CODE ANN. § 28A.415.024(1) (West Supp. 2006) ("All credits earned in furtherance of degrees earned by certified staff, that are used to increase earnings on the salary schedule . . . must be obtained from an educational institution accredited by an accrediting association recognized by rule of the state board of education.").

435. FLA. STAT. ANN. § 817.567(3) (West 2006) (stating that the penalty is a misdemeanor of the first degree); 720 ILL. COMP. STAT. ANN. 5/17-2.5 (West Supp. 2005) (stating that the penalty is a class A misdemeanor); IOWA CODE ANN. § 715A.6A (West 2003).

436. *See, e.g.*, MICH. COMP. LAWS ANN. § 390.1605 (West Supp. 2006) (providing for a fine of $100,000); OR. REV. STAT. § 348.609.5(b) (2005) (providing for a penalty of $1,000); WASH. REV. CODE ANN. § 28A.415.024(4)(b) (West Supp. 2006); IND. CODE ANN. § 24-5-0.5-8 (West 2000) (providing for a penalty of $500).

437. North Dakota is the only state that has different penalties for suppliers and users of fake degrees. *See* N.D. CENT. CODE § 15-20.4-15 (2003) (recognizing that there is a difference in culpability between those who use false degrees and those who issue them, North Dakota makes use of fraudulent degrees a class A misdemeanor, while issuing fraudulent degrees is a class C felony).

438. *See* OREGON OFFICE OF DEGREE AUTHORIZATION, *supra* note 161.

439. *See, e.g.*, Letter from Office of Degree Authorization, State of Oregon, Oregon Student Assistance Commission, to Jeanette Louise Beckelhymer, (Feb. 18, 2004) (warning Ms. Beckelhymer from claiming a master's degree from William Carey International University in Pasadena, California). William Carey International University is now listed at Oregon's website as an unaccredited school approved by the Office of Degree Authorization.

440. OR. REV. STAT.§ 348.609.5(b)(2005).

441. *Id.* § 348.609(5)(a).

442. *Id*.

443. *See id.* § 348.992 ("Violation of any of the provisions of ORS 348.594 to 348.615 by any person individually or on behalf of an organization or group is a Class B misdemeanor.").

Western University and three of its graduates, claiming violation of free speech rights.[444] Seeking to avoid costly litigation, Oregon and Kennedy-Western entered into a settlement agreement, under which Oregon changed its law to allow a person to use a degree not recognized by Oregon if he or she discloses the degree as unaccredited.[445] But nothing in the settlement or the amended statute requires unaccredited schools to inform their students that their degrees are unaccredited. Failure to insist that an unaccredited school disclose its lack of accreditation is problematic[446] given that many unaccredited schools misrepresent their accreditation status.[447] Consequently, "graduates" of Kennedy-Western and other unaccredited schools are likely to continue to break Oregon's law (and laws from other states), thereby risking criminal liability if they mistakenly believe the schools are accredited.

Because criminal prosecution of consumers who obtain bogus degrees is warranted in the extreme situations already covered by state law, punishing holders of substandard degrees would be both harsh and an unwise use of prosecutorial resources given that *some* holders of such degrees are victims themselves.[448] Separating "victims" from "participants" would likely entail difficult and time-consuming investigation because prosecutors would have to prove actual intent to commit degree fraud. This article proposes a more moderate program of public education and workplace discipline to deter individuals from obtaining substandard degrees or using them to deceive others. In this way, state and federal governments can help consumers obtain the knowledge they need to help protect themselves—without unduly penalizing holders of substandard degrees for their own victimization.

B. Proposal to Launch a Media Awareness Campaign

To decrease the demand for fake and substandard unaccredited degrees, state higher education agencies and the Education Department should implement a public service announcement campaign warning the public about such degrees.[449]

444. *See* Complaint, Kennedy-Western U. v. Contreras, (D.Or. 2004) (No. 04-1023-HU (suing Alan Contreras, Administrator of the Oregon Student Assistance Commission Office of Degree Authorization, and Hardy Myers, Attorney General for the State of Oregon). Kennedy-Western was highly motivated to challenge Oregon because of the potential loss in profits, which in 2003 amounted to almost $25 million paid by its nearly 10,000 students currently enrolled. *See Bogus degree hearings*, *supra* note 29, at 39.

445. *See supra* note 362.

446. Some graduates of Kennedy-Western and other unaccredited schools feel cheated once they realize the type of education they have received because they cannot reap the full benefits of having obtained a college degree. *See supra* Part II.C.3 (discussing complaints by students who obtained degrees from Kennedy-Western). *See also* EZELL & BEAR, *supra* note 13, at 40 (referencing "Dr." Laura Callahan, who was such a victim because, although she took steps to educate herself about avoiding diploma mills, she was still duped by one).

447. *See supra* Part II.B.2.

448. *See supra* Part II.B.

449. While the risk of discovering the true nature of a diploma mill degree was once slight, experts believe that the tide is already changing thanks to a number of well-publicized, individual cases. *See* EZELL & BEAR, *supra* note 13, at 116. A widely disseminated public service

The campaigns should focus first on warning potential students of the education and career hazards of these degrees, as well as about viable alternatives such as community colleges, and low-interest loans for accredited degree programs. [450] The announcements should also inform consumers that they could be criminally prosecuted in states forbidding the use of such degrees. [451] Consumers should be directed to web links that contain lists of accredited schools and information about the ways in which they can identify fake schools. [452] A mechanism should be provided for the consumer to report fake schools to the proper authorities. In addition to warning potential students, the announcements could warn the public about the dangers of receiving services from professionals with fake and unaccredited degrees. It would also be prudent to include a special caution on international diploma mills and dubious accreditations conferred by unstable foreign governments.[453]

Several states and the U.S. Education Department have already begun campaigns of this nature, which could be broadened. Oregon, Michigan, and the Education Department all maintain information on their websites about which schools are accredited or unaccredited.[454] Maine recently enacted a statute that requires the state to provide, "via publicly accessible sites on the Internet, information to protect students, businesses and others from persons, institutions or entities that issue, manufacture or use false academic degrees."[455] The statute also requires publication of all known "diploma mills, degree mills, accreditation mills and substandard schools or institutions of higher education."[456] By consulting all these websites, a person should be able to determine whether a degree provider is legitimate so as to avoid civil or criminal liability. These websites also make valuable information available to employers and the public, and they should be replicated in other states. The purpose of the mass media campaign, however, is to make prospective students and the public aware of the substandard degree problem and inform them of the useful information at these websites.

Some of the costs of public awareness campaigns could be drawn from the

campaign would expand this trend exponentially.

450. Johnson, *supra* note 87, at 309-310 (discussing the viability of community colleges as an alternative to enrolling in accredited four-year institutions because community colleges are generally accessible and affordable to all).

451. *See supra* Part IV.A (discussing states where a person's use of fake or unaccredited degrees is a crime).

452. *See* U.S. Dep't of Educ., Postsecondary Educational Institutions and Programs Accredited by Accrediting Agencies and State Approval Agencies Recognized by the U.S. Secretary of Education, http://www.ope.ed.gov/accreditation/ (last visited July 28, 2005) (providing a web page where the public can search a school's name and see if it is accredited by an ED-recognized accrediting agency); MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3 (providing a lists of unaccredited schools).

453. *See* EZELL & BEAR, *supra* note 13, at 69–70 (discussing how international diploma mills take advantage of corrupt governments to represent themselves as legitimate).

454. *See* MICHIGAN'S LIST OF NON-ACCREDITED COLLEGES/UNIVERSITIES, *supra* note 3; OREGON OFFICE OF DEGREE AUTHORIZATION, *supra* note 161.

455. 20A ME. REV. STAT. ANN. § 10804 (West Supp. 2005).

456. *Id*.

assets of diploma mills closed through prosecution under tougher regulations.[457] Current law already allows the law enforcement agencies to seize these assets under specified circumstances.[458] Some of the proceeds of assets seized could also be used to supplement governmental financial aid assistance for low-income students attending accredited programs—an alternative that would, of course, be further promoted through the awareness campaigns.[459]

The Ad Council creates many nationally-televised public service announcements (PSAs), and, through cooperation with the Education Department, could inspire honest consumers to get legitimate education credentials and unmask employees who have obtained dubious degrees. The campaign could aspire to the heights of the most famous higher education campaign, the United Negro College Fund slogan, "A Mind is a Terrible Thing to Waste," which has been credited with inspiring the enrollment of African-Americans in colleges.[460] With the help of the Ad Council, a possible campaign slogan could be: "Don't be Duped by Deceptive Degrees," or "Make Your Education Worth the Paper it's Printed on." A proposed degree fraud awareness campaign would meet the Ad Council's four criteria: (1) the issue of concern would be sponsored by a government agency (the Education Department), (2) making consumers aware of bogus and substandard unaccredited degrees would be an issue completely non-partisan in nature, (3) the campaign would be national in scope because it would be relevant to a nationwide audience, and (4) federal coordination with state departments of education would create a national network to disseminate information.[461] Using multiple mediums such as Internet, radio, television, magazines, newspapers, and flyers, the campaign would ensure that the widest possible socioeconomic audience will receive proper warnings.

In addition, the Education Department could run a more covert awareness campaign by releasing investigative results to relevant local media outlets. Most

457. *See supra* Part III.C.2 (discussing proposed law to expand the scope of prosecutable offenses committed by operators of diploma mills).

458. *See supra* notes 290-326 and accompanying text (discussing the prosecution of several diploma mill operators and assets seized from their closure).

459. For example, the Education Department could join efforts with Colorado's media campaign to promote increased enrollment in higher education. "College in Colorado" is a public and private partnership through which $15 million will be used to promote new and existing scholarships, promote grants for low-income students to go to college, and fund a media campaign to raise awareness that money is available to send every Coloradan to college. *See* Chris Frates, *Teens Nudged Toward College[:] Low Participation Targeted*, DENV. POST, Jan. 18, 2005, at B1. That same media campaign could be used to educate students about how to tell legitimately accredited universities from diploma mills and inferior-quality unaccredited schools.

460. Since 1972, The United Negro College Fund has helped to raise more than $2 billion to graduate 350,000 minority students from college with the help of the "A Mind is a Terrible Thing to Waste" slogan. *See*, AD Council, The Advertising Council: Effective Positive Social Change, http://www.adcouncil.org/about/ (last visited Mar. 6, 2005).

461. *See* Ad Council, Frequently Asked Questions: General Questions, http://www.adcouncil.org/np/How_To_Official/ (last visited Mar. 8, 2005) (listing four criteria necessary to receive PSA sponsorship). Alternatively, the Education Department could run an independent advertising campaign with an Ad Council endorsement (entailing similar requirements to developing campaigns within the Ad Council). *Id.*

local television stations have a consumer affairs department or investigative reporter who would pick up on this information. The demand-side deterrent effect of a graduate of a diploma mill appearing on television in a shameful light could strengthen the effectiveness of a national media campaign.

A massive media campaign would also raise the awareness of employers as well. Alerted to the problem of bogus and unaccredited degrees, employers could then audit employee records to determine who has such degrees, particularly if the employer is a governmental entity.[462] The possibility of local reporters uncovering employees with such degrees may encourage some employers to expedite a degree-legitimacy auditing process for their own protection and reputation. In addition, media reports may increase pressure on local politicians and state legislatures to take stronger action against diploma mills. Educational quality and consumer fraud are important issues to voters.[463] And in a time of increasing media attention on income inequality and job losses, regulation of operators of diploma mills and unaccredited degree schools/programs offers a politically low-cost way of protecting low-to-moderate-income workers.

C. Proposed Law for Disciplinary Action Against Employees With Substandard Degrees

The last proposal for curbing consumer demand for online substandard degrees is to establish a standard to determine when employers should discipline employees with substandard degrees. By establishing best practices with respect to federal employees, and amending federal law to discipline employees violating those practices, the federal government can both reduce the harm of substantially inferior degrees within its own ranks and set a model for state and private employers to follow. This section thus makes specific recommendations for federal law and employment practices with the intention that state and private employers would find these models useful to emulate.

First, all federal agencies should conduct regular degree-legitimacy audits. These audits are especially important for governmental employers because tax dollars may be paying for tuition reimbursements for unaccredited degrees or paying the salaries of such degree holders.[464] If estimates about the existence of at

462. See *infra* Part IV.C (discussing employee audit proposal).

463. *See, e.g.,* Kevin Begos, *Governor Fails to Wow Voters: Few Improvements Are Noted in Poll*, TAMPA TRIB., Nov. 24, 2005, at 6, *available at* 2005 WLNR 19943060 (stating that although improving education is a stated goal of Jeb Bush, 34 percent of Florida voters responded in a survey that the quality of education has not changed much during his seven years as governor); Martha Stoddard, *Amendment Would Protect Privacy Rights Worries about Government Intrusion into Private Lives Are Behind the Proposal*, OMAHA WORLD-HERALD, Feb. 19, 2006 at 3B, *available at* 2006 WLNR 3238882 (As a consumer protection measure, Nebraska residents have the opportunity to vote on "Legislative Resolution 254CA [which] would prohibit the state from making or enforcing 'any law which infringes upon or interferes with the privacy of the person, family, home, property, documents, correspondence or information of any person.'").

464. *See supra* notes 177-79 and accompanying text (discussing GAO report's finding that government money has been used to reimburse employees for the cost of obtaining fake and unaccredited degrees).

least one million fake degrees are accurate, widespread employee personnel audits will undoubtedly uncover many fake and unaccredited degrees.[465] With this information in hand, employers face a wide range of possible disciplinary actions that may be taken against the identified employees.

As discussed above, criminal prosecution is inappropriate for these employees; however, some form of discipline is necessary to deter the demand for fake and inferior-quality unaccredited degrees. A federal statute already forbids tuition reimbursement for unaccredited degrees,[466] and this statute should be enforced. Moreover, an existing regulation provides that "an applicant, appointee, or employee may be denied Federal employment or removed from a position only when the action will protect the integrity or promote the efficiency of the service."[467] The criteria, however, for an agency to take such action are too generic to be applied to the problem at hand.[468] Therefore the statute and the regulation should be amended to authorize discipline of a federal employee with a fake or unaccredited degree, allowing human resource supervisors to fire or demote the employee, reduce the employee's salary, or require the employee to reimburse the government for any raises or employer-sponsored tuition money received. This article proposes a five-factor disciplinary test for employers to determine the proper action that should be taken against employees with these degrees. These factors include: (1) scrutinizing each employee in light of the employee's previous education, (2) examining the level of deception practiced by the provider of the dubious degree, (3) assessing the employee's job performance before and after obtaining the dubious degree, (4) comparing the employee's job performance to the employer's requirements for the position, and (5) assessing the level of integrity the employer needs to maintain.

The first of these five factors requires the supervisor to identify the type of degree obtained by the employee and to scrutinize it in light of the employee's level of educational attainment prior to acquiring the dubious degree. This factor acknowledges the educational naiveté of many workers before they obtain at least their first post-secondary degree.[469] For instance, if an employee obtains a bogus or unaccredited degree but has never attended college, that factor weighs in favor of leniency. Indeed, it might establish a presumption of innocence unless one of

465. *See* EZELL & BEAR, *supra* note 13, at 29 (estimating over one million fake degrees sold). *See also* Christopher Byron, *Fee For Certificate - Executive Resumes Padded By Sheaves Of Faux Sheepskin*, N.Y. POST, July 27, 2004, at 41 (reporting that, in a search of filings by companies to the United States Securities & Exchange Commission, "15 different chairmen and CEOs, 29 corporate board members and 40 other top officials of public companies . . . have burnished their resumes with diplomas and degrees from Barrington U. and 17 similar [diploma mill] operations").

466. *See* 5 U.S.C. § 4107(a) (2004).

467. *See* 5 C.F.R. § 731.201 (2004).

468. *See id*. § 731.202 (2004).

469. The rationale behind treating the high-school graduate differently from the college-educated is that the college-educated may be presumed to have greater sophistication in differentiating between authentic and illegitimate post-secondary education. Having completed course work in a traditional college setting, the educated worker knows a degree is not earned when one has to do a small amount of work to obtain it.

the other factors militates in favor of discipline. Conversely, if an employee already held a traditional bachelor's or associate's degree prior to getting the bogus or unaccredited degree, that factor suggests more sophistication on the employee's part and might establish a presumption of guilt. [470] Other facts such as the culpability of the degree provider would be necessary to swing the pendulum back in favor of the employee.

The second factor in the disciplinary test requires scrutiny of the level of deception practiced by the online provider of the dubious degree. The areas of deception include misrepresentations about accreditation, amount of course work, and quality of education. The employer should objectively evaluate the representations made on the degree provider's web pages and in the written materials sent to the employee. The supervisor should search for answers to questions like the following: Did the degree provider convey the impression that little or no work was involved, credit heavily the employee's prior learning or life experiences, or grant the degree shortly after the employee paid for the degree or completed the course packet? [471] Did the provider try to create an aura of legitimacy by using a name very similar to a reputable and traditional accredited college or university, by claiming accreditation from fake or non-ED-recognized accrediting agencies, by misrepresenting its state-licensing status, or by claiming compliance with non-existent federal guidelines on crediting an employee's life or learning experience? [472] Did the provider claim to provide education on par with similar legitimate institutions by claiming affiliation with reputable schools and posting testimonials about the quality of the instruction? [473] The employer should probably conclude that no discipline, other than a reprimand, is necessary when the employee's level of sophistication was minimal and the deception perpetrated by the online degree provider was great. On the other hand, if the employee was more educationally-sophisticated and the bogus nature of the degree was readily apparent, harsher discipline is probably appropriate. [474]

The third part of the disciplinary test requires the employer to assess the employee's performance. Based on previous evaluations, employers should be able to determine if the worker has been performing the job satisfactorily, regardless of whether or not he possesses the credentialed degree. If the online degree provider required the completion of real academic work, the employer should assess whether the employee's job performance actually improved after

470. *See supra* notes 1-4 and accompanying text (discussing arbiter's denial of pay increases to two teachers who obtained doctorate degrees from a substandard school because the teachers should have realize the doctoral program was substandard as a result of previous experience in obtaining degrees from reputable accredited schools)

471. *See* EZELL & BEAR, *supra* note 13, at 82-102 (providing lists of deceptive practices that diploma mills engage in to mislead people).

472. *See Bogus Degree Hearings*, *supra* note 29 at 3 (opening statement of Senator Collins).

473. *See* EZELL & BEAR, *supra* note 13, at 82-102.

474. *See, e.g., id.* at 185 (At his criminal trial, a state psychologist with a degree from a diploma mill stated that he was not bothered by the diploma mill's lack of a telephone or mailing address or the mill's willingness to grant him a doctorate degree based on his life experiences. In closing argument, the prosecutor stated: "There sits a man who clearly spent more time deciding which candy bar to buy from the vending machine than he did in choosing his university.").

obtaining the unaccredited degree. Strong work performance, both before and after obtaining the questionable degree, should weigh in the employee's favor. [475]

Under the fourth part of the disciplinary test, the employer should assess the employee's performance in view of employer's requirements for the job position. The nature of the employment itself must be considered before taking action. Employers may be acting unfairly if they terminate or demote employees for falsely claiming accredited degrees when the degrees are not necessary for job performance. [476] While the job description may indicate that a degree is preferred or required, care should be taken to make sure a degree is reasonably necessary to perform the job. [477]

An employer's application of factors three and four could lead, for instance, to the conclusion that even though a graduate of Concord Law School hired as an entry-level attorney is performing well, her lack of a law degree from a school accredited by the American Bar Association limits her usefulness because she cannot obtain a license to litigate in any courts where the employer is located. [478] Therefore, if the employee is in a state where an ABA-accredited degree is necessary to obtain a license to practice, the employer is free to fire the employee for not possessing such a degree. Conversely, if the United Parcel Service ("UPS"), which recruits students on college campuses to fill part-time package handling positions, discovers an employee working as a package handler obtained his associate's degree from an online unaccredited school, the employee should not be fired if he is performing competently.[479] A college degree is not necessary to perform this position. [480]

The fifth and final factor for a supervisor to consider is the level of integrity the employer needs to preserve by focusing on integrity in the hiring process, integrity in educational claims, and integrity in services or goods provided by the employer's workforce. Because maintaining a high level of integrity may be necessary, a personnel supervisor could terminate or demote an employee even though the employee's culpability was minimal and the degree provider's deception was pervasive. In applying this factor, the forced resignation of "Dr." Laura Callahan from her post as a senior-level director in the Department of Homeland Security may have been justified by integrity concerns even if one believes she was competent and believes her claims that she investigated diploma

475. *See, e.g.,* Johnson, *supra* note 87, at 303-05 (discussing Charles Abell, top official in the Department of Homeland Security, and how his superiors supported his retention despite his attainment of a master's degree from a reputed diploma mill).

476. *See id.* at 288-300 (explaining how employers act unfairly when they insist on job applicants having college degrees to fill low-to-moderate-skill positions).

477. *See id.* at 311-30 (explaining how employers risk liability under federal anti-discrimination law when they prefer employees with college education over those having only a high school diploma if the college education is not a business necessity and manifestly related to successful job performance).

478. *See supra* notes 153-54 and accompanying text.

479. *See* Johnson, *supra* note 87, at 299-300 (discussing UPS's hiring practices and how it may be violating federal anti-discrimination law when it prefers individuals with college education when filling package handling positions).

480. *Id.*

mill Hamilton University before obtaining three degrees from it.[481]

The five-factor test seeks to prevent employers from losing otherwise competent workers due to lack of proper credentials as well as to protect employees who may have themselves been victims of deception. While firing is an ultimate punishment, the test allows lesser sanctions such as demotions and salary reductions. Applying the five factors will still send a strong message to employees and will, hopefully, deter the pursuit of fake and unaccredited degrees. Even if an employer decides that an employee does not deserve any serious disciplinary action, the employer should at least formally reprimand an employee who obtains a fake or unaccredited degree. In addition, the employee should be forced to return any tuition support received regardless of the employee's naivety. Such a sanction will serve a restitution purpose and preserve limited resources for employees seeking to legitimately educate themselves.

As a final step in regulating their workforces, federal employers should review their own degree requirements, hiring procedures, and promotion processes, and assure that required degrees correspond to genuine job needs. They should then communicate clearly to the workforce their standards for degrees, hiring, promotions, raises, and tuition reimbursement as well as the penalties employees may suffer if they do not meet those standards. Encouraging quality education advances the interest of both employers and employees. By adopting these measures, the federal government can both enhance its own extensive workforce and serve as a welcome model for state and private employers. When combined with the mass media campaign and legislative changes proposed elsewhere in this article, the federal government's lead in setting disciplinary standards may have a substantial impact on private employers.

CONCLUSION

The proliferation of fake and substandard unaccredited schools is an international epidemic. The Internet has greatly enhanced the ability of these schools to operate, both by reaching out to unsophisticated consumers and by facilitating their movement across jurisdictional lines. Other countries have already taken aggressive steps against fraudulent and substandard unaccredited institutions that purport to offer postsecondary education. For example, in September 2004, Iran's Ministry of Science, Research, and Technology froze the financial accounts of Ardeshir Qassemlu, chancellor of American University of Hawaii's Tehran campus, and issued an order banning him from leaving Iran.[482]

481. *See* EZELL & BEAR, *supra* note 13, at 291–95 (providing Callahan's prepared statement explaining how she investigated Hamilton University but erroneously concluded it was legitimate). Callahan's competency has also been questioned. *See* Paul Sperry, *Cut-Rate Diplomas*, REASON, Jan. 1, 2005, at 38, *available at* 2005 WLNR 2108888 (stating that Callahan drew a six-figure salary even though all three of her degrees were from diploma mill Hamilton University in Wyoming and that "Callahan's [heavy-handed] management practices had led to 'low morale' among her 60 federal employees and 65 contractors").

482. *See*, *Diploma Mills' Activities Reflect Iran's Bigger Problems* RADIO FREE EUROPE/ RADIO LIBERTY (Sept. 27, 2004), http://www.rferl.org/reports/iran-report/2004/09/33-270904.asp (Qassemlu, whose only academic degree was issued by American University of Hawaii, formerly

These affirmative acts of enforcement followed a three-year mass media campaign designed to shine a spotlight on the institution's scheme that sold some eight thousand bogus degrees to Iranian citizens over a ten-year period.[483] Iranian officials view substandard schools as a primary target in their plan for the overall improvement of Iran's education system.[484]

Unlike some countries, America's current enforcement mechanisms and activities are woefully inadequate to protect the public from peddlers of substandard degrees. America's patchwork of laws in a few jurisdictions, combined with low-enforcement priority on a state and federal level, have allowed operators of diploma mills and inferior-quality unaccredited schools to proliferate. Congress should step into the breach by enacting the Authentic Credentials in Higher Education Act and strengthening oversight of federal employers. At the same time, federal and state agencies should coordinate a massive media campaign to raise awareness about the public and personal harms perpetrated by individuals with substandard degrees. Finally, state and private employers can follow the proposed five-factor test for federal employers to deter the demand for these degrees by reprimanding current employees who have them and following good credential-checking procedures. These measures will help safeguard the integrity of legitimate higher education, protect vulnerable consumers, restore integrity to the hiring and promoting processes, and improve America's workforce.

spent one year in prison on a fraud conviction.) (last visited July 21, 2006).

483. *Id.*

484. *Id.*

A PELAGIAN VISION FOR OUR AUGUSTINIAN CONSTITUTION: A REVIEW OF JUSTICE BREYER'S *ACTIVE LIBERTY*

WILLIAM E. THRO*

INTRODUCTION

Early in the fifth century, the Christian Church was divided by the "Pelagian Controversy."[1] Pelagius, a British monk, taught that individuals had the capability to repent their sins and achieve salvation.[2] God's grace is helpful, but it is unnecessary.[3] In contrast, Augustine, a North African Bishop, taught that individuals lacked the capacity to repent their sins and achieve salvation.[4] God's grace is indispensable.[5] Although framed in terms of a narrow—but fundamental—theological question, the "Pelagian Controversy" involved a much broader issue: the inherent nature of humanity.[6] Essentially, the Pelagian view states that humanity is inherently good or virtuous.[7] In contrast, the Augustinian view states that humanity is inherently bad, corrupt, or, yes, sinful.[8]

While the Christian Church resolved the theological issue in the fifth century,[9] humanity continues to grapple with the broader question.[10] For a nation, the

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1. ALLISTER E. MCGRATH, CHRISTIAN THEOLOGY: AN INTRODUCTION 443 (3d ed. 2001).

2. R.C. SPROUL, WILLING TO BELIEVE: THE CONTROVERSY OVER FREE WILL 35 (1997).

3. MCGRATH, *supra* note 1, at 448 ("For Pelagius, humanity merely needed to be shown what to do, and could then be left to achieve it unaided.").

4. SPROUL, *supra* note 2, at 51. *See also* R.C. SPROUL, CHOSEN BY GOD 65 (1986) (discussing Augustine's views in the context of the doctrine of predestination).

5. SPROUL, *supra* note 2, at 51 ("Augustine established grace as indispensable to the Christian life."). *See also* MCGRATH, *supra* note 1, at 448 ("[F]or Augustine, humanity needed to be shown what to do and then gently aided at every point . . . .").

6. MCGRATH, *supra* note 1, at 443.

7. SPROUL, *supra* note 2, at 41–42.

8. SPROUL, *supra* note 2, at 52–55.

9. *Id*. at 42–45.

10. Indeed, as George Weigel has observed, the debate over the European Constitution was

collective answer to that question inevitably will determine how it organizes its government. If the nation—like Pelagius—assumes that humanity is inherently good and virtuous, then it will develop a constitution that largely defers to the democratic process, which is an expression of society's collective will.[11] Alternatively, if a nation—like Augustine—assumes that humanity is inherently bad and corrupt,[12] then it will develop a constitution that will be distrustful[13] of "any entity exercising power" and will check the exercise of power.[14] When applied to all aspects of life rather than simply the government, the Augustinian vision results in power and responsibility being divided between family, guild, university, city, region, church, and nation with each exercising "sovereignty" in its own "sphere."[15]

This distinction between a Pelagian constitutional vision and an Augustinian constitutional vision forms a basis for reviewing Justice Stephen Breyer's new book, *Active Liberty: Interpreting Our Democratic Constitution.*[16] Although it is an important work and has many strengths, *Active Liberty* is flawed—it adopts a Pelagian

effectively a debate over the nature of humanity in general. *See* GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL (2005). Similarly, Robert Keegan has suggested that the foreign policy disputes between the United States and Europe are a product of different perspectives on humanity. *See* ROBERT KEEGAN, OF PARADISE AND POWER (2003).

11. SPROUL, *supra* note 2, at 41–42. Of course, there might be a small community where a bad or corrupt majority gains control. However, because the Pelagian view assumes that "human nature was created not only good, but incontrovertibly good," it logically follows that in the Pelagian worldview the larger community will be dominated by the good and virtuous. R.C. SPROUL, WHAT IS REFORMED THEOLOGY? 122 (1997). Thus, the values of the nation or the world must trump those of the city or the region.

12. SPROUL, *supra* note 2, at 52–55.

13. The Augustinian concept of distrust is perhaps best exemplified in Calvinist principles. As Professor Hamilton explained:

> One of the dominating themes of Calvin's theology is this fundamental distrust of human motives, beliefs, and actions. On Calvin's terms, there is never a moment in human history when that which is human can be trusted blindly as a force for good. Humans may try to achieve good, but there are no tricks, no imaginative role-playing, and no social organizations that can guarantee the generation of good. . . . Thus, Calvinism counsels in favor of diligent surveillance of one's own and other's actions, and it also presupposes the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.

Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella, eds. 2001) [hereinafter CHRISTIAN PERSPECTIVES].

14. Hamilton, *supra* note 13, at 293. Although such a perspective is firmly rooted in the Protestant theology of Calvin, it is also consistent with the Roman Catholic notion of subsidiarity, first expressed by Pope Leo XII. *See* Robert F. Cochran, Jr., *Tort Law and Intermediate Communities:Calvinist and Catholic Insights in* CHRISTIAN PERSPECTIVES, *supra* note 13, at 486, 488–89.

15. *See* Abraham Kuyper, *Sphere Sovereignty* (1880) *in* ABRAHAM KUYPER: A CENTENNIAL READER 461 (James D. Bratt ed., 1998). Kuyper was both a Calvinist theologian and Prime Minister of the Netherlands. For a brief overview of the notion of "sphere sovereignty," see Cochran, *supra* note 14, at 487–88.

16. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

vision of the Constitution,[17] but our Constitution is Augustinian.[18] In other words, Justice Breyer puts forth a vision that is directly contrary to the assumptions of our Constitution. The remainder of this review demonstrates this thesis. Part I discusses Justice Breyer's "theme" of constitutional interpretation. Part II demonstrates why our Constitution conforms to an Augustinian vision. Part III explains why Justice Breyer's theme of constitutional interpretation conforms to the Pelagian vision.

I. JUSTICE BREYER'S THEME OF CONSTITUTIONAL INTERPRETATION

Based on his Tanner Lectures on Human Values at Harvard University in 2004,[19] *Active Liberty*, like Justice Scalia's *A Matter of Interpretation: Federal Courts and the Law*,[20] is intended to discuss a "theme"[21] of constitutional interpretation.[22] Justice Breyer accomplishes this objective by first laying out his theme,[23] explaining why he thinks it is consistent with both an interpretative tradition[24] and American constitutional history,[25] and then applying his theme to six different areas of the law—speech,[26] federalism,[27] privacy,[28] affirmative action,[29] statutory interpretation,[30] and administrative law.[31] He concludes by explaining why he believes that his theme is

17. By comparing Justice Breyer's view to that of Pelagius, I do not mean to suggest that Justice Breyer or anyone who shares his Pelagian view of the Constitution or of humanity should be regarded as a religious heretic or is guilty of some offense against the Church. Rather, I simply mean to suggest Justice Breyer's view is consistent with the worldview that logically flows from an acceptance of the basic tenets of Pelagian thought.

18. More precisely, the Constitution is based on Calvinist principles. Hamilton, *supra* note 13, at 293–94. Of course, the Augustinian view forms the basis for the theology of John Calvin. SPROUL, *supra* note 2, at 105.

19. BREYER, *supra* note 16, at ix. *See also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002) (discussing the same "theme" of constitutional interpretation as part of his James Madison Lecture on Constitutional Law at New York University School of Law in 2001).

20. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

21. Justice Breyer insists that he is "not arguing for a new theory of constitutional interpretation," but rather "for greater awareness of, and emphasis upon, the Constitution's democratic imperative." BREYER, *supra* note 16, at 110. *Id*. at 7 ("To illustrate a theme is not to present a general theory of constitutional interpretation.").

22. Indeed, some have suggested that Justice Breyer wrote *Active Liberty* as a means of rebutting Justice Scalia's constitutional vision. *See* Jeffrey Toobin, *Breyer's Big Idea*, THE NEW YORKER, Oct. 31, 2005, at 36 ("The book . . . was inspired in part by Breyer's disdain for the method of constitutional interpretation championed by his principal ideological rivals on the Court, Antonin Scalia and Clarence Thomas.").

23. BREYER, *supra* note 16, at 15–16.

24. *Id*. at 17–20.

25. *Id*. at 21–34.

26. *Id*. at 39–55.

27. *Id.* at 56–65.

28. *Id*. at 66–74.

29. *Id*. at 75–84.

30. *Id.* at 85–101.

31. *Id.* at 102–08.

superior to the textualist approach advocated by Justice Scalia and others.[32]

Drawing upon a dichotomy first suggested by the nineteenth century French philosopher Benjamin Constant, Justice Breyer makes a sharp distinction between "modern liberty" and "ancient liberty."[33] Modern liberty is the "individual's freedom to pursue his own interests and desires free of improper government interference,"[34] and ancient liberty is the "freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation's public acts."[35] Although he is "conscious of the importance of modern liberty,"[36] he wishes to "focus primarily"[37] on the "active and collective participation in political power."[38]

Justice Breyer's basic message is that "reference to the Constitution's basic democratic objectives can help courts shape constitutional doctrine, reconcile competing constitutional values, time judicial intervention, interpret statutory ambiguities, and create room for agency interpretations."[39] Justice Breyer insists that an emphasis on the "democratic objective"[40] will "yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems."[41] In order to accomplish this "sharing of a nation's sovereign authority,"[42] judges must ensure that the people "have the capacity to exercise their democratic responsibilities"[43] so that they can "participate in government"[44] with broad authority "to decide and leeway to make mistakes."[45]

Of course, a possible conflict emerges in the relationship between Justice Breyer's "embrace of democracy in his book and the vigorous enforcement, in which [he] has sometimes enthusiastically participated, of individual rights against majority decisions."[46] Justice Breyer insists that the judiciary "can defer to the legislature's own judgment insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert,"[47] but that the judiciary should not defer "when they evaluate the risk that [a statute] will defeat the participatory self-government objective itself.[48] Thus, the exact role of the courts

32. *Id.* at 115–32.
33. *Id*. at 3–5.
34. *Id.* at 5.
35. *Id.* at 3.
36. *Id.* at 5.
37. *Id.*
38. *Id.*
39. *Id.* at 109.
40. *Id.* at 6.
41. *Id.*
42. *Id.* at 15.
43. *Id*. at 16.
44. *Id*. at 15.
45. *Id*.
46. Toobin, *supra* note 22, at 42 (quoting former Justice of the Supreme Judicial Court of Massachusetts and U.S. Solicitor General Charles Fried).
47. BREYER, *supra* note 16, at 49.
48. *Id.*

remains "mysterious and really unexplained."[49] One suspects that Justice Breyer views the Court as a check on majority decisions—as a "bevy of platonic guardians"[50] who invalidate laws simply because the policy choice is "uncommonly silly."[51]

II. OUR AUGUSTINIAN CONSTITUTION

Our Constitution embodies the Augustinian Perspective in three ways.[52] First, "[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments."[53] The Constitution establishes "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[54] By dividing sovereignty between the national government and the States,[55] the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[56] Thus,

> the preservation of the States, and the maintenance of their governments, are as much within the design and care of the

49. Toobin, *supra* note 22, at 42 (quoting former Justice of the Supreme Judicial Court of Massachusetts and U.S. Solicitor General Charles Fried).

50. Griswold v. Connecticut, 381 U.S. 479, 526–27 (1965) (Black, J., dissenting) .

51. Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting). Thus, the ordinary or original meaning of words within a statute might be disregarded in order to give substance to individual desires or aspirations. *See* SCALIA, *supra* note 20, at 17. The courts might assume responsibility for the management of the day-to-day functions of government.

52. The Constitution's "marriage of distrust in individuals but hope in properly structured institutions is no mere historical accident but has its roots in the Reformation theology of John Calvin, the greatest systematic theologian of the Reformation." Hamilton, *supra* note 13, at 293. Indeed, Calvinist ideas were influential in colonial culture and were dominant among the delegates of the Constitutional Convention. *Id*. at 293–94.

53. THE FEDERALIST NO. 51 (James Madison). As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 46–49 (7th ed. 1991).

54. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

55. Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. *See* DECLARATION OF INDEPENDENCE (U.S. 1776) ("[T]hese United colonies are, and of right ought to be Free and Independent States."). Each individual State retained the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Indeed, the Articles of Confederation explicitly recognized that each State "retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION, art. II (1777). Thus, before the ratification of the United States Constitution, the States were sovereign entities. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

56. THE FEDERALIST NO. 51 (James Madison). *See also* THE FEDERALIST NO. 28 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").

> Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[57]

This division of sovereignty between the States and the national government "is a defining feature of our Nation's constitutional blueprint."[58] It "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day."[59] The division of power between *dual sovereigns*—the States and the National Government—is reflected throughout the Constitution's text,[60] as well as in its structure.[61] Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom,"[62] the Supreme Court has intervened to maintain the sovereign prerogatives of both the States and the National Government.[63]

In order to preserve the sovereignty of the National Government, the Court has prevented the States from imposing term limits on members of Congress,[64] and from instructing members of Congress as to how to vote on certain issues.[65] Similarly, it has invalidated state laws that infringe on the right to travel,[66] that undermine the Nation's foreign policy,[67] and that exempt a State from generally-applicable regulations of interstate commerce.[68] Conversely, recognizing that "the erosion of state sovereignty is likely to occur a step at a time,"[69] the Supreme Court has declared that the national government may not compel the States to pass

57. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

58. Fed. Mari. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002).

59. New York v. United States, 505 U.S. 144, 187 (1992).

60. *See* Printz v. United States, 521 U.S. 898, 933 (1997).

61. *See* Alden v. Maine, 527 U.S. 706, 714–15 (1999). *See also* U.S. CONST. amend. X. (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.).

62. United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

63. Moreover, the Supreme Court has reinforced the division of power among the sovereigns by insisting that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (requiring a clear statement in federal legislation for Congress to dictate the qualifications for state officials); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (prohibiting abrogation of sovereign immunity without a clear statement); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981) (requiring a clear statement from Congress to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, State sovereignty can only be diminished by a clear expression of congressional intent within the statutory text.

64. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 800–01 (1995).

65. Cook v. Gralike, 531 U.S. 510, 519–22 (2001).

66. Saenz v. Roe, 526 U.S. 489 (1999) (citing United States v. Guest, 383 U.S. 745, 757 (1966)).

67. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–74 (2000)

68. Reno v. Condon, 528 U.S. 141, 150 (2000).

69. South Carolina v. Baker, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting).

particular legislation,[70] require state officials to enforce federal law,[71] dictate the location of the State Capitol,[72] or regulate purely local matters.[73] Similarly, the Court has restricted Congress' power to enforce the Fourteenth Amendment[74] and its ability to abrogate the States' sovereign immunity.[75] Indeed, in some circumstances, the States' sovereignty interest will preclude federal courts from enjoining on-going violations of federal law.[76]

Second, after sovereignty is divided between the States and the National Government, "then the portion [of sovereignty] allotted to each [is] subdivided among distinct and separate departments."[77] The Constitution "does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints."[78] Thus, Congress may not interfere with the President's enforcement of the law.[79] Conversely, the President may not interfere with the ability of Congress to legislate.[80] Of course, the judiciary, through the practice of judicial review,[81] ensures that the national government remains one of

70. New York v. United States, 505 U.S. 144, 162 (1992).

71. Printz v. United States, 521 U.S. 898, 935 (1997).

72. Coyle v. Smith, 221 U.S. 559, 579 (1911).

73. United States v. Morrison, 529 U.S. 598, 617–19 (2000); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995).

74. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

75. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

76. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (citing *Seminole Tribe of Fla.*, 517 U.S. at 44).

77. THE FEDERALIST NO. 51 (James Madison).

78. Printz v. United States, 521 U.S. 898, 922 (1997).

79. INS v. Chadha, 462 U.S. 919, 954–56 (1983).

80. Clinton v. New York, 524 U.S. 417, 444–47 (1998).

81. Judicial review is the power to nullify the results of the democratic process. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4 (Harvard University Press 1980) (1938). The elected members of the legislature, thinking that that they are acting in accordance with the federal and state constitutions, pass a law that has the overwhelming support of the people. The elected executive, thinking that the bill presented is constitutional, signs the proposal into law. Yet, despite the measure's popularity and despite the fact that the elected legislature and the elected executive think that the new statute is both wise policy and constitutional, the judiciary, which is the least democratic branch, may invalidate the law simply because it interprets the Constitution differently. Thus, the will of the people, as expressed through their elected leaders, is thwarted by a simple majority of judges.

Recognizing the dangers of rule by a "bevy of Platonic Guardians," the judiciary generally has embraced judicial restraint—the idea that the courts will intervene only when necessary to vindicate the fundamental values expressed in the Constitution—as a check on its power of judicial review. Griswold v. Connecticut, 381 U.S. 479, 513 (Black, J., dissenting). Thus, "uncommonly silly" laws are upheld as constitutional unless it can be shown that the statute violates a textual provision of the Constitution. Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting). The meaning of a statute turns on "the provisions of our laws rather than the principal concerns of our legislators." Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998). The courts acknowledge that they are not "omni-competent" and, thus, cannot micromanage government departments. People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997) ("The conceit that [courts are competent to decide every issue] belongs to a myth of the legal profession's omnicompetence that was exploded long ago.").

enumerated, and thus limited, powers.[82]

Third, various provisions of the Fourteenth Amendment restrict the States while empowering the national government to protect civil liberties.[83] Both the Equal Protection Clause[84] and the Privileges and Immunities Clause impose substantive restrictions on the States.[85] Moreover, although the Bill of Rights originally did not apply to the States,[86] the Due Process Clause incorporates most of the provisions in those first ten amendments.[87] In addition, Section Five of the Fourteenth Amendment gives Congress the authority to enact legislation that enforces the substantive guarantees of Section One against the States.[88] Consequently, if the States have engaged in conduct that violates the Fourteenth

82. McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

83. Similarly, the Thirteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments contain provisions that allow Congress to enforce them against the States. *See* U.S. CONST. amend XIII, § 2; XV, § 2; XIX § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. Presumably, if a State was violating the rights guaranteed by these Amendments, Congress would be able to abrogate its sovereign immunity as a means of enforcing the Amendments.

84. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). The implication is that the Constitution protects "*persons*, not *groups*." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (emphasis in original). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986) (Powell, J., concurring). Indeed, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Shelley v. Kraemer, 334 U.S. 1, 22 (1948). If a program treats everyone equally, there is no equal protection violation. Romer v. Evans, 517 U.S. 620, 623 (1996) (stating that the Equal Protection Clause enforces the principle that the Constitution neither knows nor tolerates classes among its citizens).

The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981)). This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications. *See Cleburne*, 473 U.S. at 440–41. *See also* Graham v. Richardson, 403 U.S. 365 (1971); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

85. *See* Johnson v. California, 543 U.S. 499 (2005) (discussing equal protection); Saenz v. Roe, 526 U.S. 489, 503–04 (1999) (discussing privileges and immunities).

86. Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833). Of course, many regard the Bill of Rights as *creating limits* on the national government. I regard the Bill of Rights not as creating limits, but merely as *confirming* limits that already existed. In other words, even if the Bill of Rights did not exist, the national government would be incapable of establishing a church, punishing the free exercise of religion, abridging the freedom of speech, etc.

87. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 310–11 (5th ed. 2003) (listing cases and specific provisions of the Bill of Rights). *Cf.* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights). Indeed, it appears that the only provisions of the Bill of Rights that have not been incorporated are: (1) the Second Amendment; (2) the Third Amendment; (3) that portion of the Fifth Amendment guaranteeing a right to indictment by a grand jury; (4) that portion of the Seventh Amendment guaranteeing a right to a jury trial in civil cases; and (5) that portion of the Eighth Amendment prohibiting excessive fines and bail. 2 O'BRIEN, *supra* note 87, at 312.

88. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

Amendment, then Congress can take remedial action to correct the violation and to prevent future violations.[89]

III. JUSTICE BREYER'S THEME CONFORMS TO THE PELAGIAN VISION

Justice Breyer's "theme" conforms to the Pelagian vision in three ways. First, he ignores the division of sovereignty between the States and the National Government. Instead of recognizing that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front,"[90] Justice Breyer advocates "federal-state cooperation that permits effective action."[91] He contends that the Court's recent decisions upholding State sovereignty,[92] "are

89. Kimel v. Fla. Bd. of Regents, 528 U.S. 68, 81 (2000). For example, because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," one way of enforcing the Fourteenth Amendment is to abrogate the States' sovereign immunity. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (citation omitted). If Congress is enforcing the Fourteenth Amendment, then it may abrogate a State's sovereign immunity. *See* Tennessee v. Lane, 541 U.S. 509, 518 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003); Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 80; Alden v. Maine, 527 U.S. 706, 756 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1986). In other words, abrogation of sovereign immunity is an appropriate response to unconstitutional conduct by the States. *See* United States v. Georgia, 126 S. Ct. 877, 882 (2006).

90. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

91. BREYER, *supra* note 16, at 57

92. *See* Fed. Mari. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (ruling that sovereign immunity bars individuals from bringing federal administrative proceedings against the States); Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, (2001) (declaring there to be no abrogation of sovereign immunity for ADA Title I claims); United States v. Morrison, 529 U.S. 598 (2000) (holding that there was no congressional authority to enact the Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that there is no abrogation of sovereign immunity for ADEA claims); Alden v. Maine, 527 U.S. 706 (1999) (implying that there is no abrogation for FLSA claims); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (allowing no waiver of sovereign immunity for Lanham Act claims); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (allowing no abrogation for intellectual property claims); Printz v. United States, 521 U.S. 898 (1997) (ruling that Congress may not commandeer state and local officials to enforce federal law); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (allowing no abrogation of sovereign immunity for Indian Gaming Act claims); United States v. Lopez, 514 U.S. 549 (1995) (declaring there was no congressional authority to regulate possession of a gun near a school); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not force States to pass particular types of legislation). *Cf.* Gonzales v. Oregon, 126 S. Ct. 904 (2006) (holding that the U.S. Attorney General may not adopt an interpretative rule which would invalidate Oregon's Death with Dignity Act).

To his credit, Justice Breyer—unlike many commentators and scholars—does not refer to these developments as "States' Rights." That term—which seems to be favored by those who are opposed to dual sovereignty—elicits visions of John C. Calhoun advocating nullification of federal law, of Jefferson Davis and his colleagues attempting to break the Union over slavery, and of Southern political leaders refusing to follow federal court orders during the 1960s. Such associations are unfortunate and ignore the fact that the division of sovereignty is a two-way street. Just as the sovereignty of the States limits the powers of the national government, the

often retrograde"[93] because "[t]hey discourage use of cooperative, incentive-based regulatory methods."[94] Because Congress may not force States to pass particular laws[95] or utilize state officials to enforce federal statutes,[96] Justice Breyer believes that Congress is forced "either to forego the program in question altogether or, perhaps more likely, to expand the size of the program-related federal bureaucracy."[97] Similarly, limiting congressional power to regulate matters traditionally assigned to the States[98] ignores the public's participation "in the legislative process at the national level"[99] and makes "it less likely that Congress will enact laws that might well embody cooperative federalism principles."[100] As to those decisions limiting the ability of the legislative branch to abrogate State sovereign immunity,[101] Justice Breyer contends that they "make it more difficult for Congress to create uniform individual remedies under legislation dealing with nationwide problems."[102] In sum, Justice Breyer does not appear to view the

sovereignty of the national government limits the authority of the States. States are still subject to the supremacy of federal law under the Constitution; in those areas where sovereignty is explicitly assigned to the national government, the national government remains superior. *See, e.g.*, U.S. CONST. art. I, § 10 (enumerating the powers of Congress); art. VII (presenting the Supremacy Clause).

93. BREYER, *supra* note 16, at 59.

94. *Id.*

95. New York v. United States, 505 U.S. 144 (1992).

96. Printz v. United States, 521 U.S. 898 (1997).

97. BREYER, *supra* note 16, at 60.

98. United States v. Morrison, 529 U.S. 598 (2000) (finding no congressional authority to enact the Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (finding no congressional authority to regulate possession of a gun near a school).

99. BREYER, *supra* note 16, at 62.

100. *Id*. at 63.

101. *See* Fed. Mari. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (ruling that sovereign immunity bars individuals from bringing federal administrative proceedings against the States); Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, (2001) (declaring there to be no abrogation of sovereign immunity for ADA Title I claims); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that there is no abrogation of sovereign immunity for ADEA claims); Alden v. Maine, 527 U.S. 706 (1999) (implying that there is no abrogation for FLSA claims); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (allowing no waiver of sovereign immunity for Lanham Act claims); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (allowing no abrogation for intellectual property claims); Printz v. United States, 521 U.S. 898 (1997) (ruling that Congress may not commandeer state and local officials to enforce federal law); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (allowing no abrogation of sovereign immunity for Indian Gaming Act claims).

Justice Breyer refers to these decisions as requiring "a state to *waive* its Eleventh Amendment immunity for suit by private citizens." BREYER, *supra* note 16, at 60–61 (emphasis added). This is incorrect. There is a fundamental difference between abrogation of sovereign immunity and waiver of sovereign immunity. Abrogation occurs where Congress passes a statute abolishing sovereign immunity for certain claims. Waiver occurs where the State voluntarily takes an action that relinquishes its immunity for certain claims. *See generally* WILLIAM E. THRO, WHY YOU CANNOT SUE STATE U: A GUIDE TO SOVEREIGN IMMUNITY (2001).

102. BREYER, *supra* note 16, at 61.

States as "a defining feature of our Nation's constitutional blueprint,"[103] but simply a convenient mechanism for the Congress to implement the national majority's will.

Second, Justice Breyer blurs "the separation and independence of the coordinate branches of the Federal Government"[104] by imagining what "a hypothetical member of Congress *would have* decided."[105] His discussions of statutory interpretation[106] and administrative law illustrate the point.[107] Although "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,"[108] Justice Breyer seeks "an interpretation of the statute that tends to implement the legislator's will."[109] He contends that an "overly literal reading of a text can too often stand in the way" of the "translation of the general desire of the public for certain ends."[110] Thus, the Judicial Branch's *interpretation* of what a majority of the public *meant to say* appears to replace what the Legislative Branch *actually said*. Similarly, while the Supreme Court will defer to an administrative agency's interpretation of an ambiguous statute,[111] Justice Breyer insists that such deference is only "a rule of thumb"[112] that does not apply if "a statutory term . . . concerns a matter that Congress is likely to have wanted to decide for itself."[113] In seeking to ascertain what Congress, or more accurately an imaginary member of Congress, would have wanted in every instance, Justice Breyer diminishes both the role of the Executive in implementing statutes and the judiciary's role in interpreting statutory text. In doing so, he promotes "the

103. Fed. Mari. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002).

104. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

105. BREYER, *sup*ra note, 16 at 108 (emphasis added)

106. *Id.* at 85–101.

107. *Id.* at 102–08.

108. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998). Over a century and a half ago, the Supreme Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used . . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). As Justice Scalia noted in another context:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts Constitution: A government of laws, not men. Men may intend what they will; but it is only the laws that they enact which bind us.

SCALIA, *supra* note 22, at 17.

109. BREYER, *supra* note 16, at 99.

110. *Id.* at 101.

111. Chevron, USA v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

112. BREYER, *supra* note 16, at 106.

113. *Id.*

accumulation of excessive power in any one branch."[114]

Third, Justice Breyer elevates the "Constitution's democratic nature"[115] while diminishing "the individual's right to freedom from the majority."[116] His discussion of racial preferences illustrates the point.[117] Although racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"[118] and, thus, "call for the most exacting judicial examination,"[119] Justice Breyer focuses on whether racial preferences are "necessary to maintain a well-functioning participatory democracy."[120] Similarly, while the motivation for racial classifications is irrelevant,[121] and while the history

114. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

115. BREYER, *supra* note 16, at 5.

116. *Id.*

117. *Id*. at 75–84.

118. Shaw v. Reno, 509 U.S. 630, 643 (1993) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). *Cf.* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 172 (1977) (Brennan, J., concurring) ("[A]n explicit policy of assignment by race may serve to stimulate our society's latent race consciousness."); Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("Here the individual is important, not his race, his creed, or his color.").

119. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J., concurring). *See also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500–01 (1989). Consequently, the Court has declared that racial classifications

> are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."

Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted). *See also Croson*, 488 U.S. at 493. Moreover, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" Johnson v. California, 543 U.S. 499, 505 (quoting *Adarand*, 515 U.S. at 227).

120. BREYER, *supra* note 16, at 82.

121. Indeed, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." *Johnson,* 125 S. Ct. at 1146 (citations omitted). *See also Adarand*, 515 U.S. at 226 ("[D]espite the surface appeal of holding 'benign' racial classifications to a lower standard, because 'it may not always be clear that a so-called preference is in fact benign.'" (quoting *Bakke*, 438 U.S. at 298 (Powell, J., concurring))); *Croson*, 488 U.S. at 500 ("But the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."). As Justice Thomas observed:

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the

of racial classifications suggests that great deference to governmental findings simply leads to further discrimination,[122] Justice Breyer contends that "invidious discrimination and positive discrimination [are] not equivalent."[123] Justice Breyer's discussions of free speech[124] and the right to privacy[125] reveal a similar emphasis on finding an interpretation that "would facilitate the functioning of democracy."[126] In the speech context, Justice Breyer wishes "to preserve speech that is essential to our democratic form of government while simultaneously permitting the law to deal effectively with such modern regulatory problems as campaign finance and product or work place safety."[127] In the privacy context, his focus is not on "eighteenth-century details" but on "the effect of a holding of a certain breadth on the *ongoing policy-creating process*."[128] In sum, interpretations that may vindicate the rights of the individual, but which do not promote "the perspective of the Constitution's basic democratic objectives," are rejected.[129]

CONCLUSION

Justice Breyer's "theme" is entirely appropriate for the Constitution—the Constitution of South Africa.[130] When the white minority in South Africa voluntarily

> heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

Adarand, 515 U.S. at 240 (Thomas, J., concurring). In other words, if the government "denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race," the rights of the citizens "to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking." *Croson*, 488 U.S. at 493.

122. *Cf.* Korematsu v. United States, 323 U.S. 214, 235–40 (1944) (Murphy, J., dissenting). Indeed, the entire notion of underrepresentation "rests upon the 'completely unrealistic' assumption that minorities will [make a particular choice] in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507 (quoting Sheet Metal Workers v. E.E.O.C., 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). Consequently, in only rare instances will there be sufficient evidence to justify a finding of present day effects of prior intentional discrimination. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

123. BREYER, *supra* note 16, at 78.

124. *Id*. at 39–55.

125. *Id*. at 66–74.

126. *Id.* at 83.

127. *Id*. at 55

128. *Id*. at 73 (emphasis added).

129. *Id*. at 83 (referring to the Equal Protection Clause rather than privacy rights, Justice Breyer does so as an example of how valuing active liberty and a well-functioning democracy can resolve competing interpretations of constitutional provisions).

130. The South African Constitution embodies deference to the will of democratic majorities. This is expressed in a number of constitutional provisions. First, the Constitutional Court—the highest judicial body—is commanded to "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom." S. AFR. CONST. 1996 § 39(1)(a). Second, a two-thirds majority of the National Assembly (along with a supporting vote of at least six provinces of the National Council of Provinces) can amend most provisions of the Constitution at any time. *Id*. at § 74. Since one party—the African National Congress—currently holds more than two-thirds of the seats, revision of the nation's fundamental law can be accomplished by a single political party. Third, the National Assembly (the legislature) is elected by proportional representation, which allows parties

surrendered its control of the government to the black majority in the early 1990s,[131] all segments of the multi-racial society negotiated a constitution[132] that effectively embodies the Pelagian vision.[133] Yet, in America, our society chose a different path.[134] Our Constitution embodies an Augustinian vision.[135] Consequently, an interpretative vision based on Pelagian assumptions is inappropriate. Even if he were

with low levels of support to obtain seats. *Id.* at § 46(1)(d). Fourth, because the president is the leader of the party or the coalition that has a majority in the National Assembly, there is neither a legislative check on the executive nor an executive check on the legislature. *See id*. at § 86. Fifth, although South Africa is nominally a federation, the individual provinces are subordinate to the will of the national government, which, as explained above, is controlled by democratic majorities. *See id.* at §§ 103–141.

Of course, South Africa does have a comprehensive bill of rights and the Constitutional Court vigorously enforces those rights. Indeed, the Constitutional Court invalidated the initial Constitution. *See In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) (S. Afr.). However, this judicial check is the only real check on the power of a democratic majority. South Africa's bill of rights creates limits on government rather than merely confirming the limits that are implicit in the structure. In that sense, South Africa is fundamentally different from the Augustinian vision embodied in the United States Constitution.

131. For a comprehensive account of those events, see ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY (Univ. Chicago 1996) (1994).

132. For a discussion of those negotiations, see I.M. RAUTENBACH & E.F.J. MALHERBE, CONSTITUTIONAL LAW 17–19 (4th ed. 2004); ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW: ANALYSIS & CASES 1–11 (2002).

133. It is not surprising that South Africa's majority chose a Pelagian rather than an Augustinian vision for their Constitution. One of the intellectual foundations of the Apartheid regime was a perverse and erroneous interpretation of Kuyper's theory of sphere sovereignty. *See* ALLISTER SPARKS, THE MIND OF SOUTH AFRICA 156–59 (1990). However, as observed above, Kuyper's theory of sphere sovereignty—when properly interpreted and applied—is a clear application of the Augustinian or, more precisely, Calvinist perspective. *See* Cochran, *supra* note 14, at 487–88.

134. Of course, the fact that America has chosen a different path has enormous consequences. As I have related elsewhere, the principles of decentralization and judicial restraint undermine the ability of our society to achieve quality education. *See* William E. Thro, *The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 EDUC. L. REP. 477 (2005) (noting that, although the United States acknowledges the importance of education to the survival of a democratic nation, judicial restraint and decentralization make financing public education a difficult task).

135. More precisely, our *constitutions* embody an Augustinian perspective. America does not have one constitution, it has fifty-one constitutions—the national charter and the state constitutions. Of course, from a jurisprudential standpoint, state constitutions are significantly different from the Federal Constitution. First, the Federal Constitution represents a delegation of power, while the state constitutions represent a limitation on power. *See, e.g.*, Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982). *See also* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785 (Md. 1983). Second, state constitutions are far more reflective of the values and aspirations of the citizens of the several States. *See* Charles G. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1144–45 (1978). Third, unlike the Federal Constitution, which has been amended only seventeen times since 1791, State constitutions are regularly amended, often completely rewritten, and frequently revised. For a review of the factors that should be considered in revision of a state constitution, see Janice C. May, *Texas Constitutional Revision: Lessons and Laments*, 66 NAT'L CIVIC REV., 64 (1977); A.E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1 (1974).

not a sitting jurist, Justice Breyer's book would mark a significant contribution to American constitutional law. Anyone who is interested in constitutional interpretation should read it. However, it should be read with the understanding that Justice Breyer's assumptions are not those of the American Framers.

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