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ARTICLES

This study examines the legal meaning of "financial exigency" and explores why colleges and universities more often declared a financial exigency during the 1973-1975 recession than during the more severe recession of 2007-2009, perhaps signaling an end to the use of this tactic to reduce campus workforces. The study traces judicial interpretations of "financial exigency" to understand the legal requirements for laying off tenured faculty. With these legal requirements in mind, this study identifies several reasons why colleges and universities generally did not declare financial exigency during the 2007-2009 recession. Institutions with steady enrollments throughout their programs preserved their faculty ranks, keeping declarations of financial exigency from being bona fide. If particular programs lost enrollment, institutions sometimes closed them and laid off faculty, but usually without declaring a financial exigency. Beyond financial exigency, institutions exercised other economic options, including implementing furloughs and using federal stimulus funds to plug budget holes. Other factors dissuading declarations of financial exigency included concerns over institutional bond ratings, a decline in faculty union membership, and the replacement of tenured faculty by contingent faculty.

This Article evaluates the new OCR policy in the context of the complete suite of Title IX regulations and policy interpretations issued over the last four decades. It begins with a brief history of Title IX in athletics, including a discussion of the relevant documents that have modified the statute and implementing regulations. It highlights concerns expressed about the 2005 Additional Clarification and Model Survey, and evaluates the concerns raised in the 2010 USCCR Report. The Article then discusses what the 2010 Clarification adds to or takes away from existing Title IX policy, and concludes with a discussion of how this policy appears designed to force schools toward a social-engineering-inspired goal of proportionality, once again, by making it more difficult to comply with the law any other way.

Higher education's relationship with its mentally ill students took a turn for the worse after the campus shootings at Virginia Tech and Northern Illinois University. Unfortunately, nonviolent mentally ill students have suffered by being treated as violent rather than as a subgroup of the general population. Because emerging adulthood poses increasing mental health challenges to campus, this Article proposes that higher education embrace a slightly different educative and legal approach to all its students, thereby better serving students who come to campus with diagnosed or undiagnosed mental disorders or who first manifest while on campus, and segregating them from the distinguishable subgroup of violent students.

NOTES

As intercollegiate athletics become increasingly commercialized, a number of commentators have explored the

impact such commercialization should have, if any, on the § 503(c)(3) non-profit tax exemption treatment for such programs. This Note examines the case for continued tax exemption treatment in light of increasing commercialization and explores alternative means of addressing increasing commercialization.

Student Privacy, Campus Safety, and Reconsidering the Modern Student-University Relationship

Jason A. Zwara 419

Since the in loco parentis doctrine fell in the middle of the 20th century, legal doctrines regarding campus safety and student privacy have struggled to keep up with the growing diversification and broadening variety of higher education institutions. Colleges and universities have grown increasingly responsible for the safety and wellbeing of students, but have not been granted the requisite legal abilities to succeed. This article advocates for the development of a flexible approach to student privacy and campus safety to parallel this increased accountability.

DECLARING AN END TO "FINANCIAL EXIGENCY"? CHANGES IN HIGHER EDUCATION LAW, LABOR, AND FINANCE, 1971–2011

MICHAEL W. KLEIN *

INTRODUCTION

The recession that began in December 2007 and officially ended in June 2009 was one of the longest and most devastating economic downturns in the United States since the end of World War II,[1] and has been called the "Great Recession."[2] By comparison, the recession of 1973–1975 was shorter and had lower unemployment.[3] Several colleges and universities declared a "financial exigency" around the time of the 1973–1975 recession, and subsequently faced lawsuits for doing so,[4] while few institutions have followed such a path during the Great Recession and its aftermath.[5] This article explains the legal meaning and significance of "financial exigency," and it explores the reasons why institutions chose alternatives—such as implementing furloughs and plugging budget holes with federal stimulus funds—instead of declaring financial exigency during the recent economic downturn. This article also examines considerations for institutional bond ratings and changes in federal labor law that may have also influenced colleges and universities not to declare financial exigency during the Great Recession.

II. COMPARING RECESSIONS: 2007-2009 VS. 1973-1975

A. 2007-2009

The eighteen-month recession between December 2007 and June 2009 surpassed the two previous longest recessions since World War II, the

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1. *See* Andrew Sum et al., The Economic Recession of 2007-2009: A Comparative Perspective on Its Duration and the Severity of Its Labor Market Impacts 1 (Apr. 1, 2009) (unpublished manuscript) (on file with the Northeastern University Center for Labor Market Studies), http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1019&context=clms_pub; *see also* Catherine Rampell, *Recession May Be Over, But Joblessness Remains*, N.Y. TIMES, Sept. 21, 2010, at B1.

2. *See* Catherine Rampell, *'Great Recession': A Brief Etymology*, N.Y. TIMES ECONOMIX BLOG (Mar. 11, 2009, 5:39 PM), http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/. Although used to describe other recessions in the U.S., the phrase "the Great Recession" was increasingly applied in December 2008 to the economic downturn that began in 2007. *Id.*

3. Donald A. Walker, *The 1973-1975 Recession in the United States of America*, ECON. NOTES (1975).

4. *See* Geoffrey Caston, *Academic Tenure and Retrenchment: The US Experience*, 8 OXFORD REV. OF EDUC. 299, 302-03 (1982).

5. *See* Scott Jaschik, *Layoffs Without 'Financial Exigency'*, INSIDE HIGHER EDUC. (Mar. 2, 2010), http://www.insidehighered.com/news/2010/03/02/exigency.

sixteen-month recessions of 1973–1975 and 1981–1982.[6] The recession was as severe as it was long. It has been called "a different breed of recession, with disconcerting similarities to the Great Depression of the 1930s," such as bank failings, shuttered retail businesses, and stalled investment projects.[7] The nation's unemployment statistics reflect the severity of the recession.[8] Between December 2007 and December 2009, the U.S. lost 7.2 million jobs,[9] which was the largest loss ever experienced during any recession in the post-World War II era.[10] The unemployment rate increased from 4.7% in November 2007 to 10.2% in October 2009.[11] This was the highest percentage-point increase in the unemployment rate of any recession since World War II.[12]

The recession hit public and private colleges and universities alike.[13] At the beginning of the recession, all colleges and universities were victims of a credit crisis, with higher interest rates on their debt and restricted access to short-term funds for payroll, debt payments, and construction projects.[14] In the public sector, at least forty-one states cut funding for their public institutions of higher education between the spring of 2008 and the spring of 2010.[15] Across the fifty states, state tax appropriations for higher education decreased 6.7% between 2007-2008 and 2009-2010.[16] In the private sector, at the end of fiscal year 2009, the four largest university

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6. Justin Lahart, *The Great Recession: A Downturn Sized Up*, WALL ST. J., July 28, 2009, at A12.

7. *See* David Breneman, *Recessions Past and Present*, NAT'L CROSSTALK, Mar. 2009, at 11.

8. *See United States Unemployment Rate*, TRADING ECON. (Feb. 3, 2012), http://www.tradingeconomics.com/united-states/unemployment-rate.

9. Justin Lahart, *Economy Still Bleeds Jobs*, WALL ST. J., Jan. 9, 2010, at A1.

10. Sum, *supra* note 1, at 3.

11. *See* Peter S. Goodman, *U.S. Unemployment Rate Hits 10.2%, Highest in 26 Years*, N.Y. TIMES, Nov. 7, 2009, at B1.

12. Sum, *supra* note 1, at 4.

13. *See Universities and the Recession*, ECONOMIST (Apr. 23, 2009), http://www.economist.com/node/13527458.

14. *See* William Zumeta, *State Support of Higher Education: The Roller Coaster Plunges Downward Yet Again*, *in* NEA 2009 ALMANAC OF HIGHER EDUC. 29, 33 (Harold Wechsler ed., 2009).

15. *See* Nicholas Johnson, Phil Oliff & Erica Williams, *An Update on State Budget Cuts*, CTR. ON BUDGET AND POLICY PRIORITIES 3 (May 25, 2010), http://www.cbpp.org/files/3-13-08sfp.pdf.

16. *One-Year (FY09-FY10), Two-Year (FY08-FY10), and Five-Year (FY05-FY10) Percent Changes in State Fiscal Support for Higher Education, by Source of Fiscal Support*, GRAPEVINE (2010), http://www.grapevine.ilstu.edu/tables/FY10/Revised_Feb10/GPV10_Table2_revised_pdf.pdf.

endowments lost about one-quarter of their value.[17] Harvard's endowment lost $11 billion, or 27.3%;[18] Yale's endowment shrank by $6.6 billion, or 25%;[19] Stanford lost $4.6 billion, or 27%, of its endowment;[20] and Princeton's endowment lost $3.7 billion, or 23%.[21]

Despite the constraints throughout the national economy and within academe during the Great Recession, colleges and universities rarely declared financial exigency when eliminating tenured jobs or considering doing so between 2009 and early 2010.[22] Institutions, particularly public colleges and universities, sought flexible budget-balancing options that they could implement quickly in the face of state appropriations cuts that were deep but not necessarily a threat to their "financial survival."[23]

A search of federal and state cases between 2005 and early 2012 did not reveal any lawsuits filed based on "financial exigency." The American Association of University Professors (AAUP), which investigates "extreme cases" of violations of academic freedom, governance, and tenure, issued only two investigative reports between 2007 and 2010 involving issues of financial exigency related to the Great Recession.[24] The AAUP reported on Bethune-Cookman University in Daytona Beach, Florida, which dismissed thirty-four faculty and staff on May 15, 2009 after a mandate by the board of trustees "to drastically reduce . . . expenses and overhead in

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17. *See* LUCIE LAPOVSKY, COMMONFUND INST., ENDOWMENT SPENDING: EXTERNAL PERCEPTIONS AND INTERNAL PRACTICES (Mar. 2009), *available at* http://www.commonfund.org/InvestorResources/Publications/White%20Papers/Endowment%20WhitePaper_Spending%20-%20External%20Perceptions%20and%20Internal%20Practices.pdf.

18. Geraldine Fabrikant, *Harvard and Yale Report Losses in Endowments*, N.Y. TIMES, Sept. 10, 2009, at B3.

19. John Hechinger, *Yale Endowment Posts a 25% Loss*, WALL ST. J., Sept. 23, 2009, at C3.

20. Andrew Ross Sorkin, *Investment Indigestion at Stanford*, N.Y. TIMES, Oct. 6, 2009, at B1.

21. John Hechinger, *Princeton Endowment Fell 23%*, WALL ST. J., Sept. 30, 2009, at C3.

22. Jaschik, *supra* note 5.

23. *Id*.

24. AM. ASS'N OF UNIV. PROFESSORS, Academic Freedom: Investigative Reports (2010), http://www.aaup.org/AAUP/programs/academicfreedom/investrep/default.htm (last visited March 26, 2012). The AAUP also issued an investigative report on the University of Texas Medical Branch in Galveston, which declared a financial exigency on November 12, 2008 after being devastated by Hurricane Ike two months earlier. *See Academic Freedom and Tenure: The University of Texas Medical Branch (Galveston)*, AM. ASS'N OF UNIV. PROFESSORS (2010), http://www.aaup.org/AAUP/programs/academicfreedom/investrep/2010/Galveston.htm.

light of the recent economic downturn."[25] University officials explained that the call to reduce expenses was caused by a financial exigency brought on by endowment losses and reduced state appropriations.[26] In the other report issued by the AAUP involving the effect of the Great Recession, Clark Atlanta University laid off faculty without declaring a financial exigency.[27] Clark Atlanta University cited an "enrollment emergency"—while insisting that its "financial posture . . . remains strong"—when, in February 2009, it eliminated fifty-five faculty, including twenty who had tenure.[28] The AAUP conducted an investigation "into issues of academic freedom, tenure, and due process posed by the release of numerous tenured professors on grounds of financial exigency" at the San Francisco Art Institute.[29] The Art Institute, after facing tightening credit, a drop in its endowment, and cash-flow challenges, laid off nine tenured faculty members in April 2009.[30]

B. 1973–1975

Compared to the Great Recession of 2007–2009, the recession that began in November 1973 and ended in March 1975 was relatively mild.[31] Although the recession began during the fourth quarter of 1973, total employment rose from 85.8 million in January 1974 to 86.4 million in July 1974.[32] It was not until after September 1974 that a declining trend in employment appeared.[33] Between 1973 and 1975, the number of

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25. *Academic Freedom and Tenure: Bethune-Cookman University*, AM. ASS'N OF UNIV. PROFESSORS *(Florida)* 6 (2010), http://www.aaup.org/NR/rdonlyres/B776AEB7-3DF5-4AEE-BEF9-82408582BF1E/0/BethCook.pdf.

26. *Id*. at 13. *See infra* text accompanying notes 245-249.

27. *See Academic Freedom and Tenure: Clark Atlanta University*, AM. ASS'N OF UNIV. PROFESSORS (2010), http://www.aaup.org/AAUP/programs/academicfreedom/investrep/2010/clarkatlanta.htm.

28. *Id*. at 1, 3- 4; *See infra* text accompanying notes 283-304.

29. *Investigation at San Francisco Art Institute*, AM. ASS'N OF UNIV. PROFESSORS (Oct. 19, 2009), http://www.aaup.org/AAUP/newsroom/highlightsarchive/2009/SFAI.htm.

30. Steve Kolowich, *9 Tenured Faculty Members Are Laid Off at San Francisco Art Institute*, CHRON. HIGHER EDUC. (Apr. 17, 2009), http://chronicle.com/article/9-Tenured-Faculty-Members-A/42767/.

31. *See* Martin Curtsinger, *Revisions Show Deeper 2007-2009 Recession*, REDDING (July 29, 2011), http://www.redding.com/news/2011/jul/29/revisions-show-deeper-2007-2009-recession/.

32. Walker, *supra* note 3, at 14.

33. *Id*.

unemployed people in the U.S. increased by 3.56 million,[34] which is less than half the number of jobs lost during the Great Recession.[35] The unemployment rate increased from 4.5% in October 1973 to a peak of 9.2% in May 1975.[36]

Public colleges and universities fared much better during the recession of 1973–1975 than they did during the Great Recession, while private institutions did not.[37] Across all fifty states in 1974–1975, appropriations of state tax funds for operating expenses of all higher education was nearly $11 billion, an increase of 25% from 1973–1974 and up 29% from 1972–1973.[38] Private institutions, however, faced "a hostile environment for university endowments" caused by "[t]he high inflation and poor investment environment of the 1970s."[39] At Yale, for example, "[t]he combined effect of double-digit inflation, poor investment returns, and high levels of spending devastated [e]ndowment funds."[40] Between 1968 and 1979, the market value of Yale's endowment remained virtually unchanged, while the endowment's real value declined by 46[%]."[41]

While the 1973–1975 recession was shorter and less severe than the Great Recession, it led several colleges and universities to declare a financial exigency in court cases.[42] "The early 1970s saw a number of cases before the courts in which dismissed faculty members challenged either the genuineness of the 'financial exigency' itself or the procedures by which individuals had been selected to go."[43] A list of the cases triggered by declarations of financial exigency or termination notices issued within a year before or soon after the official duration of the 1973-1975 recession, and those that followed their legal precedents, appears below:

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34. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1940 TO DATE(2010), *available at* http://www.bls.gov/cps/cpsaat1.pdf.

35. *See supra* text accompanying note 9.

36. Walker, *supra* note 3, at 18.

37. Goldie Blumenstyk, *More Than 100 Colleges Fail Education Department's Test of Financial Strength*, CHRON. HIGHER EDUC. (June 4, 2009), http://chronicle.com/article/More-Than-100-Colleges-Fail/47492/.

38. M. M. CHAMBERS, APPROPRIATIONS OF STATE TAX FUNDS FOR OPERATING EXPENSES OF HIGHER EDUCATION 1974-75, 6 (1974), *available at* http://www.grapevine.ilstu.edu//historical/Appropriations1974-75.pdf.

39. YALE UNIV. INVS. OFFICE, THE YALE ENDOWMENT 2000 44 (2001), *available at* http://www.yale.edu/investments/Yale_Endowment_00.pdf.

40. *Id*.

41. *Id*.

42. *See* Caston, *supra* note 4.

43. *Id.* at 302–03.

Institution (State)	**"Financial Exigency" Declared or Termination Notice Provided**
North Idaho College	November 1972[44]
Southern Colorado State College	December 14, 1972[45]
Bloomfield College (New Jersey)	June 21, 1973[46]
Peru State College (Nebraska)	June 18, 1973[47]
University of Wisconsin	April 4, 1973[48]
Goucher College (Maryland)	June 1975[49]
Elmhurst College (Illinois)	June 1975[50]
Creighton University (Nebraska)	November 25, 1975[51]

Through the 1970s and 1980s, colleges and universities continued to declare a financial exigency before laying off tenured faculty.[52] These cases include:

Institution (State)	**"Financial Exigency" Declared or Termination Notice Provided**
City University of New York	Financial exigency declared May 1976; notices of discontinuance mailed July 1976[53]
University of Idaho	April 1981[54]
Boise State University	June 1982[55]

Before examining the reasons why institutions declared a financial exigency less frequently during the Great Recession compared to the

44. Bignall v. North Idaho Coll., 538 F.2d 243, 244 (9th Cir. 1976).

45. *SCSC Hit with $100,000 Law Suit*, TODAY AT S. COLO. STATE COLLEGE, Sept. 12, 1974, at 1.

46. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 848 (N.J. Super. Ct. Ch. Div. 1974); *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

47. Levitt v. Bd. of Trustees of Neb. State Colls., 376 F. Supp. 945, 947 (D. Neb. 1974).

48. Graney v. Bd. of Regents, 286 N.W.2d 138, 140 (Wis. Ct. App. 1979). *See also* Johnson v. Bd. of Regents, 377 F. Supp. 227, 231 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

49. Krotkoff v. Goucher Coll., 585 F.2d 675, 677 (4th Cir. 1975).

50. Rose v. Elmhurst Coll., 379 N.E.2d 791, 793 (Ill. 1978).

51. Scheuer v. Creighton Univ., 260 N.W.2d 595, 596 (Neb. 1977).

52. Caston, *supra* note 4, at 299.

53. Klein v. Board of Higher Educ., 434 F. Supp. 1113, 1115–16 (S.D.N.Y. 1977).

54. Pace v. Hymas, 726 P.2d 693, 695 (D. Idaho 1986).

55. Milbouer v. Keppler, 644 F. Supp. 201, 203 (D. Idaho 1986).

recession of 1973–1975, the legal meaning of "financial exigency" needs to be explored. As explained below, the phrase originated in 1940,[56] but courts refined its meaning in the 1970s and 1980s.[57]

III. THE MEANING OF "FINANCIAL EXIGENCY"

A. AAUP's 1940 Statement on Principles on Academic Freedom and Tenure

When institutions laid off tenured faculty during and soon after the recession of 1973–1975, they typically first declared a "financial exigency."[58] The term originates from the AAUP's *1940 Statement on Principles on Academic Freedom and Tenure*.[59] The *1940 Statement* recommended procedures and conditions for terminating tenured faculty.[60] The *1940 Statement* anticipated two types of termination: termination "for . . . cause," and termination "because of financial exigencies."[61] In cases of financial exigency, institutions have a specific burden of proof: "termination of a continuous appointment because of financial exigency should be demonstrably bona fide."[62]

The AAUP's statements are authoritative when an institution has a contract with the AAUP, or if the institution references the AAUP's guidelines in its policies and procedures.[63] Otherwise, "the guidelines remain a reference point in the search for definitions of terms and due process considerations."[64] Courts have also provided definitions for those terms.[65] In cases involving declarations of financial exigency through the

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56. *See* AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), *available at* http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf.

57. Sheila Slaughter, *Retrenchment in the 1980s: The Politics of Prestige and Gender*, 64 J. HIGHER EDUC. 250, 261 (1993).

58. Sheila Slaughter, *Political Action, Faculty Autonomy, and Retrenchment: A Decade of Academic Freedom, 1970–1980*, *in* HIGHER EDUCATION IN AMERICAN SOCIETY 77, 88 (Philip G. Altbach & Robert O. Berdahl eds., rev. ed. 1981) ("In the decade 1970-1980, 85 percent of the faculty who were fired lost their jobs under conditions of financial exigency").

59. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 56.

60. *Id*.

61. *Id*. at 4.

62. *Id*.

63. Donald L. Zekan, *Beyond Financial Exigency: St. Bonaventure's Fiscal Crisis Reflects Economic Realities*, 24 BUS. OFFICER 24, 24 (Dec. 1995).

64. *Id*.

65. *Bloomfield Coll*., 322 A.2d at 850-51.

1970s and early 1980s,[66] courts balanced the needs of institutions to deal with bona fide financial crises against the contractual and constitutional rights of tenured faculty members.[67]

B. The First "Financial Exigency" Case

The "first major contract case on financial exigency" in the country involved the layoff of tenured faculty at Bloomfield College in New Jersey in 1973.[68] In the early 1970s, Bloomfield College faced shrinking enrollment, a growing budget deficit, a declining endowment, and cuts in federal aid.[69] The college's Faculty Handbook, reflecting language from the AAUP statement, required the college to declare a "financial exigency" before it terminated tenured faculty.[70] Accordingly, Bloomfield College's board of trustees declared a financial exigency on June 21, 1973 and announced that it would lay off thirteen faculty members and place all other faculty, tenured or not, on one-year terminal contracts.[71] Despite these decisions, the college hired twelve new, untenured faculty members between June and September 1973.[72] Bloomfield College claimed that these new faculty members were hired to replace the professors who left the institution due to "normal attrition," not those who were terminated because of the financial exigency.[73] The Bloomfield College chapter of the AAUP sued, alleging that the college had violated the tenure rights of faculty under their contract with the institution.[74]

To determine if a financial exigency existed, the trial court focused on the college's assets.[75] Those assets included tuition income, the college property, the endowment fund, and a 322-acre golf course valued between $5 million and $7 million.[76] The college was considering a long-term plan

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66. *See infra* text accompanying notes 68-232.

67. T. Michael Bolger & David D. Wilmoth, *Dismissal of Tenured Faculty Members for Reasons of Financial Exigency*, 65 MARQ. L. REV. 347, 348-49 (1982).

68. WILLIAM KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 580 (4th ed., 2006); Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846 (N.J. Super. Ct. Ch. Div. 1974); *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

69. *Bloomfield Coll.*, 322 A.2d at 850-51.

70. *Id.* at 848.

71. *Id.*

72. *Id.* at 849.

73. *Id.*

74. *Id.* at 847.

75. *Id.* at 850.

76. *Id.* at 851.

to develop the golf course into a housing complex,[77] but the court encouraged the college to sell the property quickly rather than lay off tenured faculty.[78] The court wrote: "[T]he sale of [the golf course] as an available alternative to the abrogation of tenure is a viable one and fairly to be considered on the meritorious issues."[79] The court's particular—and perhaps peculiar—focus on this one asset has caused higher education law insiders to refer to *Bloomfield College* as the "golf course case."[80]

The trial court held that Bloomfield College did not face a financial exigency.[81] The court found that Bloomfield College's financial problem was "one of liquidity, which, as the evidence demonstrates, has plagued the college for many years."[82] It concluded, "[u]nless we are prepared to say that financial exigency is chronic at Bloomfield College, it is difficult to say how, by any reasonable definition, the circumstances can now be pronounced exigent."[83] Moreover, the court questioned the financial impact of hiring twelve new professors soon after laying off thirteen faculty members.[84] As a result, the court held that the layoffs were not "in good faith related to a condition of financial exigency within the institution."[85] The court ordered the college to reinstate the terminated faculty members and restore tenure to the other affected professors.[86]

The Appellate Division, while upholding the trial court's decision to reinstate the terminated faculty and restore tenure to the others,[87] found the lower court's definition of financial exigency to be too narrow.[88] The court wrote, "[T]he mere fact that this financial strain existed for some period of time does not negate the reality that a 'financial exigency' was a fact of life for the college administration within the meaning of the underlying contract."[89] The Appellate Division suggested that a more "reasonable

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77. *Id*. at 852.

78. *Id*. ("Although its preference is to exploit The Knoll's long-term possibilities, its choices are by no means restricted to this course of action. The option of selling the property now is perhaps more realistic as a survival measure since it would supply immediate liquidity.")

79. *Id*.

80. MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 412 (3rd ed. 2006).

81. *Bloomfield Coll.*, 322 A.2d at 857.

82. *Id*.

83. *Id*.

84. *Id*. at 856.

85. *Id*.

86. *Id*. at 860.

87. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615, 618 (N.J. App. Div. 1975).

88. *Id*. at 617.

89. *Id*.

construction" of "financial exigency" is "the phrase 'state of urgency.'"[90] Under this test, the Appellate Division found adequate evidence—including the absence of liquidity and cash flow—to prove that a financial exigency existed at Bloomfield College.[91]

The Appellate Division criticized the lower court's focus on the assets of the college, specifically the golf course and whether to sell or develop it.[92] The court wrote:

> Whether such a plan of action [to dispose of the property] to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution. Its choice of alternative is beyond the scope of judicial oversight in the context of this litigation.[93]

The lower court's conclusion that a financial exigency did not exist because of the potential alternative use of the golf course "was unwarranted and should not have been the basis of decision."[94]

In 1976, one year after the *Bloomfield College* decision, the AAUP defined "financial exigency."[95] In its *Recommended Institutional Regulations on Academic Freedom and Tenure*, the AAUP defined financial exigency as "an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means" than layoffs of tenured faculty.[96] The AAUP revised its recommended institutional regulations six times between 1976 and 2009, but the definition of financial exigency has remained the same.[97]

C. Declarations of Financial Exigency Upheld

Courts have not supported the AAUP's definition of "financial exigency" to mean a threat to the survival of the institution.[98] Like the New Jersey Appellate Division in *Bloomfield College*, courts have generally deferred to institutions' boards of trustees when the boards declared a financial exigency after facing operating deficits, appropriations cuts, and enrollment decreases, provided the "financial crisis is bona fide

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90. *Id*.
91. *Id*.
92. *Id*. at 617.
93. *Id*.
94. *Id*.
95. Ralph S. Brown, Jr., *Financial Exigency*, AAUP BULLETIN 5, 5-6 (Spring 1976).
96. AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE (2009), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm.
97. *Id*.
98. *Id.*

and not used as a pretext for other" violations of employees' contracts.[99] Throughout the 1970s and into the 1980s, courts accepted that financial exigencies existed at many institutions and upheld their decisions to lay off faculty, as described below in roughly chronological order according to the date of decision.[100]

In 1973, the Nebraska legislature adopted a budget that required Peru State College to reduce its number of faculty members.[101] At the direction of the college's board of trustees, the college administration developed a list of sixteen criteria on which to evaluate faculty members for termination, while also considering the most necessary programs to maintain along with the faculty members needed for those programs.[102] Applying those criteria to each member of the faculty, the administration recommended the release of eleven faculty members, at least two of whom were tenured.[103] The administration informed the eleven faculty members that "their employment would terminate at the close of the 1972–73 academic year because of financial exigency."[104] In response to the termination of their employment, James D. Levitt and Darrell Wininger sued, alleging—among other causes of action—that the process used to determine their release was arbitrary and capricious.[105] The court upheld the decision and processes of Peru State's board of trustees.[106] The court wrote:

> It appears to the Court that this [process followed by the college administration] reflects a fair and reasonable approach to the problem. The Board is obligated to provide the best possible education program at the various State Colleges. As a consequence, upon being faced with a shortage of funds, the Board decided it must maintain the most necessary programs at Peru College and this necessitated deciding which faculty members were necessary to maintain those programs.[107]

The court concluded that "the process utilized to select the plaintiffs for termination was fair and reasonable and that the plaintiffs have not carried

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99. Steven Glenn Olswang, *Planning the Unthinkable: Issues in Institutional Reorganization and Faculty Reductions*, 9 J.C. & U.L., 431, 433 (1982).

100. *Id.*

101. Levitt v. Bd. of Trs. of Neb. State Colls., 376 F. Supp. 945, 947 (D. Neb. 1974).

102. *Id*. at 947, 949.

103. *Id*. at 947, 952.

104. *Id*. at 947.

105. *Id*. at 949, 950.

106. *Id*. at 950.

107. *Id.*

the burden of proving that the selection process was either arbitrary or capricious."[108] The court dismissed the complaint.[109]

In 1973, the Wisconsin legislature reduced the University of Wisconsin's biennial budget by 2.5% each year, and it reduced enrollments on several campuses.[110] These reductions caused a loss of instructional funds under a funding formula tying appropriations to student credit hours, resulting in layoffs of some tenured faculty.[111] Thirty-eight tenured faculty members who lost their jobs requested a preliminary injunction in federal court, alleging that the university denied them minimal procedural due process guaranteed by the Fourteenth Amendment.[112] The plaintiffs contended that the university chancellors who made the layoff decisions were not impartial and that the laid-off faculty members did not have a fair opportunity to challenge those decisions.[113]

The court generally agreed with the University of Wisconsin System's contention that the layoff decisions "were precipitated by budgetary decisions by the governor and the legislature, and by the changing sociological or economic currents which have resulted in reduced student enrollment at certain campuses and within certain departments."[114] The court also described these circumstances as a "fiscal exigency."[115] The court denied the plaintiffs' motion for a preliminary injunction.[116] The court ruled that the university had powers under the federal constitution "to assign to the chancellors of the respective campuses the authority both to make the initial decision to lay-off specific tenured faculty members and to make the ultimate decision,"[117] and that the Fourteenth Amendment did not "require adversary proceedings. The information disclosed [by the chancellors] was reasonably adequate to provide each plaintiff the opportunity to make a showing that reduced student enrollments and fiscal exigency were not in fact the precipitating causes for the decisions to lay-off tenured teachers," and that the layoffs were not "arbitrary and unreasonable."[118]

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108. *Id*.

109. *Id*. at 953.

110. Johnson v. Bd. of Regents, 377 F. Supp. 227, 230 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975). *See also* Graney v. Bd. of Regents, 286 N.W.2d 138 (Wis. App. 1979).

111. *Graney*, 286 N.W.2d at 145.

112. *Johnson*, 377 F. Supp. at 230–231.

113. *Id*. at 235-36.

114. *Id*. at 236.

115. *Id*. at 242.

116. *Id*.

117. *Id*. at 240.

118. *Id*. at 242.

After the thirty-eight plaintiffs lost in federal court, seventeen of them sued in state court in Wisconsin.[119] They asserted six causes of action, including breach of contract, violations of rights under the state's tenure law, and violations of due process.[120] The trial court dismissed the plaintiffs' action seeking damages and declaratory and injunctive relief, and a Wisconsin Court of Appeals upheld the order.[121] The Court of Appeals ruled that the plaintiffs were precluded from suing the Board of Regents because of the doctrines of sovereign immunity and public officer civil immunity, and because the plaintiffs failed to exercise their exclusive method of review under state administrative procedures.[122] The court also held that the plaintiffs were precluded from asserting due-process issues because of the doctrine of *res judicata*; the federal courts had already determined those issues.[123] Finally, the court held that the plaintiffs could not sue individual members of the Board of Regents because the plaintiffs failed to prove that the regents acted outside of the scope of their official authority.[124] The court found that the Board of Regents had the authority to lay off tenured faculty because of financial exigency.[125] While the authority was not expressly stated in the tenure statute, the authority was "implied under the general powers of the board for state universities,"[126] the laws of which provide boards with "all . . . powers necessary or convenient to accomplish the objects and perform the duties prescribed by law."[127] The court held that the Board of Regents did not interfere with the protections provided under the tenure statute when it used its discretion to determine that a significant cut in state appropriations required the dismissal of tenured faculty.[128]

Between 1968–1969 and 1973–1974, Goucher College experienced six years of deficits, a diminished endowment, and declining enrollment.[129] The college took several steps to address these fiscal difficulties, including not renewing the contracts of eleven untenured and four tenured faculty members.[130] Hertha Krotkoff, a tenured professor of German, was terminated in part because the college decided to eliminate the Classics department and the German section of the Modern Language department

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119. Graney v. Bd. of Regents, 286 N.W.2d 138 (Wis. App. 1979).
120. *Id*. at 141.
121. *Id*. at 140, 149.
122. *Id*. at 141.
123. *Id*. at 142.
124. *Id*. at 144, 149.
125. *Id*. at 148-49.
126. *Id*. at 145.
127. *Id*., (citing WIS. STAT. § 37.02(1) (1971)).
128. *Graney*, 286 N.W.2d at 149.
129. Krotkoff v. Goucher Coll., 585 F.2d 675, 677 (4th Cir. 1975).
130. *Id*. at 677.

based on enrollment projections.[131] Krotkoff sued the college, alleging violation of the tenure provision of her contract.[132] The jury returned a $180,000 verdict for Krotkoff, but the district judge, perceiving error, granted a new trial and entered judgment for the college notwithstanding the verdict.[133]

The Fourth Circuit Court of Appeals upheld the district court's decision.[134] The key issue on appeal was "whether as a matter of law Krotkoff's contract permitted termination of her tenure by discontinuing her teaching position because of financial exigency."[135] The letter from Goucher to Krotkoff that granted her "indeterminate tenure" did not define the term "indeterminate tenure," and the college's bylaws—which defined "tenure" and the grounds for dismissal—did not mention financial exigency.[136] The court—after reviewing testimony from the American Council on Education, which cited the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*,[137] scholarly works on financial exigency,[138] and cases from other jurisdictions[139]—concluded: "The national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide."[140]

With this national standard in mind, the Fourth Circuit found "no significant evidence that Krotkoff and Goucher contracted with reference to a peculiar understanding of tenure."[141] While some tenured faculty members testified that they understood tenure at Goucher "to preclude

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131. *Id*. at 677-78.
132. *Id*. at 676.
133. *Id*.
134. *Id*.
135. *Id*. at 678.
136. *Id*.
137. *Id*. at 679.
138. *Id*. (citing Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J. LAW & EDUC. 279 (1977); Marjorie C. Mix, TENURE AND TERMINATION IN FINANCIAL EXIGENCY (1978); Clark Byse, *Academic Freedom, Tenure, and the Law: A Comment on* Worzella v. Board of Regents, 73 HARV. L. REV. 304 (1959)).
139. *Krotkoff*, 585 F.2d at 679 (citing *inter alia Am. Ass'n of Univ. Professors, Bloomfield Coll.Chapter v. Bloomfield Coll.*, 322 A.2d 846 (N.J. Sup. Ct. Ch. Div. 1974), *aff'd*, 346 A.2d 615 (N.J. Sup. Ct. App. Div. 1975); *Scheuer v. Creighton Univ.*, 260 N.W.2d 595 (Neb. 1977); *Johnson v. Bd. of Regents of Univ. of Wis. Sys.*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); *Levitt v. Bd. of Trs. of Neb. State Colls.*, 376 F. Supp. 945 (D. Neb. 1974)).
140. *Krotkoff*, 585 F.2d at 678.
141. *Id*. at 680.

dismissal for financial reasons . . . [f]our other tenured faculty members testified to a contrary understanding."[142] Moreover, Goucher introduced evidence that, in the past, it had terminated the appointments of tenured professors because of "its precarious financial condition."[143] The Fourth Circuit agreed with the district court that, as a matter of law, Goucher did not breach Krotkoff's contract.[144] The evidence overwhelmingly demonstrated "that the college was confronted by pressing financial need. As a result of the large annual deficits aggregating more than $1,500,000 over an extended period and the steady decline in enrollment, the college's financial position was precarious. Action undoubtedly was required to secure the institution's future."[145]

In November 1972, North Idaho College's Board of Trustees ordered the president to cut two full-time teaching positions from the faculty after a decline in enrollment.[146] By letter on January 10, 1973, the president notified Annette Bignall that she was one of the two professors not rehired for the coming year.[147] The letter stated no reasons for her termination.[148] Bignall taught at the college from 1961 to 1973, as a part-time instructor until 1969, and then as a full-time instructor.[149] She sued the college in federal district court, claiming that the college had denied her procedural and substantive due process.[150] The district court held that Bignall had improperly terminated a hearing of the Board of Trustees regarding her dismissal, thereby waiving her right to further procedural due process, and in any case, the college used "valid, nondiscriminatory reasons" to decline to renew her contract.[151]

On appeal, Bignall claimed she was denied procedural due process because she did not receive proper notice and a proper hearing prior to the president's decision, and because the Board of Trustees was a biased panel.[152] Bignall also contended that the college violated its tenure policy

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142. *Id*.
143. *Id*.
144. *Id.* at 681.
145. *Id*.
146. Bignall v. N. Idaho Coll., 538 F.2d 243, 245 (9th Cir. 1976).
147.*Id*. at 245.
148. *Id*.
149. *Id*.
150. *Id*. at 244–45. Bignall's husband, Bliss Bignall, was also a plaintiff. Mrs. Bignall claimed she was denied due process in retaliation for the activities of her husband, who was a lawyer, in behalf of minority students at the college. The Bignalls claimed these activities were protected under the First Amendment. *Id*. at 245. The district court found no First Amendment violation, and the Bignalls did not appeal this part of the decision. *Id*.
151. *Id*. at 245.
152. *Id*.

by not showing a "demonstrable financial exigency" when it dismissed her.[153] The Ninth Circuit Court of Appeals held that Bignall was not denied procedural due process because "adequate procedures remain[ed] to challenge and forestall the non-retention" after the president's decision, and because Bignall chose to withdraw prematurely from a hearing afforded by the college.[154]

Bignall's claims regarding substantive due process depended in part on whether she had tenure that created a property right.[155] North Idaho College did not adopt a formal tenure policy until the spring of 1972.[156] The district court held, however, that Bignall had "*de facto* tenure," and the Circuit Court of Appeals agreed.[157] Faculty members can establish *de facto* tenure after a long period of service and legitimate reliance upon guidelines promulgated by their university.[158] Bignall had served North Idaho College for twelve years, and she relied on a general statement by the college's president when she was hired in 1961 that she would have tenure after three years.[159] The college's handbook declared that faculty who taught continuously for three years would have their contracts automatically renewed unless the college fired them for cause.[160]

In 1966, Bignall signed a report as a member of a committee on academic freedom and tenure that stated "that no further statement is necessary beyond the AAUP 1940 Statement on Academic Freedom and Tenure," under which tenured faculty may be laid off "because of financial exigencies."[161] Under this standard of protection of Bignall's *de facto* tenure, the college bore the burden of proving that there was a financial exigency, and that the president adopted and used a uniform set of procedures for all faculty.[162] The Circuit Court of Appeals upheld the district court's ruling that the college "met its burden of proof" that a financial exigency existed.[163] "[N]ot only had projected increases in enrollment not materialized, but enrollment had fallen so that the College . . . was overstaffed" after hiring new faculty in 1973, all of whom were aboard before Bignall's non-retention.[164] "In the absence of any evidence

153. *Id*.
154. *Id*. at 246.
155. *Id.* at 245.
156. *Id*. at 248 n. 5.
157. *Id*. at 245, 246, 247.
158. Perry v. Sindermann, 408 U.S. 593, 600-01 (1972).
159. *Bignall*, 538 F.2d at 249.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.

that a cut was not required," the court wrote, "the College demonstrated its financial plight."[165]

In 1976–1977, the City University of New York (CUNY) suffered a 13% cut to its budget after trying to achieve savings of $54.8 million through administrative and service cuts the previous year.[166] On May 24, 1976, the New York City Board of Higher Education (BHE), which governs CUNY, implemented a retrenchment plan that directed each branch president to determine which academic and non-academic programs or activities to scale back or terminate.[167] The retrenchment plan had to set forth criteria to determine which individuals would be discontinued, and it also had to include a review process.[168] Tenured faculty with the longest full-time, continuous service were the last employees to be considered for retrenchment,[169] but they remained vulnerable.[170] CUNY laid off about 1,050 faculty members, including some with tenure.[171]

Eight of the laid-off faculty members—including faculty who were either tenured, had received letters of reappointment for the 1976–1977 academic year, or were "certificated," meaning they were granted administrative certificates of continuous employment that guaranteed reappointment, subject to certain conditions[172]—sued the BHE.[173] They claimed that their terminations were arbitrary or capricious and that they did not receive adequate procedural due process.[174] The plaintiffs alleged that their dismissals were arbitrary and capricious "because the system managed by defendants was allegedly rife with wasteful practices and defendants knew of the impending budgetary problems yet did nothing to consult, plan ahead or save money and simply made 'wholesale' reductions in the instructional staff at the last moment instead of cutting administrative costs."[175] The court disagreed and upheld the retrenchments.[176] The court wrote:

> All of the BHE and CUNY branch plans submitted . . . reflect strenuous efforts to minimize reductions in the instructional staff

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165. *Id*.

166. Klein v. Bd. of Higher Educ., 434 F. Supp. 1113, 1115–16 (S.D.N.Y. 1977).

167. *Id*. at 1116.

168. *Id*.

169. *Id*.

170. *Id.*

171. Arnold H. Lubasch, *A Suit Challenges Ouster of 1,050 City U. Teachers*, N.Y. TIMES, Sept. 3, 1976, at B2.

172. *Id.*

173. *Klein*, 434 F. Supp. at 1114, 1115 n4.

174. *Id*. at 1114.

175. *Id*. at 1114, 1116.

176. *Id.* at 1119.

> and to allocate budget cuts rationally and in the best interests of the CUNY community. The budget cuts imposed on BHE leave no room to doubt that spending reductions were required, and defendants fairly and reasonably implemented the requisite reductions upon due consideration and on well-reasoned grounds.[177]

The court concluded, "Defendants have satisfied the Court that a bona fide financial emergency existed and that they adopted and applied a uniform set of procedures for meeting that emergency."[178]

In a case against Southern Colorado State College,[179] the question whether the institution had a financial exigency was not even contested.[180] In upholding the dismissal of Lyle Brenna, a tenured professor, the Tenth Circuit Court of Appeals wrote, "Because of bona fide budgetary exigencies it became necessary for the college to reduce its full time faculty from 340 to 308."[181] In reviewing the tenure rules applicable in the case, the court stated, "The tenure policy provided that termination of tenured faculty was permissible in the event of a 'bona fide budgetary exigency,' which it is agreed existed in this case."[182] With the question of financial exigency off the table, Brenna claimed that "the decision to remove him instead of the nontenured professor [in the same department] was so arbitrary or capricious as to violate the concept of 'substantive' due process."[183] Rejecting this argument, the Tenth Circuit Court of Appeals wrote:

> It is enough to note that the interpretation applied by the college's administrative officials in selecting the criteria for deciding which faculty members would be terminated was sufficiently reasonable to put to rest any claim that their decision was arbitrary or capricious. Likewise, their decision as to which currently employed faculty member least met the needs of the department was based on substantial evidence and was made in good faith, which would preclude a finding that it was arbitrary or capricious.[184]

At Boise State University, the State Board of Education, which governs the university, made a declaration of financial exigency in June 1982.[185]

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177. *Id*. at 1117–18.
178. *Id*. at 1118.
179. Brenna v. S. Colo. State Coll., 589 F.2d 475 (10th Cir. 1978).
180. *Id.* at 476.
181. *Id*.
182. *Id*. at 477.
183. *Id*. at 476.
184. *Id*. at 477.
185. Milbouer v. Keppler, 644 F. Supp. 201, 203 (D. Idaho 1986).

Henrietta Milbouer, a tenured professor who was dismissed, sued the university, charging that a financial exigency "did not in fact exist."[186] To decide this issue, the court looked to the Idaho State Board of Education's Policy Manual for Higher Education Institutions, which defined financial exigency as "[a] demonstrably bona fide, imminent financial crisis which threatens the viability of an agency, institution, office or department as a whole, or one or more of its programs, or other distinct units, and which cannot be adequately alleviated by means other than a reduction in the employment force."[187]

The court reviewed state budget cuts and how the university reacted to them to see if the university's declaration of financial exigency met the State Board of Education's definition.[188] The institution had suffered significant budget reductions after the governor ordered budget holdbacks in fiscal years 1980–1982, and the governor ordered another 9% cut in fiscal year 1983.[189] The university's president was directed to retain surplus funds in anticipation of further holdbacks, which materialized in October 1982, leaving insufficient funds "to solve the severe and long-standing budgetary problems facing the University."[190] The court concluded that "[t]he preponderance of the evidence shows that a genuine financial exigency existed at BSU in June of 1982."[191]

In addition to the cases discussed above, it should be noted that, under AAUP policy, program discontinuance may lead to the termination of tenured faculty appointments.[192] The AAUP's *Recommended Institutional Regulations on Academic Freedom & Tenure* states: "Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction."[193] Under this AAUP policy, "[t]he decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations," which "do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."[194]

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186. *Id*. at 203.
187. *Id*.
188. *Id.*
189. *Id*. at 204.
190. *Id*.
191. *Id*.
192. AM. ASS'N. OF UNIV. PROFESSORS, *supra* note 96, at §4.d.
193. *Id.*
194. *Id*.

The first major case to interpret this policy was *Browzin v. Catholic University of America*.[195] In 1969, Catholic University faced a bona fide financial exigency, as stipulated by the parties.[196] The university's School of Engineering and Architecture "was faced with a severe budget reduction" and decided to eliminate its programs in Soil Mechanics and Hydrology, which "had no great strength and could not hope to achieve strength under the new budgetary limitations."[197] The university laid off Boris Browzin, the professor who was responsible for those programs, and he sued the university for breach of contract.[198] The case was tried without a jury, and the district court granted the university's motion to dismiss on the grounds that on the facts and the law presented, Browzin showed no right to relief.[199] The Court of Appeals for the District of Columbia Circuit upheld the decision.[200] Focused on the termination of tenured positions for abandonment of a program of instruction, the Court of Appeals wrote:

> Catholic University, as the parties stipulated, was indeed faced with *bona fide* financial difficulties, but it chose to meet its problems by discontinuing its courses in Soil Mechanics and Hydrology. This discontinuance was, according to the University's own version of the events, the immediate reason why Browzin lost his job. There really is no dispute that there was an abandonment of Browzin's program of instruction.[201]

Courts have distinguished *Browzin* and the elimination of an academic program from layoffs within a school or department, holding that a financial exigency need only exist in one school or department—not the entire university—to justify faculty layoffs within that school.[202] For example, it was "undisputed that Creighton University as a whole was not in a real state of financial exigency" in the 1970s,[203] but its School of Pharmacy had an operating deficit between fiscal years 1971-1972 to 1975-1976.[204] The school anticipated another deficit in 1976-1977,[205] even after

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195. 527 F.2d 843 (D.D.C. 1975).

196. *Id*. at 845.

197. *Id*. at 844–845.

198. *Id*. at 845.

199. *Id*.

200. *Id*. at 851.

201. *Id*. at 848. The Court of Appeals also found that the university made sufficient effort to place Browzin in another suitable position. *Id*. at 849.

202. *See* Scheuer v. Creighton Univ., 260 N.W.2d 595, 597 (Neb. 1977); *see also* Rose v. Elmhurst Coll., 379 N.E.2d 791 (Ill. 1978).

203. *Scheuer*, 260 N.W.2d at 597.

204. *Id*. at 596.

205. *Id*. *See also id*., at 601 ("The deficit faced for 1976–1977 was in excess of $200,000. This deficit would be more than three times greater than any previous deficit.").

adopting remedial measures such as cutting costs for equipment and travel, freezing faculty salaries, and terminating some non-faculty positions.[206] In 1975, the school decided to terminate four faculty members.[207] Edwin Scheuer, a tenured assistant professor at the School of Pharmacy, was terminated because the medicinal chemistry program was reduced to a one-semester, three-hour freshman course.[208] Scheuer sued the university, claiming that financial exigency must apply to the university as a whole, not just his program, to terminate his contract.[209]

To decide the case, the Nebraska Supreme Court interpreted the Creighton faculty handbook's provisions regarding "financial exigency" and the discontinuance of academic programs.[210] The handbook provided for "termination of appointment . . . based upon financial exigency, which may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof."[211] The court rejected the argument that the financial exigency had to apply to the university as a whole because otherwise, the university would be required "to continue programs running up large deficits so long as the institution as a whole had financial resources available to it," which would inevitably "spread the financial exigency in one school or department to the entire University. This could . . . result in the closing of the entire institution."[212] Upholding the termination, the court wrote, "[w]e specifically hold the term 'financial exigency' as used in the contract of employment herein may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole."[213] Deciding otherwise would mean "no tenured employee in any college may be released until the institution exhausts its total assets or at the very least reaches the point where its very survival as an institution is in jeopardy."[214]

The following year, 1978, the Appellate Court of Illinois upheld Elmhurst College's decision to release Ashley Rose, a tenured professor from the college's religion department.[215] In June 1975, the college sent Rose a letter that terminated his employment effective August 31, 1976, as part of the college's curtailment of the religion department due to declining enrollment.[216] The faculty manual in place when Rose was hired in 1969

206. *Id*. at 596.
207. *Id*.
208. *Id*. at 600.
209. *Id*. at 599.
210. *Id*. at 600–01.
211. *Id*. at 597.
212. *Id*. at 600.
213. *Id*. at 601.
214. *Id*.
215. Rose v. Elmhurst Coll., 379 N.E.2d 791, 792, 794 (Ill. 1978).
216. *Id*.

permitted the university to release tenured faculty "because of decline in enrollment or lack of funds,"[217] and an update in the handbook in 1974 allowed "termination due to financial exigency or elimination or curtailment of an academic program."[218] Rose asserted he could be terminated only under terms of the 1969 contract.[219] His suit resulted in a summary judgment for the college, and Rose appealed.[220]

The Appellate Court of Illinois considered whether "any genuine issue of material fact exists on the record which would preclude summary judgment."[221] The court held that the dismissal was permitted no matter which contract was considered.[222] The court wrote, "[T]he plaintiff is no better off by reliance upon the provisions of the 1969 Manual. A decline in enrollment, which is a stated ground for termination set forth in the 1969 Manual, was established . . . [by the evidence,] leaving no genuine or material question of fact."[223] The court concluded, "The uncontradicted evidence indicates that the college's curtailment of the department of religion as well as other departments was a direct consequence of declining enrollment,"[224] justifying the dismissal.[225]

Whether the financial exigency exists university-wide or within one school, it is important that institutions meet their burden of proof.[226] In 1982, the University of Idaho laid off Lois Pace, a tenured professor of home economics in the research and extension division of the College of Agriculture, after the State Board of Education declared a financial exigency.[227] Prior to laying off Pace, the university had not considered any cost-saving alternatives to reductions in personnel, including freezing or reducing salaries, travel, capital outlays, supplies, or equipment.[228] Ruling against the university, the Supreme Court of Idaho wrote, "The evidence . . . clearly shows that the defendants did not satisfy the requirements for proving a financial exigency; they did not demonstrate a 'bona fide, imminent financial crisis . . . *which cannot be adequately alleviated by means other than a reduction in the employment force*.'"[229]

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217. *Id*. at 792.
218. *Id*.
219. *Id*. at 793.
220. *Id*. at 792–93.
221. *Id*. at 793.
222. *Id.*
223. *Id*. at 794.
224. *Id*.
225. *Id.*
226. *See* Pace v. Hymas, 726 P.2d 693 (Idaho 1986).
227. *Id.* at 694.
228. *Id*. at 702.
229. *Id*. (emphasis in original).

Based on the court decisions deciding the financial exigency cases from the 1970s and 1980s, some experts have asserted that "[i]t is rare for colleges to lose exigency cases, as the *Bloomfield* and *Pace* cases are well known to college attorneys."[230] College and university counsel are careful to advise their clients to avoid the pitfalls described in those cases in the event layoffs are needed.[231] Based on a review of the cases described above, institutions need to show evidence of significant fiscal difficulty, need to consider alternatives to laying off faculty members, and cannot hire faculty to replace those they have fired for the bona fide reason of a financial exigency.[232]

IV. "FINANCIAL EXIGENCY" AND THE GREAT RECESSION OF 2007–2009

Despite the fiscal crisis caused by the Great Recession of 2007–2009, few universities declared a financial exigency between 2007 and 2011.[233] Colleges and universities demonstrated their awareness of the legal requirements for declaring a financial exigency.[234] Institutions that have enrolled more students throughout their programs over the years and have hired more faculty to serve them would find it difficult prove a "bona fide" financial crisis.[235] Institutions that determined it necessary to impose layoffs or achieve savings on personnel costs often did so without declaring financial exigency.[236] Those that lost enrollment in a particular program followed the lessons in *Browzin v. Catholic University*[237] and *Scheuer v. Creighton University*[238] by laying off faculty through the elimination of entire programs.[239] Colleges and universities considered other alternatives

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230. OLIVAS, *supra* note 80, at 417. Institutions continued to prevail in financial exigency cases in the 1990s. *See, e.g.*, Johnston-Taylor v. Gannon, No. 91-2398, 1992 U.S. App. LEXIS 22052, at *5–6, *10 (6th Cir. 1992), *cert. denied*, 507 U.S. 986 (1993).

231. *See* OLIVAS, *supra* note 80.

232. *See also* Steven G. Olswang, Ellen M. Babbitt, Cheryl A. Cameron, & Edmund K. Kamai, *Retrenchment*, 30 J.C. & U.L. 47, 61 (2003): "Factors usually considered in determining whether a financial exigency is bona fide include: (1) the Board's motivation for its action; (2) the adequacy of the institution's operating funds; (3) the overall financial condition of the institution; (4) the use of other cost-cutting or money-saving measures before the institution is forced to terminate faculty; and (5) the efforts to find alternative employment for faculty."

233. *See infra* text accompanying notes 241-53.

234. *Id.*

235. See *infra* text accompanying notes 254-73.

236. *See infra* text accompanying notes 283-404.

237. 527 F.2d 843 (D.D.C. 1975).

238. 260 N.W.2d 595 (Neb. 1977).

239. See *infra* text accompanying notes 305-40.

to declaring a financial exigency, such as implementing furloughs, using federal stimulus funds, and reducing staff instead of faculty.[240]

A. Declarations of "Financial Exigency" in 2007–2011

The Washington State Board for Community and Technical Colleges declared a state of financial emergency on June 11, 2009, citing sufficient cuts in state funding to trigger the statutory ability to make such a declaration.[241] By statute, the State Board for Community and Technical Colleges "may declare a financial emergency under the following conditions: (1) Reduction of allotments by the governor pursuant to [expenditure laws], or (2) reduction by the legislature from one biennium to the next or within a biennium of appropriated funds based on constant dollars using the implicit price deflator."[242] Bates Technical College was the system's only college that laid off full-time faculty members under this authority, dismissing six instructors.[243] In September 2011, the Washington State Board for Community and Technical Colleges again declared a financial emergency, this one covering the 2011–2013 biennium, citing overall state budget cuts of $165 million since 2009, and the governor's request to state agencies for 5% and 10% budget-reduction scenarios.[244]

Bethune-Cookman University, a historically black institution in Daytona Beach, Florida, notified thirty-four faculty and staff on May 15, 2009, that their positions were terminated, effective immediately, after a mandate by the Board of Trustees "to drastically reduce . . . expenses and overhead in light of the recent economic downturn."[245] In the AAUP's investigation of these layoffs, the university's general counsel and others explained that the mandate was "due to financial exigency."[246] The university's executive vice president of finance and administration indicated that a diminishing endowment and cuts in appropriations from the State of Florida caused the

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240. See *infra* text accompanying notes 341-84.

241. Regular Meeting Agenda Item, WASH. STATE BD. FOR CMTY. AND TECH. COLLS. (June 11, 2009), http://www.sbctc.edu/docs/board/agendas/2009/10-11june2009/2009_june_meeting_agenda-complete.pdf.

242. WASH. REV. CODE § 28B.50.873 (2010).

243. Paul Fain, *Faculty Fears in Washington*, INSIDE HIGHER EDUC. (Oct. 17, 2011), http://www.insidehighered.com/news/2011/10/17/financial_emergency_in_washington_state_could_lead_to_layoffs_of_tenured_faculty.

244. Press Release, Wash. State Bd. for Cmty. and Tech. Colls., Community and Technical College Board Declares Financial Emergency (September 2011), http://www.sbctc.ctc.edu/general/documents/SBCTC_Board_Meeting_Action_9-15-11.pdf.

245. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 25.

246. *Id*. at 13.

financial exigency and the need for layoffs.[247] Bethune-Cookman's Board of Trustees approved a reduction in the university's budget in early 2009, and then engaged a consulting firm for advice on how to achieve savings.[248] The AAUP concluded that Bethune-Cookman disregarded the financial exigency provisions in the *1940 Statement of Principles* by not formally declaring an exigency and not offering to reinstate faculty in positions for which they were qualified.[249]

In October 2011, Southern University's Board of Supervisors declared a financial exigency on its main campus in Baton Rouge.[250] Southern faced a $10 million budget shortfall resulting from state budget cuts, enrollment declines, and other financial losses.[251] Spending reductions, staff layoffs, and a voluntary furlough program did not achieve sufficient savings to balance the budget before the declaration of financial exigency.[252] With the declaration in place, all Southern employees—including tenured faculty—who earned more than $30,000 a year received furloughs without pay in the 2011–2012 academic year that amounted to 10% of their leave time.[253]

B. Enrollment, "Bona Fide" Declarations of Financial Exigency, and Program Closures

A key contributing factor to a declaration of financial exigency is often a decline in enrollment throughout the institution.[254] "A significant decline in enrollment creates a surplus of teachers," and one could argue "it would be unreasonable to require a university to retain faculty not needed to meet student course demand."[255] A major difference between the recession of 1973–1975 and the Great Recession of 2007–2009 was the projected enrollment of college and university students.[256] In the 1970s, experts

247. *Id*.

248. *Id*.

249. *Id*. at 14, 16.

250. Jordan Blum, *Southern Board OKs Exigency*, THE ADVOCATE (Oct. 30, 2011), http://theadvocate.com/home/1193443-125/su-board-oks-exigency.html.

251. *Id*.

252. *Id*.

253. *Id*.

254. Am. Ass'n of Coll. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 322 A.2d, 846, 849 (N.J. Sup. Ct. 1974), *aff'd* 346 A.2d 615 (N.J. App. Div. 1975); Graney v. Bd. of Regents of Univ. of Wis. Sys., 286 N.W.2d 138, 145 (Wis. Ct. App. 1979); Krotkoff v. Goucher Coll., 585 F.2d 675, 677 (4th Cir. 1978); Bignall v. N. Idaho Coll., 538 F.2d 243, 245 (9th Cir. 1976).

255. James L. Petersen, Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417, 424 (1976).

256. *See infra* text accompanying notes 260-82.

projected the growth rate of enrollment to decrease,[257] whereas the college- or university-bound population through the year 2018 is anticipated to remain steady.[258] For those institutions with consistent enrollment throughout their programs, laying off tenured faculty would not only diminish their capacity to meet student demand, but would likely fail the "bona fide" test.[259]

i. Enrollment Projections for the 1970s

A study by the Carnegie Commission on Higher Education in 1971 found that 71% of the colleges and universities in its study were in, or headed for, financial trouble.[260] The study found that institutions' expenditures outstripped income: institutions expanded their services, thereby increasing their expenditures, while income shrank from inflation and increased competition for funds.[261] Institutions routinely compete for funds as they jockey for prestige, engaging "in an 'arms race' of spending to make [themselves] look more attractive to potential students and thus in a quest for ever increasing resources."[262] These resources include state appropriations, research grants, donations from industries and philanthropies, and tuition and fees from students.[263]

In the 1970s, colleges fought fiercely for students as their enrollments shrank or leveled out.[264] According to statistics available in 1971, total degree-credit enrollments in all institutions of higher education expanded 116% between 1959 and 1969 (from 3,377,273 to 7,299,000), but were projected to grow 51.7%, to 11,075,000, between 1969 and 1979.[265] Actual enrollment in 1979 in degree-granting institutions wound up higher than projected, reaching 11,570,000 students,[266] a 58.5% increase over ten years, about half of the growth in the previous decade.

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257. *See infra* text accompanying notes 260-73.

258. *See infra* text accompanying notes 274-82.

259. *See Bloomfield Coll.*, 322 A.2d at 856.

260. EARL F. CHEIT, THE NEW DEPRESSION IN HIGHER EDUCATION: A STUDY OF FINANCIAL CONDITIONS AT 41 COLLEGES AND UNIVERSITIES 139 (1971).

261. *Id*. at 7-12.

262. Ronald G. Ehrenberg, *Econometric Studies of Higher Education*, J. ECONOMETRICS 19, 26 (2004).

263. BURTON R. CLARK, CREATING ENTREPRENEURIAL UNIVERSITIES: ORGANIZATIONAL PATHWAYS OF TRANSFORMATION 6 (1998).

264. EARL F. CHEIT, THE NEW DEPRESSION IN HIGHER EDUCATION: TWO YEARS LATER 17 (1973).

265. KENNETH A. SIMON & MARIE G. FULLAM, DEP'T OF HEALTH AND HUMAN SERVS., PROJECTIONS OF EDUCATIONAL STATISTICS TO 1979-80 23 (1971).

266. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2009 279 (2010).

The explosive growth of community colleges largely fueled the expansion in enrollment in the 1960s and 1970s.[267] States built 497 two-year colleges between 1961 and 1970, and built 149 more between 1971 and 1980.[268] Total fall enrollment at public two-year colleges increased from 739,811 students in 1963 to 2.2 million students in 1970 to 4.3 million students in 1980.[269]

After the boom of the 1960s at four-year colleges and universities, however, "the situation ha[d] changed and with it the admissions marketplace."[270] Private institutions in particular increasingly competed for students, and the tuition, fees, and financial aid they brought with them. "The problem ha[d] expanded from one of tight money to a distressing paucity of students . . . ."[271]

As early as 1972, colleges and universities were feeling the effects of the decline in the rate of enrollment growth. At Central Michigan University, "the student enrollment pressure ha[d] lessened, depriving the university of the money that would normally be produced by an expanding student population."[272] Allegheny College had three consecutive decreases in admissions applications, and Pomona College also had a reduced applicant pool.[273]

ii. Enrollment Projections for the 2010s

By contrast, a consistent rate of enrollment in the first two decades of the 21st century is likely to keep institutions that enjoy steady enrollments throughout their programs from having a bona fide reason to declare a financial exigency and lay off faculty. Between 1999 and 2009, total enrollment in degree-granting institutions increased 38%, from 14.8 million to 20.4 million.[274] The National Center for Education Statistics projects continual growth over the next decade, estimating total enrollment to expand 13% between 2009 and 2020.[275] An increasing number of these students will attend private, for-profit institutions. Between 2006 and

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267. Am. Ass'n of Cmty. Colls., *CC Growth Over Past 100 Years* (2011), http://www.aacc.nche.edu/AboutCC/history/Pages/ccgrowth.aspx.

268. *Id.*

269. SNYDER & DILLOW, *supra* note 266, at 280.

270. Stephen J. Trachtenberg & Lawrence C. Levy, *In Search of Warm Bodies*, CHANGE, Summer 1973, at 52.

271. *Id.*

272. CHEIT, *supra* note 264, at 33.

273. *See id.* at 29, 32.

274. WILLIAM J. HUSSAR & TABITHA M. BAILEY, NAT'L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2020 58–59 (Sept. 2011).

275. *Id.* at 20.

2009, the total number of students at private, for-profit institutions increased 68%, from 1.38 million to 2.24 million.[276]

The Great Recession drove even more students to colleges and universities. "[T]he pace of growth [of college and university enrollment] accelerated when the Great Recession began in 2007. Historically high levels of unemployment, especially for young adults, appear[ed] to have served as a stimulant to . . . . enrollment."[277] According to a Pew Research Center analysis of census data, the share of eighteen- to twenty-four-year-olds attending college in the U.S. hit an all-time high in October 2010: 12.2 million students, or 41.2% of young adults ages eighteen to twenty-four.[278]

Some institutions have said that, because of the number of students they serve, they will not impose layoffs. Taylor Reveley, president of the College of William and Mary, said layoffs "are enormously destructive of the fabric of the school, and we don't have enough people to begin with" to serve the university's 7,625 students.[279] Montclair State University President Susan Cole, in her address to the community on April 21, 2010, said that the university "will continue to recruit highly qualified faculty in response to enrollment growth."[280] She assured the audience that "no matter what happens with the [State] budget, there will be no layoffs at Montclair State University."[281]

The statements from the presidents at William and Mary and Montclair State reflect legal requirements established by *Bloomfield College* and subsequent cases involving layoffs resulting from declarations of institution-wide financial exigency. By hiring new faculty in the past few years, Montclair State—particularly because it is located in New Jersey, the jurisdiction where *Bloomfield College* was decided—would have a difficult

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276. *See* LAURA G. KNAPP ET AT., NAT'L CTR. FOR EDUC. STATISTICS, ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2006; GRADUATION RATES, 2000 & 2003 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2006 4 (2008); LAURA G. KNAPP ET AT., NAT'L CTR. FOR EDUC. STATISTICS, ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2009; GRADUATION RATES, 2003 & 2006 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2009 7 (2011).

277. RICHARD FRY, PEW RESEARCH CTR, HISPANIC COLLEGE ENROLLMENT SPIKES, NARROWING GAPS WITH OTHER GROUPS 5 (2011), *available at* http://www.pewhispanic.org/files/2011/08/146.pdf.

278. *Id.* at 3, 20.

279. Jon Marcus, *Hard Times: Tuitions Rise, Services Cut, as University Officials Try To Ride Out a Severe Economic Downturn*, NAT'L CROSSTALK, Mar. 2009, at 5, 7.

280. Susan A. Cole, President, Montclair State Univ., President's Address to the University Community (Apr. 21, 2010) (transcript available at https://www.montclair.edu/president/news/article.php?ArticleID=5531&ChannelID=32).

281. *Id.*

time proving a "bona fide" reason for laying off previously hired faculty under the standard established in *Bloomfield College*.[282]

iii. University-Wide Enrollment Losses

Clark Atlanta University (CAU) laid off tenured faculty precisely because of loss of enrollment, yet adamantly—and controversially—did not declare financial exigency.[283] Saying it was responding to "declining student enrollments that have been persisting for several years, compounded by the nation's deepening economic recession," Clark Atlanta announced on February 5, 2009 that it would reduce its workforce by at least seventy full-time faculty and about thirty full-time staff. [284] After some positions were quickly reinstated, fifty-five faculty members were terminated, twenty of whom had tenure.[285]

In the same announcement, Clark Atlanta stated in a series of bullet points:

> • CLARK ATLANTA UNIVERSITY IS NOT DECLARING FINANCIAL EXIGENCY.
> • Clark Atlanta University is not in financial trouble. There is absolutely no financial emergency at CAU, and the University is not in a cash-marginal position.
> • CAU remains a viable institution and is fiscally sound.
> • CAU is still committed to long-term growth and forward progress.[286]

Clark Atlanta's enrollment fell from more than 5,000 students in the fall of 2000[287] to 4,068 in the fall of 2008,[288] and about 200 students cited

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282. *See supra* text accompanying notes 68–97 (discussing the layoff of tenured faculty members at Bloomfield College, an early "financial exigency" case).

283. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 27, at § II.

284. CLARK ATLANTA UNIV., Clark Atlanta University to Respond to Nation's Economic Condition: CAU Re-Engineering and Positioning for Future Growth 1–2 (Feb. 5, 2009), *available at* http://www.cau.edu/CMFiles/Docs/StatementOnCAU Restructuring.pdf.

285. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 27, at § II.

286. CLARK ATLANTA UNIV., *supra* note 284, at 4.

287. THOMAS D. SNYDER & CHARLENE M. HOFFMAN, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2002 270 (2003).

288. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010 368 (2010).

financial difficulties and did not enroll in the spring of 2009.[289] In January 2009, the university reported that some students had experienced trouble accessing student loans, and some donors of university scholarships had experienced "loss of revenue and . . . indicated that their previous level of financial support [was] not possible" at that time.[290] The university said that it would "realign its workforce with the University's current enrollment and anticipated enrollment over the next several years."[291]

Under Clark Atlanta's faculty handbook, declaring an "enrollment emergency" is easier than declaring a "financial exigency."[292] An "enrollment emergency" is defined "as either a sudden or unplanned progressive decline in student enrollment the detrimental financial effects of which are too great or too rapid to be offset by normal procedures outlined in the Handbook."[293] Procedurally, "[t]he president, after consultation with the University Senate Executive Committee and the Executive Committee of the Board of Trustees, will make the policy declaration of a state of enrollment emergency to the university."[294]

Clark Atlanta's faculty handbook defines financial exigency as "a rare and serious institutional crisis which is defined as the critical, urgent need of the university to reorder its current fund monetary expenditures in such a way as to remedy and relieve its inability to meet the projected annual monetary expenditures with sufficient revenue."[295] The multi-step procedure for declaring a financial exigency involves the Board of Trustees, the President, the University Senate, and the faculty:

> The Board of Trustees, upon recommendation of the President, who will have consulted with the University Senate, decides a) whether a financial crisis meets the criteria; and b) whether a financial exigency should be declared. The University Senate participates in the decision that financial exigency exists through

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289. Scott Jaschik, *Turmoil Over 70 Faculty Layoffs at Clark Atlanta*, INSIDE HIGHER EDUC. (Feb. 9, 2009), http://www.insidehighered.com/news/2009/02/09/cau.

290. CLARK ATLANTA UNIV., *supra* note 284, at 1. About 98% of Clark Atlanta's students qualify for financial aid, higher than the national average of 70%. Shaila Dewan, *Economy Hits Hard on Black Campuses*, N.Y. TIMES, Feb. 19, 2009, at A13.

291. CLARK ATLANTA UNIV., *supra* note 284, at 2.

292. *See* CLARK ATLANTA UNIV., Faculty Handbook §§ 2.8.5, 2.8.5.2, 2.8.5.3 (Oct. 2004), *available at* http://www.cau.edu/CMFiles/Docs/FacultyHandbook.pdf. Under the faculty handbook, the university can lay off faculty without cause in three circumstances: major changes in curricular requirements, academic programs, or departments; an enrollment emergency; and financial exigency. *Id.*

293. *Id.* at § 2.8.5.2.

294. *Id.*

295. *Id.* at § 2.8.5.3.

> its Executive Committee and other committees as deemed appropriate by the University Senate, which advises the president.
>
> Subsequently, the faculty shall be represented in administrative processes relating to program reorganization or the curtailment or termination of instructional programs because of financial exigency through the Academic Council's Curriculum Committee, and the Academic Council. Faculty, however, shall not necessarily be represented in individual personnel decisions; the president and the Board of Trustees shall have final authority in all matters related to financial exigency.[296]

Clark Atlanta laid off faculty under an enrollment emergency in order to avoid declaring a financial exigency.[297] In an interview with the student newspaper, President Carlton E. Brown said that, without the layoffs, the university would have faced a budget shortfall of $6 million, jeopardizing its ability to meet costs through the summer of 2009 and the start of the fall 2009 semester.[298] He said, "[w]e would then have to declare financial exigency, which is the most dangerous condition to enter."[299] President Brown said the university avoided declaring financial exigency "to protect the financial position of the university and preserve its accreditation and capability."[300]

The AAUP investigated the circumstances surrounding Clark Atlanta's layoffs.[301] The AAUP's investigative committee found that enrollment in the spring of 2009 was just under 4,000 students and down less than 2% from the previous fall's enrollment of 4,063.[302] Finding no precipitate drop in enrollment, the AAUP wrote, "[t]he university may well have been in a difficult financial condition, but if that condition was serious enough genuinely to necessitate the large-scale layoff of faculty and staff in midsemester, then there was de facto a state of financial exigency."[303] The AAUP concluded that the "declaration of an enrollment emergency was

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296. *Id.*

297. *President Brown Responds to Panther's Front Page Questions*, THE PANTHER, Apr. 7, 2009, *available at* http://web.archive.org/web/20090515114541/http://media.www.thecaupanther.com/media/storage/paper292/news/2009/04/07/News/President.Brown.Responds.To.The.Panthers.Front.Page.Questions-3700982.shtml?

298. *Id.*

299. *Id.*

300. *Id.*

301. *See generally* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 27 (reporting the findings of the AAUP investigating committee regarding the termination of fifty-five faculty members by Clark Atlanta University).

302. *See id.* at § III(A).

303. *Id.*

unwarranted and was in fact a pretext, a convenient means to avoid faculty handbook requirements for meaningful academic due process in the termination of faculty appointments."[304]

iv. Program-Specific Enrollment Losses and Closures

Programs with low enrollment are vulnerable to elimination, particularly under the judicial rulings that allowed institutions to declare "financial exigency" in an individual college or program.[305] Institutions may close programs and lay off tenured faculty without declaring financial exigency if the decision is "based essentially upon educational considerations," which "do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."[306] During the 2007–2009 recession, institutions chose the latter course. For example, the University of Southern Mississippi's technical and occupational education major suffered dwindling numbers of majors and non-degree students in the fall of 2009.[307] Denise Von Herrmann, Dean of the College of Arts and Letters, said the technical and occupational education program had become obsolete because of a change in licensure requirements for vocational teachers in Mississippi.[308] Southern Mississippi formally "suspended enrollment" in the program in the spring of 2010, meaning no new students could enroll but current students could earn their degrees.[309] Three tenured faculty members in the program were laid off.[310] The university had three academic years to request that the Mississippi Board of Trustees of State Institutions of Higher Learning either delete the program

304. *Id.* at § III(B).

305. *See, e.g.*, Scheuer v. Creighton Univ., 260 N.W.2d 595, 601 (Neb. 1977) (holding that "financial exigency" as used in professor's employment contract may refer to financial exigency in department or college of university and that the term is not restricted to a financial exigency existing in the institution as a whole).

306. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 96, at 3.

307. *See* David Glenn, *When Tenured Professors Are Laid Off, What Recourse?*, CHRON. HIGHER EDUC., Sept. 28, 2009, *available at* http://chronicle.com/article/When-Tenured-Professors-Are/48606.

308. *See* Merlyn Dakin, *Professors Dropped in Cut*, THE STUDENT PRINTZ (Sept. 1, 2009), http://www.studentprintz.com/news/professors-dropped-in-cut-1.347608#.T2NtesWPWM0TxG5rIHfXwQ.

309. *See* MISSISSIPPI BD. OF TRS. OF STATE INSTS. OF HIGHER LEARNING, MINUTES OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING 21–23 (Apr. 14–15, 2010), http://www.ihl.state.ms.us/board/downloads/BdApril2010.pdf.

310. *See* Dakin, *supra* note 308.

or remove it from suspension.[311] Absent such a request, the Board of Trustees' Office of Academic and Student Affairs must delete the program.[312]

Several public universities in Florida eliminated entire programs, with Florida State described as "ground zero" for the clash between the economic decision to cut programs and the principles of shared governance.[313] In June 2009, Florida State's board of trustees voted to suspend or terminate ten undergraduate majors and three graduate-level programs.[314] The university identified programs with low enrollment, such as Science Education, Math Education, and Scenic Design; programs with low quality, such as Physical Education; and programs within the College of Arts and Sciences with low enrollments and high cost, such as Physics.[315] Termination notices effective May 2010 were sent to sixty-two faculty members, twenty-one of whom had tenure.[316] Florida State's faculty union filed a grievance against the layoffs, arguing the university violated more than twelve articles of their collective bargaining agreement by failing to provide proper layoff notice, failing to specify the layoff unit, failing to apply layoff criteria properly, and improperly enacting layoffs as nonappointments.[317]

The grievance proceeded to arbitration, and the arbitrator supported two of the faculty union's four grievances. First, the arbitrator found that the university provided proper notice to the union of the layoffs, because notice was provided well within the thirty-day period required by the collective bargaining agreement.[318]

With regard to the layoff units, the arbitrator found that the layoff units selected by the university were academic-degree programs and not stand-alone organization levels such as schools, colleges, and departments as required under the contract.[319] Moreover, the selection process used by the Dean of Arts and Sciences allowed him to protect "favored faculty" and appeared "to have been a subterfuge to avoid having to comply with [the

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311. *See* MISSISSIPPI BD. OF TRS. OF STATE INSTS. OF HIGHER LEARNING, *supra* note 309, at 23.

312. *Id.*

313. *See* David Glenn & Peter Schmidt, *Disappearing Disciplines: Degree Programs Fight for Their Lives*, CHRON. HIGHER EDUC., Mar. 28, 2010, *available at* http://chronicle.com/article/Disappearing-Disciplines-D/64850/.

314. *Id.*

315. *See* Fla. St. Univ. Bd. of Trs. v. United Faculty of Fla., 30, 37, 38 (2010) (Sergent, Arb.) (unpublished opinion and award), http://www.uf-ffsu.org/art/ArbitrationAwardHighRes.pdf.

316. *See* Glenn & Schmidt, *supra* note 313.

317. *See Fla. St. Univ. Bd. of Trs.*, *supra* note 315, at 2–3.

318. *Id.* at 43–45.

319. *Id.* at 47–50.

article in the collective bargaining agreement], which requires that tenured faculty be laid off last."[320]

The most significant layoff criterion noted by the arbitrator was the university's requirement to consider an employee's "length of continuous service . . . ."[321] The arbitrator criticized Florida State several times over its application of this criterion, finding that the Dean of Arts and Sciences "completely ignored" it,[322] the Provost favored shorter-serving faculty in a teaching program he supported,[323] and the university's exercise of its discretion under this article was "arbitrary, capricious, and unreasonable."[324]

With regard to the layoffs in the Anthropology department, the Dean of Arts and Sciences "used the discretion afforded him by [the collective bargaining agreement's article regarding layoffs] to manipulate the layoff units to allow him to arbitrarily select who got laid off, based on his personal judgment and relationships . . . ."[325]

Finally, the arbitrator found that the university did not improperly use the layoff provision rather than the non-reappointment provision of the contract when it eliminated the position of a non-tenured art professor.[326] The arbitrator ordered the university to reinstate the twelve tenured faculty members who filed grievances,[327] and the university agreed to rescind the layoffs of all tenured faculty, whether or not they were part of the grievance.[328]

The University of Florida, after cutting $47 million across the board and letting individual colleges decide what to cut based on academic and strategic reasons, closed several programs and laid off eight faculty members in 2008.[329] The faculty members were not tenured.[330] The College of Liberal Arts and Sciences merged zoology and botany, as well as criminology and sociology, and put Spanish into a stand-alone

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320. *Id.* at 56.
321. *Id.* at 56–57.
322. *Id.* at 57.
323. *Id.* at 60–61.
324. *Id.* at 71.
325. *Id.* at 77–78.
326. *Id.* at 80.
327. *Id.* at 82.
328. *See* Doug Blackburn, *FSU Tenured Faculty Reinstated*, TALLAHASSEE DEMOCRAT, Nov. 6, 2010, *available at* http://www.uff-fsu.org/art/tdo2010 1106.pdf.
329. *See* Nathan Crabbe, *UF Faculty Protest Layoffs and Raise*, GAINESVILLE SUN, *reprinted in* SARASOTA HERALD-TRIB., July 31, 2008, at BM8.
330. *See UF Reduces Spending by $47 Million in Response to State Budget Reductions*, UNIV. OF FLA. NEWS, May 5, 2008, *available at* http://news.ufl.edu/ 2008/05/05/ budget-cuts-2.

department after merging other languages into a separate department.[331] The university also closed the College of Journalism and Communications' Documentary Institute in 2010.[332] The institute's two tenured full professors and two non-tenure-track instructors received layoff notices. The university rescinded the layoff notice to the institute's director, and the other tenured professor and the two instructors accepted positions at Wake Forest University's Documentary Film Program.[333]

The University of Central Florida laid off thirty-three faculty, some of whom were tenured,[334] and four staff after eliminating four academic programs and suspending a fifth program between 2009 and 2010.[335] The closed programs were cardiopulmonary sciences and radiologic sciences in the College of Health and Public Affairs; engineering technology in the College of Engineering and Computer Science; and management information systems in the College of Business Administration.[336] The College of Science suspended its actuarial program, leaving the possibility for it to be reopened, but its faculty and staff were still laid off.[337]

The University of Nevada at Reno also eliminated several programs and suspended one program after the state cut $11 million from the university's budget.[338] On June 2, 2010, the Nevada Board of Regents voted to eliminate the Department of Animal Biotechnology, its bachelor's degree in animal biotechnology, and its bachelor's and master's degrees in animal science; the Department of Resource Economics and its bachelor's degree in agricultural and applied economics, its bachelor's degree in environmental and resource economics, and its master's degree in resource and applied economics; the Center for Nutrition and Metabolism; German

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331. *See* Crabbe, *supra* note 329.

332. *See* Nathan Crabbe, *UF Documentary Institute May Close, But Films Will Go On*, GAINESVILLE SUN (May 19, 2010), *available at* http://www.gainesville.com/article/20100519/COLUMNISTS/5191005; Andy Guess, *Dead Programs Walking*, INSIDE HIGHER EDUC., (Apr. 30, 2009) http://www.insidehighered.com/news/2009/04/ 30/programs.

333. *See* E-mail message from Churchill Roberts, Professor, Department of Telecommunications, University of Florida, to Michael W. Klein (Jan. 15, 2012) (on file with author). *See also* Crabbe, *supra* note 332.

334. *See* E-mail message from Ida Cook, Chair, Faculty Senate, University of Central Florida, to Michael W. Klein (Jan. 16, 2012) (on file with author).

335. *See* Luis Zaragoza, *Majors, Faculty On the Way Out*, ORLANDO SENTINEL, Jul. 23, 2009, at B1.

336. *Id.*

337. *Id.*

338. *See* Lenita Powers, *UNR Budget Cuts Passed*, RENO GAZETTE-J., June 3, 2010, available at http://www.rgj.com/article/20100603/NEWS02/100603064/ 1321/news.

studies; interior design; and supply chain management.[339] Moreover, the master's degree program in speech communications was suspended for five years.[340]

C. Need for Alternatives

Some university and state officials may be reluctant to declare a financial exigency and take action against tenured faculty because of the legal requirement to consider other options first. For example, Idaho's legislature imposed across-the-board pay cuts for state employees in 2009, but tenured faculty at public colleges and universities were spared because Idaho's State Board of Education did not want to declare a financial exigency.[341] Alluding to the *Pace* case, the Executive Director of the State Board of Education said, "Where we have lost the court cases is where the employee can demonstrate the university had another option."[342]

The San Francisco Art Institute (SFAI) took several steps before laying off nine tenured faculty members in April 2009.[343] It temporarily reduced salaries of administration and staff on a sliding scale, ranging from 25% for the three senior administrators to 0% for those making less than $40,000.[344] It temporarily suspended institutional contributions to its 403(b) retirement plan,[345] a rare action by a university.[346] And between the Fall 2008 and Spring 2009 semesters, it closed its campus from mid-December to mid-January, placing all nonessential faculty and staff on furlough during that time.[347] The recession caused SFAI's $10 million endowment to lose one-third of its value, and the President, Chris Bratton, resigned in May 2010 to become the Deputy Director of the Museum of Fine Arts as well as the President of the School of the Museum of Fine Arts in Boston.[348] With an

339. *Id.*

340. *Id.*

341. *See* Kathleen Kreller, *JFAC Chairs Called on the Carpet*, IDAHO STATESMAN, Mar. 26, 2009, at 6. The article misidentifies the Board of Education as the Board of Higher Education.

342. *Id.*

343. *See* Kolowich, *supra* note 30.

344. *See* Chris Bratton, DIALOGUE: NOTES FROM THE PRESIDENT'S OFFICE, Mar. 5, 2009 (on file with the San Francisco Art Institute).

345. *Id.*

346. *See id. See also* Tamar Lewin, *Brandeis Halts Retirement Payments*, N.Y. TIMES, May 22, 2009, at A15 (explaining that "[w]hile universities across the country have taken a wide range of actions to confront their financial problems, including layoffs and the suspension of capital projects, freezing contributions to retirement accounts is rare").

347. *See* Bratton, *supra* note 344.

348. *See* Kenneth Baker, *S.F. Art Institute President Bratton Resigning*, S.F. CHRON., May 10, 2010, at C3.

interim president in place starting in July 2010, SFAI conducted a national search and appointed Charles Desmarais, the Deputy Director for art at the Brooklyn Museum, as President in May 2011.[349]

Institutions that did not declare a financial exigency and lay off faculty chose to implement some of the same measures seen at the San Francisco Art Institute.[350] Furloughs and salary reductions were the most prominent.[351]

i. Furloughs

During fiscal year 2010, more than twenty states considered imposing furloughs, i.e., unpaid days off, on state employees.[352] Some public colleges and universities imposed furloughs, too. The University of California (UC), for example, aimed to achieve pay cuts ranging from 4% to 10% by furloughing state-funded workers between eleven and twenty-six days, depending on employees' salary levels, for one year beginning September 1, 2009.[353] The furloughs were projected to save the university more than $200 million and cover roughly a quarter of the university's $813 million deficit.[354] After the Board of Regents approved the plan, the university had to negotiate the furloughs with more than a dozen labor unions that represent UC workers.[355] The University of California's faculty, who are not unionized,[356] were also required to take furlough days, but not on days they were scheduled to teach.[357] In July of 2009, the union representing California State University (CSU) faculty members agreed to accept two furlough days per month over the 2009–2010 academic year, reducing their compensation by approximately 10%.[358] California State

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349. *See* Kenneth Baker, *Institute Appoints New Chief*, S.F. CHRON., May 20, 2011, at E6.

350. These institutions included the University of California, California State University, state colleges in New Jersey, Georgia, and Maryland, and the University of Idaho. *See infra* text accompanying notes 352–374.

351. *See infra* text accompanying notes 352–374.

352. *See* Leslie Eaton, Ryan Knutson, & Philip Shishkin, *States Shut Down to Save Cash*, WALL ST. J., Sept. 4, 2009, at A1.

353. *See* Laurel Rosenhall, *Plan Furlough Proposal is Redone by UC*, SACRAMENTO BEE, July 11, 2009, at A3.

354. *Id.* at A3-A4.

355. *Id.* at A4.

356. *Id.*

357. *See* Cynthia Lee, *Faculty Get Answers on Furloughs, Other Consequences of Budget*, UCLA TODAY (Aug. 27, 2009), *available at* http://www.today.ucla.edu/portal/ut/faculty-get-answers-on-furloughs-100496.aspx.

358. *See Union Accepts Furloughs at California Universities*, N.Y. TIMES, July 26, 2009, *available at* http://www.nytimes.com/2009/07/26/us/26california.html.

University, after suffering a 20% cut in state appropriations, faced a $584 million deficit, and it aimed to save $275 million from the furlough plan.[359] Chancellor Charles B. Reed estimated that the deal helped to prevent the elimination of roughly 6,000 jobs.[360] Faculty did not face furloughs in California after the 2009–2010 academic year,[361] even though California cut $650 million each from UC and CSU in the fiscal year 2012 budget, representing a 20% reduction in operating support for each system.[362] The universities responded by sharply raising tuition, intensifying recruitment of out-of-state students—who pay higher rates than California residents—leaving faculty vacancies unfilled; and scaling back enrollment increases.[363]

New Jersey also negotiated a furlough deal with its state college and university faculty. In July of 2009, the faculty union at the nine state colleges and universities agreed to take seven furlough days and defer a 3.5% cost-of-living adjustment until January 2011 in exchange for a no-layoff pledge from the institutions.[364] Furloughs were also part of cost-saving plans in Georgia and Maryland. In August 2009, Georgia's Board of Regents required the thirty-five state colleges and universities to furlough employees, including faculty, at least six days in the 2009–2010 academic year, and the presidents complied immediately.[365] Employees took at least three days by the end of December of 2009, and the remainder by the end of June of 2010.[366] Institutions could not cancel classes as a way of implementing the furloughs.[367] For three years in a row, between fiscal years 2008 and 2011, Maryland's state government required the twelve-campus University System of Maryland to achieve budget savings

359. *Id.*

360. *Cal State Faculty Accepts Furloughs*, INSIDE HIGHER EDUC., July 27, 2009, http://www.insidehighered.com/quicktakes/2009/07/27/cal-state-faculty-accepts-furloughs.

361. *See* Kaustuv Basu, *Fighting Against Furloughs*, INSIDE HIGHER EDUC., Nov. 11, 2011, http://www.insidehighered.com/news/2011/11/11/furlough-discussions-become-more-common-contract-talks.

362. *See* Jennifer Medina, *California Cuts Weight Heavily on Its Colleges*, N.Y. TIMES, July 9, 2011, at A12.

363. *Id.*

364. *See* Trish G. Graber, *Deal Sets Furloughs at Rowan, Other New Jersey Colleges*, GLOUCESTER COUNTY TIMES, July 10, 2009, http://www.nj.com/gloucester/index.ssf?/base/news-4/124720713273550.xml&coll=8.

365. *See* Laura Diamond, *Unpaid Days Off Set at Colleges*, ATLANTA J.-CONSTITUTION, Aug. 13, 2009, at 1A.

366. *Id.*

367. *Id.*

through furloughs.[368] In fiscal year 2011, the lowest-paid employees took at least one furlough day, and the highest-paid employees took as many as ten furlough days.[369]

In Idaho, the State Board of Education adopted a new rule in February 2010 that authorized chief executive officers of institutions to take certain employment actions—including imposing furloughs—without a declaration of financial exigency by the board.[370] The new policy states:

> [T]he authority delegated to each chief executive officer includes the authority, in the chief executive officer's discretion, to reduce expenditures to respond to financial challenges (without a financial exigency declaration by the Board) and to maintain sound fiscal management. In such cases, the chief executive officer may take employment actions which are uniform across the entire institution, or uniform across institution budgetary units, but may not include actions requiring a financial exigency declaration by the Board. Such actions may include work hour adjustments such as furloughs or other unpaid leave as long as such are uniform across budgetary units or uniformly tiered as applied to certain salary levels or classifications. Work hour adjustments may be pro-rated based on annual salary levels to equitably reduce the financial hardship of the adjustments on lower level employees. Institutions shall adopt internal policies for implementing the employment actions in a manner consistent with the Board's policies and procedures, and furnish these policies to the Board.[371]

With the new authority in place, the University of Idaho implemented furloughs in March 2010 for the remainder of the academic year.[372] The furloughs affected 2,600 faculty and staff.[373] Furlough time varied

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368. *See* UNIVERSITY SYSTEM OF MARYLAND (USM) FURLOUGH/SALARY REDUCTION GUIDELINES: FISCAL YEAR 2011, http://www.umaryland.edu/president/TSR1/FY11-Furlough-Guidelines.

369. *See id;* Jennifer R. Ballengee, *State Faculty Treated Unfairly*, BALT. SUN, Nov. 4, 2010, http://articles.baltimoresun.com/2010-11-04/news/bs-ed-university-faculty-20101104_1_furlough-days-usm-state-faculty.

370. *See* Eric Kelderman, *Idaho Faculty Members Fear That New State Policies Will Undermine Tenure*, CHRON. HIGHER EDUC., Feb. 22, 2010, http://chronicle.com/ article/Idaho-Faculty-Members-Fear-/64333.

371. Idaho State Board of Education Governing Policies and Procedures § II.B.2.c, *available at* http://www.boardofed.idaho.gov/policies/documents/policies/ii/ii_b_appointment_authority_and_procedures_06-11.pdf.

372. *See* Charles Huckabee, *U. of Idaho President Orders Furloughs in Next Months*, CHRON. HIGHER EDUC., Mar. 2, 2010, *available at* http://chronicle.com/article/U-of-Idaho-President-Orders/64450.

373. *Id.*

according to salary, with the highest compensated employees taking the most unpaid leave.[374]

In states with unionized faculty, state officials are wise not to impose furloughs through legislation. In New York in May 2010, the legislature and governor agreed on an emergency appropriation bill that implemented unpaid furloughs on several groups of state employees that had collective bargaining agreements with the state, including workers at the State University of New York (SUNY) and CUNY.[375] The unions sued, charging that the legislated furloughs violated the contracts clause of the U.S. Constitution.[376] The court granted a temporary restraining order against the furloughs.[377] The court found that the union members would suffer irreparable harm from the state's "failure to pay the contracted-for increases in salaries and wages, which were negotiated years prior to the challenged extender bill, and upon which the affected employees have surely relied."[378] The court also held that the unions were likely to win on the merits of the case.[379] The court found that the legislation would cause substantial contractual impairment by reducing salaries by 20% and holding back negotiated raises.[380] The court questioned the legitimate public purpose of the furloughs because "the contested terms were abruptly placed within a weekly emergency appropriations bill by the Governor after communications with state employee unions did not lead to desired results," precluding legislative deliberation.[381] Finally, the court found that implementing furloughs through legislation was not a reasonable and necessary means to accomplish a public purpose.[382] The economic crisis at the time was not "sufficient justification for a drastic impairment of

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374. *Id.*

375. *See* Smith v. Paterson, No. 1:10-CV-00546 (LEK/DRH), slip op. 7 (N.D.N.Y. May 28, 2010); Bowen v. New York, No. 1:10-CV-00549 (LEK/DRH), slip op. 7 (N.D.N.Y. May 28, 2010).

376. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 7; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 7. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . [L]aw impairing the Obligation of Contracts . . . .").

377. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 27; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 27.

378. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 12; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 12.

379. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 24; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 24.

380. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 16; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 16.

381. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 19; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 19.

382. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 22; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 22.

contracts to which the State is a party. Without any showing of a substantial record of considered alternatives the reasonableness and necessity of the challenged provisions are cast in serious doubt."[383] The court noted "the conspicuous absence of a record showing that options were actually considered and compared, and that the conclusion was then reached that only the enacted provisions would suffice to fulfill a specified public purpose."[384]

ii. Federal Stimulus Funds

In 2009–2010, public colleges had access to federal stimulus funds that provided a significant alternative to laying off tenured faculty.[385] The American Recovery and Reinvestment Act of 2009 (ARRA), enacted on February 17, 2009,[386] infused the American economy with $787 billion in stimulus funds.[387] Within the ARRA, the State Fiscal Stabilization Fund (SFSF) provided $48.3 billion to states to support K-12 and higher education, with each state's allocation based on its population.[388]

The SFSF consisted of two components: the Education Stabilization Fund (81.8% of the SFSF) and the Government Services Funds (18.2% of the SFSF).[389] The ARRA required states to use their Education Stabilization funds to restore state aid to school districts under the state's K-12 funding formula to the greater of the FY2008 or FY2009 level in each of fiscal years 2009, 2010, and 2011; and state support to "public institutions of higher education in the State" to the greater of the FY2008 or FY2009 level in each of fiscal years 2009, 2010, and 2011.[390] A state was required to restore support for both K-12 education and public institutions of higher education—it could not choose to restore support for only elementary and secondary education or for only postsecondary education.[391] Across fiscal years 2009 to 2011, nearly $9 billion of these

383. *Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 22; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 22.

384. *Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 23; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 23.

385. *See generally* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (appropriating funds for economic stabilization and recovery).

386. *Id.*

387. Sheryl Gay Stolberg & Adam Nagourney, *As Recovery Measure Becomes Law, the Partisan Fight Over It Endures*, N.Y. TIMES, Feb. 18, 2009, at A17.

388. *See* American Recovery and Reinvestment Act, *supra* note 385, §§ 14001–14002.

389. *Id.* at § 14002.

390. *Id.*

391. *See* U.S. Dep't of Educ., GUIDANCE ON THE STATE FISCAL STABILIZATION FUND PROGRAM § III-B-8 (Apr. 2009).

federal stimulus funds went through state budgets to higher education, representing 4% of total state support for higher education during that period.[392]

Some state governments specifically used their share of federal stimulus funds to prevent layoffs at their public colleges and universities. The University of Iowa's president, Sally Mason, said that the $80.3 million in federal stimulus money received by the Iowa state Board of Regents helped the university prevent "inevitable layoffs and furloughs."[393] Arizona's public universities used federal stimulus funds and tuition surcharges to prevent significant layoffs.[394] The University of Wisconsin estimated that it created or saved 137 jobs for research faculty members, research assistants, graduate assistants, and laboratory assistants with the $5.2 million in federal stimulus funds it spent through September 2009.[395]

iii. Layoffs of Staff and Elimination of Vacant Positions

While tenured faculty were largely immune from layoffs during the Great Recession, staff members were not. Harvard laid off 275 staff in June 2009 after the decline in the value of its endowment contributed to a projected budget deficit of $220 million over two years.[396] Stanford University laid off 412 staff members between January and August 2009 in response to an anticipated 30% decline in the university's endowment.[397] In April of 2009, the University of Toledo laid off about 100 staff and eliminated 200 vacant positions to close a $16 million budget gap.[398] In

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392. *See* Eric Kelderman, *State Spending on Higher Education Edges Down, as Deficits Loom*, CHRON. HIGHER EDUC., Jan. 24, 2011, *available at* http://chronicle.com/article/State-Spending-on-Colleges/126020.

393. B.A. Morelli, *Regents to Avoid Major Cuts Next Year*, IOWA CITY PRESS-CITIZEN, Apr. 30, 2009, *available at* http://www.presscitizen.com/article/20090430/NEWS01/ 90430003/1079.

394. *See* Anne Ryman, *Arizona University Tuition Surcharges Approved*, ARIZ. REPUBLIC, Apr. 30, 2009, *available at* http://www.azcentral.com/news/articles/2009/04/30/20090430tuitionhikes0430-ON.html.

395. *See What One University Got for $5-million in Stimulus Funds: 137 Jobs*, CHRON. HIGHER EDUC., Oct. 15, 2009, http://chronicle.com/blogPost/What-One-University-Got-for/8482.

396. *See* Robert Tomsho, *Harvard, Hit by Recession, Lays Off 275*, WALL ST. J., June 24, 2009, at A4; Peter Zhu, *Staff, Activists Protest Layoffs*, HARVARD CRIMSON, June 25, 2009, *available at* http://www.thecrimson.com/article/2009/6/25/staff-activists-protest-layoffs-dozens-of.

397. *As Fiscal Year Closes, Impact of Downturn Felt Across Campus*, STANFORD REPORT, Sept. 1, 2009, *available at* http://news.stanford.edu/news/2009/august31/the-budget-090209.html.

398. *See* Meghan Gilbert, *University of Toledo Will Lay Off 87 to Help Eliminate $16M Shortfall*. TOLEDO BLADE, Apr. 29, 2009, *available at*

June of 2009, the flagship campus of the University of Colorado in Boulder cut $12.9 million from its budget by eliminating forty-two full-time staff positions and thirty-three full-time faculty positions.[399] Most of the positions were left vacant after employees retired or quit.[400] In June of 2009, Temple University also laid off staff, dismissing at least eighteen union-affiliated administrative assistants and other staff, nine of whom were rehired to fill vacant jobs.[401]

In January of 2009, Dartmouth College, as part of a plan to address a projected budget gap of $100 million, laid off seventy-six employees but specified why it did not lay off any faculty members.[402] The majority of the eliminated positions were administrative or managerial, with the rest coming from among hourly workers.[403] President Jim Yong Kim explained that Dartmouth did not lay off any professors because the college had frozen some vacant faculty positions, and it had concerns about protecting academic quality.[404]

iv. Other Options: Suspend Searches, Sell Art, Raise Tuition

Some institutions suspended faculty searches and sharply reduced their number of new tenure-track positions.[405] In July of 2009, the University of California's campuses deferred at least half of their planned faculty hirings, with Berkeley expected to reduce faculty recruitment from the usual 100 positions a year to ten.[406] At the same time, Stanford froze fifty faculty positions.[407] Harvard put faculty hiring for the Arts & Sciences in a "pause

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http://www.toledoblade.com/local/2009/04/29/University-of-Toledo-will-lay-off-87-to-help-eliminate-a-16M-shortfall.html.

399. *See* Brittany Anas, *CU Campus Cutting $12.9 Million*, DAILY CAMERA, June 3, 2009, *available at* http://www.dailycamera.com/archivesearch/ci_13123463.

400. *Id.*

401. *See* Zoe Tillman, *Protest Over Layoffs at Temple University*, PHILA. INQUIRER, June 3, 2009, at B07.

402. *See* Paul Fain & Beckie Supiano, *Dartmouth Resumes Layoffs and Loans in Face of $100-Million Budget Gap*, CHRON. HIGHER EDUC., Feb. 8, 2010, *available at* http://chronicle.com/article/Dartmouth-Resumes-Layoffs-and/64071.

403. *Id.*

404. *Id.*

405. *See* Breneman, *supra* note 7.

406. *See* Tamar Lewin, *University of California Makes Cuts After Reduction in State Financing*, N.Y. TIMES, July 11, 2009, at A11.

407. *See As Fiscal Year Closes*, *supra* note 397.

period" in April 2008 and formally postponed almost all tenure-track and tenured searches in December 2008.[408]

Brandeis University faced a firestorm over its proposal in January 2009 to close its Rose Art Museum and sell the museum's 6,000-piece collection, estimated to be worth between $350 million and $400 million.[409] After outcry from the Rose family, which donated money to establish the museum in 1961, and other donors, the university said it would sell only a limited number of pieces and keep the museum open as a teaching and exhibition gallery.[410] Despite this announcement, three members of the museum's board of overseers sued to prevent Brandeis from closing the museum and selling the artwork.[411] The Massachusetts attorney general announced it would examine any sales to determine if they were consistent with the terms of the original gifts.[412] The overseers' lawsuit was settled in early 2011, with Brandeis promising not to sell the collection.[413] The university found budget reductions in other areas, and by October of 2011, Brandeis' endowment gained back nearly all the losses it suffered during the recession.[414] The museum was renovated and reopened on October 27, 2011, with new exhibitions to help celebrate the museum's fiftieth anniversary.[415] Museum and university leaders moved to integrate the museum more fully into the curriculum and life of the university.[416]

Finally, institutions imposed higher tuition and fees on their students as an alternative to faculty layoffs. California State University raised its fees twice in 2009 for a total increase of 32%,[417] and cut enrollment by over

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408. *See* Christian B. Flow & Esther I. Yi, *FAS Freezes All Faculty Salaries, Cuts Searches*, HARVARD CRIMSON, Dec. 9, 2008, http://www.thecrimson.com/article/2008/12/9/fas-freezes-all-faculty-salaries-cuts/.

409. *See* Randy Kennedy & Carol Vogel, *Outcry Over a Plan to Sell Museum's Holdings*, N.Y. TIMES, Jan. 28, 2009, at C5.

410. *See* John Hechinger, *New Unrest on Campus as Donors Rebel*, WALL ST. J., Apr. 23, 2009, at A1.

411. *See Brandeis Agrees to Delay Sale of Artwork*, BOSTON GLOBE, Oct. 14, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/10/14/brandeis_agrees_to_delay_sale_of_artwork.

412. *See* Kennedy & Vogel, *supra* note 409.

413. *See* Geoff Edgarse, *Rose Art Museum Revival*, BOSTON GLOBE, Oct. 23, 2011, at B1.

414. *Id.*

415. *Id.*

416. *See id.*; Sebastian Smee, *Rose Art Museum Shines at 50*, BOSTON GLOBE, Nov. 6, 2011, at N1.

417. *See* Lisa M. Krieger, *CSU Proposes 20 Percent Fee Hike*, SAN JOSE MERCURY NEWS, July 16, 2009, http://www.mercurynews.com/politics/ci_12856053?nclick _check=1.

29,000 students between 2008–2009 and 2010–2011.[418] University of California Regents assessed a 9.3% student fee increase to prevent layoffs.[419] Tuition at the four-year institutions within the State University of New York rose 15% in 2009–2010.[420] The Iowa state Board of Regents imposed a $100 surcharge for the spring 2010 semester on students at the University of Iowa, Iowa State University, and the University of Northern Iowa.[421]

D. Preserving Institutional Bond Ratings

When considering whether to declare financial exigency during the Great Recession, institutions weighed the long-term consequences of such a declaration on their ability to borrow money in the marketplace, which has become an increasingly important source of revenue for colleges and universities. Colleges and universities added "massive amounts of debt to their balance sheets" in the 1980s and 1990s.[422] Institutions faced growing facilities needs, including construction of science and technology buildings, modernization of their physical plant, and long-ignored deferred maintenance.[423] With donations and other sources of revenue difficult to obtain, institutions borrowed what they needed, permitting them to "build now and pay later."[424]

To borrow funds, colleges and universities typically sell debt securities.[425] The major bond-rating agencies, such as Moody's and Standard & Poor's, research the financial strength of colleges and universities and then rate the institutions.[426] The better the rating, the lower an institution's borrowing costs.[427] A lower bond rating resulting from a declaration of financial exigency could lead an institution to be perceived as economically weakened for decades. "Declaration of financial exigency

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418. *See* California State University, *2011–12 State Appropriations Equal 1998–99 Levels, But Enrollment Has Increased by 58,000 FTEs* (2011), http://www.calstate.edu/pa/BudgetCentral/JulyStateSupport.pdf.

419. Larry Gordon, *UC Regents to Seek 9.3% Fee Hike*, L.A. TIMES, Apr. 30, 2009, http://www.latimes.com/news/local/la-me-uc30-2009apr30,0,4681556.story; Larry Gordon, *UC Students Face Increased Fees*, L.A. TIMES, Sept. 11, 2009, http://www.latimes.com/news/local/la-me-ucfees11-2009sep11,0,5783183.story.

420. *See* Linda Saslow, *Suffolk County College is Raising Tuition*, N.Y. TIMES, Apr. 26, 2009, at LI2.

421. Morelli, *supra* note 393.

422. William F. Massy, *Optimizing Capital Decisions*, *in* RESOURCE ALLOCATION IN HIGHER EDUCATION 115, 122 (William F. Massy ed., 1996).

423. *Id.*

424. *Id.*

425. *Id.* at 126

426. *Id.*

427. *Id.*

is seen as a declaration of bankruptcy," which could diminish the benefits of a declaration of financial exigency.[428]

Bond ratings were a consideration when Idaho decided not to declare a financial exigency in 2009. In defending the Idaho State Board of Education's proposal to expand presidential authority over campus salaries without needing a declaration of financial exigency, University of Idaho general counsel Kent Nelson indicated that the proposal avoided problems that a declaration of financial exigency could cause, such as a lower bond rating.[429]

Maintaining a positive bond rating became more important as the effects of the Great Recession wore on.[430] Moody's Investment Service issued a "negative outlook" for the U.S. higher education sector in January 2010, indicating challenges in fundamental credit conditions.[431] Higher education institutions faced "greater uncertainty, reduced financial flexibility, and increased competitive pressures."[432] Whether institutions relied on endowment income or tuition, Moody's warned them that "revenues may decline faster than expenses can be adjusted."[433]

Moody's issued a statement in March 2011 that signaled that declarations of financial exigency might not harm institutional bond ratings. The statement said:

> On balance . . . declaring financial exigency is likely to be a positive step in terms of credit standing because it empowers management to take aggressive cost-cutting steps to preserve cash flow to pay debt service. Such a declaration would have little or no negative impact on a university's bond rating if Moody's expects the actions will improve future financial position.[434]

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428. Roger Benjamin & Steve Carroll, *The Implications of the Changed Environment for Governance in Higher Education*, *in* THE RESPONSIVE UNIVERSITY: RESTRUCTURING FOR HIGH PERFORMANCE 92, 108 (William G. Tierney ed., 1998).

429. *See* Marcus Kellis, *SBOE Proposal Incurs Faculty Questions*, UNIV. OF IDAHO ARGONAUT, Oct. 12, 2009.

430. *Id.*

431. *See* Laura C. Sander, Roger Goodman, & John C. Nelson, MOODY'S INVESTORS SERVICE, ANNUAL SECTOR OUTLOOK FOR U.S. HIGHER EDUCATION FOR 2010, at 1 (Jan. 2010).

432. *Id.* at 2.

433. *Id.*

434. Edith Behr, *Announcement: Moody's: public universities may declare financial exigency to trim faculty, reduce operating costs*, MOODY'S INVESTORS SERVICE ANNOUNCEMENT (Mar. 7, 2011).

Moody's acknowledged "the competitive risks to reputation" faced by institutions that declare a financial exigency.[435] Investors, lenders, donors, students, and prominent faculty might avoid institutions that declare a financial exigency.[436]

E. Decline in Faculty Union Membership

The absence of declarations of financial exigency during the Great Recession compared to the 1970s could be related to the decline in membership in faculty unions at four-year institutions. The number of organized faculty at four-year institutions—principally represented by the AAUP, the National Education Association, and the American Federation of Teachers—decreased from 138,254 in 1994 to 120,713 in 2006.[437] The AAUP lost almost 57% of its membership over 35 years: the AAUP had 90,000 members in 1971, and it had 38,785 members in 2006.[438] In 1979, the AAUP had 1,362 chapters.[439] In 2011, it had 148 chapters.[440]

With fewer faculty members represented by the AAUP and a decreased number of campus chapters, fewer institutions are likely to have contracts and policies referencing the AAUP's statements. AAUP statements—such as the *1940 Statement on Principles on Academic Freedom and Tenure*, which contains the procedures to be followed in cases of terminations due to financial exigency—[441]are binding on institutions only when they have a contract with the AAUP, or when they reference the AAUP's guidelines in their policies and procedures.[442]

Part of the reason for the decline in membership in faculty unions, especially at private institutions, is the U.S. Supreme Court decision in *National Labor Relations Board v. Yeshiva University*.[443] The Court held in that case that faculty at private colleges and universities are "managerial" personnel and therefore ineligible to form unions under the National Labor

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435. *Id.*

436. *Id.*

437. FRANK R. ANNUNZIATO, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUC. v (1995); JOAN MORIARTY & MICHELLE SAVARESE, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUC. vii (2006).

438. Robin Wilson, *The AAUP, 92, and Ailing*, CHRON. HIGHER EDUC., June 8, 2007, at A8; MORIARTY & SAVARESE, *supra* note 437, at ix.

439. Dick Dashiell, REPORT ON THE 65TH ANNUAL MEETING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 1 (1979).

440. Am. Ass'n of Univ. Professors, *Chapter Web Sites* (2010), http://www.aaup.org/AAUP/about/chaps/.

441. *See generally* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 56.

442. *See* Zekan, *supra* note 63, at 24.

443. 444 U.S. 672 (1980).

Relations Act.[444] The Court based its ruling on faculty members' authority over course offerings, teaching methods, grading policies, admission standards, and graduation decisions.[445]

The National Labor Relations Act does not apply to public-sector employers;[446] as a result, state laws regulate collective bargaining at public institutions of higher education.[447] Unionized faculty are located in thirty-one states and the District of Columbia, with a majority concentrated in three states: California, New York, and New Jersey.[448] 94% of organized faculty are employed in public institutions.[449] Twenty-two states, however, have "right-to-work" laws, which do not require employees to join a union or to pay dues or fees to the union.[450]

The *Yeshiva* decision and the strength of right-to-work states have combined to curb the rate of union membership among college and university faculty.[451] According to Cary Nelson, the national president of the American Association of University Professors, "In the 1980s, the drive toward faculty unionization slowed. . . . Organizing at private universities came to a virtual halt, and the union movement ran out of states with positive legislative environments for public-sector organizing."[452]

F. Rise of Contingent Faculty

Tenure has an important economic influence on institutional decisions regarding layoffs.[453] Therefore, it is important to understand how tenure status compares with tenure-track, non-tenure-track, part-time, and adjunct positions. Faculty not on the tenure track are defined as "contingent

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444. *See id.* at 686. The National Labor Relations Act (NLRA), which grants employees the right to form labor organizations and to deal collectively through such organizations, specifically exempts supervisors, who are defined as any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action," if the exercise of this authority "requires the use of independent judgment." 29 U.S.C. § 152(11) (2010).

445. *Yeshiva Univ.*, 444 U.S. at 686.

446. 29 U.S.C. § 152(2) (2010).

447. *See* Kaplin & Lee, *supra* note 68, at 278.

448. MORIARTY & SAVARESE, *supra* note 437, at viii.

449. *Id.*

450. *See Employees in Right to Work States*, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. (2010), http://www.nrtw.org/d/rtwempl.htm.

451. *See* CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM 129 (2010).

452. *Id.* at 130.

453. *See* Scott Jaschik, *Layoffs Without 'Financial Exigency,'* INSIDE HIGHER EDUC., (Mar. 2, 2010), http://www.insidehighered.com/news/2010/03/02/exigency.

faculty," encompassing full-time non-tenure-track faculty, part-time faculty, and adjunct faculty.[454] Tenure represents a contractual relationship between faculty members and their institution, which generally entitles faculty members to continue in their position until they retire or resign.[455] Tenured faculty may also be dismissed for cause.[456] Colleges and universities make their strongest employment commitments to their tenured faculty.[457]

Before they reach tenure status, professors are usually in a tenure-track position.[458] In a tenure-track position, a faculty member has a contract for a stated period of time, usually one to three years.[459] The institution may renew the contract, and by a certain deadline, usually by the sixth year, the institution evaluates the faculty member for tenure.[460] In a non-tenure-track position, a faculty member receives one or more contracts over a set time period.[461] Non-tenure-track positions can be either full-time or part-time.[462] The individual is not reviewed for tenure.[463]

Finally, there are part-time and adjunct faculty. A part-time faculty member usually teaches a course load lower than that of a full-time faculty member and is usually not on a tenure track.[464] The term "adjunct" implies a short-term or casual relationship with the institution.[465] Adjunct faculty may be full-time or part-time and are not on a tenure track; they are typically paid by the hour or by the course.[466]

Between 1995 and 2007, contingent faculty came to outnumber tenured faculty.[467] In 1975, totaling data from all degree-granting institutions, tenure and tenure-track faculty held the majority of positions: 36.5% of faculty were full-time tenured, and 20.3% were full-time tenure-track.[468]

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454. *See, e.g.*, ANN H. FRANKE, AMERICAN COUNCIL ON EDUCATION, FACULTY IN TIMES OF FINANCIAL DISTRESS: EXAMINING GOVERNANCE, EXIGENCY, LAYOFFS, AND ALTERNATIVES 1 (2009).

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.* at 2.

468. *See* Am. Ass'n of Univ. Professors, *Trends in Faculty Status, 1975–2007: All Degree-Granting Institutions; National Totals* (2007), http://www.aaup.org/

Only 30.2% of faculty in 1975 were part-time, and 13% were full-time non-tenure track.[469]

By 2007, the proportion of tenure and non-tenure faculty was reversed.[470] Only 21.3% of faculty were full-time tenured, and 9.9% were full-time tenure-track.[471] Part-time faculty represented over half of the faculty nationally in 2007, 50.3%, and another 18.5% of faculty were full-time non-tenure track.[472]

Colleges and universities are hiring more contingent faculty for two primary reasons. Institutions are looking to reduce personnel costs, and they need more flexibility in staffing.[473] At the same time, this trend raises concerns about the effect on student learning and success; inequities among faculty; and the whittling away of tenure, shared governance, and academic freedom.[474]

Because of the increased reliance on contingent faculty in higher education, some economists caution that focusing on layoffs might not accurately measure the effect of the Great Recession on higher education as it would for other industries.[475] At some institutions, for example, the effects of the recession might be more keenly observed in a decrease in adjunct faculty members and in course offerings.[476] In other words, with fewer tenured professors on their faculty, it would not make economic sense for colleges and universities to declare financial exigency. "With the proliferation of non-tenure-eligible positions, significant savings can be achieved by declining to renew faculty contracts or, if necessary, interrupting contracts during their terms."[477]

V. CONCLUSION

The economic consequences of the 1973–1975 recession, and its reverberations over the next decade, led to several declarations of financial exigency by colleges and universities, which in turn led to law suits over

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NR/rdonlyres/7D01E0C7-C255-41F1-9F11-E27D0028CB2A/0/TrendsinFacultyStatus2007.pdf.

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

473. *See* Alene Russell, *Faculty Trends and Issues*, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES POLICY MATTERS, Apr. 2006, at 3.

474. *Id.*

475. *See* Goldie Blumenstyk, *In a Time of Uncertainty, Colleges Hold Fast to the Status Quo*, CHRON. HIGHER EDUC., Oct. 25, 2009, *available at* http://chronicle.com/article/In-a-Time-of-Uncertainty-C/48911/.

476. *Id.*

477. Franke, *supra* note 454, at 14.

layoffs of tenured faculty.[478] During the more severe recession of 2007–2009, declarations of financial exigency by colleges and universities were less common. Instead, institutions of higher education closed entire programs,[479] imposed furloughs,[480] used federal stimulus funds to plug budget holes and prevent layoffs,[481] and laid off staff instead of tenured faculty.[482] Why did institutions choose these tactics over declaring a financial exigency? The answer lies in the legal standards established in the financial-exigency cases of the 1970s and 1980s, and it lies in the changing nature of the faculty workforce.

The concept of a financial exigency is connected to the principles of academic freedom. The AAUP's *1940 Statement on Principles on Academic Freedom and Tenure* acknowledged the possibility of terminating tenured faculty "because of financial exigency," [483] provided such terminations are based on "demonstrably bona fide economic hardships."[484] State and federal courts have interpreted the phrase and established parameters for its deployment. Institutions successfully proved they faced a financial exigency when they demonstrated they lacked liquidity and cash flow,[485] experienced budget shortfalls,[486] suffered cuts in government appropriations,[487] had enrollment decreases,[488] or lost funds in their endowment.[489] Courts have held that the financial exigency need only exist in one school or department, not the entire university, in order to

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478. *See, e.g.*, Bignall v. N. Idaho Coll., 538 F.2d 243 (9th Cir. 1976); Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846 (N.J. Ch. Div., 1974); *aff'd*, 346 A.2d 615(N.J. App. Div., 1975); Levitt v. Bd. of Trs. of Neb. State Colls., 376 F. Supp. 945 (D. Neb. 1974).; Graney v. Bd. of Regents, 286 N.W.2d 138 (Wis. App. 1979); Johnson v. Bd. of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); Pace v. Hymas, 726 P.2d 693 (1986); Milbouer v. Keppler, 644 F. Supp. 201 (D. Idaho 1986).

479. *See supra* text accompanying notes 305-340.

480. *See supra* text accompanying notes 352–374.

481. *See supra* text accompanying notes 393-395.

482. *See supra* text accompanying notes 396-404.

483. Am. Ass'n of Univ. Professors, *supra* note 56.

484. *Id*.

485. *See* Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615, 617 (N.J. Super. Ct. Ch. Div. 1975).

486. *See* Levitt v. Bd. of Trs. of Neb. State Colls., 376 F.Supp. 945, 950 (D. Neb. 1974).

487. *See* Graney v. Bd. of Regents, 286 N.W.2d 138, 145 (Wis. App. 1979); Klein v. Bd. of Higher Educ., 434 F. Supp. 1113, 1115 (S.D.N.Y. 1977); Milbouer v. Keppler, 644 F. Supp. 201, 204 (D. Idaho 1986).

488. *See* Johnson v. Bd. of Regents, 377 F. Supp. 227, 230 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); Bignall v. North Idaho Coll., 538 F.2d 243, 245 (9th Cir. 1976).

489. *See* Krotkoff v. Goucher Coll., 585 F.2d 675, 677–81 (4th Cir. 1975).

justify faculty layoffs within that school or department.[490] Above all, the declaration must be made in good faith and cannot be a pretext for laying off unwanted faculty.[491] Additionally, institutions must consider cost-saving alternatives to reducing their faculty ranks, including freezing or reducing salaries, travel, capital spending, supplies, or equipment.[492]

Many institutions of higher education experienced fiscal difficulties during the 2007–2009 recession, yet colleges and universities have hesitated to invoke the status of a financial exigency.[493] A few institutions that took this severe step included Bates Technical College in the state of Washington,[494] Bethune-Cookman University,[495] and Southern University.[496]

Rather than declare a financial exigency, several institutions found other ways to lay off tenured faculty, often on grounds of enrollment declines. Clark Atlanta University laid off tenured faculty by declaring a university-wide "enrollment emergency" under the terms of its faculty handbook.[497] Other institutions closed academic programs based on enrollment declines within those programs, including the University of Southern Mississippi,[498] the University of Florida,[499] and the University of Central Florida.[500]

Furloughs saved personnel expenses at several institutions that chose not to declare a financial exigency. The University of California;[501] California State University;[502] state colleges in New Jersey, [503] Georgia,[504] Maryland;[505] and the University of Idaho imposed furloughs on their workforces, including faculty.[506]

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490. *See* Rose v. Elmhurst Coll., 379 N.E.2d 791, 794 (1978); Scheuer v. Creighton Univ., 260 N.W.2d 595, 601 (1977).

491. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 856 (N.J. Super. Ct. Ch. Div. 1974).

492. Pace v. Hymas, 726 P.2d 693, 702 (1986).

493. Jaschik, *supra* note 453.

494. Fain, *supra* note 243.

495. ACADEMIC FREEDOM AND TENURE: BETHUNE-COOKMAN UNIV., *supra* note 25.

496. Blum, *supra* note 250.

497. CLARK ATLANTA UNIV., *supra* note 284; CLARK ATLANTA UNIV., Faculty Handbook *supra* note 292, at § 2.8.5.

498. *See* Glenn, *supra* note 307.

499. *Id.*

500. *See* Zaragoza, *supra* note 335.

501. *See* Rosenhall, *supra* note 353.

502. *See Union Accepts Furloughs*, *supra* note 358.

503. *See* Graber, *supra* note 364.

504. *See* Diamond, *supra* note 365.

505. *See* UNIV. SYS. OF MD., *supra* note 368.

506. *See* Huckabee, *supra* note 372.

Federal stimulus funds prevented layoffs at several public institutions, but staff were victims of layoffs at other institutions, particularly at private colleges and universities. The University of Iowa,[507] Arizona's public universities,[508] and the University of Wisconsin specifically used federal stimulus funds to avoid layoffs.[509] Private institutions including Harvard,[510] Stanford,[511] and Dartmouth laid off many staff members to balance their budgets as their endowments fell.[512]

An increased reliance on borrowing since the 1970s influenced decision-making at colleges and universities regarding financial exigency. Colleges and universities took on significant debt to build new facilities,[513] and maintaining a strong credit rating was important to hold down borrowing costs.[514] For example, the University of Idaho purposely insulated its credit rating when it decided not to declare a financial exigency in 2009.[515]

Between the early 1970s and the recession of 2007–2009, fewer faculty members at four-year institutions had protections from unions and from tenure status, giving institutions more flexibility to downsize their faculty without declaring financial exigency. In particular, membership in the AAUP declined from 90,000 in 1971 to 38,785 in 2006.[516] This decline is due in part to *National Labor Relations Board v. Yeshiva University*, the U.S. Supreme Court decision that faculty at private colleges and universities are "managerial" personnel and cannot form unions under the National Labor Relations Act.[517] Moreover, by 2007, only 21.3% of faculty among all institutions were full-time tenured, and 9.9% were full-time tenure track.[518] With contingent faculty outnumbering tenured faculty, institutions did not need to declare a financial exigency to dismiss the majority of their professors.[519]

Is it time to declare the end of "financial exigency"? Some commentators think so.[520] Pronouncements of financial exigency's demise, however—like rumors of Mark Twain's death in 1897—might be an

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507. *See* Morelli, *supra* note 393.
508. *See* Ryman, *supra* note 394.
509. *See What One University Got for $5-million*, *supra* note 395.
510. *See* Tomsho, *supra* note 396.
511. *See As Fiscal Year Closes*, *supra* note 397.
512. *See* Fain & Supiano, *supra* note 402.
513. Massy, *supra* note 422.
514. *Id.* at 126.
515. *See* Kellis, *supra* note 429.
516. MORIARTY & SAVARESE, *supra* note 448, at ix.
517. 444 U.S. 672, 686 (1980).
518. Am. Ass'n of Univ. Professors, *Trends in Faculty Status, 1975–2007*, *supra* note 468.
519. *Id.*
520. *See* Jaschik, *supra* note 5.

exaggeration.[521] The recession of 2007–2009 and its aftermath caused at least three institutions to declare a financial exigency,[522] and public institutions in other states considered it.[523] The stigma of declaring a financial exigency may be lifting, with at least one bond-rating agency suggesting the positive aspects of such declarations.[524] What is certain is that since the mid-1980s, institutions have seldom used this tactic. They have other options to help balance their budgets without causing them to appear to be "severely stressed" and ultimately "suffer competitive declines in reputation."[525] And not being able to compete for students—and their tuition dollars—would toll a real death knell.[526]

521. THE OXFORD DICTIONARY OF QUOTATIONS 786 (Knowles ed. 1999).

522. See *supra* text accompanying notes 240–242.

523. *See* Kristina Dell, *State Universities Face Deepening Cuts*, TODAY, Mar. 22, 2011, http://today.msnbc.msn.com/id/42140407/ns/business-your_retirement/#

524. *See* Behr, *supra* note 434, at 1.

525. *Id.*

526. See *supra* notes 432-433.

THE 2010 "DEAR COLLEAGUE" LETTER ON TITLE IX COMPLIANCE FOR COLLEGE ATHLETIC PROGRAMS: POINTING THE WAY TO PROPORTIONALITY…AGAIN

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INTRODUCTION

Since the enactment of Title IX of the Education Amendments of 1972,[1] one aspect of the law as applied to intercollegiate athletics has proven particularly difficult for athletic programs—that is, how to determine whether an athletic program that maintains separate and not necessarily identical teams and other participation opportunities for men and women nevertheless provides appropriate athletic participation opportunities for its female students. The law itself merely mandates that educational institutions that receive federal funding not discriminate on the basis of sex, but offers no further clarity. Implementing regulations issued in 1975 simply state that the federal government, in determining compliance with the law, will evaluate "[w]hether [an educational institution's] selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," without explaining the metrics for that evaluation.[2] A 1979 Policy Interpretation[3] finally set out *what* the government would evaluate, but left open *how* the government would evaluate an educational institution against what has come to be known as the Three-Part Test for Effective Accommodation. According to the 1979 Policy Interpretation, an educational institution has effectively accommodated the athletic interests and abilities of its students if it satisfies one of three criteria:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a *history and continuing practice of program expansion* which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been *fully and*

1. *See* Patsy Takemoto Mink Equal Opportunity in Education Act, Title XI, Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–88 (2006)).

2. 34 C.F.R. § 106.41 (2011).

3. Title IX of the Educational Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

effectively accommodated by the present program.[4]

Over the last three decades, various pronouncements from the United States Department of Education's Office for Civil Rights (OCR) and the federal courts have added substance to this test, and have established some guidelines for compliance with each part of the test.[5] However, not all parts of this test have evolved into equally desirable measures of compliance. The "substantial proportionality" test is the only test with objective measures—it compares the percentage of women among student-athletes with the percentage of women in the student body—and as such has become known as a "safe harbor" for Title IX compliance.[6] The "history and continuing practice of program expansion" test involves a subjective assessment of an educational institution's commitment, over time, to add programs.[7] This second test has become somewhat less relevant, however, as educational institutions continue to approach substantial proportionality and, at any rate, a "historical" commitment to equity matters somewhat less today because educational institutions have had nearly forty years to add participation opportunities for women. The "full and effective accommodation" test,[8] on the other hand, does remain relevant, as it allows an educational institution to demonstrate Title IX compliance in the absence of substantial proportionality. However, this test has proven difficult to employ, as each educational institution must meet the needs of its own students in its own way.

The changing political atmosphere of the executive branch over time has further complicated any widespread implementation of the "full and effective accommodation" test. Over the last 20 years, the Clinton, Bush, and Obama administrations have each put a unique stamp on the test by issuing guidance through the OCR on the utility of surveys or other methods of establishing full and effective accommodation in the absence of substantial proportionality.

In 1996, after a number of federal court cases discussed the requirements of the three-part test,[9] the Clinton Administration issued a policy clarification that provided educational institutions with only limited guidance on how to prove that athletic programs satisfied the interests and

4. *Id*. at 71,418 (emphasis added).

5. *See infra* text accompanying notes 48–53.

6. *See* 44 Fed. Reg. at 239, 71,418. In fact, a Clinton Administration policy explicitly called the "substantial proportionality" test a "safe harbor," but a subsequent Bush Administration policy removed that designation. *See* text accompanying notes 10–14, *infra*.

7. *See* 44 Fed. Reg. at 239, 71,418.

8. *Id*.

9. *See infra* notes 58–62.

abilities of female students.[10] But this clarification had a more important impact on Title IX compliance by declaring, for the first time, that when an educational institution has achieved a proportion of female student-athletes that mirrors the proportion of female undergraduates, the institution will have found a "safe harbor" in the tumultuous waters of Title IX compliance.[11]

A 2003 Bush administration policy incorporated all of the Clinton administration's *1996 Clarification* except the substantial proportionality test's controversial "safe harbor" designation.[12] Furthermore, the *2003 Further Clarification* also declared that each of the three tests for compliance—substantial proportionality, a history of continuing program expansion, and full and effective satisfaction of women's athletic interests and abilities—as first set out in by the original 1979 policy implementation,[13]were "an equally sufficient means of complying with Title IX."[14] Two years later, the Bush Administration issued another policy in an attempt to establish some standards for proving compliance with the "full and effective accommodation test."[15] This *2005 Additional Clarification*, along with a Model Survey, Technical Manual, and User's Guide, aimed to provide guidance beyond that in the *1996 Clarification* both of the interests and abilities test, and of the use of surveys to measure

10. "Dear Colleague" Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (Jan. 16, 1996), *available at* http://www.ed.gov/ocr/docs/clarific.html [hereinafter *1996 Clarification*].

11. *Id*.

12. "Dear Colleague" Letter from Gerald Reynolds, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html [hereinafter *2003 Further Clarification*].

13. *See* Title IX of the Educational Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239, 71,413 (Dec. 11, 1979).

14. *2003 Further Clarification*, *supra* note 12, at 2.

15. *See* "Dear Colleague" Letter from James F. Manning, Delegate of the Auth. of the Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three* (March 17, 2005), *available at* http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf [hereinafter *2005 Additional Clarification*]. For a more complete discussion of the *2005 Additional Clarification* and the accompanying Model Survey and related Technical Manual, see Catherine Pieronek, *An Analysis of the New Clarification of Intercollegiate Athletics Policy Regarding Part Three of the Three-Part Test for Compliance with the Effective Accommodation Guidelines of Title IX*, 32 J.C. & U.L. 105 (2005).

student interest in intercollegiate athletics.[16]

But the Model Survey fomented controversy from its inception. Groups such as the National Women's Law Center (NWLC) published lists of objections to the survey instrument and methodology.[17] The National Collegiate Athletic Association (NCAA) issued a press release parroting the NWLC's objections and urging its member institutions not to use the survey.[18] Both organizations also pushed to characterize Title IX as a law that promotes women's participation in athletics, rather than as a law that simply prohibits educational institutions from discriminating against women who wish to participate in sports.[19] Politicians joined the chorus of negativity as well. More than 140 Democrats in the U.S. House of Representatives urged President George W. Bush to withdraw the *2005 Additional Clarification*, claiming that it "lower[ed] standards for Title IX

16. *Id*.

17. NATIONAL WOMEN'S LAW CENTER, THE DEPARTMENT OF EDUCATION'S "CLARIFICATION" OF TITLE IX POLICY UNDERMINES THE LAW AND THREATENS THE GAINS WOMEN AND GIRLS HAVE MADE IN SPORTS (2005), *available at* http://www.nwlc.org/pdf/FactSheet_Prong3_1.pdf [hereinafter 2005 NWLC STATEMENT]. For a thorough discussion of NWLC's objections to the *2005 Additional Clarification* and Model Survey, see Pieronek, *supra* note 15, at 134–40. *See also* U.S. COMM'N ON CIVIL RIGHTS, TITLE IX AND ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES 11–13, 18–23, 49–56 (2010), *available at* http://www.usccr.gov/pubs/TitleIX-2010-rev100610.pdf. [hereinafter 2010 USCCR REPORT] (presenting testimony from, and follow-up discussion with, Jocelyn Samuels, who, at the time of her testimony in May of 2007, served as NWLC's Vice President for Education and Employment. *Id*. at 104.

18. Press Release, Nat'l Collegiate Athletic Assoc., In Honor of Title IX Anniversary NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law (June 22, 2005), *available at* http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/index.html [hereinafter 2005 NCAA Press Release]. *See also* Pieronek, *supra* note 15, at 140–41; 2010 USCCR REPORT, *supra* note17, at 14–16, 57–61 (testimony of Judith Sweet, who had served in a number of administrative capacities at the NCAA). In fact, the NCAA Divisions I, II, and III governance structures unanimously endorsed a resolution that "urged the Department of Education to honor its 2003 commitment to strongly enforce the standards of long-standing Title IX athletics policies, including the 1996 Clarification," and "urged NCAA members to decline use of the procedures set forth in the March 17, 2005, Additional Clarification." 2005 NCAA Press Release, *supra*.

19. For example, the NWLC claimed that the *2005 Additional Clarification* "conflicts with a key purpose of Title IX—to encourage women's interest in sports and eliminate stereotypes that discourage them from participating." 2005 NWLC STATEMENT, *supra* note 17, at 2. The NCAA press release contained identical language. 2005 NCAA Press Release, *supra* note 18.

compliance."[20] The U.S. Senate Appropriations Committee, clearly having misread (or not read at all) the survey instrument and accompanying documents, criticized the OCR for creating a survey that allowed an educational institution to demonstrate compliance based on survey results alone.[21] Even members of the Commission on Opportunity in Athletics, convened in 2003 by the Secretary of Education to discuss Title IX reforms and whose work led to the *2005 Additional Clarification*, urged the OCR to rescind the *2005 Additional Clarification*—not for substantive reasons, but for procedural reasons, because the members believed that the document should not have been issued outside the normal federal rule-making process.[22]

In response to these objections, the Obama Administration made yet another change to executive branch policy with the April 20, 2010, issuance of a "Dear Colleague" letter that sets out the OCR's current position on how an educational institution might prove compliance with Title IX by demonstrating that its athletic program offerings satisfy the interests and abilities of its female students.[23] The letter explicitly withdraws the Bush administration's *2005 Additional Clarification* and explicitly reaffirms the Clinton administration's *1996 Clarification*. Nevertheless, by its silence, it appears to leave in place the Bush administration's *2003 Further Clarification* that removes the Clinton administration's "safe harbor" designation from the "substantial proportionality" test.

The Obama administration drew high praise from the NWLC and others

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20. Letter from Nancy Pelosi, Minority Leader, U.S. House of Representatives, to President George W. Bush (June 22, 2005), *available at* http://pelosi.house.gov/news/press-releases/2005/06/releases-June05-TitleIX.shtml. *See also* Pieronek, *supra* note 15, at 141–42.

21. *See* Jamie Schuman, *Senate Panel Says More Proof Needed for Colleges' Compliance with Title IX*, CHRON. HIGHER EDUC. (D.C.), July 29, 2005, at A38. *See also* Pieronek, *supra* note 16, at 142.

22. *See* Erik Brady, *Ex-members of Title IX Panel Urge Schools Not to Use Surveys*, USA TODAY, Oct. 18, 2005, at C9. Several members of the 2003 commission believed that the *1996 Clarification* did not receive widespread acceptance because the OCR issued it through non-regulatory processes. The commissioners felt strongly that their work, which led to the creation of the *2005 Additional Clarification* and Model Survey, would be strengthened through the public-comment process, and would be accepted as legitimate policy once the public had a right to offer input. *Id*. *See also* Pieronek, *supra* note 16, at 143.

23. "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* (Apr. 20, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html [hereinafter *2010 Clarification*].

with its announcement of a change to an apparently already ineffective Bush administration policy.[24] But not everyone agreed with the wisdom of that decision. The OCR's action came less than three weeks after the United States Commission on Civil Rights (USCCR)[25] issued a report on "Title IX and Athletics: Accommodating Interests and Abilities," in which it explicitly advocated for the use of the 2005 Model Survey.[26] The Commission described that survey as the "best method available" for assessing athletic interests and abilities, and explained that "it offers institutions a flexible and practical, yet rigorous means of attaining a high student response rate."[27] The Commission had also recommended that the OCR "continue to encourage institutions to use the Model Survey as a method of complying with Title IX, rather than relying on mechanical compliance with proportional representation, which may result in unnecessary reduction of men's athletic opportunities,"[28] and had asked the NCAA to reconsider its position on using the survey.[29]

Despite this strong endorsement of the Model Survey by a bipartisan body authorized by Congress to investigate and comment upon national civil-rights matters, the OCR found the *2005 Additional Clarification*,

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24. *See* Erik Brady, *Rescinding of Title IX Model Survey Draws Praise from Critics*, USA TODAY (April 20, 2010), http://www.usatoday.com/sports/college/2010-04-19-title-ix-reaction_N.htm. Prior to the issuance of the Model Survey, fifty-seven educational institutions had successfully used their own, albeit identifiably flawed, surveys to demonstrate compliance with the interests and abilities test. *See* ALAN F. KARR AND ASHISH P. SANIL, NAT'L INST. OF STATISTICAL SCIENCES, TITLE IX DATA COLLECTION: TECHNICAL MANUAL FOR DEVELOPING THE USER'S GUIDE 6 (2005) (hereinafter 2005 TECHNICAL MANUAL). But even with the assurances that the OCR would treat the Model Survey as an unassailable survey instrument and the resulting data as good if the instrument were used according to directions, see *2005 Additional Clarification*, *supra* note 15, not a single NCAA-member institution has yet used this survey to assess student interest in athletics. 2010 USCCR REPORT, *supra* note 17, at 7.

25. The U.S. Commission on Civil Rights is an independent, bipartisan agency established by the United States Congress through the Civil Rights Act of 1957. It is entrusted with responsibility for investigating, reporting on and making recommendations relevant to national civil rights issues. Civil Rights Act of 1957, 42 U.S.C. §§ 1981-2000H-6 (2006).

26. *See* 2010 USCCR REPORT, *supra* note 17. Although the report is dated February 2010, it was not released by the Commission until April 1st of 2010 and testimony on relevant issues was heard in May 2007. *See* Erik Brady, *Commission: Title IX Interpretation Unnecessarily Hurts Men's Sports*, USA TODAY (Apr. 1, 2010), http://www.usatoday.com/sports/college/2010-04-01-title-ix_N.htm.

27. 2010 USCCR REPORT, *supra* note 17, at 2.

28. *Id*.

29. *Id*.

Model Survey, and related documents "inconsistent with the nondiscriminatory methods of assessment" set forth in prior OCR pronouncements on the subject.[30] The OCR also declared, without citing any evidence, that the 2005 documents "do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys," relevant to assessing athletic interests and abilities.[31]

In issuing the *2010 Clarification*, what has the OCR actually accomplished? Is the policy a "no-brainer" that will "better ensure equal opportunity in athletics, and allow women to realize their potential," as Vice President Joseph Biden stated the day he announced the release of the letter?[32] Is it a meaningless political move, given that no educational institution has even used the Model Survey since its release in 2005? Or does it change the way that the OCR will view educational institutions' efforts to prove compliance with Title IX by demonstrating the full and effective satisfaction of the athletic interests and abilities of their female students?

This Article evaluates the new OCR policy in the context of the complete suite of Title IX regulations and policy interpretations issued over the last four decades. It begins with a brief history of Title IX in athletics, including a discussion of the relevant documents that have modified the statute and implementing regulations. It highlights concerns expressed about the *2005 Additional Clarification* and Model Survey, and evaluates the concerns raised in the *2010 USCCR Report*. The Article then discusses what the *2010 Clarification* adds to or takes away from existing Title IX policy, and concludes with a discussion of how this policy appears designed to force schools toward a social-engineering-inspired goal of proportionality, once again, by making it more difficult to comply with the law any other way.

I. THE PROGRESS OF WOMEN IN HIGHER EDUCATION

When enacted in 1972, Title IX provided, quite simply, that

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .[33]

The law contained a number of exclusions for certain types of schools

30. *2010 Clarification*, *supra* note 23, at 2.

31. *Id*.

32. Press Release, Dep't of Educ., Vice President Biden Announces Strengthening of Title IX (Apr. 20, 2010), *available at* http://www2.ed.gov/news/pressreleases/2010/04/04202010a.html.

33. Patsy Takemoto Mink Equal Opportunity in Education Act, Title XI, Education Amendments of 1972, 20 U.S.C. §§ 1681(a) (2006).

and programs, such as traditionally single-sex schools,[34] and traditionally single-sex programs like Girl Scouts and Boy Scouts.[35] Its mandate seemed simple: educational institutions that receive federal funding may not discriminate on the basis of sex. Figuring out exactly what that mandate meant in practice and application, however, has not proved as simple as the wording seems.

Women today enjoy considerable academic success. They comprise approximately half of the U.S. population,[36] but graduate from high school at a higher rate than men,[37] and earn more than half of all bachelors' and master's degrees awarded across all fields.[38] In fact, women crossed the 50% mark at these degree levels a mere ten years after the enactment of Title IX.[39] Women have also earned nearly half of all Ph.D.[40] and first professional degrees[41] granted in recent years. There do remain significant challenges in individual degree programs—for example, women remain seriously under-represented in engineering and the physical sciences[42]—but

34. *Id*. §1681(a)(5).

35. *Id*. §1681(a)(6)(B).

36. Women actually comprise 50.7% of the U.S. population, but only 48.5% of the traditional college-aged population (ages 18 to 24). NAT'L SCIENCE FOUND., NSF 09-305, WOMEN, MINORITIES AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING 21 tbl.A-1 (2009) [hereinafter NSF 2009 DATA TABLES]. Updated data tables are available at http://www.nsf.gov/statistics/wmpd/.

37. *See* JUDY TOUCHTON WITH CARYN MCTIGHE MUSIL & KATHRYN PELTIER CAMPBELL, ASSOC. OF AM. COLLS. & UNIVS., A MEASURE OF EQUITY: WOMEN'S PROGRESS IN HIGHER EDUCATION 3 (2008). In 2005, 87% of women, but only 79% of men, in the 18–24 year-old group had earned a high school diploma or its equivalent. *Id*.

38. NSF 2009 DATA TABLES, *supra* note 36, at 39 tbl.C-4, tbl.E-2 (In 2007, women earned 57.5% of all bachelor's degrees granted and 60.7% of all master's degrees granted).

39. NAT'L SCIENCE FOUND., NSF 08-321, SCIENCE AND ENGINEERING DEGREES: 1966–2006, at 5 tbl.2 (2008) *available at* http://www.nsf.gov/statistics/nsf08321/pdf/nsf08321.pdf [hereinafter NSF 2008 REPORT] (Women crossed the 50% mark for bachelor's degrees awarded in 1982, and for master's degrees awarded in 1981).

40. *Id*. at 28 tbl.25 (Women earned 45% of all Ph.D. degrees granted across all fields in 2006). 2007 data are not available for all Ph.D. degree earners.

41. The National Science Foundation defines a "first professional degree" as a degree that requires at least six years of college work for completion and two years of pre-professional training. *Id*. at 61. First professional degrees include chiropractic, dentistry, medicine, optometry, osteopathic medicine, pharmacy, podiatry, veterinary medicine, law, divinity/ministry and rabbinical/Talmudic studies. *Id*. Women earned 49.6% of all first professional degrees granted in 2006. *Id*. 2007 data is not available for all first professional degree earners.

42. For example, in 2007, women earned only 18.5% of all engineering

overall, women have made significant educational progress in the wake of the enactment of Title IX.

Nevertheless, at all levels of education, women still do not comprise a proportional share of student-athletes. In high schools across the country, girls comprise half of all students but only 41.3% of student-athletes.[43] At NCAA member institutions,[44] women comprise nearly 60% of all students, but only 42.6% of student-athletes.[45]

This lack of proportionality raises a legitimate concern within the scope of Title IX because institutional decisions can create this participation-rate disparity by funding equipment, facilities, coaches, etc., in an unequal manner. In this way, athletics differs from academics. On the academic side of the collegiate enterprise, women and men have a wide array of opportunities across a range of institutions and programs. Whether a male or female student occupies a seat in a classroom or a bed in a residence hall, the cost is the same to the educational institution. Thus, in a broad sense, it matters little to an institution whether the tuition-paying, expense-costing human is a man or a woman—most institutions merely want to enroll the best students they can to achieve their enrollment and graduation goals. But athletes, on the other hand, do cost the institution differently depending on the sports they play and, surprisingly, depending on their gender.

The financial aspects of athletics differ significantly from the financial aspects of academics. Athletic participation opportunities are not as fungible as seats in a classroom. An educational institution cannot increase

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bachelor's degrees granted, NSF 2009 DATA TABLES, *supra* note 36, at 39 tbl.C-4, 22.6% of all engineering master's degrees granted, *id*. at 144 tbl.E-2, and only 20.9% of all engineering Ph.D. degrees granted, *id*. at 172 tbl.F-2.

43. Press Release, Nat'l Fed'n of State High Sch. Assocs., High School Sports Participation Increases for 20th Consecutive Year (Sept. 15, 2009), *available at* http://www.nfhs.org/content.aspx?id=3505.

44. Other national athletic associations—including the National Association for Intercollegiate Athletics (NAIA), the National Christian Collegiate Athletic Association (NCCAA), the National Junior College Athletic Association (NJCAA) and the United States Collegiate Athletic Association (USCAA)—also sponsor competitions, but only the NCAA collects and presents participation data by gender in a consistent format that aggregates data across all member institutions. Even the Government Accountability Office uses only NCAA data in its analyses of trends in athletics participation by women and men. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-535, INTERCOLLEGIATE ATHLETICS: RECENT TRENDS IN TEAMS AND PARTICIPANTS IN NATIONAL COLLEGIATE ATHLETIC ASSOCIATION SPORTS 28 (2007).

45. NAT'L COLLEGIATE ATHLETICS ASSOC., 1981–82 – 2006–07, NCAA SPORTS SPONSORSHIP AND PARTICIPATION REPORT 63–64 (2009).

the number of female student-athletes simply by substituting a woman for a man on a team. Rather, adding opportunities for women usually requires adding entire teams, with all of their attendant costs. And although men's programs actually cost more to operate than women's programs, men's programs also have a higher total revenue (or lose less money overall) than women's sports—with or without profitable football teams—as Table 1 below shows.

Table 1: Median Expenditures and Revenue of Men's and Women's Athletic Programs
NCAA Division I (2006) (in millions of dollars)

	Median Expenditures	**Median Total Revenue**	**Median Net Revenue**
Football Bowl Subdivision (n=119)[46]			
Men's Programs	$15.196	$18.824	$1.209
Women's Programs	$6.143	$1.702	($4.033)
	Median Expenditures	**Median Total Revenue**	**Median Net Revenue**
Football Championship Subdivision (n=118)[47]			
Men's Programs	$4.204	$3.028	($0.443)
Women's Programs	$2.701	$1.441	($0.585)
Division I without Football (n=93)[48]			
Men's Programs	$3.003	$2.791	($0.033)
Women's Programs	$2.949	$2.235	($0.273)

Football clearly has a significant positive impact on the financial status of men's programs in the NCAA's Football Bowl Subdivision (FBS). But even at educational institutions where football is less profitable overall (the Football Championship Subdivision, or FCS), or totally nonexistent, men's

46. NAT'L COLLEGIATE ATHLETICS ASSOC., NCAA REVENUES AND EXPENSES: DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 2004–2006, at 21 tbl.3.1 (2008).

47. *Id*. at 50 tbl.4.1.

48. *Id*. at 78 tbl.5.1.

sports cost their institutions less money because their programs generate more revenue. In fact, in 2006, not one single women's program across all 330 institutions in the NCAA's Division I reported revenues exceeding expenses, while sixty-six men's programs actually earned money for their institutions: sixty-one in the FBS, one in the FCS, and four among schools with no football program.[49]

Simply put, women's athletic participation opportunities, collectively, cost educational institutions more money than men's athletic participation opportunities. And when achieving equity in athletics requires an allocation of financial assets, funding opportunities for women may well require taking opportunities away from men. The same mathematical considerations simply do not apply in academics.

A serious debate has raged for decades over whether an educational institution striving for Title IX compliance should make available to women a percentage of athletic participation opportunities that closely resembles their percentage in the student body (proportionality), or whether the institution merely needs to meet the athletic interests and abilities of the students it enrolls, much the same way it strives to meet the academic interests of all of its students.[50] The proportionality solution could cause an educational institution, working with fixed financial resources, to choose to cut men's programs, and those cuts might or might not result in additional opportunities for women. Satisfying women's interests and abilities, on the other hand, might preserve more opportunities for both men and women, but presents an additional problem for the institution, because even though Title IX actually allows an educational institution to decide which way it chooses to comply with the law, the OCR has not made it equivalently easy to *prove* compliance or, alternatively, avoid a finding of noncompliance.

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49. *Id*. at 23 tbl.3.5; 52 tbl.4.5; 80 tbl.5.6.

50. There has been very little discussion in recent years about the "history of continuing program expansion" test for Title IX compliance. Although it remains possible to comply with the law by demonstrating a history of continuing program expansion, the lack of attention to this criterion leads to the question of whether it is a viable way to comply with the law thirty years after the *1979 Policy Interpretation* included it in its three-part test for compliance, or whether it is merely a road that ultimately leads to proportionality.

II. A BRIEF HISTORY OF TITLE IX: THE STATUTE, REGULATIONS, AND CLARIFYING DOCUMENTS[51]

Over the years, as educational institutions and all three branches of the federal government have wrestled with the meaning of Title IX as applied to intercollegiate athletics, a seemingly simple law has become complex. A brief chronology of significant developments since 1972 includes:

- Promulgation of the 1975 Implementing Regulations:[52] These regulations mention athletics only twice. The regulations require that an educational institution distribute any athletic scholarships/financial assistance to male and female student-athletes in proportion to their participation in athletics.[53] The regulations also provide general guidelines on gender equity in athletics, indicating that an institution may sponsor separate men's and women's teams, but must nevertheless provide "equal athletic opportunity" for men and women.[54] In assessing whether the educational institution has met this responsibility, the regulations listed ten factors to consider:
  - (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
  - (2) The provision of equipment and supplies;
  - (3) Scheduling of games and practice time;
  - (4) Travel and per diem allowance;
  - (5) Opportunity to receive coaching and academic tutoring;
  - (6) Assignment and compensation of coaches and tutors;
  - (7) Provision of locker rooms, practice and competitive facilities;
  - (8) Provision of medical and training facilities and services;
  - (9) Provision of housing and dining facilities and services;
  - (10) Publicity.[55]
- Issuance of the 1979 Policy Interpretation:[56] This policy interpretation treated the first of the ten items listed above as a separate line of inquiry because it involves a separate issue for

51. For a more detailed discussion of the history of Title IX in athletics, see Pieronek, *supra* note 15, at 105–12.

52. 34 C.F.R. § 106.41 (2011).

53. *Id*. § 106.37(c).

54. *Id*. § 106.41.

55. *Id*. § 106.41(c).

56. *See* Title IX of the Educational Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

educational institutions. Items (2) through (10) concern the *quality* of a female student-athlete's participation experience—that is, whether women receive "equivalent treatment" by the institution.[57] But item (1) concerns whether or not she even *has* that participation experience in the first place—that is, whether the educational institution has effectively accommodated her athletic interests and abilities. The 1979 Policy Interpretation thus established a three-part test for "effective accommodation" comprising:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a *history and continuing practice of program expansion* which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been *fully and effectively accommodated* by the present program.[58]

- *Grove City College v. Bell*:[59] In 1984, the United States Supreme Court determined that Title IX applied only to those specific educational programs and activities within an institution that received federal funding, effectively removing athletics from Title IX's reach, unless the athletic program itself received federal funding.
- Civil Rights Restoration Act of 1987:[60] In 1988, Congress enacted the Civil Rights Restoration Act of 1987 "to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs."[61] The law had the effect of subjecting to

57. *Id*.
58. *Id*. at 71,418 (emphasis added).
59. 465 U.S. 555 (1984).
60. 20 U.S.C. § 1687–88 (2006).
61. S. REP. NO. 100-64, at 2 (1988) (citation omitted).

> Title IX's mandates *all* operations of an educational institution, including athletics, if *any* program at the institution accepted any federal funding whatsoever.[62]
>
> • Over the next fifteen years, the federal courts further defined the meaning of the three-part test for effective accommodation. With regard to proportionality (Part One of the three-part test), the courts noted that proportionality did not necessarily mean exact proportionality, but did mean something closer than a 10% disparity between the enrollment of women and the participation of women in athletics.[63] With regard to a history of continuing program expansion (Part Two of the three-part test), courts made clear that an educational institution could not demonstrate continuing program expansion if it had cut women's programs[64] or if it had added only one women's team over a fifteen-year period.[65] And with regard to the satisfying the interests and abilities test (Part Three of the three-part test), courts ruled that the existence of a viable women's team demonstrated interest and ability, and thus, cutting that team could not possibly allow the institution to comply with the law by demonstrating that it had satisfied the interests and abilities of its female students.[66] Moreover, courts found that educational institutions could, in the absence of proportionality, cut only men's teams—regardless of the fact that this could be considered a gender-based decision—and still remain in compliance with the law.[67]

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62. *See* 20 U.S.C. §1687(2), (4) (2006).

63. *See* Roberts v. Colo. State Bd. of Agric., 814 F. Supp. 1507, 1511–13 (D. Colo. 1993), *aff'd in relevant part*, 998 F.2d 824 (10th Cir. 1993) (12.7% difference too high); Cohen v. Brown Univ., 809 F. Supp. 978, 980–81, 991 (D.R.I. 1992) (preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), 879 F. Supp. 185 (D.R.I. 1995) (trial on the merits) (10% difference between women's enrollment and women's participation in athletics determined too high), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

64. *See Roberts*, 814 F. Supp. at 1514; Favia v. Ind. Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

65. *See* Pederson vs. La. State Univ., 912 F. Supp. 892, 916–17 (M.D. La. 1996) (University only added two women's teams because it was following decisions of the Southeastern Conference, not in an effort to expand women's athletics), *aff'd in part, rev'd in part, vacated in part and remanded*, 201 F.3d 388 (5th Cir.), *on rehearing*, 213 F.3d 858 (5th Cir. 2000) (prior decision modified); *Cohen*, 809 F. Supp. at 981, 991.

66. *See Roberts*, 814 F. Supp. at 1517; *Favia*, 812 F. Supp. at 585; *Cohen*, 809 F. Supp. at 991–93.

67. *See* Boulahanis v. Bd. of Regents, Ill. State Univ., 198 F.3d 633, 637–38 (7th Cir. 1999); Miami Univ. Wrestling Club v. Miami Univ., 195 F. Supp. 2d

- The Clinton administration's *1996 Clarification*:[68] This document provided specific factors to guide an analysis of each part of the three-part test. It contained a lengthy discussion of the concept of substantial proportionality (Part One), including arithmetic examples of situations in which an educational institution probably would and probably would not have to add a women's team. The document only briefly discussed the other two effective accommodation tests. It listed factors to consider when attempting to satisfy either test, but provided no objective measures for evaluating compliance with either the history of continuing program expansion test (Part Two) or the interests and abilities test (Part Three). Importantly, the transmittal letter accompanying the *1996 Clarification* also clearly set out the controversial premise that the substantial proportionality test provided educational institutions with a "safe harbor."[69]
- The Bush administration's *2003 Further Clarification*:[70] This document responded to widespread concerns that the *1996 Clarification* drove institutions to strive for substantial proportionality, because the *1996 Clarification* characterized only substantial proportionality as a "safe harbor." The *2003 Further Clarification* specifically incorporated the guidelines for compliance with each part of the three-part test as presented in the *1996 Clarification*, but also made clear that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored,"[71] thus removing the "safe harbor" designation from the substantial proportionality test.

1010 (S.D. Ohio 2001), *aff'd*, 302 F.3d 608, 615–16 (6th Cir. 2002); Chalenor v. Univ. of N.D., 142 F. Supp. 2d 1154, 1157 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002); Neal v. Bd. of Trustees of the Cal. State Univ., 1997 WL 1524813, 14–15 (E.D. Cal. Dec. 26, 1997), *on rehearing*, 1999 WL 1569047 (E.D. Cal. Feb. 22, 1999), *rev'd and vacated*, 198 F.3d 763 (1999); Kelley v. Bd. of Trustees of the Univ. of Ill., 832 F. Supp. 237, 244 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994).

68. *1996 Clarification*, *supra* note 10.

69. *Id*.

70. *2003 Further Clarification*, *supra* note 12.

71. *Id*. at 2.

III. THE 2005 ADDITIONAL CLARIFICATION AND MODEL SURVEY

In response to a report issued by the Secretary of Education's Commission on Opportunity in Athletics in 2003,[72] the OCR issued yet another Title IX clarification,[73] to give educational institutions a clear, objective, and straightforward way of determining compliance with the interests and abilities test for effective accommodation (Part Three). This clarification included the Model Survey developed by the National Center for Education Statistics, based on studies of other surveys conducted by the National Institute of Statistical Sciences.[74] In offering the survey, the OCR assured that, if an institution used the Model Survey to assess student interest in athletics participation and administered the survey in accordance with the accompanying User's Guide, neither the survey instrument nor the raw results of the survey would be open to question. Of course, the institution's interpretation of the survey results and its actions in response to the survey data would remain open to review.[75]

The *2005 Additional Clarification* also indicated that the survey results would present a rebuttable presumption of compliance with Part Three.[76] Thus, the results would allow an educational institution to demonstrate compliance *unless* there existed at the educational institution: (1) unmet interest sufficient to sustain a varsity team in a sport, which the survey would identify;[77] (2) sufficient ability to sustain a varsity team in a sport, which the survey could identify; and (3) a reasonable expectation of competition for the team within the institution's normal competitive region.[78] Critics, however, charged that the survey "lower[ed] the standard for Title IX compliance" because it allowed educational institutions to justify fewer participation opportunities—that is, non-proportional

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72. SEC'Y COMM'N ON OPPORTUNITY IN ATHLETICS, U.S. DEP'T OF EDUC., OPEN TO ALL: TITLE IX AT THIRTY (2003) [hereinafter *2003 Commission Report*] *available at* http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf. *See also* Pieronek, *supra* note 15, at 109–13; Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L 75 (2003).

73. *2005 Additional Clarification*, *supra* note 15.

74. 2010 USCCR REPORT, *supra* note 17, at 7. These organizations have been described as "independent, expert statisticians." *Id*.

75. *2005 Additional Clarification*, *supra* note 15, at 7–8.

76. *Id*.

77. *Id*. at 11. The survey allowed students to assess their own ability, but also allowed for actual evaluation of those abilities by coaches and other professionals.

78. *Id*. at 4. The *2005 Additional Clarification* thus included language similar to that in the *1996 Clarification*, *supra* note 10, at 1, and incorporated by reference into the *2003 Further Clarification*, *supra* note 12, at 2.

participation opportunities—for women, if women expressed less interest in athletics generally than men.[79] Rather than interpreting the direct expression of interest, or lack thereof, as women having the "ability to express and act on their own interests,"[80] critics contended that any lack of interest by women in athletics must be the result of a "lingering lack of exposure [to] and the second-class status of opportunities for women" in athletics.[81]

Critics also charged that the survey allowed educational institutions to support decisions not to offer *particular* sports for women. The 2005 Model Survey allowed an educational institution to restrict survey administration to current students, but recommended administering it to the "entire student population."[82] The NWLC argued that this would "allow[] schools to evade their legal obligation to look broadly for interest in certain sports by women,"[83] albeit without identifying whence this legal obligation arises. More to the point, though, the NWLC did note that "students interested in a sport not offered by a school are unlikely to attend that school."[84] Consequently, surveying only the population of enrolled, or even admitted and enrolled, students "narrows the universe of interest and has the impact of perpetuating limited sports opportunities,"[85] because a student presumably would not apply to, much less attend, an educational institution that did not sponsor a team in a sport in which the student had a serious interest in participating. Unfortunately, this characterization of an educational institution's obligations to understand student interests could invalidate a survey that does not reach the entire population of students who *might* be interested in the institution. Solving this problem likely would require the intervention of Department of Education, the NCAA or other athletic organizations, or national testing organizations that reach millions of high school students annually—it is not something an individual educational institution likely could solve for itself.

Overall, critics expressed concern that 2005 Model Survey results could justify fewer opportunities for women in response to lower expressed levels of interest. This would, in turn, have the effect of "fr[eezing] past bias against women's participation in sports."[86]

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79. *See* Pieronek, *supra* note 15 at 141–42.

80. 2010 USCCR REPORT, *supra* note 17, at 9 (summarizing the testimony of Jessica Gavora, a Washington, D.C.-based writer who has commented extensively on Title IX and athletics).

81. *Id*. at 28 (capturing discussion comments from Jocelyn Samuels).

82. *See 2005 Additional Clarification*, *supra* note 15, at 10, 49.

83. 2005 NWLC STATEMENT, *supra* note 17, at 2.

84. *Id*.

85. 2010 USCCR REPORT, *supra* note 17, at 98 (quoting from the rebuttal statement of Commissioners Michael Yaki and Arlan Melendez).

86. *Id*. at 30 (capturing discussion comments from Judith Sweet).

But a properly executed survey could have had the exact opposite effect, by providing firm evidence of sufficient unmet interest to force an institution to add participation opportunities for women. In fact, during the May 2007 discussions that informed the 2010 U.S. Commission on Civil Rights (USCCR) Report, the chair of the USCCR, Gerald A. Reynolds, "observed that if [the Model Survey] was a method for avoiding a school's obligation to add women's teams, it was a poor idea," because a survey "would augment the burden on schools over time if women's interest and ability continued to increase."[87] And David Black, commenting in his role as Deputy Assistant Secretary for Enforcement at the OCR, pointed out that the Model Survey actually presented a "tool to identify unmet interest," and noted that some educational institutions might not want to use it because survey results might identify unmet interest that the institution would then have to meet.[88]

Critics also objected to the way in which the survey treated non-respondents—that is, by equating lack of response to lack of interest as long as the survey was open to the entire student population.[89] But the developers of the Model Survey had included significant safeguards to ensure that interested students would have a way of expressing their interest. The *2005 Additional Clarification* set out a clear preference for a census approach over a survey approach,[90] because a survey approach could miss interested students and also presents difficulties in dealing with sampling error. It recommended tying the survey to something that students had to do, such as registering for classes, further evidencing a desire to give every student a chance to respond.[91] And it also allowed non-response to equate to lack of interest only if the educational institution clearly told the students that fact.[92] But critics complained that students might not take such surveys seriously and, for any number of reasons, might not complete them.[93] Further, NCAA guidelines declared "suspect" any survey with a response rate below 60%, and indicated that a non-response rate of more than 40% would not meet the organization's validity criteria.[94] Others have pointed out, however, that a survey response rate as

87. *Id*. at 27.

88. *Id*.

89. *2005 Additional Clarification*, *supra* note 15, at 6.

90. *Id*. at 7.

91. *Id*.

92. *Id*.

93. 2010 USCCR REPORT, *supra* note 17, at 12 (capturing comments by Jocelyn Samuels).

94. *Id*. at 13, 53. Interestingly, however, the NCAA appears to have based its objections on a sample survey rather than a census survey, because the guidelines "warn that response rates below 60% 'would almost always be cause for concern because almost half of *those selected to represent your school* did not participate in

low as 2% might provide valuable information, "if [those] responses are from the 25 students interested in softball, [because] the institution is now eligible to add the sport, and assess the ability of [those] interested students."[95]

However unreasonable, the criticisms of the Model Survey have persisted. Only one educational institution has ever used the survey to prove compliance with Part Three.[96] And now, no further educational institutions will.

IV. THE 2010 CIVIL RIGHTS COMMISSION REPORT

In May 2007, the USCCR heard testimony from a number of Title IX experts and the general public on the *2005 Additional Clarification* and Model Survey, and compiled the testimony and the Commission's recommendations into a report, which it issued in April 2010.[97] As the Executive Summary explains, "The guidance was issued at a time when critics of Title IX claimed that rigid compliance forced the cancellation of many educational programs or teams for men, as many schools demonstrated Title IX compliance through 'substantial proportionality.'"[98] The report also acknowledged that the Model Survey had "prompted a strong and often negative reaction from the [NCAA] and many women's groups."[99]

The report contains testimony from and discussions involving people who favored a broader range of ways to prove Title IX compliance, along with those who focused on proportionality as an ultimate goal. The panelists addressed a "wide range of issues," along with a defined list of questions:

- The methods that schools used to administer the Model Survey, with special attention to electronic means and the impact on response rate.
- The appropriateness of using any survey in gauging interest.

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the study' . . ." *Id*. at 53 (emphasis added). The NCAA does not address what would happen if half of those who *do* respond represent the opinions of the half of the population that did not participate.

95. *Id*. at 20 (capturing comments by David Black).

96. *See* ALISON SOMIN, THE FEDERALIST SOCIETY, NEW FEDERAL INITIATIVE PROJECT, TITLE IX 7 n.24 (2010), *available at* http://www.fed-soc.org/doclib/20100805_NFIPTitleIX.pdf. *See also* Eric McErlain, *WIU Completes Model Survey*, SAVING SPORTS, BLOG OF THE AMERICAN SPORTS COUNSEL (May 27, 2009, 12:05 AM), http://savingsports.blogspot.com/2009/05/wiu-completes-model-survey.html.

97. 2010 USCCR REPORT, *supra* note 17, at 1–2.

98. *Id*. at 1.

99. *Id*.

- Are men and women equally interested in sports?
- To what extent has Title IX affected women's participation in sports?
- Has Title IX resulted in the elimination of any men's sports?
- How is ability in sports determined?[100]

After hearing testimony from representatives of the NCAA, the NWLC, and critics of the law, the Commission declared the Model Survey "the best method available for attaining [Part] Three compliance, because it offers institutions a flexible and practical, yet rigorous means of attaining a high student response rate."[101] The report also presented four recommendations directed at the OCR and the NCAA:

> 1. The U.S. Commission on Civil Rights commends the U.S. Department of Education for developing the student interest survey and for providing a rigorous yet practical means of complying with Title IX. It recommends that the Department's Office for Civil Rights continue to encourage institutions to use the Model Survey as a method of complying with Title IX, rather than relying on mechanical compliance with proportional representation, which may result in unnecessary reduction of men's athletic opportunities.
> 2. Since female students are fully capable of expressing interest in athletics, or lack thereof, advocates for particular views on Title IX compliance should not devalue or dismiss their perspectives.
> 3. [Part] Three regulations should be revised to explicitly take into account the interest of both sexes rather than just the interest of the underrepresented sex. This would help to restore Title IX to its original goal of providing equal opportunity for individuals of both sexes.
> 4. The NCAA should reconsider its objection to the Model Survey and not discourage educational institutions from using student interest surveys or urge them to avoid their use, since college students are adults capable of assessing their own interest in sports. [102]

100. *Id*. at 2.

101. *Id*.

102. *Id.* at 4. Of the eight commissioners, five voted in favor of the recommendations, one abstained and two were not present for the vote.

But the report apparently had no effect on the OCR. A mere three weeks after the USCCR released the report, the OCR took an action directly opposite to that recommended by the independent, bipartisan USCCR and revoked the Model Survey.[103]

V. THE 2010 CLARIFICATION

The *2010 Clarification*, by rescinding the *2005 Additional Clarification*, closed the door on the use of the Model Survey as a way of demonstrating compliance with the interests and abilities criterion (Part Three) of the three-part test for effective accommodation.[104] That much is clear from the language of the clarification itself: "[T]he Department is withdrawing the *2005 Additional Clarification* and User's Guide, including the model survey."[105]

But what else has the *2010 Clarificatio*n changed? In stating that "[a]ll other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance,"[106] has the *2010 Clarification* done anything other than simply eliminate the 2005 Model Survey from the methods an educational institution might use to assess interest and ability? On its face, this statement indicates that the OCR has reverted to the standards for proving compliance with Part Three as set out in the *2003 Further Clarification*[107] and, by its incorporation into the *2003 Further Clarification*, the *1996 Clarification*.[108] But the *2010 Clarification* actually goes further, and adds to those documents by "provid[ing] additional clarification on[] the multiple indicators discussed in the *1996 Clarification* that guide the OCR's analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique."[109] In fact, the *2010 Clarification* actually adds to existing policy and, consequently, requires careful analysis in the context of those prior policies.

A. The 1979 Policy Interpretation

Soon after the adoption of the 1975 Implementing Regulations, it became necessary to clarify the provision dealing with the goal of equal athletic opportunity for men and women within the context of separate

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103. *2010 Clarification*, *supra* note 23, at 2.
104. *Id.*
105. *Id.*
106. *Id.*
107. *2003 Further Clarification*, *supra* note 12, at 1–3.
108. *Id.*; *1996 Clarification*, *supra* note 10.
109. *2010 Clarification*, *supra* note 25, at 2–3.

athletic programs. As stated in the "Purpose" section of the 1979 Policy Interpretation, between 1975 and 1978, the Department of Health, Education and Welfare (HEW)[110] had received over one hundred complaints about sex discrimination in collegiate athletic programs, and numerous questions about compliance issues.[111] HEW thus determined a need for "further guidance on what constitutes compliance with the law,"[112] and issued the 1979 Policy Interpretation "to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."[113]

This new guidance focused separately on equal-treatment factors—scholarships, equipment, and other program accouterments—and on the effective accommodation of the interests and abilities of student-athletes through sufficient participation opportunities. The effective accommodation section presented for the first time the now-familiar three-part test for compliance: substantial proportionality; a history of continuing program expansion; or the full and effective accommodation of the interests and abilities of students of the underrepresented sex.[114] Unfortunately, the 1979 Policy Interpretation offered no other guidance on what constituted compliance with any of these criteria, leaving the interpretation of the text to the courts for the next seventeen years.

The courts, however, never explicitly defined standards for complying with Part Three (or any other part). Instead, when evaluating decisions that colleges and universities made about their athletic programs, courts identified actions that did not meet the requirements of the test, or circumstances that rendered an application of the test unnecessary. In so doing, they identified certain actions that did not constitute compliance or that did not implicate compliance under that criterion, but never stated what actually did constitute compliance.

In *Cohen v. Brown University*; *Roberts v. Colorado State University*; and *Favia v. Indiana University of Pennsylvania*, each defendant institution cut both men's and women's programs in response to budget concerns. These cuts impacted men's and women's opportunities fairly equally, but in each case, the representation of women among student-athletes was at least 10% lower than their representation in the undergraduate student body before and after the cuts—a condition that the

110. *1979 Policy Interpretation*, *supra* note 3, at 71,413 (At the time, the Department of Health, Education and Welfare had responsibility for Title IX.).

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 71,418.

courts construed as an absence of substantial proportionality.[115] And in each case, the federal courts indicated that, absent proportionality, cutting a viable women's team could not satisfy the interests and abilities test because eliminating those opportunities for women worked directly against satisfying their interests and abilities as expressed through their participation on those teams.[116]

When men used similar logic to challenge cuts to their programs, however, the courts reacted differently. In *Kelley v. Board of Trustees of the University of Illinois*, the court determined that, where a disproportionately high percentage of participation opportunities existed for members of one sex, the interests and abilities of that group are presumptively met—that is, the institution may choose to satisfy Part One, substantial proportionality, and need not satisfy Part Three.[117] Building on the reasoning in *Kelley*, the courts in *Neal v. Board of Trustees of the California State University*; *Boulahanis v. Board of Regents, Illinois State University*; *Chalenor v. University of North Dakota*; and *Miami University Wrestling Club v. Miami University*, further ruled that cuts to men's programs made expressly for the purpose of complying with Title IX—in other words, decisions made on the basis of the sex of the student-athletes involved—did not violate Title IX as long as the resulting athletic program either complied with the substantial proportionality test or continued to provide more opportunities to male student-athletes.[118]

B. 1996 Clarification

In issuing the *1996 Clarification*,[119] the Clinton administration recognized "the need to provide additional clarification regarding what is

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[115] Roberts v. Colo. State Bd. of Agric., 814 F. Supp. 1507, 1511–13 (D. Colo. 1993), *aff'd in relevant part*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993); Cohen v. Brown Univ., 809 F. Supp. 978, 980–81, 991 (D.R.I. 1992) (preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), 879 F. Supp. 185 (D.R.I. 1995) (trial on the merits), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

116. *Roberts*, 814 F. Supp. at 1517; Favia v. Ind. Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993); *Cohen*, 809 F. Supp. at 991–93.

117. Kelley v. Bd. of Trustees of the Univ. of Ill., 35 F.3d 265, 270 (7th Cir. 1994).

118. *See* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046 (8th Cir. 2002); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615–16 (6th Cir. 2002); Neal v. Bd. of Trustees of the Cal. State Univ., 198 F.3d 763, 766–69, 772–73 (9th Cir. 1999); Boulahanis v. Bd. of Regents, Ill. State Univ., 198 F.3d 633, 638 (7th Cir. 1999).

119. *1996 Clarification*, *supra* note 10.

commonly referred to as the 'three-part test' . . . "[120] after almost a decade of allowing the courts alone to clarify the law. The transmittal letter accompanying the clarification characterized the interests and abilities criterion as "center[ing] on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution."[121] And, despite declaring the substantial proportionality criterion a "safe harbor," the letter confirmed that each part of the test provided a viable way of complying with Title IX. Discussing Part Three specifically, the letter stated:

> In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated.[122]

Following in the path established by the courts in *Kelley* and the other men's athletics cases, the letter also indicated that the interests and abilities test may focus only on the underrepresented sex, because Title IX addresses discrimination and, significantly, because the law allows educational institutions to establish separate programs for men and women, "thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex."[123] The transmittal letter also noted that "several parties suggested that the [OCR] provide more information regarding the specific elements of an appropriate assessment of student interest and ability."[124] In choosing not to give such specific guidance, the OCR indicated a countervailing desire "to give institutions flexibility to determine interests and abilities consistent with [their] unique circumstances and needs."[125] And recognizing the usefulness of sharing good assessment strategies, the OCR indicated that it would "work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques."[126]

The clarification itself looks at each part of the three-part test separately. In exploring Part Three, the clarification recognizes that under-

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id*.
126. *Id*.

representation of (typically) women in an institution's athletic program might result from factors other than discrimination on the part of the institution. But consistent with the decisions in *Cohen*, *Favia*, and *Roberts*,[127] the clarification states:

> If an institution has recently eliminated a viable team from the intercollegiate program, the [OCR] will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.[128]

The clarification then discusses three areas of inquiry when evaluating whether an institution has complied with Title IX by satisfying the interests and abilities of its female students:

> The [OCR] will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; *and* (c) a reasonable expectation of competition for the team. If *all three conditions are present* the OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.[129]

In evaluating whether there exists unmet interest in a particular sport among an institution's current students and admitted students not yet enrolled, the OCR will seek to identify the existence of any of the following indicators:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular in interscholastic sports by admitted students.[130]

Thus, the clarification requires that the institution pay attention to things going on both at the institution and in the areas from which the institution recruits its students, to ensure that the institution notices trends to which it might react in improving opportunities for women. It explicitly allows the

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127. *See supra* text accompanying note 116.
128. *1996 Clarification*, *supra* note 10.
129. *Id*. (emphasis added).
130. *Id*.

use of questionnaires or surveys to gauge student interest.[131] In conducting an assessment of interest on campus, the clarification does not require any particular method, and instead allows an institution to use "nondiscriminatory methods of its choosing," which could include surveys, a student forum, or any other method that would "reach a wide audience of students."[132] The OCR did indicate that any information-gathering mechanism should provide an "open-ended" way for students to indicate the sports in which they have interest. However, such assessments need not undergo "elaborate scientific validation."[133] Thus, an institution could use a survey, but need not. The OCR also cautioned that, however an institution evaluated interest, such evaluations must occur periodically "so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex."[134]

In evaluating whether sufficient ability exists to sustain a team in a sport in which the institution has identified an emerging interest, the OCR will look at the following:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.[135]

It matters not whether the students interested and able to sustain a team can compete at the same level as the institution's other, existing teams; it matters that they can sustain any sort of a team, however successful or unsuccessful that team might be.[136]

Finally, in determining whether reasonable competitive opportunities exist within the institution's geographic area, the OCR will consider:

- competitive opportunities offered by other schools against which the institution competes; and

131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*.

> • competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.[137]

If such opportunities do not exist, an institution might still have an obligation to try to generate interest in the particular sport, but need not create the team until a reasonable competitive opportunity exists.[138]

Thus, the *1996 Clarification* spelled out the indicators that the OCR will examine to determine whether sufficient interest and ability exist to sustain a competitive team in the institution's geographic region. An institution may assess interest in a way that works for the institution, as long as that method is nondiscriminatory and is designed to reach broadly across the student population.[139] The professional judgment of coaches, administrators, and students is important in determining whether a sufficient number of students have the ability to sustain a team. However, the institution cannot refuse to create a team that could be competitive, even if it would not be as competitive as the institution's other, established team.[140] Additionally, an institution does not need to do something outrageous, such as creating a downhill snow-skiing team in Miami, Florida, but might have to encourage other teams in its conference or its state to develop programs in emerging sports to establish a geographically reasonable competitive group in a sport.[141]

Some have characterized the *1996 Clarification's* guidance on Part Three as a thorough list of indicators to consider, but have complained that the guidance on evaluating those indicators was "so vague that schools had no way of knowing when they had attained compliance."[142] Others believed the factors to be "very specific,"[143] "appropriate and lawful,"[144] and have characterized as "misguided" any suggestions that "the 1996 Clarification did not provide adequate guidance," because it actually provided "a very detailed road map."[145] This level of disagreement alone should have demonstrated the need for further efforts to reconcile these diametrically opposed viewpoints. The real issue, of course, is that the *1996 Clarification* provided guidance on Part One, substantial

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137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id*.
142. 2010 USCCR REPORT, *supra* note 17, at 6 (summarizing the testimony of Daniel A. Cohen, an attorney specializing in Title IX cases).
143. *Id*. at 12 (comments by Jocelyn Samuels).
144. *Id*. at 22 (comments by Jocelyn Samuels).
145. *Id*.

proportionality, that was "measurable," so "school officials knew when compliance with Title IX had been attained."[146] The clarification's guidance on Part Three, on the other hand, "was so ambiguous that [school officials] could not determine [for themselves] when compliance was achieved," so "schools resorted to using proportionality."[147] Those obsessed with proportionality as the standard for Title IX compliance, then, would find the guidance in the *1996 Clarification* adequate, while those looking for other means of compliance likely would find the guidance insufficient.

C. 2003 Further Clarification

In the *2003 Further Clarification*,[148] the Bush administration explicitly incorporated the *1996 Clarification* in its entirety, but with one significant change. In response to criticisms of the "safe harbor" designation bestowed upon the substantial proportionality criterion in the *1996 Clarification*, the *2003 Further Clarification* declared that "each of the three prongs of the test is an equally sufficient means of complying with Title IX," and stated clearly that "no one prong is favored,"[149] thereby lifting the "safe harbor" designation from the substantial proportionality criterion. It added nothing new to public understanding of Part Three.

D. 2010 Clarification

By withdrawing the *2005 Additional Clarification* and the accompanying Model Survey and related documents, the *2010 Clarification*, on its face, returns Title IX compliance to the criteria defined by the *1996 Clarification* and explicitly adopted by the *2003 Further Clarification*.[150] However, the *2010 Clarification* actually goes beyond simply eliminating one policy statement and returning to the prior statement. Instead, it also addresses some of the objections raised in response to the *2005 Additional Clarification* and offers some additional guidance on using a survey to gather data to support an evaluation of the interests and abilities criteria.[151] In so doing, it incorporates much of what informed the Model Survey and also adds some new recommendations. What it does not do, however, is provide an assured way of using a survey to determine student interest in athletics.

The *2010 Clarification* focuses on the three areas of inquiry first

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146. *Id*. at 7 (summarizing the testimony of Daniel Cohen).
147. *Id*.
148. *2003 Further Clarification*, *supra* note 12.
149. *Id*.
150. *2010 Clarification*, *supra* note 23, at 2.
151. *Id*. at 8–12.

presented in the *1996 Clarification* used by the OCR to determine compliance with the interests and abilities criteria:

1. Is there unmet interest in a particular sport?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?[152]

The *Clarification* continues, "If the answer to all three questions is 'Yes,' the [OCR] will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance" with the interests and abilities criterion.[153] A "No" answer to any question, then, means that, even in the absence of substantial proportionality, the institution's athletic program has fully and effectively accommodated the interests and abilities of those female students on campus at the time the institution conducted the assessment.

This formulation sets out the same standards as the *1996 Clarification*[154] and the *2005 Additional Clarification*,[155] but uses more negative language than the *2005 Additional Clarification*, signifying perhaps that the OCR takes a harsher view toward attempting to comply with Title IX using this test, despite the persisting language in the *2003 Further Clarification* that "no one prong is favored."[156] While the *1996 Clarification* and the *2010 Clarification* state that an institution fails Part Three if the answers to all three of the questions are "Yes," the *2005 Additional Clarification* states that an institution satisfies Part Three unless the answers to all three of the questions are "Yes."[157] Thus, the OCR shifts the rhetoric from finding a way to help educational institutions prove compliance with this criterion, to explaining what will result in noncompliance.

The *1996 Clarification* did provide some guidance on what each of these three questions means.[158] The *2010 Clarification* leaves the analysis of the third question unchanged, but provides substantially more guidance on the first two questions. It groups those questions into one inquiry, discusses in some detail how survey instruments might inform the answers to the two questions together, and actually adds some items for consideration beyond those stated in the *1996 Clarification*.[159]

i. Unmet Interest and Ability: How to Answer the First Two

152. *Id*. at 4.
153. *Id*.
154. *1996 Clarification*, *supra* note 10.
155. *2005 Additional Clarification*, *supra* note 15, at 1.
156. *2003 Further Clarification*, *supra* note 12.
157. *Id*.
158. *1996 Clarification*, *supra* note 10.
159. *2010 Clarification*, *supra* note 23, at 5–13.

Questions

In the *1996 Clarification*, the OCR simply set out several indicators of interest[160] and several indicators of ability.[161] In the *2010 Clarification*, the OCR incorporates these indicators into a much more detailed discussion of how to evaluate those indicators of interest and ability. It sets out eight areas that the OCR will evaluate:

1. Whether the educational institution uses nondiscriminatory methods of assessment;[162]
2. Whether the educational institution has used an assessment to eliminate a viable team;[163]
3. Multiple indicators that evidence student interest in athletics;[164]
4. Multiple indicators that evidence student athletic ability;[165]
5. Frequency of assessments by the institution;[166]
6. Whether the educational institution has effective procedures for evaluating requests to add teams and assessing participation;[167]
7. Whether, if the educational institution has used a survey to assess interests and abilities, it has properly designed and implemented that survey tool;[168] and
8. Multiple indicators that assess whether a sufficient number of interested and able students exist in order to sustain a team.[169]

Items one, three, and four add nothing new to Title IX athletics guidance. Items two, five, seven, and eight actually bring in parts of the *2005 Additional Clarification* and Model Survey, but in a much weaker way. Item six, however, may create some new requirements for educational institutions to consider.

a. Reiterating Old Policy: Items One, Three, and Four

Item one merely reiterates language first contained in the *1979 Policy Interpretation* and reiterated in the *1996 Clarification.* It affirms that the OCR allows an educational institution to use methods of its choosing to determine the athletic interests and abilities of women, but requires that any

160. *See supra* text accompanying note 112.
161. *See supra* text accompanying note 138.
162. *2010 Clarification*, *supra* note 23, at 5.
163. *Id*.
164. *Id*. at 5–6.
165. *Id.* at 6.
166. *Id*. at 7.
167. *Id*. at 8.
168. *Id*. at 8–12.
169. *Id*. at 12–13.

assessment process account for "nationally increasing levels of women's [athletic] interests and abilities,"[170] and further requires that the methods used to determine interest and ability do not disadvantage women, that the methods used to determine ability account for team performance records, and that the methods "are responsive to the expressed interests of [female] students capable of intercollegiate competition."[171]

Items three and four come directly from the guidelines established in the *1996 Clarification*.[172] The *2010 Clarification* changes nothing substantive about those items.

b. Incorporating the 2005 Model Survey: Items Two, Five, Seven, and Eight

Items two, five, seven, and eight, each in its own way, incorporate much of the discussion contained in the *2005 Additional Clarification* and, in particular, in the User's Guide that described how to administer the Model Survey. In some cases, the *2010 Clarification* language borrows directly from the 2005 documents. In other cases, the *2010 Clarification* weakens some strong protections that the 2005 documents offered.

Item two brings in a concept first stated in the *2005 Additional Clarification* regarding whether the results of a survey could justify eliminating a viable team. As the *2005 Additional Clarification* states, educational institutions:

> cannot use the failure [of students] to express interest during a census or survey to eliminate a current and viable intercollegiate team for the underrepresented sex. Students participating on a viable intercollegiate team have [already] expressed interest in intercollegiate participation by active participation, and census or survey results . . . may not be used to contradict that expressed interest.[173]

The *2010 Clarification* uses similar language to prohibit the termination of a viable team on the basis of survey or assessment data:

> The [OCR] does not consider the failure by students to express interest during a survey . . . as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and the [OCR] does not use survey results to

170. *Id*. at 5, quoting 44 Fed. Reg. at 71,417. *See also 1996 Clarification*, *supra* note 10.

171. *2010 Clarification*, *supra* note 23, at 5, quoting 44 Fed. Reg. at 71,417.

172. *Id*. at 5–7; *see also 1996 Clarification*, *supra* note 10.

173. *2005 Additional Clarification*, *supra* note 15, at 8.

nullify that expressed interest.[174]

Item five covers "Frequency of Assessments." The *1996 Clarification* indicated that an educational institution should evaluate interest "periodically[,] so that the institution can identify in a timely and responsive manner any developing interests and abilities" among female students.[175] The *2010 Clarification* adds several factors to consider when determining how frequently to conduct an assessment, including, but not limited to:

- the degree to which the previous assessment captured the interests and abilities of the institution's students and admitted students of the underrepresented sex;
- changes in demographics or student population at the institution; and
- whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.[176]

Moreover, if an educational institution conducts a survey that "detect[s] levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team,"[177] the *2010 Clarification* indicates that the institution should conduct surveys more frequently, apparently to capture the exact moment that student interest rises to a level sufficient to sustain a team. The *2005 Additional Clarification* embraced these concepts as well, but stated that a survey with a high response rate at an institution with a demographically stable population of students "might serve for several years," as long as "there are no complaints from the underrepresented sex with regard to a lack of athletic opportunities."[178]

Item seven discusses surveys directly, acknowledging that "a properly designed and implemented survey is one tool that can assist an institution in capturing information on students' interests and abilities."[179] It does note that a survey comprises only one component of an institution's overall assessment of compliance with Part Three, and states that the OCR "will not accept an institution's reliance on a survey alone, regardless of the response rate, to determine whether [the educational institution] is fully and effectively accommodating the interests and abilities of [women]."[180] By making this statement, the OCR clearly is attempting to address the

174. *2010 Clarification*, *supra* note 23, at 5.
175. *1996 Clarification*, *supra* note 10, at 8.
176. *2010 Clarification*, *supra* note 23, at 7.
177. *Id*.
178. *2005 Additional Clarification*, *supra* note 15, at 11.
179. *Id*. *2010 Clarification*, *supra* note 23, at 8.
180. *Id*.

concerns of those who objected to the 2005 Model Survey on the (erroneous) belief that survey results could create a shield for an educational institution that, in the absence of substantial proportionality, chose not to add any participation opportunities for women.[181] The *2005 Additional Clarification* clearly stated the additional factors that would mitigate against relying solely on survey results, including any "recent broad-based petition from an existing club team for elevation to varsity status,"[182] and any "direct and very persuasive" requests to add athletic teams.[183] Thus, while appearing to differentiate the use of surveys under the *2010 Clarification* from the use of the Model Survey under the *2005 Additional Clarification*, the OCR really changes nothing.

Item seven clearly states that the OCR does not endorse or sanction any particular survey. Thus, an educational institution probably could still use the 2005 Model Survey, or something like it, but any survey instrument may be subject to scrutiny.[184] The *2010 Clarification* then lists and discusses separately the factors it will examine in any survey, including: survey content; survey target population; response rates and treatment of non-responses; confidentiality protections; and survey frequency.[185]

Under "survey content," the clarification discusses how to inform students of the survey purpose, how to ensure it has collected information regarding all relevant sports, and how to collect follow-up information from students who have expressed an interest in athletics.[186] For "purpose," the clarification offers the following statement to include in a survey:

> This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [the institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.[187]

181. *See, e.g.*, 2005 NWLC STATEMENT, *supra* note 17, at 2; Schuman, *supra* note 21, at A38.

182. *2005 Additional Clarification*, *supra* note 15, at 6 n.10.

183. *Id*. at 2–3.

184. *2010 Clarification*, *supra* note 23, at 9.

185. *Id*.

186. *Id*. at 9–10.

187. *Id*. at 9.

This does not differ greatly from the purpose statement provided in the 2005 Model Survey:

> This data collection is being conducted to determine the extent to which the athletic interests and abilities of students at XXX University are being met by the current offerings of recreational, intramural, club and intercollegiate athletics. The information, which is being requested from all students, will be used by the university for evaluation, research, and planning purposes.[188]

It could be argued that the 2005 Model Survey actually presents a stronger statement of purpose, because it addresses student interests first and university research needs second. Nevertheless, both statements contain the same information, but together raise the question of why the OCR felt the need to change the language in the 2010 version.

In the *2010 Clarification*, the OCR provides a table that shows how an educational institution might assess student interest and ability in certain sports[189]—a chart very similar in format to a chart presented in the *2005 Additional Clarification*.[190] Interestingly, however, the *2010 Clarification* lists only twenty-three sports to consider for both men and women,[191] while the *2005 Additional Clarification* offered thirty, because it also included seven "emerging sports."[192] Thus, an argument can be made that the *2005 Additional Clarification* actually offered a superior survey in that it allowed for early identification of emerging trends.

With regard to contacting interested students, the *2010 Clarification*, just like the 2005 Model Survey, suggests that educational institutions conduct the survey confidentially, but also find a way to allow interested students to provide contact information for follow-up.[193]

The OCR will also look at the survey target population, specifically whether the survey reaches all full-time undergraduate students or a random sampling, and recommends a census of the entire student body—just like the 2005 Model Survey—to avoid problems inherent in selecting the sampling mechanism and sample size, the calculation of sampling error,

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188. *2005 Additional Clarification*, *supra* note 15, at 15.

189. *2010 Clarification*, *supra* note 23, at 10.

190. *2005 Additional Clarification*, *supra* note 15, at 20.

191. *2010 Clarification*, *supra* note 23, at 9 n.20.

192. *2005 Additional Clarification*, *supra* note 15, at 19. The seven emerging sports comprised archery, badminton, equestrian, rugby, squash, synchronized swimming, and team handball—a list of sports that appeal to both men and women.

193. *2010 Clarification*, *supra* note 23, at 10; *2005 Additional Clarification*, *supra* note 15, at 21.

and the use of estimates derived from samples.[194] The *2010 Clarification* also indicates that if an educational institution chooses to survey a subset of the undergraduate population, "the larger the sample, the more weight the [OCR] will accord the estimate."[195] The *2005 Additional Clarification*, on the other hand, made a much stronger statement regarding sample versus census surveys, calling census surveys "superior in almost every respect."[196] Thus, the *2010 Clarification* appears to provide weaker guidance in this regard.

Treatment of non-responses proved a very challenging aspect of developing widespread acceptance for the 2005 Model Survey.[197] The 2005 Model Survey—just like the accepted surveys that educational institutions had developed for themselves before the OCR provided its survey—assumed that non-response equates to a lack of interest, as long as the survey instrument clearly explained this assumption.[198] The *2005 Additional Clarification* indicated that a survey instrument could explain this assumption by sending an e-mail containing a web link to the survey, and by stating in the e-mail that "if a student does not to respond to the survey, the institution will understand that the student is not interested in additional athletic participation."[199]

Like the 2005 Model Survey, the *2010 Clarification* indicates that the OCR will evaluate whether any survey "is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses."[200] It provides examples of how to generate a high response rate and how to follow-up with non-responders.[201] But the *2010 Clarification* also states that the OCR "does *not* consider non-responses to surveys as evidence of lack of interest or ability in athletics,"[202] yet provides absolutely no guidance on what non-responses *do* indicate. Rather, the clarification simply follows up this comment with a general restatement that the OCR will consider multiple indicators of

194. *2010 Clarification*, *supra* note 23, at 10–11; *2005 Additional Clarification*, *supra* note 15, at 10.

195. *2010 Clarification*, *supra* note 23, at 11.

196. *2005 Additional Clarification*, *supra* note 15, at 10.

197. The NWLC, for example, complained that the 2005 Model Survey's treatment of non-response bias and student self-assessment of ability "is flawed and inconsistent with the requirements of prior [OCR] policy," but did not identify those inconsistent policies. 2005 NWLC STATEMENT, *supra* note 17, at 3.

198. For a more detailed discussion of this point, *see* Pieronek, *supra* note 17, at 132–33.

199. *2005 Additional Clarification*, *supra* note 15, at 12.

200. *2010 Clarification*, *supra* note 23, at 11.

201. *Id*. at 11–12.

202. *Id*. at 12 (emphasis added).

interest and ability.[203]

The confidentiality provisions in the *2010 Clarification* do not differ from those in the *2005 Additional Clarification*. Both documents require confidentiality in administering the survey, except to the extent needed to follow up with students who have expressed interest in being contacted by the institution.[204]

Item eight reminds educational institutions that the OCR will evaluate multiple indicators to assess whether there exists at the institution a sufficient number of interested and able students to sustain a team. And, like Item two, it borrows directly from the *2005 Additional Clarification* for the list of factors to consider, including the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution's competitive regions.[205]

But while the *2005 Additional Clarification* indicated that the OCR would "defer[] to the decisions of the athletic directors and coaches,"[206] in evaluating whether a sufficient number of students exists to field a team, the *2010 Clarification* provides no such latitude to athletic administrators.[207]

Thus, while these four aspects of evaluating an educational institution's assessment processes, including surveys, do borrow heavily from the *2005 Additional Clarification*, it is clear that the *2010 Clarification* weakens some of the protections that would allow educational institutions to rely on surveys to gather reliable data, particularly, those protections that generated the most controversy back in 2005. In some ways, the guidance provided in the *2010 Clarification* could be interpreted as fuzzier or less definite than that provided in 2005, so it ultimately might prove less useful. And it is also clear that the *2010 Clarification* does more than simply return Title IX compliance to the standards set out in 1996.

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203. *Id*.

204. *2010 Clarification*, *supra* note 23, at 12; *2005 Additional Clarification*, *supra* note 15, at 11.

205. *2010 Clarification*, *supra* note 23, at 12; *see also 2005 Additional Clarification*, *supra* note 15, at 11–12, for comparable criteria.

206. *2005 Additional Clarification*, *supra* note 15, at 11.

207. *2010 Clarification*, *supra* note 23, at 12–13.

c. More Monitoring, Evaluating and Reporting: Item Six

Item Six addresses "Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation" and appears to add some new considerations that will affect educational institutions that choose to comply with Title IX under Part Three. In particular, the OCR

> recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of [female] students . . . , including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.[208]

This new requirement actually mirrors what the OCR regulations require for educational institutions to demonstrate Title IX compliance across the institution, and not just in its athletic programs. For example, the 1975 Implementing Regulations require an educational institution to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX],"[209] and requires that such policies and procedures be disseminated broadly.[210] But this recommendation raises the question of whether issues relevant to athletics must be handled separately from other Title IX issues at an educational institution, and whether an institution's normal Title IX grievance procedures will suffice.

In addition, the OCR recommends that educational institutions develop procedures for collecting, and then actually collect, a significant amount of data relevant to the participation of women in club and intramural sports,[211] which may prove useful when determining which teams to elevate to varsity status and when. But the OCR also recommends going beyond the situation at the institution itself, and suggests that educational institutions also evaluate and document "the participation of [women] in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students."[212] For educational institutions with a more local or regional reach, this might prove a reasonable task. For national institutions that draw from across the country, this could prove more difficult. Nevertheless, the OCR notes that this type of documentation "may be

208. *Id*. at 8.
209. 34 C.F.R. § 106.8(b) (2011).
210. *Id*. at § 106.9.
211. *2010 Clarification*, *supra* note 23, at 8.
212. *Id*.

needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three."[213] Thus, an educational institution apparently needs to amass vast quantities of data regarding conditions off its campus to prove that it has a grasp of trends in girls' high school sports and that it has plans to respond to those trends.

Finally, Item six also implies that an educational institution's Title IX coordinator, as required by the 1975 Implementing Regulations,[214] might not be the appropriate individual to carry out Title IX responsibilities regarding athletics. It suggests that an educational institution should "consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments,"[215] and offers educational institutions the option of creating "a Title IX committee to carry out these functions."[216] By this "recommendation"—the implementation of which the OCR undoubtedly will regard favorably—the OCR actually requires more of an institution with regard to its athletics enterprise than it requires with regard to an institution's academic enterprise.

ii. Reasonable Expectation of Competition: How to Answer the Third Question

In addressing the third of the three questions to ask when evaluating compliance under the interests and abilities criterion—that is, whether there exists a reasonable expectation of competition for any team the institution might choose to create in response to expressed interests and abilities—the *2010 Clarification* adds nothing new, and uses language identical to that in the *1996 Clarification*[217] and similar to that in the *2005 Additional Clarification*.[218] The OCR will look at "available competitive opportunities in the geographic area in which the institution's athletes primarily compete,"[219] considering the institution's usual competition and potential competition located nearby.

213. *Id*.

214. 34 C.F.R. § 106.8(a) (2011).

215. *2010 Clarification*, *supra* note 23, at 8.

216. *Id*. The document also indicates that the Title IX coordinator should be part of the committee, and that the committee should receive appropriate training.

217. *Id*. at 13; *1996 Clarification*, *supra* note 10.

218. *2005 Additional Clarification*, *supra* note 15, at 12.

219. *2010 Clarification*, *supra* note 23, at 13.

VI. SIGNIFICANT ASPECTS OF THE *2010 CLARIFICATION*

In many ways, the *2010 Clarification* changes little about how the OCR views compliance under Part Three—that is, how an institution demonstrates the full and effective satisfaction of interests and abilities of its female students. It alters nothing substantive in the *1996 Clarification* or the *2003 Further Clarification*. But it does more than just eliminate the use of the Model Survey and anything associated with the *2005 Additional Clarification*, because it actually incorporates some aspects of the *2005 Additional Clarification* in its discussion of surveys and assessments, and has examples to bring some clarity to the (real or perceived) vagaries of the *1996 Clarification*.

Much of the discussion in the *2010 Clarification* about the use of surveys sets out standards that mirror those in the *2005 Additional Clarification*. As first stated in the *2005 Additional Clarification*, the *2010 Clarification* prohibits the use of survey results to eliminate a viable team.[220] It lists factors to consider in determining how frequently to assess interest and ability that mirror those listed in the *1996 Clarification* and explicitly embraced in the *2005 Additional Clarification*.[221] It discusses the construction of the survey instrument itself and how to properly administer a survey, using language almost identical to that in the Model Survey User's Guide that accompanied the *2005 Additional Clarification*.[222] And it discusses the multiple indicators that an educational institution should evaluate when assessing whether there exists on campus a sufficient number of interested and able female students to sustain a new team – indicators first spelled out in the *2005 Additional Clarification*.[223]

The *2010 Clarification* also adds something new to Title IX compliance, in the form of a recommendation that educational institutions "have effective ongoing procedures for collecting, maintaining, and analyzing information" on women's athletic interests and abilities.[224] It suggests a structure for a committee to monitor this particular aspect of Title IX compliance that goes beyond what the 1975 Implementing Regulations require in terms of Title IX compliance monitoring generally on campus.[225] Although cast in the form of recommendations, educational institutions should be aware that the OCR could construe a failure to follow such recommendations as evidence of noncompliance with Part Three.

Most troubling about the *2010 Clarification*, however, is the complete

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220. *2005 Additional Clarification*, *supra* note 15, at 7–8; *2010 Clarification*, *supra* note 23, at 5.

221. *2010 Clarification*, *supra* note 23, at 7–8.

222. *Id*. at 8–12.

223. *Id*. at 12–13.

224. *Id*. at 8.

225. *See generally* 34 C.F.R. §§ 106.8-106.9 (2011).

disregard for the unbiased statistical methods that factored into the development of the 2005 Model Survey. So, although the *2010 Clarification* allows for the use of surveys, educational institutions cannot use the one survey developed by a national institute that specializes in statistical methods.[226] Now, any survey used must adhere to the same goals for survey content and administration, but cannot be *that* survey. This once again introduces a heightened level of vagueness to Part Three compliance, undoubtedly making it less attractive than the objectively measurable Part One, the substantial proportionality test.

In the years between 1992 and 2002, the OCR conducted 130 Title IX investigations and found that eighty-six of the investigated institutions complied with Title IX under Part Three. Fifty-seven of those eighty-six institutions used surveys to demonstrate compliance.[227] The National Institute of Statistical Sciences examined the surveys used, identified the flaws, and constructed the Model Survey to remedy the flaws in surveys that had, nevertheless, proved sufficient to demonstrate Title IX compliance during that decade.[228]

CONCLUSION

It is difficult to escape the conclusion that the *2010 Clarification* now makes it more difficult to comply with Title IX under Part Three. Even with the vagueness of the Clinton administration's *1996 Clarification*, some educational institutions, using their own survey instruments, managed to prove that their athletic programs met the needs of their female students. Through the *2005 Additional Clarification* and Model Survey, the Bush administration's OCR sought to use the best features of those surveys, remedy identified flaws, and present for general use a survey designed to identify unmet student interest in athletics. But critics blasted the survey as a method to avoid adding opportunities for women, and, in response, the Obama administration's OCR has created a situation that imposes on educational institutions the requirements of survey development and administration that led to the Model Survey, but leaves them on their own to create a survey that meets those requirements.

This move will likely have the effect of driving intercollegiate athletic programs back to the only objective measure of compliance that exists, substantial proportionality. And proportionality, unfortunately, "demand[s] that schools ignore actual student interest in sports and manipulate their athletic programs such that gender ratios match[] that of the undergraduate

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226. *2005 Additional Clarification*, *supra* note 15, at 9–14; *2010 Clarification*, *supra* note 23, at 8–10.

227. *2005 Additional Clarification*, *supra* note 15, at 6.

228. *See* Pieronek, *supra* note 17, at 125–29.

student population."[229] Thus, "statistical proportionality triumph[s] not by proving that men and women [have] identical interests in sports, but by making actual interest in sports irrelevant to Title IX compliance."[230]

229. 2010 USCCR REPORT, *supra* note 158, at 8 (capturing comments by Jessica Gavora).

230. *Id*.

"HOPE AND DESPONDENCE": EMERGING ADULTHOOD AND HIGHER EDUCATION'S RELATIONSHIP WITH ITS NONVIOLENT MENTALLY ILL STUDENTS

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"Hope and Despondence" from William Knox, *Mortality*, THE LONELY HEARTH, THE SONGS OF ISRAEL, HARP OF SION, AND OTHER POEMS 95-97 (1847) *available at* http://rpo.library.utoronto.ca/poem/2846.html. Knox's *Mortality* was one of Abraham Lincoln's favorite poems, which he recited so often that he was thought to be its author. ABRAHAM LINCOLN RESEARCH SITE, *Abraham Lincoln's Favorite Poem*, http://rogerjnorton.com/Lincoln38.html (last visited Oct. 18, 2011). It is now believed that Lincoln suffered from chronic depression. Robert Siegel, *Exploring Abraham Lincoln's 'Melancholy,'* NPR.ORG (Oct. 26, 2005), http://www.npr.org/templates/story/story.php?storyId=4976127.

INTRODUCTION

Seung-Hui Cho and Steven Kazmierczak: The rampage shooters at Virginia Tech (2007) and Northern Illinois University (2008) were both young men with histories of mental illness who took out their anger at a major university.[1] In the wake of the Virginia Tech massacre, colleges and universities across the country formed threat-assessment teams to deal with students who exhibit behavior that might lead to violent outcomes.[2] Just such a team at Pima Community College suspended Jared Loughner several months before he killed six people, including a federal judge, and wounded thirteen, most notably Rep. Gabrielle Gifford.[3] That team examined what would turn out to be Loughner's devolution from being a highly disruptive student to a violent shooter, starting with reports in September 2009, through that entire academic year until he was suspended in September 2010.[4] Loughner's on-campus behavior was characterized by observers as "creepy," "bizarre," and "strange" and included classroom outbursts, a bizarre YouTube video,[5] and overall hostile and strange behavior.[6] What all seem to agree on is that Loughner is mentally ill.[7]

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1. *See, e.g.*, Editorial, *Speak Up*, CHI. TRIB., Jan. 20, 2011, at 20, *available at* http://articles.chicagotribune.com/2011-01-20/news/ct-edit-tucson-20110120_1_mental-illness-mental-health-shooting-rampage; Stephen A. Diamond, *Déjà Vu?: A Wicked Rage for Recognition*, PSYCHOL. TODAY (Jan. 11, 2011), http://www.psychologytoday.com/blog/evil-deeds/201101/deja-vu-wicked-rage-recognition. As this Article was going to press, another former student was arrested for murdering seven people at a small Christian college in northern California. *See, e..g.*, Michael Martinez & Dan Simon, *California Man Ordered Held without Bail in Oakland College Mass Killings*, CNN.COM (April 4, 2012) http://articles.cnn.com/2012-04-04/us/us_california-shooting_1_goh-oakland-court?_s=PM:US.

2. Robert Anglen & Dennis Wagner, *College Unsure How to Handle Loughner's Behavior, E-mails Show*, AZCENTRAL.COM (May 10, 2011), http://www.azcentral.com/news/articles/2011/05/19/20110519loughner-emails-pima-community-college-brk19-ON.html.

3. *Id.*; *see also* Marc Lacey & Serge F. Kovaleski, *'Creepy,' 'Very Hostile': A College Recorded Its Fears*, N.Y. TIMES, Jan. 13, 2011, at A1, *available at* http://www.nytimes.com/2011/01/13/us/13college.html?pagewanted=all.

4. Lacey & Kovaleski, *supra* note 2.

5. Anglen & Wagner, *supra* note 2.

6. Lacey & Kovaleski, *supra* note 3. Although Pima Community College seemed to have done everything it could to prevent a tragedy similar to the ones at Virginia Tech and NIU, public sentiment suggests that the college was in some

The unfortunate consequence is that many colleges and universities paint all their mentally ill students with too broad a brush, especially those who are merely disruptive but do not devolve to violence.

Colleges and universities are caught in the cross-hairs when it comes to their mentally ill students. Colleges and universities cannot refuse to accept qualified applicants with mental illness, many of whom succeed in higher education and go on to lead productive lives. On the other hand, the public has become increasingly concerned about campus safety and rampage violence. As a consequence, campus authorities have been tasked with keeping their campuses safe from dangerous, mentally ill students who might kill.

Within that task, campus administrators must try to differentiate between those students who are mentally ill and a threat to others from those who are mentally ill but not a threat to others. Campus counseling centers see many mental disorders, and when there are concerns of violence, many campuses have adopted stringent but thoughtful processes for removing violent students from campus. But within the spectrum between violent and peaceable mentally ill students are those students whose behavior is "threatening" although not violent. They behave strangely and may be disruptive, but are not a threat to anyone, except perhaps to themselves. It is with these students that campuses have greater difficulty.

Out of an abundance of caution and fear of liability, some institutions have swept all mentally ill students into the same category, often mistaking disruption or the manifestation of mental disorder as the behavior of a violent student. As a consequence, some institutions have adopted blanket and involuntary withdrawal policies, especially for students who have manifested a suicidal ideation.[8] Other institutions are taking a hard-line

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way responsible for not doing more. Anglen & Wagner, *supra* note 2; *see also* Lucinda Roy, *After Tucson: A Personal Assessment of Higher Education's Response to Threats*, CHRON. OF HIGHER EDUC., Feb. 18, 2011, at B10–13, *available at* http://chronicle.com/article/After-Tucson-a-Personal/126274/. One obvious problem with the community college's taking "ownership" of Loughner would have been the liability issues for undertaking responsibility for a third party. *See*, *e.g.*, Susan P. Stuart, *Participatory Lawyering and the Ivory Tower: Conducting a Forensic Law Audit in the Aftermath of Virginia Tech*, 35 J.C. & U.L. 323, 340 (2009).

7. Tim Steller & Kim Smith, *Loughner Found Incompetent to Stand Trial*, ARIZ. DAILY STAR, May 25, 2011, at A1, *available at* http://azstarnet.com/news/local/crime/article_1d5ce648-86f8-11e0-82ec-001cc4c03286.html.

8. *See, e.g.*, Paul S. Appelbaum, *"Depressed? Get Out!": Dealing with Suicidal Students on College Campuses*, 57 LAW & PSYCHIATRY 914 (2006); Brian Whitley, *N.J. Report Finds Colleges Utilize "Blanket Removal" Policy When Handling Suicidal Students*, BLOG.NJ.COM (Dec. 3, 2009), http://www.nj.com/news/index.ssf/2009/12/nj_report_finds_colleges_utili.html.

disciplinary approach to dealing with disruptive students whose behavior is a manifestation of mental disorder.[9] These institutions reason that "'[i]t is not about suicide attempts or mental health issues[; i]t's about behavior."[10] And even in the absence of formal discipline proceedings, some mentally ill students are simply counseled out as part of a benign policy to help them recover but also just to get them off campus.

This Article is about those mentally ill students who do not pose threats of violence that might result in campus tragedy.[11] This category is necessarily imprecise because the indicators of violence are so imprecise. Profiling potential shooters and successfully removing them from campus are difficult propositions at best.[12] But what this Article challenges is the underlying presumption of lumping all mentally ill students—threatening, odd, disruptive, or the like—into the broad category of "dangerous" in order to winnow out and remove the "violent."

Colleges and universities cannot be blamed for catching small fish along with the big fish. Given the potential institutional liability for campus safety, it is better to be safe than sorry. Such an approach cuts down on mental health treatment costs for mentally ill students and avoids liability

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9. *See, e.g.*, Bonnie Miller Ruben & Megan Twohey, *Colleges Take Hard Line on Psychological Problems: Critics See Harm; Officials Cite Court Rulings, Virginia Tech*, CHI. TRIB., Dec. 27, 2007, at 1.1, *available at* http://articles.chicagotribune.com/2007-12-27/news/0712261226_1_mental-illness-mentalhealth-law-students. Cited instances include a student at Eastern Illinois University who suffers from post-traumatic stress disorder as a result of sexual abuse. During a French class, she felt a flashback was imminent and tried to leave the classroom. Unable to do so in time, she suffered an attack. Although she eventually signed a voluntary withdrawal form, she was threatened with removal for violating the university's disciplinary code. *See*, Stephen Di Benedetto, *Reliving the Past: Flashback Sends Student Home*, DAILY E. NEWS (Oct. 6, 2007), http://www.library.eiu.edu/denpdfs/2007/10/07oct05pg01.pdf; Elizabeth Redden, *Student, Interrupted*, INSIDE HIGHER ED. (Oct. 15, 2007), http://www.insidehighered.com/news/2007/10/15/ptsd. Another student, at Wisconsin's St. Norbert College, overdosed on prescription drugs after experiencing problems with the medication for her bipolar disorder. She eventually took a medical leave after being threatened with disciplinary action. Ruben & Twohey, *supra*.

10. Rubin & Twohey, *supra* note 9.

11. Since the events at Virginia Tech, institutions have been actively working on mechanisms for culling such violent students from campuses. They have increased campus information-sharing, created threat-assessment and emergency preparedness teams, and instituted training protocols. *See, e.g.*, Roy, *supra* note 6; Stuart, *supra* note 6, at 365–77.

12. *See, e.g.*, Stanton Peele, *Can We Profile Killers Like Jared Loughner, Nidal Malik Hasan, and the VA Tech Shooter?*, PSYCHOL. TODAY (Jan. 11, 2011), http://www.psychologytoday.com/blog/addiction-in-society/201101/can-we-profile-killers-jared-loughner-nidal-malik-hasan-and-the-va-.

costs for self-injury while on campus.[13] Furthermore, a behavioral threshold for removal from campus is more clear-cut and is easy to administer. However, this Article proposes a paradigm shift in an institution's default presumption of sweeping all the disruptive and mentally ill students into the same category in order to rid itself of dangerous students because the removal system then becomes over-inclusive.

As a general rule, mental illness is no more likely to be an indicator of violence in comparison to violence in the population at large. Rather, the literature suggests that a better and more accurate behavioral cut-off for campus threat assessment analysis should focus on students who are actually violent or have the potential for violence, i.e. those motivated by anger and rage.[14] Thus, the removal processes need not focus on all mentally ill students, especially those who are disruptive but not dangerous.

The institutional dilemma is that the mentally ill student often *is* different and behaves differently. Private and public fears of violence cause those differences to be viewed as threatening and *ipso facto* dangerous. When the community senses "danger," it wants it removed. The irony is that the campus community has more mentally ill students than ever before.[15] Indeed, the sheer number of mentally ill students on campus makes them an integral part of the community. Cutting indiscriminately among this growing mentally ill population—by using disruption as the measure of concern rather than violence—slices too deeply into the general campus community, a community that is supposed to embrace difference and individuality.

This Article advocates broader institutional acceptance of the behavior that accompanies a large swath of the mentally ill community and a shifting from the presumption of removal to inclusion. This can be achieved by the institution's engaging in a different legal relationship with its mentally ill students, thereby narrowing the focus of the presumption of removal onto the truly violent student. This paradigm shift requires an institutional approach that acknowledges that disruptive mentally ill students have more in common with the general student body than with violent students. That shift necessarily means that disruptive mentally ill students should be considered full-fledged members of the same "disciplinary" class as all other students.

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13. *See, e.g.*, Schiezler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002) (holding college had a duty to protect a student who committed suicide); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Super. Aug. 29, 2005) (finding university had a duty to protect a student who died in a dorm fire); *see generally* Stuart, *supra* note 6, at 343–44.

14. Diamond, *supra* note 1.

15. *See infra* Part I.

This shift in presumptions can be accomplished if the institution recognizes that the characteristics of the mentally ill student really have more in common with the general population than with the violent student. If the institution has a better understanding of the "emerging adulthood" maturational period[16] of current college and university students, then it will have a better understanding of the greater commonalities between the nonviolent mentally ill student and the general student population. Indeed, emerging adulthood brings with it a greater likelihood of mental illness as a function of the maturation between adolescence and adulthood.[17] In fact, many mental disorders actually manifest during this period, as a function of the disorder and even as a consequence of being a student.[18] Therefore, as goes the maturational period so go the mentally ill students.

This Article also broadly posits that, if colleges and universities better recognize the problems of emerging adulthood within their student bodies, they might be better able to align their legal responsibilities to them, especially in managing, accommodating, and educating those who are mentally ill. These generationally different scholars are unable to manage the transition from the adolescence of high school to the "adulthood" expected in college without significant assistance. As a result, institutions must change their traditional expectations of emerging adults as fully functioning participants in the academy. Likewise, parents can no longer adhere to those traditional expectations in order to avoid further responsibility for their children and then hold the contradictory expectation that the institution has a duty to protect them. Instead, these stakeholders need to understand that emerging adulthood requires a joint relationship that places students somewhere between adolescents needing protection and fully functioning adults. Such a view would place the institutional legal relationship between the duty to protect and the special relationship increasingly imposed by courts and the mere duty to supervise used in K-12 public education.[19] Making greater joint responsibility a priority for the

16. *See infra* Part IV.

17. *See infra* text accompanying notes 65–71.

18. *See infra* text accompanying notes 56–71.

19. Other authorities have advocated changing certain formal legal relationships based on maturity levels. *See, e.g.*, Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741 (2009); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055 (2010); Megan E. Hay, *Incremental Independence: Conforming the Law to the Process of Adolescence*, 15 WM. & MARY J. WOMEN & L. 663 (2009); Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625 (2008); *see also* Rachael Andersen-Watts, Note, *Recognizing Our Dangerous Gifts: Applying the Social Model to Individuals with Mental Illness*, 12 MICH. ST. U. J. MED. & L. 141

student population at large will then make it easier for institutions to better manage their relationship to those students who are mentally ill.

Part I of this Article outlines the increasing mental health challenges that colleges and universities face as more students either come to college with mental disorders or manifest these disorders while there. Part II summarizes the current civil rights framework that protects and serves the mentally ill student under the Rehabilitation Act and the Americans with Disabilities Act (ADA), including its 2008 Amendments. Part III discusses the current model of legal relationship between the institution and its students and the problems inherent in continuing to rely on that model. Part IV introduces the emerging adulthood maturational period, its relationship to mentally ill students, and the rationale for treating mentally ill students as a subgroup of the larger population rather than as a subgroup of violent students. Finally, Part V proposes practical steps for adapting to the emerging adulthood model in its educational and legal relationship to all its students, especially those with mental disorders. The upshot is that if colleges and universities embrace an emerging adulthood model in dealing with all their students, they must necessarily embrace the differences that mentally ill students bring to the institution rather than relegating them to the same fate as the violent student.

I. MENTALLY ILL STUDENTS: "I WAS SUPPOSED TO BE HAVING THE TIME OF MY LIFE."[20]

There is little doubt that the number of college and university students with mental impairments—distinct from learning disorders—is on the rise.[21] Several explanations exist for this increase in student mental illness. Improvements in pharmaceuticals allow those with pre-existing conditions to attend college. But an equally compelling explanation for the increase, especially for first-time manifestations on campus, is that mental illness itself is rising in this contemporary student population, with a panoply of causes.

First, students with pre-existing disorders can now attend college because increasingly sophisticated medications are available for their treatment.[22] They are able to function better because they can rely on more

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(2008) (advocating a special legal analysis for the mentally ill and the right to make their own medical decisions); Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929 (2009).

20. SYLVIA PLATH, THE BELL JAR 2 (Harper Collins Publishers 1996) (1963).

21. *See infra* Part I.

22. *See, e.g.*, Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 NASPA J. 165, 169 (2003). "[I]mprovements in and increased use of psychotropic medications, particularly selective serotonin reuptake inhibitors (SSRIs), might bolster

effective medications to ameliorate their symptoms.[23] "[M]ore and more students are coming to college having already seen a mental health professional or having received psychiatric medications."[24] Indeed, "[s]ome students arrive at the University on five or six psychiatric medications considered crucial to their stability."[25] In a survey at a large Midwestern public university, researchers found 7% of respondents currently taking medication for psychiatric purposes.[26]

Second, although there is authority to suggest that college and university students may be more comfortable today in reporting mental health problems and seeking counseling,[27] conflicting evidence suggests that the college and university student population is no more likely to seek help than in the past, apparently hoping to solve their problems themselves.[28]

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otherwise disturbed students to the degree that they can attend college. . . . The sale rate of SSRIs in the United States has increased 800% since 1990." Ozgur Erdur-Baker et al., *Nature and Severity of College Students' Psychological Concerns: A Comparison of Clinical and Nonclinical National Samples*, 37 PROF'L PSYCHOL., RES. & PRAC. 317, 322 (2006); *see also* Jeffrey R. Young, *Prozac Campus*, CHRON. OF HIGHER EDUC., Feb. 10, 2003, at A37, *available at* http://www.utsystem.edu/news/clips/dailyclips/2003/0209-0215/Health-CHE-Prozac-021003.pdf.

23. Kitzrow, *supra* note 22, at 169; *College Students Exhibiting More Severe Mental Illness, Study Finds*, SCIENCE DAILY 2 (Aug. 13, 2010), www.sciencedaily.com/releases/2010/08/100812111053.htm.

24. Johanna Soet & Todd Sevig, *Mental Health Issues Facing a Diverse Sample of College Students: Results from the College Student Mental Health Survey*, 43 NASPA J. 410, 425 (2006).

25. Emily Gibson, *Mental Illness in the College Student*, MEDPAGE TODAY'S KEVINMD.COM 1 (Jan. 2011), www.kevinmd.com/blog/2011/01/mental-illness-college-student.html. A recent survey suggests that over 90% of student mental health clinics believe that the number of students arriving on campus with psychiatric medications has increased. ROBERT P. GALLAGHER, NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 2009 12 (2009), http://www.iacsinc.org/2009%20National%20Survey.pdf.

26. This finding is comparable to 7.7% of the general adult population. Soet & Sevig, *supra* note 24, at 425.

27. *See, e.g.*, Collegiate Health Risk Mgmt., *Old Stand-bys & Prescription Newcomers: College Drug Use in Brief*, OCT. COLLEGIATE HEALTH NEWS & VIEWS 4 (2005) [hereinafter *Old Stand-bys*]; Justin Hunt & Daniel Eisenberg, *Mental Health Problems and Help-Seeking Behavior Among College Students*, 46 J. ADOLESCENT HEALTH 3, 5 (2010).

28. Steven J. Garlow et al., *Depression, Desperation, and Suicidal Ideation in College Students: Results from the American Foundation for Suicide Prevention College Screening Project at Emory University*, 25 DEPRESSION & ANXIETY 482, 487 (2008) ("[T]here is a disconcerting lack of utilization of treatment resources by those students with suicidal ideation and depression."); Kara Zivin et al., *Persistence of Mental Health Problems and Needs in a College Student Population*, 117 J. AFFECTIVE DISORDERS 180, 184 (2009) ("We also found a high

One study extrapolated a typical college or university applicant profile from a study of high school students and discovered that a student at risk for mental health problems was less likely to ask for help if she was Caucasian and had significantly higher grades with few if any behavioral problems.[29] That student was also more likely to report higher incidence of suicidal ideation and just as likely to report a prior suicide attempt.[30] Thus, the academic success that would impel a student to attend college may also prevent that student from seeking help for mental health issues. "Given that the maladaptive coping styles and attitudes of adolescents with suicidal ideation tend to revolve around the need for independence and autonomy, the same students may be more successful academically by appropriately applying similar attitudes and beliefs within an academic context."[31]

Third, the sheer number of students with mental health issues—many of whom first manifest symptoms while in college—is a factor in the rise of mental illness on campus. One study at a large public university explored student reports of depression, anxiety, eating disorder, self-injury, and suicidal ideation.[32] That study found that more than one-third of the students surveyed displayed at least one mental health problem at either the base-line year or at the two-year follow-up[33] with two-thirds of those at base-line having a *persistent* mental health problem, indicating that colleges and universities are not seeing just transient problems.[34] Even worse is a recent study finding that nearly half of college-age students had a psychiatric disorder the previous year.[35] In face-to-face interviews with over 2,000 college students, researchers discovered that 45.79% had a psychiatric disorder, with alcohol use disorders (20.3%) and personality disorders (17.68%) leading the pack.[36] Even the existence of mood disorders (10.62%) and anxiety disorders (11.94%) was significant.[37]

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degree of persistence in lack of perceived need for help and in lack of services use, even among those students who screened positive for disorders at both time points.").

29. Mathilde M. Husky et al., *Correlates of Help-Seeking Behavior Among At-Risk Adolescents*, 40 CHILD PSYCHIATRY & HUM. DEV. 15, 22 (2009).

30. *Id.* at 21–22.

31. *Id.* at 22.

32. Zivin et al., *supra* note 28, at 180.

33. *Id.* at 184.

34. *Id.*

35. Carlos Blanco et al., *Mental Health of College Students and Their Non-College-Attending Peers: Results from the National Epidemiologic Study on Alcohol and Related Conditions*, 65 ARCHIVES OF GEN. PSYCHIATRY 1429, 1429 (2008).

36. *Id.* at Table 2.

37. *Id.* Similar results were reached for this age cohort generally—eighteen- to twenty-nine-year-olds—in the National Comorbidity Survey Replication updated in 2007: Twelve-month prevalence of any anxiety disorder (22.3%), any

Another recent survey indicates that nearly half the clients seen by college and university mental health centers have severe psychological problems, of which "7.4% . . . have impairment[] so serious[] that they cannot remain in school or can only do so with extensive psychological/psychiatric help, while 40.9% experience severe problems but can be treated successfully with available treatment modalities."[38]

Depression alone affects 49% of college students so severely that they have difficulty functioning, with 14.9% meeting the criteria for clinical depression.[39] During any previous thirty-day period, as many as 4.8% of college and university students had symptoms of poor mental health or depression.[40] Unfortunately, student depression is inextricably linked with suicidal ideation. "Those students with the most severe symptoms of depression were more likely to experience current suicidal ideation[,] and conversely those students with suicidal ideation had worse symptoms of depression."[41]

However, depression is just one of the diagnoses in a much broader domain of internal distress. Other diagnoses include anxiety, rage, feeling out of control, and uncomfortable "emotional activation."[42] More students are being diagnosed with bipolar disorder and bipolar spectrum disorder.[43] Post traumatic stress disorder is more common than originally believed, with numbers exceeding social anxiety, substance abuse, psychosis, and obsessive-compulsive disorder.[44] As many as 30% of college and university students meet DSM-IV criteria for alcohol use, with 6% meeting the criteria for alcohol dependence.[45] While an estimated 1100 college and university students will commit suicide in a year, nearly 1400 will die of

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mood disorder (12.9%), and impulse-control disorders (11.9%), with an overall total of 43.8% having a DSM-IV disorder. NATIONAL COMORBIDITY SURVEY, NCS-R TWELVE-MONTH PREVALENCE ESTIMATES (Table 2) (2005), www.hcp.med.harvard.edu/ncs/index.php.

38. GALLAGHER, *supra* note 25, at 6.

39. Eric Swanholm et al., *Pessimism, Trauma, Risky Sex: Covariates of Depression in College Students*, 33 AM. J. OF HEALTH BEHAV. 309, 309 (2009). Depressed students tend to be pessimistic and report a higher rate of risky sexual behaviors. *Id.* at 312, 316; *Old Stand-bys*, *supra* note 27, at 3 (explaining 40% of students self-reported depression that inhibited functioning while 30% classified themselves as clinically depressed, but only 15% actually diagnosed).

40. Elissa R. Weitzman, *Poor Mental Health, Depression, and Associations with Alcohol Consumption, Harm, and Abuse in a National Sample of Young Adults in College*, 192 J. NERVOUS & MENTAL DISEASE 269, 275 (2004).

41. Garlow et al., *supra* note 28, at 486.

42. *Id.*

43. *Old Stand-bys*, *supra* note 27, at 3.

44. Soet & Sevig, *supra* note 24, at 425.

45. Weitzman, *supra* note 40, at 269.

alcohol-related causes.[46] Another study found increasing numbers of students presenting complex mental health problems, including anxiety, suicidal ideation (tripled), depression (doubled), personality disorders, and sexual assault (quadrupled).[47] The problem is particularly acute for students with co-occurring problems—substance abuse and mental health problems—because they "have more severe and chronic disorders . . . , greater functional impairment . . . , and higher risk of suicide[,]" but barely one-third seek mental health counseling.[48]

The mental health issues posed by today's college and university students are part of a much broader on-campus malaise. In a 2010 nationwide student health survey conducted by the American College Health Association, the following startling statistics stand out for previous twelve-month occurrences:

Felt overwhelmed	83.6%
Felt exhausted (but not from physical activity)	77.9%
Felt very sad	58.3%
Felt lonely	54.4%
Felt overwhelming anxiety	46.4%
Felt things were hopeless	43.9%
Felt overwhelming anger	36.7%
Felt so depressed it was difficult to function	28.4%
Seriously considered suicide	6.0%
Intentional injuries to self	5.1%
Attempted suicide	1.3%[49]

Understandably, administrators and mental health professionals are now spending more time with campus mental health issues, including marked

46. *Old Stand-bys*, *supra* note 27, at 3. Annually, the average college student spends approximately the same amount on alcohol as on books, about $900. As a consequence, nearly one-fourth reports failing a test or project due to alcohol use; one-third reports missing class; more than 30,000 are treated for alcohol overdose; one in eight reports injuries from alcohol use while one in twenty requires medical treatment. *Id.* at 6. Interestingly, frequent binge drinking may more closely correlate with general anxiety disorder than with depression, especially among males. James A. Cranford et al., *Substance Use Behaviors, Mental Health Problems, and Use of Mental Health Services in a Probability Sample of College Students*, 34 ADDICTIVE BEHAV. 134, 142 (2009).

47. Sherry A. Benton et al., *Changes in Counseling Center Client Problems Across 13 Years*, 34 PROF'L PSYCHOL., RES. & PRAC. 66, 69–70 (2003).

48. Cranford et al., *supra* note 46, at 142 (internal citations omitted).

49. AM. COLL. HEALTH ASS'N, NATIONAL COLLEGE HEALTH ASSESSMENT II: REFERENCE GROUP EXECUTIVE SUMMARY, FALL 2010 13–14 (2011) [hereinafter *ACHA*].

increases in eating disorders, drug and alcohol abuse, classroom disruption, and suicide attempts.[50]

The specific indicia and risk factors for campus mental health issues are varied. Specific risks include being male, experiencing a higher number of stressful events within the previous year, being born in the United States, and living away from parents.[51] Male students are more likely to commit suicide while female and poorer students are more likely to have depression or anxiety disorder.[52] But the emotional profile of contemporary college students seems to play a major role. "The bottom line is that students are coming to college overwhelmed and more damaged than those of previous years."[53] Although students' self-rating on achievement and academic ability is trending upward,[54] the emotional health of college and university freshmen has now reached its lowest point since students were first asked in 1985 to self-rate their emotional health, with just barely half reporting that their emotional health is in the highest 10% or above average.[55] "Some university faculty describe the undergraduates entering prestigious institutions as falling into two types, neither of which is good: 'crispies' are burned out from too much work and too much perfectionism, and 'teacups' are perfect on the outside but easily broken if rattled."[56]

The underlying roots of this overall decline in student mental health are also various. They include "divorce, family dysfunction, instability, poor

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50. Kitzrow, *supra* note 22, at 167. *But see* Bettina B. Hoeppner et al., *Examining Trends in Intake Rates, Client Symptoms, Hopelessness, and Suicidality in a University Counseling Center Over 12 Years*, 50 J. COLL. STUDENT DEV. 539, 549 (2009) ("Our results do not support the notion of increasing levels of psychopathology and symptom severity among university counseling center client populations over the decade 1995–2005.").

51. Blanco et al., *supra* note 35, at 5.

52. Hunt & Eisenberg, *supra* note 27, at 4.

53. ARTHUR LEVINE & JEANETTE S. CURETON, WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY'S COLLEGE STUDENT 95 (1998); Kitzrow, *supra* note 22, at 167. As reported in 1998: "Eating disorders are up at 58 percent of the institutions surveyed. Classroom disruption increased at a startling 44 percent of colleges, drug abuse at 42 percent, alcohol abuse at 35 percent of campuses. Gambling has grown at 25 percent of the institutions, and suicide attempts have risen at 23 percent." LEVINE & CURETON, *supra*, at 95–96.

54. HIGHER EDUC. RES. INST. UCLA, HERI: RESEARCH BRIEF: THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2010 1 (Jan. 2011) [hereinafter *HERI*].

55. *Id.* *But see* Kali H. Trzesniewski & M. Brent Donnellan, *Rethinking "Generation Me": A Study of Cohort Effects from 1976-2006*, 5 PERSPECTIVES ON PSYCHOL. SCI. 58, 69 (2010) (finding that student profiles have changed little over the past thirty years).

56. Jean M. Twenge, *Generational Changes and Their Impact in the Classroom: Teaching Generation Me*, 43 MED. EDUC. 398, 403 (2008) [hereinafter Twenge, *Generational Changes*].

parenting skills, poor frustration tolerance, violence, early experimentation with drugs, alcohol and sex, and poor interpersonal attachments."[57] However, when succeeding generations of students are reporting more symptoms of psychopathology, something more deeply cultural is at work. "The pattern of change best fits a model of cultural change toward extrinsic rather than intrinsic goals that may have negatively impacted youth mental health."[58] In a seventy-year review of scores on the Minnesota Multiphasic Personality Inventory (MMPI), researchers found upward trends in measures of "moodiness, restlessness, dissatisfaction and instability"; "unrealistically positive self-appraisal, overactivity, and low self-control"; general symptoms of anxiety; and depression:[59]

> As American culture shifted toward emphasizing individual achievement, money, and status rather than social relationship and community, psychopathology increased among young people. . . . [S]ocieties emphasizing extrinsic goals may be promoting a cultural norm of personal autonomy and attainment that is unrealistic, unattainable or otherwise inappropriate, resulting in a gap between expectations and realities. Given that 50% of high school students in 2000 expected to obtain a graduate degree but only 10% will likely reach this goal, this seems to be a plausible explanation for at least some of the rise in psychopathologic symptoms.[60]

Similarly, this generation has a 50% greater confidence rate—compared to the mid-1970s—that they would hold a professional job by age thirty when the reality is that only 18% of high school graduates in either era did so.[61] However, today's *average* college student was more anxious than 85% of 1970s' students.[62]

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57. Kitzrow, *supra* note 22, at 169.

58. Jean M. Twenge et al., *Birth Cohort Increases in Psychopathology among Young Americans, 1938–2007: A Cross-Temporal Meta-Analysis of the MMPI*, 30 CLINICAL PSYCHOL. REV. 145, 152 (2010) [hereinafter Twenge, *Birth Cohort*].

59. *Id.* at 152. In this study, the authors collated the information of more than 63,000 college students on the MMPI and MMPI-2 from 1938 through 2007. *Id.* at 149.

60. *Id.* at 152 (citations omitted).

61. Jean M. Twenge & Stacy M. Campbell, *Generational Differences in Psychological Traits and Their Impact on the Workplace*, 23 J. MANAGERIAL PSYCHOL. 862, 866 (2008) [hereinafter Twenge & Campbell, *Generational Differences*]. Today's college students seem to be aiming higher than their actual abilities might warrant. Twenge, *Generational Changes*, *supra* note 56, at 400. Thus, they come to college with increasing narcissism and a sense of entitlement, "the sense that the world owes [them] something ('I deserve the best', 'I *need* an A'). . . . One recent study found that a third of undergraduates believed they deserved at least a B just for attending class; two-thirds believed they should get special consideration if they simply explained to their professor that they were

Somewhat surprising sources of student distress are the institution itself and possibly the students' unrealistic view of their ability to succeed. "[F]or many undergraduate students, the college experience may actually cause physical and psychological distress."[63] College and university freshmen become stressed simply from the transition to a new life and social environment, but especially the increased pressure on academic achievement.[64] In addition to students' inability to gauge their academic success, recent reports show fewer students are academically ready for college.[65]

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trying hard." *Id.* at 401–02. Similarly, a recent study reveals a past-decade decrease in college students' "empathic concern." Sara H. Konrath et al., *Changes in Dispositional Empathy in American College Students over Time: A Meta-Analysis*, 15 PERSONALITY & SOC. PSYCHOL. REV. 180, 187 (2011). "Young adults today compose one of the most self-concerned, competitive, confident, and individualistic cohorts in recent history." *Id. See also* Twenge & Campbell, *Generational Differences*, *supra*, at 864–65. For example, 81% of eighteen- to twenty-five-year-olds identified getting rich as among their generation's major goals while only 30% identified helping others as a major goal. Konrath et al., *supra*, at 187. This current generation is also more likely to agree with the following statements than did 1980s college students: "I think I am a special person" and "I can live my life any way I want to." Twenge & Campbell, *Generational Differences*, *supra*, at 865. Sadly, these characteristics manifest in increased crime rates against the marginalized and increased alcohol abuse. Konrath et al, *supra*, at 188.

62. Twenge & Campbell, *Generational Differences*, *supra* note 61, at 871; *see also* Trzesniewski & Donnellan, *supra* note 55, at 71.

63. Mary E. Pritchard et al., *What Predicts Adjustment among College Students? A Longitudinal Panel Study*, 56 J. AM. COLL. HEALTH 15, 18 (2007); *see also* Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 144 (2010) ("Many law students begin their legal education with little or no signs of mental impairment such as depression or anxiety. But due to the nature of a legal education, . . . depression and anxiety may develop.") With regard to mental illness problems in law school, "[a] student who coped well with the stress of undergraduate studies may find herself affected for the first time when faced with the chronic and generally greater stress of law school." Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 28 (1999).

64. Shannon E. Ross et al., *Sources of Stress among College Students*, 33 COLL. STUDENT J. 312, 312 (1999).

65. *See, e.g.*, Sharon Otterman, *Data on New York's Graduates Show Most Aren't College Ready*, N.Y. TIMES, Feb. 7, 2011, at A1, *available at* http://www.nytimes.com/2011/02/08/nyregion/08regents.html; Holly K. Hacker, *Students Hit College, Then Play Catch-Up*, DALL. MORNING NEWS, March 21, 2010, at A1, *available at* http://www.dallasnews.com/news/education/headlines/20100320-Students-playing-catch-up-as-they-4288.ece.

The college environment itself is new, different, and unfamiliar, and it creates a range of issues alien to students' previous experiences, including changes in social activities and sleeping and eating habits, conflicts with roommates, financial difficulties, and even just waiting in long lines.[66] "College life itself can act as a trigger for mental health problems, with students facing an environment of less structure, more stress, irregular sleep patterns, poor eating habits, increased access to alcohol and drugs, new relationships, peer pressure and homesickness just to name a few."[67] College freshmen bring their stresses to orientation then compound their problems with increasing "[p]hysical ailments, quantity of alcohol consumed on weekends, frequency of drinking, frequency of intoxication, and negative affect."[68] These lifestyle changes and stressors manifest in lack of energy, sleeping and eating problems, depression, and inability to concentrate, with 10% reporting moderate to severe depression.[69] Some stressors are even considered traumatic, or at least difficult to handle, by significant numbers of college and university students: academics (42.1%); intimate relationships (30.7%); finances (33%); and sleep difficulties (22.9%).[70] As a consequence, "[y]oung adult students are living with more academic and social stress than they've ever known before at a vulnerable time in their development."[71]

A further source of the rise in student mental illness is the maturational period. Many mental disorders such as depression, schizophrenia, and

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66. Ross et al., *supra* note 64, at 316–17, Table 1.

67. Collegiate Health Risk Mgmt., *Mental Illness: The New Campus Epidemic?*, COLLEGIATE HEALTH NEWS & VIEWS, Oct. 2005, at 3–4 [hereinafter *Campus Epidemic*]. "Students report loneliness and other social difficulties. Many are unhappy without really understanding why." *Id.* at 3 (citation and internal quotation marks omitted). At a slightly different level, law students' sources of depression are a bit easier to pinpoint. *See* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 375–85 (2009); Adam J. Shapiro, Comment, *Defining the Rights of Law Students with Mental Disabilities*, 58 U. MIAMI L. REV. 923, 929–933 (2004); Jolly-Ryan, *supra* note 63, at 125–127.

68. Pritchard, et al., *supra* note 63, at 18. This survey started during orientation week at one Midwestern university. *Id*. at 16.

69. *mtvU AP 2009 Economy, College Stress and Mental Health Poll*, HALFOFUS, http://www.halfofus.com/_media/_pr/may09_exec.pdf (last visited Feb. 29, 2012).

70. *ACHA*, *supra* note 49, at 15. The stress arising from going to school and working to pay for it is a primary reason why students drop out of college. JEAN JOHNSON ET AL., WITH THEIR WHOLE LIVES AHEAD OF THEM: MYTHS AND REALITIES ABOUT WHY SO MANY STUDENTS FAIL TO FINISH COLLEGE 5–8, *available at* http://www.publicagenda.org/TheirWholeLivesAheadofThem (A Public Agenda Report for the Bill & Melinda Gates Foundation).

71. Gibson, *supra* note 25.

bipolar disorder manifest themselves during this period of late adolescence and early adulthood.[72] "Young adulthood is . . . a high-risk period for the onset of psychiatric symptoms, with the typical ages of onset for serious mental illnesses being between the ages of 17 and 25."[73] This is not to suggest that serious mental illnesses only manifest in this period, [74] but it is during this crucial period when serious mental illnesses will have emerged.[75] An examination of the age-of-onset distribution of DSM-IV psychiatric disorders from the National Comorbidity Survey Replication reveals the following: 75% of the onset of any anxiety disorder manifests by age twenty-one; nearly 95% of the onset of impulse-control disorders manifests by age twenty-three; and 50% of major substance use disorders manifest by age twenty.[76] "Whatever else we can say about mental disorders, . . . they have their strongest foothold in youth, with substantially lower risk among people who have matured out of the high-risk age range."[77]

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72. Kitzrow, *supra* note 22, at 169; Kathy R. Hollingsworth et al., *The High-Risk (Disturbed and Disturbing) College Student*, 128 NEW DIRECTIONS FOR STUDENT SERV. 37, 41 (2009). S*ee also* Michael N. Sharpe et al., *The Emergence of Psychiatric Disabilities in Postsecondary Education*, 3 ISSUE BRIEF: EXAMINING CURRENT CHALLENGES IN SECONDARY EDUC. & TRANSITION (National Center on Secondary Education and Transition Institute on Community Integration, Minneapolis) Aug. 2004, at 1. "Depression, bipolar disorder, schizophrenia and many others often do not manifest themselves until a person's late teens and early twenties." *Campus Epidemic*, *supra* note 67, at 4.

73. Alexa Smith-Osborne, *Antecedents to Postsecondary Educational Attainment for Individuals with Psychiatric Disorders: A Meta-Analysis*, 1 BEST PRACTS. IN MENTAL HEALTH 15, 15 (2005).

74. One study revealed that many mentally ill adolescents between the ages of thirteen and eighteen had manifested early. Indeed, 50% of disorders may manifest at very early ages: anxiety disorders (six); behavior disorders (eleven); mood disorders (thirteen); and substance use disorders (fifteen). Kathleen Ries Merikangas, *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results from the National Comorbidity Survey Replication—Adolescent Supplement (NCS-A)*, 49 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 980, 987 (2010). In addition, morbidity and mortality rates double during adolescence. *See* Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, 1021 ANN. N.Y. ACAD. SCI. 1, 3 (2004).

75. Smith-Osborne, *supra* note 73.

76. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCHIATRY 593, 597 (2005). "The prevalence rates reported here closely approximate those of our nationally representative sample of adults using nearly identical methods, suggesting that the majority of mental disorders in adults emerge before adulthood." Merikangas, *supra* note 74, at 985 (exploring onset of DSM-IV disorders for adolescents between ages thirteen and eighteen years old).

77. Kessler et al., *supra* note 76, at 601.

Unfortunately, not all children who manifest mental disorders before attending college or university are identified in the public schools because the symptoms are intertwined with the typical problems exhibited during adolescence.[78] Thus, if "most" serious mental disorders are present during this maturational period and nearly 50% of this age group attends college or university,[79] then higher education is necessarily recruiting a significant number of students who have not yet been diagnosed or may develop mental disorders while on campus. Higher education needs to account for all the mental illness problems presented by its customer base whenever manifested.

II. THE RIGHTS OF MENTALLY ILL STUDENTS: "HELP, I NEED SOMEBODY"[80]

Whatever legal relationship higher education has with its mentally ill students, it must be informed by the civil rights statutes designed to protect the disabled, particularly the Rehabilitation Act and the Americans with Disabilities Act ("ADA"). Neither statute requires an affirmative out-reach program for dealing with those students: the students must self-identify

78. Julia C. Dimoff, Note, *The Inadequacy of the IDEA in Assessing Mental Health for Adolescents: A Call for School-Based Mental Health*, 6 DEPAUL J. HEALTH CARE L. 319, 323 (2003). Part of the problem lies with the inability of public schools to identify many mental disorders under the IDEA referral model. *Id.* at 320. *See also* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1164–65 (2007) (arguing "child with a disability" is under-identified and under-served in the "emotional disturbance" category under IDEA). Another problem lies in the wildly varying diagnostic choices. Dimoff, *supra*, at 323. A third problem is that adolescent conduct is so unpredictable that schools are not always the best judge of what is a mental disorder and what is just bad conduct. *Id.* at 321; *see also* Hensel, *supra*, at 1165. Last, the traditional methods of recognizing mental disorders in adolescents have been dismissed as insufficient. Dimoff, *supra*, at 325–329. One suggestion to help solve that problem is the introduction of mental health screenings in the public schools. *See e.g.*, Alixis L. Toma, Comment, *Identifying the Unidentifiable: How Washington's Public Education System Can Aid in the Prevention and Detection of Childhood Mental Illness*, 33 SEATTLE U. L. REV. 225, 261–62 (2009). If nothing else, mental health screenings may be more likely to identify students at risk for suicide. Michelle A. Scott et al., *School-Based Screening to Identify At-Risk Students Not Already Known to School Professionals: The Columbia Suicide Screen*, 99 AM. J. PUB. HEALTH 334, 337 (2009).

79. Zivin et al., *supra* note 28, at 180.

80. "When I was younger, so much younger than today/I never needed anybody's help in any way/But now these days are gone, I'm not so self assured/Now I find I've changed my mind and opened up the doors." JOHN LENNON & PAUL MCCARTNEY, *Help!*, *on* HELP! (Capitol Records 1965).

and request assistance.[81] However, the intent and content of both Acts is a necessary starting point for understanding the difficulties faced by mentally ill students on campus, although the ADA Amendments Act of 2008 may have some ameliorative effect.

The Rehabilitation Act is the older of the two civil rights laws governing higher education, and its 1973 amendment prohibits discrimination on the basis of disability by recipients of federal financial assistance.[82] Section 504 of the Act states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[83]

By reason of their receipt of federal funds, most colleges and universities were covered by § 504 from the outset but now their programs or activities are also covered.[84] Section 504 specifically requires that reasonable accommodations be provided to otherwise qualified individuals if they "would otherwise be denied meaningful access to a university."[85] Each institution must designate a compliance officer and adopt due process procedures for processing complaints under the Act.[86] Although the 1990 passage of the ADA overshadowed the Rehabilitation Act, § 504 remains a potent tool for redressing institutional discrimination against college students,[87] especially in its incorporation of some of the ADA's salient terms, such as the definition of "disability."[88]

The Americans with Disabilities Act expanded the rights set forth in the Rehabilitation Act by extending them to the private sector.[89] In keeping

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81. *See* 29 U.S.C. § 701(b)-(c) (2006); 42 U.S.C. § 12101(b) (2006).

82. 29 U.S.C. § 794 (2006); Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 846 (2010) [hereinafter Rothstein, *Fifty Year Retrospective*].

83. 29 U.S.C. § 794(a) (2006).

84. "For the purposes of this section, the term 'program or activity' means all of the operations of . . . a college, university, or other postsecondary institution, or public system of higher education." *Id.* at § 794(b)(2)(A) (2006). Indeed, private colleges and universities were nearly the only private-sector entities affected by the Act because of that funding. Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 846.

85. 34 C.F.R. § 104.12 (2011); Karen Bower & Victor Schwartz, *Legal and Ethical Issues in College Mental Health*, *in* MENTAL HEALTH CARE IN THE COLLEGE COMMUNITY 113, 128 (Jerald Kay & Victor Schwartz ed., 2010).

86. 34 C.F.R. § 104.7 (2011); Bower & Schwartz, *supra* note 85, at 128.

87 *See, e.g.*, Brodsky v. New Eng. Sch. of Law, 617 F. Supp. 2d 1, 4–5 (D. Mass. 2009); Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508, 516 (D.N.J. 2008).

88. 29 U.S.C. § 705(9)(B) (2006).

89. *See* Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 854.

with congressional findings of discrimination against the disabled,[90] the ADA is divided into three operative subchapters to address access to employment opportunities (Title I),[91] public services (Title II),[92] and public accommodations and services operated by private entities (Title III).[93] For most intents and purposes (and what this Article will presume hereafter), both the Rehabilitation Act and the ADA generally have the same import for college and university students with mental disorders.[94] And, "unless one of the subtle distinctions [between the two Acts] is pertinent to a particular case, [courts] will treat claims under the two statutes identically."[95]

The ADA's Titles II and III affect higher education directly: Title II as to public institutions[96] and Title III as to private institutions.[97] The anti-discrimination provisions of both Titles are nearly identical in their import—and congruent with the Rehabilitation Act—by their prohibiting the exclusion of a qualified individual with a disability, by reason of that disability, from the benefits of either a public entity or a public accommodation provided by a private entity.[98] Both state and private

90. 42 U.S.C. § 12101(a)(3) (2006)

91. *Id.* at § 12111 et seq. (2006 & Supp. | 2010).

92. *Id.* at § 12131 et seq. (2006).

93. *Id.* at § 12181 et seq. (2006).

94. Indeed, some students will file complaints that allege violations of both. *See, e.g.*, Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006); Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d. 79, 81 (2d Cir. 2004) *amended by* 511 F.3d 238 (2d Cir. 2004); Manickavasagar v. Va. Commonwealth U. Sch. of Med., 667 F. Supp. 2d 635, 637 (E.D. Va. 2009); *Brodsky*, 617 F. Supp. 2d at 4; Guckenberger v. Bos. Univ., 957 F. Supp. 306, 310–11 (D. Mass. 1997); Coleman v. Zatechka, 824 F. Supp. 1360, 1362 (D. Neb. 1993).

95. Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003).

96. "The term 'public entity' means . . . (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . .". 42 U.S.C. § 12131(1) (2006) ("public entity" defined). *See, e.g.*, *Coleman*, 824 F. Supp. at 1367–68 (University of Nebraska is a public entity under the ADA); Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508, 522 (D.N.J. 2008) (state universities are public entities under Title II of the ADA).

97. "The following private entities are considered public accommodations . . . (J) a[n] . . . undergraduate, or postgraduate private school . . . .". 42 U.S.C. § 12181(7)(J) (2006). *See, e.g.*, Rothman v. Emory Univ., 828 F. Supp. 537, 541 (N.D. Ill. 1993) (private law schools are governed by Title III of the ADA).

98. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132 (2006). Claims under Title II generally require a prima facie case showing the plaintiff is a qualified individual with a

institutions must provide reasonable accommodations (or modifications) to give "meaningful access" to their programs to "otherwise qualified individuals."[99]

These civil rights protections are not self-activating, however. In order to prove a discrimination case, a student must demonstrate that she informed the institution of her disability and requested a reasonable accommodation but that the institution refused.[100] The reasonableness of the request for accommodation is constrained by its financial burden on the

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disability and that the defendant denied the benefits of or participation in defendant's program because of the disability. *See, e.g.*, Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir. 1996) (Title II). Title III discrimination claims are somewhat similar although the statutory provision is a bit more specific: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (2006). Consequently, a Title III discrimination claim requires proof of either a defendant's screening disabled people from its program or a defendant's failure to modify reasonably its program so disabled people may participate. *See, e.g.*, *Bowers*, 974 F. Supp. at 464–65; *Mershon*, 442 F.3d at 1076–77 (explaining prima facie case requires proof of 1) plaintiff's disability; 2) public accommodation; and 3) defendant's refusal to make reasonable modifications to its program).

99. *E.g.*, Martin v. PGA Tour, Inc., 532 U.S. 661, 682–83 (2001) (Title III); *Henrietta D.*, 331 F.3d at 282 (Title II). Title III's anti-discrimination provision is a bit more detailed than Title II's in specifying that public accommodations must afford "the most integrated setting appropriate to the needs of the individual" and the disabled "shall not be denied the opportunity to participate in such programs or activities that are not separate or different." 42 U.S.C. § 12182 (b)(1)(B)–(C) (2006). Public accommodations may also not impose a process to screen out the disabled and must afford reasonable modifications unless they would fundamentally change the program. *Id.* at § 12182 (b)(2) (2006).

100. *See, e.g.*, Bower & Schwartz, *supra* note 85, at 132; Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 517 (2006); Felix Simieou et al., *Legal Issues and Responsible Practices Regarding Disability Accommodations in Postsecondary Education*, 262 WEST'S ED. L. REP. 9, 11 (2011); *see also* Tips v. Regents of Tex. Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996) (holding postgraduate program did not intentionally discriminate against student when she failed to notify the university of her alleged learning disability). A student's reporting of her disability typically requires documentation: the diagnosis of disability, the credentials of the professional who made the diagnosis, the disability's effect on a major life activity, the disability's impact on educational performance, and recommendations for accommodation. Laura Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 857; Simieou et al, *supra*, at 11; Laura Rothstein, *Disability Law and Higher Education*, 63 MD. L. REV. 122, 136–38 (2004).

institution[101] and by whether it would fundamentally alter the academic standards of the program.[102] The institution must make an informed and individualized inquiry into the student's disability and the student's requests in relation to the institution's program.[103] But the law "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[104] Unfortunately, the clash between an educational program and accommodations for mental disorders creates a vague terrain upon which students with mental illness must struggle.

The first test is the nature of the disability itself. In order to be covered by the ADA, an individual must have a "mental impairment that substantially limits one or more major life activities of such individual"[105] or is "regarded as having such an impairment."[106] "Mental impairment" under the ADA means "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities."[107] These will generally include those that are specifically diagnosed under the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR).[108] Setting aside

101. Bower & Schwartz, *supra* note 85, at 132.

102. Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 854–55.

103. *See, e.g.*, Wong v. Regents of Univ. of Cal., 410 F.3d 1042, 1070 (9th Cir. 2005) (Title II); Wynne v. Tufts Univ. Med. Sch., 932 F.2d 19, 26 (1st Cir. 1991) (Rehabilitation Act); Gluckenberger v. Bos. Univ., 974 F. Supp. 106, 148–49 (D. Mass. 1997) (Title III). Although it is beyond the scope of this Article to enumerate the accommodations requested and made in higher education, they typically include extra time to take exams; reduced course load; private rooms for test-taking; flexible class attendance; flexible assignment due dates; and online courses. *See, e.g.*, Bower & Schwartz, *supra* note 85, at 132. They may also include auxiliary aids; course substitutions; interpreters; note-takers; and recording devices. *See* Simieou et al., *supra* note 100, at 12.

104. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979) (Rehabilitation Act).

105. 42 U.S.C. § 12102(1)(A) (2006).

106. *Id.* at § 12102(1)(C) (2006 & Supp. | 2010).

107. 29 C.F.R. § 1630.2(h)(2) (2011).

108. *See* Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders under the Americans with Disabilities Act*, 42 VILL. L. REV. 723, 726–27 (1997) (citing DSM-IV as the widely used resource by courts for mental disorders under the ADA); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 222–223 (2003). The chief distinction between the ADA's nomenclature and the DSM is that the former deals with legal protections whereas the latter deals with diagnosis and treatment. Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerously Mentally Ill,"* 34 U.C. DAVIS L. REV. 849, 857 (2001) [hereinafter Hubbard, *Myth*]. The *Diagnostic and Statistical Manual of Mental Disorders* is currently under revision by the American Psychiatric Association,

learning disabilities (such as learning and communication disorders) as a type of mental disorder, student mental or psychological disorders may include eating disorders, developmental disorders, mood disorders (bipolar, depression), substance-related disorders (associated with drug or alcohol use), psychotic disorders, anxiety (including stress disorders), and personality disorders.[109] These disorders qualify for coverage even if they are "episodic or in remission" so long as they would "substantially limit a major life activity when active."[110] The 2008 Amendments now require a broad construction of "disability."[111]

The next test is whether the disability substantially limits at least one major life activity. The 2008 Amendments also made significant changes to what constitutes a major life activity for purposes of proving a disability. "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[112] A limitation is substantial if, given the totality of the circumstances, the purposes of the ADA would be broadly served by coverage.[113] Substantial limitation is determined without regard to whether mitigating measures might have an ameliorative affect, such as medications or "learned behavioral or adaptive

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with DSM-V anticipated for adoption in May 2013. *See, e.g.*, David L. Wodrish et al., *Contemplating the New DSM-V; Considerations from Psychologists Who Work with School Children*, 39 PROF'L PSYCHOL., RES. & PRAC. 626; *DSM-5 The Future of Psychiatric Diagnosis*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/Pages/Default.aspx (last visited Mar. 1, 2012).

109. *APA Diagnostic Classification DSM-IV-TR*, BEHAVENET, http://www.behavenet.com/apa-diagnostic-classification-dsm-iv-tr (last visited Mar. 1, 2012). However, both Title II and Title III of the ADA deny disability coverage for either "sexual behavior disorders" or "[p]sychoactive substance use disorders resulting from current illegal use of drugs." 28 C.F.R. § 35.104 (2011) (Title II); *Id.* at § 36.104 (2011) (Title III).

110. 42 U.S.C. § 12102(4)(D) (2006 & Supp. | 2010). A minor and transitory impairment with an actual or anticipated six-month duration, however, is not a disability. *Id.* at § 12102(3)(B).

111. *Id.* at § 12102(4)(A); s*ee, e.g.*, Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 869; *see generally* Paul R. Klein, Note, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 488–90 (2010).

112. 42 U.S.C. § 12102(2)(A) (2006 & Supp. | 2010). The 2008 Amendments also added major bodily functions to the category of major life activities, including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* at § 12102(2)(B).

113. A substantial limitation need not be one that prohibits or even severely restricts a life activity. "The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." *Id.* at § 12102(4)(B). *See* Bower & Schwartz, *supra* note 85, at 128.

neurological modifications."[114] In the context of mental disorders, diagnosis will often describe severe and ongoing symptoms that neatly fit into a judicial notion of a substantial limitation,[115] and even episodic disorders may last several years.[116] To a certain extent, mental disorder is a disability unto itself in higher education.

Upon the 1990 enactment of the ADA, higher education had already adapted fairly well to making accommodations for students with disabilities because so many colleges and universities have been governed by the Rehabilitation Act's antidiscrimination provisions for decades.[117] Indeed, "[c]olleges and universities have been the leaders in finding ways to use technology to accommodate students with a wide range of disabilities."[118] But that ability to adapt has primarily been dedicated to those disabilities that impact learning and classroom performance and has proved more problematic for students with mental disorders.

To date, the majority of the few published cases brought by mentally impaired college and university students under the ADA before 2008 are those with learning disabilities. Only a tiny number address mental illness, and those with mixed results. Those results often turned on whether the student had a statutorily defined disability or on whether the student was an "otherwise qualified" individual.[119] The ADA's 2008 Amendments[120] may produce different results because of the broadened meanings of disability and major life activities. However, even if the judicial analysis is changed by the Amendments, proof of discrimination may still elude students with mental illness (as distinguished from a learning disorder).

Although a mental illness may be medically recognized, it might not be considered a substantial limitation on a major life activity[121] for a college or university student if academic success is the life activity in question. The 2008 Amendments will have some ameliorating impact by requiring an

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114. 42 U.S.C. § 12102(4)(E) (2010). *See* Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 870.

115. Mastroianni & Miaskoff, *supra* note 108, at 725.

116. *Id.* at 725–26.

117. "Higher education had evolved practices, policies, and procedures before other sectors affected by the ADA (with the exception of K-12 education)." Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 863.

118. *Id.* at 864.

119. *Id.* at 864 n.109.

120. Pub. L. No. 110-325, 122 Stat. 3553 (2008).

121. For example, a medical student's anxiety disorder did not qualify for accommodations because it only manifested on two particular types of tests—math and chemistry—for which he was able to mitigate by changing his study methods. He thereby failed to prove he was substantially limited in a major life activity. McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 978 (10th Cir. 1998). Even if mitigation were no longer considered under the 2008 Amendments, proof of a substantial limitation would still have been difficult to prove in that case.

individual assessment concerning whether a learning disability constitutes a substantial limitation.[122] But the tension will still remain if courts are persuaded to judge the student's academic abilities in comparison with the skills of the "average" person. Thus, if a college or university student has the same reading and writing skills as the average person, he may not qualify for accommodations for reading and writing impairments,[123] regardless of the individual assessment. Similarly, a disabled student's earlier educational success may prove to be a barrier to proving reasonable accommodations are even necessary.[124] Thus, unless the 2008 Amendments suggest that higher education must provide accommodations to provide optimal academic results—a standard that not even the Individuals with Disabilities Education Act requires[125]—only the institutional burden of proof has changed. In addition, some students may continue to fail in their suits when they cannot prove they are otherwise qualified because they cannot do the academic work,[126] instead being viewed as generally unsuited for that particular academic program,[127] especially an academically rigorous one.[128] Because of the deference

122. Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 681–82 (2009); *see also* Jenkins v. Nat'l Bd. of Med. Exam'rs, 08-5371 2009 WL 331638, at *3–4 (6th Cir. Feb. 11, 2009) (determining that the 2008 Amendments broadened the meaning of "substantial limitation").

123. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626–27 (6th Cir. 2000); *see also* Rothberg v. Law Sch. Admission Council, Inc., 102 F. App'x 122 (10th Cir. 2004) (denying law school applicant with learning disability extra time on admissions exam).

124. Steere v. George Washington Univ. Sch. of Med. & Health Sci., 439 F. Supp. 2d 17, 25–26 (D.D.C. 2006) (holding medical student with ADHD not entitled to accommodations); Love v. Law Sch. Admission Council, 513 F. Supp. 2d 206, 228 (E.D. Pa. 2007) (finding prospective law student not entitled to accommodations for ADHD because he had never requested them before and could not prove that his ADHD otherwise substantially limited any major life activities).

125. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 201 (1982).

126. Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d. 79, 87 (2d Cir. 2004)

127. *E.g.*, el Kouni v. Trs. of Bos. Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001) (holding medical student's inability to pass courses, to conduct himself appropriately, and to complete his thesis were cause of his dismissal, not his mental impairment); Manickavasagar v. Va. Commonwealth U. Sch. of Med., 667 F. Supp. 2d 635, 645–47 (E.D. Va. 2009) (finding medical school applicant's bipolar disorder did not form basis for school's rejection of his application when his undergraduate record and test scores were below the median admitted to that school).

128. *Steere*, 439 F. Supp. 2d at 25; *el Kouni*, 169 F. Supp. 2d at 4–5. This analysis is particularly applied if the student failed courses even with accommodations. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436

courts typically give to academic decisions,[129] this particular judicial analysis may be difficult to change, even under the broader sweep of the 2008 Amendments.

There are also behavioral issues caused by mental disorders. In the lone case dealing with a conduct problem, a medical school had technical standards with which its students were to conform. It dismissed a mentally impaired student, in part because he was "unfit to remain in the [program] because of his persistent offensive and disrupting behavior during course lectures."[130] This is the thrust of the problem with which higher education seems most concerned: the behavioral nonconformity of the mentally ill student, rather than the effect of the mental illness on academic performance.

The 2008 Amendments may prove somewhat helpful when using removal procedures for students who pose a "direct threat to the health or safety of others."[131] Under those circumstances, institutions must consider the mitigating circumstances of the impairment:

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity [accommodation] must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of

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(6th Cir. 1998); Halasz v. Univ. of New England, 816 F. Supp. 37, 40–41 (D. Me. 1993).

129. *See generally* James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27 (1996).

130. *el Kouni*, 169 F. Supp. 2d at 4.

131. Colleges and universities have an "outlet" for removing violent students: Both Title II and Title III of the ADA provide that an institution of higher education need not accommodate an individual who poses a direct threat to the health or safety of others. 42 U.S.C. § 12113(b) (2006). Title II: "This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a) (2011). Title III: "Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3) (2006). "This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 36.208(a) (2011).

> policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.[132]

This regulation was only recently promulgated by the Department of Justice in the wake of the concerns about college rampage shooters.[133] However, this regulation is directed only at harm to others and does not embrace all the behavioral issues posed by the much larger student population that has mental disorders.

Insofar as the 2008 Amendments were intended to create broader coverage under the ADA and have expanded major life activities to embrace other components of a college or university student's life beyond academic performance,[134] institutions have a somewhat broader universe to govern vis à vis its mentally ill students. Indeed, the purpose for enlarging the disability analysis was to relieve the judicial constrictions on the protected class.[135] Thus, the breadth of purpose envisioned by the 2008 Amendments may force changes in the academic "environment" rather than just the classroom, thereby requiring a holistic approach to dealing with mentally ill students. If that indeed turns out to be the case, institutions may be better served by being hospitable to the mentally ill rather than requiring that they self-identify before they receive assistance.[136] After all, a significant portion of an institution's student population already has or will manifest a mental illness during their stay on campus. With that recognition, an institution's holistic approach to dealing with its mentally ill students necessarily will result in an adjustment in the relationship between the institution and all its students.

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132. 28 C.F.R. § 35.139(b) (2011); *id.* at § 36.208(b) (2011).

133. *Id.* at § 35.139((2011).

134. Those activities include eating, sleeping, speaking, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2) (2006); Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 869; *see also* Wendy F. Hensel, *Interacting with Others: A Major Life Activity under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139 (2002) (positing that interacting with others is also a major life activity).

135. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L. J. 187, 199–204 (2010).

136. "These anti-discrimination laws broadly prohibit the denial of participation, the provision of unequal benefits, and the use of criteria or methods of administration that discriminate and actions that have the effect of excluding people with disabilities" from higher education programs. Bower & Schwartz, *supra* note 85, at 128. Discrimination claims may be brought if an individual is merely "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C) (2006).

III. THE UNIVERSITY'S RELATIONSHIP TO ITS STUDENTS: "THE TIMES THEY ARE A-CHANGIN"[137]

Up until the middle of the twentieth century, colleges and universities were pretty sure of their legal relationship with their students:

> [T]he college/student relationship was considered to be as much, if not more of, a college/*parent* affair than a direct college/*student* relationship. In other words, a parent sent a "child" off to college—entering into an agreement with the institution—and delegated certain supervisory and disciplinary powers in the process. With regard to certain types of activities—those principally involving deliberate institutional acts of student regulation and discipline—the college stood "*in loco parentis*." The power of *in loco parentis* lay in the immunity that a college received from courts regarding lawsuits by students who were disgruntled over regulations and discipline.[138]

Then in the 1960s and 1970s, college and university campuses were assaulted by waves of students who rebelled against what they viewed as archaic disciplinary codes and protective features of campuses, those features loosely formulated by the institutions' "parental" role over their students.[139] These systematic attacks were fueled, in part, by the Twenty-Sixth Amendment and the draft. As a matter of law, the minimum draft age was eighteen, and the age of majority—the voting age—was lowered from twenty-one to eighteen and thereby transmuted, in students' minds, their status from child to adult.[140] If the law considered them to be adults, the students argued, so should campus authorities.[141]

The groundswell of student protests arising from the Vietnam War and the Civil Rights Movement was also fueled, in part, by student rebellion from parental control and authority figures. "College students demanded the individual freedoms that accompanied the responsibilities of being

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137. BOB DYLAN, *The Times They Are a-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

138. Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 4 (1999). *In loco parentis* had an aspect of protection for institutions—not just a tort defense—because "most American colleges and universities did exercise substantial dominion, control, and protection over students and student lives." *Id.* at 6. *See also* Gott v. Berea Coll., 161 S.W. 204, 206 (1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils . . . .").

139. Lake, *supra* note 138, at 3.

140. Spring J. Walton, In Loco Parentis *for the 1990s: New Liabilities*, 19 OHIO N. U. L. REV. 247, 252 (1992).

141. *Id.*

legally an 'adult' and openly rejected the role of the college and university as custodial parent."[142] In addition, the age of the average college or university student increased significantly as returning veterans took advantage of the G.I. Bill's educational benefits.[143] Thus was rung the death knell of *in loco parentis*.

Twin *in loco parentis* issues were at stake in the 1960s and 1970s, both of which created a legal relationship between the institution and its students. One aspect allowed colleges and universities to discipline without fear of question. The other allowed them to promulgate rules and regulations ostensibly to "protect" their students, such as single-sex living units, required chapel attendance, prohibition against on- and off-campus drinking, dress codes, and curfews. As to the first aspect, student civil rights cases forced colleges and universities to provide due process in matters of discipline.[144] As to the second, a systemic sea-change in the regulation of student life transformed the relationship of student and institution. Reluctantly acceding to that "deregulating" movement, colleges and universities drew back from *in loco parentis* and granted student demands to treat students as adults rather than children.[145] Institutions conceived a different model of student discipline,[146] but also a different model of governance that changed the dynamic of and liability for student safety.[147]

But that was then, and this is now. Nearly congruent with the 1990s development of the psychological and sociological models of emerging adulthood came a trend for greater institutional protection and responsibility for students.[148] Post-war students seemed to want it both ways; arguing, "I want all the liberty that an adult would exercise but you (the institution) must stop me before I hurt myself." The difficulty for institutions is trying to figure out where that line is. The judiciary can no more articulate that line than can the parties, and courts are struggling to create a model of shared responsibilities between students and the

142. *Id.* (*citing* Szablewicz & Gibbs, *infra* note 145, at 456).

143. *Id.*

144. Theodore C. Stamatakos, *The Doctrine of* In Loco Parentis*, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 474–475 (1990); Walton, *supra* note 140, at 253–256.

145. James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New* In Loco Parentis, 16 J.L. & EDUC. 453, 453 (1987). *See also* Perry A. Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271, 281–82 (1986).

146. Corollary changes occurred in tort liability too. So long as *in loco parentis* no longer operated for discipline, it was also inoperable to act as a defense from tort liability. *See generally* Lake, *supra* note 138.

147. *See* Szablewicz & Gibbs, *supra* note 145, at 461–65.

148. *Id.* at 453–54; Walton, *supra* note 140, at 256–57.

institutions,[149] a modified *in loco parentis* legal relationship that attempts to balance the responsibilities of adulthood on students with rather amorphous custodial duties on the institution. Ironically, these struggles to articulate the institution-student relationship are driven by cases about students with mental disorders.

The first notable decision arose from a wrongful death case after the suicide of a University of Iowa student, Sanjay Jain, who ran his moped in his dormitory room and died from carbon-monoxide poisoning when he inhaled the exhaust fumes.[150] Experiencing both personal and academic problems, Sanjay exhibited emotional problems and had been disciplined for alcohol and drug use. After one suicide attempt, Sanjay refused to allow his hall coordinator to call his parents, and he apparently failed to seek recommended counseling.[151] The Iowa Supreme Court ultimately concluded that the parents' suit must fail because the university had created no special relationship with Sanjay that bound it to prevent his suicide.[152]

On the other hand, a federal district court in Virginia found that a sufficient, special relationship existed between Michael Frentzel and Ferrum College when he hanged himself in his room.[153] Michael's first semester in college was fraught with such significant disciplinary problems that he was required to seek counseling for anger management before he was allowed to return for his second semester. Shortly after returning to campus, he argued with his girlfriend and then attempted suicide. His next attempt was successful.[154] Before both the attempt and his suicide, Michael had sent notes to his girlfriend informing her of his intentions. In response to the university's motion to dismiss, the court determined that an institution-student relationship was created when Michael's girlfriend passed along both notes to campus officials.[155]

Finally, Elizabeth Shin came to college with a history of serious psychiatric problems, which emerged in high school and manifested in self-cutting.[156] The university became aware of these issues when she overdosed on Tylenol and codeine during spring semester of her freshman year. The university worked closely with Elizabeth and her parents to get her treatment for what was variously diagnosed as "adjustment disorder," borderline personality disorder, and severe depression.[157] Elizabeth's

149. Lake, *supra* note 138, at 17; Walton, *supra* note 140, at 256.

150. Jain v. State, 617 N.W.2d 293, 296 (Iowa 2000).

151. *Id.* at 295–96.

152. *Id.* at 300. The court particularly noted that the university had no obligation to call Sanjay's parents about the first attempt. *Id.* at 299–300.

153. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 605 (W.D. Va. 2002).

154. *Id.*

155. *Id.* at 609–10.

156. Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, *1 (Mass. Super. June 27, 2005).

157. *Id.* at *2–3.

mental health continued to deteriorate with repeated suicide threats until, in the spring of her sophomore year, she died of neurological damage after being pulled from her burning room.[158] Although the case against the university and its officials was eventually settled because the exact cause of the fire could not be directly attributed to a suicide attempt, it did proceed past the dismissal stage, in part because the court found a special relationship between Elizabeth and the university had been created, which obligated the university to protect Elizabeth from harming herself.[159]

Colleges and universities are particularly concerned about the risks of this type of relationship and duty because suicide is the second leading cause of death for students.[160] Nearly 1100 college and university students commit suicide every year,[161] 90% of whom suffered from a diagnosable psychiatric disorder.[162] The results of litigation and the dangers posed by the college or university student would easily cause whiplash in even the most sanguine of university counsel. It also suggests the difficulties campus officials face when dealing with the behavior of mentally ill students.

Colleges and universities are in a trick bag created by both court decisions and student demands. In the absence of *in loco parentis*, they must regulate students as adults because authoritarian control over student behavior is gone. However, many parents and students expect protection from harm, rather than liberty from constraint. Modern colleges and universities do the best they can by providing mental health professionals

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158. *Id.* at *5–6.

159. *Id.* at *13.

160. Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081, 3083 (2007). The suicide rate for college students is still lower than that of their non-student peers, primarily because college campuses usually prohibit firearms. *Id.*

161. *Id.*

162. AM. FOUND. FOR SUICIDE PREVENTION, RISK FACTORS FOR SUICIDE, http://www.afsp.org/index.cfm?fuseaction=home.viewPage&page_id=05147440-E24E-E376-BDF4BF8BA6444E76 (last visited Mar. 1, 2012). Depression is the predominant disorder. *Id.* In a recent survey of college and university counseling centers describing their collective 103 suicide deaths, the report noted:

> To the extent that it was known, 80% of the students were depressed, 44% had relationship problems, 15% had academic problems, 27% were on psychiatric medication, and 18% were known to have had previous psychiatric hospitalizations. Directors, however, did not know the previous psychiatric history of 59% of these students. In addition, 17% committed suicide by use of a firearm, 34% by hanging, 9% by ingesting toxic substances, 10% by jumping, and 30% by other methods.

GALLAGHER, *supra* note 25, at 7.

and training for campus officials, especially when it comes to suicide prevention. But some colleges and universities have responded by making the behavior of the mentally ill a discipline problem. This approach minimizes liability but is not without its legal hazards.

For example, in 2005, George Washington University began disciplinary proceedings against Jordan Nott after he sought on-campus treatment for depression and then voluntarily hospitalized himself for suicidal ideation.[163] He was suspended pending a hearing for violating the student code of conduct's prohibition against "endangering behavior" and barred from campus. Rather than face disciplinary charges, Jordan withdrew from school and then brought suit under the Rehabilitation Act and the ADA for the institution's disciplinary response to his mental health issues.[164]

In a similar case, Hunter College was challenged for evicting a female student with a history of depression from her dormitory room for a semester. According to the school, she had breached her housing contract even though she herself called 911 after ingesting handfuls of Tylenol.[165] The school not only evicted the student, it required her to enter counseling and be evaluated by a school psychologist before she could return. The district court determined that such a blanket zero-tolerance policy may have violated the student's disability rights, and the school settled.[166]

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163. First Amended Complaint at 4, Nott v. George Washington Univ., Civil Case No. 05-8503 (D.C. Super. Oct. 2005), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=nCXRbipk5Pc%3d&tabid=199; Bower & Schwartz, *supra* note 85, at 130. Jordan's depression stemmed from a fellow student's suicide the year before. Elizabeth Wolnick, *Depression Discrimination: Are Suicidal College Students Protected by the Americans with Disabilities Act?*, 49 ARIZ. L. REV. 989, 1001 (2007).

164. First Amended Complaint at 4, Nott v. George Washington Univ., Civil Case No. 05-8503 (D.C. Super. Oct. 2005); Bower & Schwartz, *supra* note 85, at 130. Although Jordan had never self-identified as having a mental impairment, the university's response treated him as such and triggered the protections under both Acts. Wolnick, *supra* note 163, at 1010–11.

165. Second Amended Complaint at 6–7, Doe v. Hunter Coll., No. 04-CV-6740 (SHS) (S.D.N.Y. Sept. 2005) ECF, *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=LJYj0hJIXUw%3d&tabid=314; Bower & Schwartz, *supra* note 85, at 130.

166. Transcript at 22–23, Doe v. Hunter Coll., No. 04-CV-6740 (S.D.N.Y. Aug. 25, 2005), *available a*t http://www.bazelon.org/LinkClick.aspx?fileticket=UaVNgmrehr4%3d&tabid=31; Bower & Schwartz, *supra* note 85, at 130. Similarly, the Department of Education's Office of Civil Rights letters of decision consistently require that students who qualify under the ADA and the Rehabilitation Act be given due process that accounts for the effects of their mental disorders. *See, e.g.*, Letter to Marietta Coll., OCR Docket 15-04-2060 (Mar. 18, 2005) (dismissal for history of suicide attempts), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=26yfG15xOM8%3d&tabid=313;

Disciplining students for the behaviors arising from mental health problems is a logical solution to the tensions that colleges and universities face between protecting students and protecting themselves. It also has the virtue of being easily administered. However, the consequences of doing so can also lead to legal problems. Therefore, colleges and universities should consider adjusting their policies regarding responsibility for the actions of mentally ill students. The best way to do so is for colleges and universities to reconsider their relationship with all students. This broad approach is not only convenient, but it also underscores why colleges and universities should not use mental illness, in and of itself, as a cause for discipline. Such a broad approach is appropriate because so many of the problems of mentally ill students are shared with the entirety of the student population.

IV. TODAY'S COLLEGE AND UNIVERSITY STUDENTS: "LET US DIE YOUNG OR LET US LIVE FOREVER"[167]

Given the increasing number of students with mental illness on campus, an institution's relationship with its students is best served by embracing the entire student population. As it stands, the population at large is increasingly diverse due to its generational and psychological differences. Consequently, any method by which colleges and universities change their legal relationship with their students based on the general characteristics of the entire student population inherently addresses many of the needs of the mentally ill since the maturational needs of contemporary college and university students are similar to the needs of the mentally ill.

Letter to DeSales Univ., OCR Docket 03-04-2041 (Feb. 17, 2005) (excluded from dormitory for clinical depression), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=LjQaJfgTgx4%3d&tabid=313; Letter to Bluffton Univ., OCR Docket 15-04-2042 (Dec. 22, 2004) (indefinite suspension after suicide attempt), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=LWFnT1VirFU%3d&tabid=313; Letter to Guilford Coll., OCR Docket 11-02-2003 (Mar. 6, 2003) (involuntary withdrawal for emotional disability), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=ckwX-y99cXk%3d&tabid=313; Letter to Woodbury Univ., OCR Docket 09-00-2079 (June 29, 2001) (excluded from dormitory for behavior related to psychological disability), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=tulMV2FrMvg%3d&tabid=313; Letter to San Diego Cmty. Coll. Dist., OCR Docket 09-98-2154 (Dec. 30, 1999) (suspension for psychiatric disability), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=ItMT2k2tT4c%3d&tabid=313. *See generally* Margaret M. McMenamin & Perry A. Zirkel, *OCR Rulings under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTSECONDARY EDUC. & DISABILITY 55 (2003), *available at* www.ahead.org/uploads/docs/jped/journals/JPEDVol16No2.doc.

167. ALPHAVILLE, FOREVER YOUNG (Warner Records 1984).

In addition to the psychological vulnerability of college and university students, there is a distinct maturational stage,[168] a distinct phase of development between late adolescence and young adulthood that social scientists have classified as "emerging adulthood."[169] Emerging adulthood as a distinct developmental phase has fairly recent origins, apparently resulting from contemporary cultural conditions:

> [W]hat is mainly required for emerging adulthood to exist is a relatively high median age of entering marriage and parenthood, in the late twenties or beyond. Postponing marriage and parenthood until the late twenties allows the late teens and most of the twenties to be a time of exploration and instability, a self-focused age, and an age of possibilities.[170]

This age group is "exploring (if rather aimlessly); their lives are unstable; they have a sense of being in between adolescence and adulthood (and they are assiduously avoiding adult responsibilities); and they are self-focused (to an extreme)."[171] Concurrently, the brain's maturation process—particularly the development of the prefrontal cortex—is incomplete until at least the early twenties.[172] The prefrontal cortex is important in behavior because it "is the area responsible for the brain's highest judgmental faculties. Scientists call it the site of the '"executive functions"—planning, impulse control and reasoning.'"[173]

The increasing popularity of going to college has contributed to emerging adulthood's profile and problems.[174] One authority suggests that nearly two-thirds of emerging adults go to college or university after high school, although many of them fail to get their degrees within the traditional four-year trajectory.[175] Meanwhile, the institutional view of college and university education has not adapted to the maturational deficits in the target population. Many emerging adults flounder in college because they are simply too immature. They are not ready to attend college because they are not sure why they are there and are therefore not fully committed to it. Some fail in defiance of their parents' wishes, and many lack the self-discipline necessary to succeed. Others get caught up in the

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168. "The college years represent a developmentally challenging transition to adulthood, and untreated mental illness may have significant implications for academic success, productivity, substance use, and social relationships." Hunt & Eisenberg, *supra* note 27, at 3 (footnotes omitted).

169. *See generally* JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES (Oxford University Press 2004).

170. *Id.* at 21.

171. *Id.* at 27–28.

172. Massie, *supra* note 19, at 660–61.

173. *Id.* (footnote omitted).

174. ARNETT, *supra* note 169, at 121.

175. *Id.* at 125.

excesses of college and university life because they have no sense of moderation, and many lack self-discipline because their parents have heretofore exercised significant control over them.[176] "[T]heir own resources of self-control and self-discipline prove to be inadequate for the challenges of college and university life. They blow off their classes, they fail to do their course work, they drink too much too often, and eventually they drop out or get kicked out."[177]

Although American culture views the college experience as the threshold from adolescence to adulthood, "[t]he university context can be both helpful and problematic in terms of preparing young people for adulthood. The constant flow of new ideas, social relationships, and potential career paths offered within the university context is likely to prompt identity exploration in some individuals . . . but to prompt confusion in others."[178] Certainly, there are many freshmen who are ready for and embrace this less structured environment. On the other hand, an increasing number of students are so immature that they are overwhelmed by their choices. Worse yet are those who have no interest in the choices at all.[179] The latter are "most likely to violate rules and to commit acts of physical aggression, and they reported the highest levels of many of the highest-risk behaviors, including dangerous drug use, anal and casual sex, and impaired driving."[180] Such students are still adolescents, and just like adolescents, they engage in risky behaviors that "include eating disorders, sexual behaviors, substance abuse . . . , and violence."[181] As a consequence, they are more likely to experience significant increases in sexually transmitted disease, unhealthy weight control issues, sleep deprivation, stress, and mental health problems.[182] Emerging adults also experience heavy episodic drinking and alcohol disorders,[183] while suicide

176. *Id.* at 125–27.

177. *Id.* at 127.

178. Seth J. Schwartz et al., *Examining the Light and Dark Sides of Emerging Adults' Identity: A Study of Identity Status Differences in Positive and Negative Psychosocial Functioning*, 40 J. YOUTH & ADOLESCENCE 839, 854 (2010) (citation omitted).

179. *Id.* at 839–40.

180. *Id.* at 855; Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 474–75 (2000).

181. Nancy R. Ahern, *Risky Behavior of Adolescent College Students*, 47 J. PSYCHOSOCIAL NURSING 21, 22 (2009). Violent college students are also more likely to have other mental health problems. *Id.* at 23.

182. Melissa Nelson Laska et al., *Latent Class Analysis of Lifestyle Characteristics and Health Risk Behaviors among College Youth*, 10 PREVENTION SCI. 376, 377 (2009).

183. *See generally* Deborah A. Dawson et al., *Another Look at Heavy Episodic Drinking and Alcohol Use Disorders among College and Noncollege*

is the third leading cause of death in this age bracket.[184] Studies have shown that suicide is far from a random phenomenon; there are at least one hundred attempts, and perhaps as many as two hundred, for each completed suicide.[185] "[T]he major sources of death and disability [in this age group] are related to *difficulties in the control of behavior and emotion*."[186] Emerging adulthood seems to be a primordial pool of mental illness.

Worse yet, this period of developmental immaturity is most pronounced in and most difficult for those students who enter it with pre-existing emotional disturbances.[187] But it is equally problematic and distressful for college and university students in general. It creates the perfect storm for developing mental disorders while on campus:

> Colleges and new high school graduates have what I think is a strange idea. They think every freshman is an adult who can make his or her own decisions. Students think going off to college is a declaration of independence. Colleges, by law and by inclination, don't involve parents in their children's academic progress and won't give out any information.
>
> Sometimes this is fine. . . . But then there are the other kids—probably most kids. College is being underwritten by parents'

Youth, 65 J. STUD. ON ALCOHOL 477 (2004). The highest rates of student alcohol dependence are among full-time residential students. *Id.* at 477.

184. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. (SAMHSA), OFFICE OF APPLIED STUDIES, THE DAWN REPORT: EMERGENCY DEPARTMENT VISITS FOR DRUG-RELATED SUICIDE ATTEMPTS BY YOUNG ADULTS AGED 18 TO 24: 2008, 1 (May 25, 2010), http://www.samhsa.gov/data/2k10/DAWN002/SuicideAttemptsYoungAdults.htm. Recent CDC data reveal over 4300 suicides between the ages of fifteen and twenty-four in a single year. Kenneth D. Kochanek et al., *Deaths: Preliminary Data for 2009*, 59 NAT'L VITAL STAT. REP. 1, 30 (Mar. 16, 2011), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_04.pdf.

185. SAMHSA, THE DAWN REPORT, *supra* note 184, at 1.

186. Dahl, *supra* note 74, at 3 (emphasis in original).

187. Maryann Davis & Ann Vander Stoep, *The Transition to Adulthood for Youth Who Have Serious Emotional Disturbance: Developmental Transition and Young Adult Outcomes*, 24 J. MENTAL HEALTH ADMIN. 400, 400 (1997).

> They enter the transition period developmentally behind their nondisabled peers. This immaturity can lead to difficulties in all domains of community adjustment. Their significant psychiatric impairment can also interfere with psychosocial functioning. One of the most common diagnoses among adolescents with [serious emotional disturbance] is conduct disorder, and a high proportion abuses or is dependent on substances. Youth with conduct disorders usually have poor peer relations and often come into contact with the law. Substance use interferes with impulse control and is associated with committing acts of violence in adults with mental illness.

Id. at 419.

> hard-earned cash, loans in both the parents' and the students' names, and student summer earnings. The student has uneven skills in managing time, money, and responsibilities. High school success was partly the result of parental monitoring and intervention. Students who are a little less mature than peers have needed some external structure like curfews and consequences for not getting things done; praise and reward for doing what they are supposed to do.
>
> For students like these, it's unlikely that the summer between high school graduation and the beginning of college has meant a magical transformation.[188]

Thus, higher education needs to rethink its relationship to all its students by rethinking its students' overall maturational and therefore psychological condition as emerging adults. The needs of the general student population are clearly congruent with those of the mentally ill population. What is good for the subset is necessarily good for the entire population.

V. PRACTICAL SUGGESTIONS FOR DEALING WITH MENTALLY ILL STUDENTS: "THE LONG AND WINDING ROAD"[189]

The ideal solution for realigning the institutional relationship with all students, and thus mentally ill students, will have a foundation of shared responsibility among the institution, the student, and the parent. Such a systemic solution is best accomplished if the realignment occurs with all college and university students, with periodic adjustments for increasing individual responsibility as the student matures. In other words, none of the stakeholders involved in college and university education for emerging adults can rely on an abrupt shift from high school dependence to college independence without acknowledging the need for transitional considerations. In addition, the institutional and parent stakeholders must understand how integral their continued cooperation is to this generation of college and university students. All the stakeholders must acknowledge the problems and share in the responsibilities. Such a system will not be a modified *in loco parentis* regime that gives students what they want—liberty without consequences—but a duty-relationship that resembles a comparative fault system. Colleges and universities can no longer afford the luxury of giving parents and students everything they want, while risking the backlash of liability.

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188. Marie Hartwell-Walker, *Ready or Not: Immature but Headed to College*, PSYCHCENTRAL.COM (2009), http://psychcentral.com/lib/2009/ready-or-not-immature-but-headed-to-college/.

189. THE BEATLES, LET IT BE (Apple Records 1969).

A. The Relationship between the "Workplace" and the Anti-Discrimination Laws

One of the first challenges for colleges and universities is better understanding their innate responsibility for both the institutional environment and its effect on students. In the past three decades, higher education has come to view itself as a commercial enterprise.[190] Congruent with the rise of the consumer-student in the 1980s has been the rise of colleges and universities as businesses.[191] Regardless of the motivation for these changes, the "business" of higher education necessarily has moved from a more student-centered model (which is expensive to maintain) to a more authoritarian model (which is less expensive). The demise of *in loco parentis* may not have facilitated that change, but the assumption that the consumer-student is sufficiently mature to understand the business model is a necessary consequence of this shift. On the other hand, perhaps the success of the business model itself requires that assumption. In any event, the student consumers—and their parents—still believe that the increasing tuition they are paying goes for the traditional model and its higher level of individualized attention. Parents and students want to get their money's worth, and student safety and protection is part of that expectation.[192] This disjunction of the parties' understanding of the "model" of the institution inexorably leads to a disjunction of expectations in the product of the institution and the customer to whom it is being delivered.

The shift to the business model has its most striking institutional consequence in dealing with the student, especially in not being able to decide whether they are customers or workers or even the product itself. The business model tends to view mentally ill students as flawed versions to whom it is less efficient to deliver services. Are they bad customers who should not use the service? Are they workers who can be dismissed because they disrupt the workplace? Or are they the problematic raw material waiting in the warehouse to be molded into an educated graduate? Their flaws make them less economically efficient to serve. The default model that many institutions use for litigation purposes is students as

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190. DEREK C. BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 1–17 (2003). "Universities share one characteristic with compulsive gamblers and exiled royalty: there is never enough money to satisfy their desires." *Id.* at 9.

191. Within the past forty years, higher education has precipitously increased the number of management employees: 85% more administrators and 240% more administrative staff. Benjamin Ginsberg, *Administrators Ate My Tuition*, WASH. MONTHLY (Sept.–Oct. 2011), *available at* http://www.washingtonmonthly.com/magazine/septemberoctober_2011/features/administrators_ate_my_tuition031641.php?page=1.

192. *Id.* at 11.

employees. This model is a matter of convenience and familiarity because that is the model to which the current disability laws are most suited.

Unfortunately, that employer-employee paradigm is ill-fitting. The ADA and the Rehabilitation Act broadly cover institutions that receive federal funds, but higher education is not a traditional commercial or government enterprise. Unlike the Individuals with Disabilities Education Act (IDEA), which is all about education and the disabled, the civil rights statutes applicable to college students are less about learning and more about access to an educational environment. The ADA and the Rehabilitation Act are designed to insure that one can take part in the enterprise but is not about the enterprise itself. Higher education has done well in ensuring such access but not as well in actually integrating anti-discrimination practices into the educational service, especially for the mentally ill.

Access to campus for the mentally ill is significantly different from the integration of the mentally ill into the educational process because mental disorders inherently make campus life itself more difficult. "Mental health problems can have a profound impact on all aspects of campus life: at the individual level, the interpersonal level[,] and even the institutional level."[193] Worse yet, campus life can exacerbate and even cause student mental disorders. This latter problem—higher education's "causation" of mental disorders—resembles the toxic workplace.[194] But unlike an employee who fails to prove a discrimination claim against a toxic employer without evidence that she is disabled for a broad range of jobs,[195] a college or university student has only this one "job." If she is foreclosed from one "workplace" because of a mental disorder, then she is unlikely to find an equivalent "job" at all.[196]

Rather than using a reactive model to mental illness, higher education should consider a more proactive model that resembles the educational enterprise as it actually is rather than the business it pretends to be, by adhering to some principles basic to IDEA. Indeed, one of the transitional problems for students with pre-existing disorders arises because they may have operated under IDEA's principles through high school. IDEA creates

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193. Kitzrow, *supra* note 22, at 169. It is estimated that more than four million more people would have finished college but for mental disorders. *Id.* at 170. Similarly, an estimated seven million people have terminated either high school or college due to early-onset psychiatric disorders. Ronald C. Kessler et al., *Social Consequences of Psychiatric Disorders, I: Educational Attainment*, 152 AM. J. PSYCHIATRY 1026, 1031 (1995).

194. *See generally* John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 515–518 (2011).

195. *Id.* at 519–523.

196. *See* Kessler et al., *supra* note 193, at 1026–27.

a haven for parents and disabled students from kindergarten through twelfth grade, a one-stop shop of identification, placement and accommodation for children with both learning disorders and other mental disorders.[197] Indeed, IDEA mandates that public schools actively find students who suffer from disabilities.[198] Children with qualifying mental disorders are afforded individual educational plans that will accommodate the disability and assist in their education.[199] Rather than having to self-identify, disabled elementary and secondary students have a team of teachers and other educational personnel to affirmatively help with their journey through the public schools to graduation.[200]

Insofar as colleges and universities invite students on campus—promising them that, in exchange for money, they will provide an

197. 20 U.S.C. §§ 1411–1420 (2010).

198. *Id.* at § 1401(a)(3)(A) (2010). "The State must have in effect policies and procedures to ensure that . . . [a]ll children with disabilities residing in the State . . . and who are in need of special education and related services, are identified, located, and evaluated." 34 C.F.R. § 300.111(a)(1)(i) (2010) (child find). *See, e.g.*, El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 949–52 (W.D. Tex. 2008) (holding school district violated its duty under child find when it failed to refer child to evaluation despite suspecting he had a disability); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11, 25–30 (D.D.C. 2008) (holding child find obligations kick in for children suspected of disability, not just to those who are ultimately found to be disabled). *See generally* United States Office of Special Education Programs, *About Child Find*, CHILDFINDIDEA.ORG, www.childfindidea.org/overview.htm (last visited Mar. 2, 2012).

199. 20 U.S.C. § 1414 (2010). IDEA's category of student mental disorders is "emotional disturbance" and serves as a pretty broad umbrella for education professionals to "suspect" and "evaluate" for disability services. *Id.* at § 1401(3)(A)(i) (2010); 34 C.F.R. § 300.8(c)(4) (2010). *See also* Nat'l Dissemination Ctr. for Child. with Disabilities, *NICHCY Disability Fact Sheet #5: Emotional Disturbance* (June 2010), http://nichcy.org/disability/specific/emotionaldisturbance (last visited Mar. 2, 2012). On the other hand, the ADA's identification of disabilities generally is broader than IDEA's. *See, e.g.*, Perry A. Zirkel, *A Step-By-Step Process § 504/ADA Eligibility Determinations: An Update*, 239 WEST ED. L. REP. 333, 335 (2009).

200. A "child with a disability" under the IDEA must also "need[] special education and related services." 20 U.S.C. § 1401(3)(A)(ii) (2010). Even if a mental disorder does not qualify for IDEA accommodations, some public schools offer (and may require) counseling for students with mental disorders. Dimoff, *supra* note 78, at 321. It is believed that approximately half of public schools offer mental health services, with greatest availability in larger schools (both urban and suburban), schools in the Northeast, and schools with larger Medicaid populations. Eric P. Slade, *The Relationship Between School Characteristics and the Availability of Mental Health and Related Health Services in Middle and High Schools in the United States*, 30 J. BEHAV. HEALTH SERVICES & RESEARCH 382, 389 (2003). Rural schools are less likely to offer mental health services even though their mental health problems are as prevalent as in urban schools. *Id.*

education—the institutions should consider being pro-active rather than reactive in providing assurances to their mentally ill students that they too can and will be educated. Access is not enough. Nowhere is this more important than in better preparing all entering students for the college experience, thereby creating a smoother transition for those who already are mentally ill, treating them as one of the whole rather than a separate category.

B. Educational Transitions for Emerging Adults

If higher education recognizes that entering students are emerging adults, in which mental illness is a large subpopulation, then it also must do a better job of preparing them for what lies ahead.[201] This group does not see the college experience as the threshold for responsibility and adulthood. Rather, it assumes that college is a continuum of the adolescent experience. Higher education need not change its objectives. There is no reason to conclude that students no longer have the ability to engage in the academic life. But there is a greater need for higher education to adjust its assumptions of students' *immediate* capacities to engage in basic problem-solving crucial to higher academic achievement and to cope with an inherently less structured and less controlled environment. This problem is especially acute for the student who is mentally ill.[202]

In general, disabled entering students report that their contact with postsecondary assistance is either too little or too late.[203] They enter college trying to balance their need for accommodations with their new academic burdens, often fearful to disclose their needs and not knowing where to find the appropriate resources.[204] They often do not disclose because of institutional hostility or because they do not even realize they have a disability.[205]

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201. *See supra* Part I.

202. *See* Smith-Osborne, *supra* note 73, at 16 ("[T]he psychosocial rehabilitation literature has found that psychiatric disabilities are the least understood and least academically supported disability type on campus.").

203. Elizabeth Evans Getzel & Colleen A. Thoma, *Experiences of College Students with Disabilities and the Importance of Self-Determination in Higher Education Settings*, 31 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 77, 82 (2008).

204. *Id.* at 77. *See also* Letter to Spring Arbor Univ. (Diana Y. Bower), OCR Docket 15-10-2098 (Dec. 16, 2010) (student advised university admissions representative of pre-existing disabilities, but was never referred to campus disabilities services office), *available at* http://www.nacua.org/documents/OCRLetter_SpringArborU.pdf.

205. Getzel & Thoma, *supra* note 203, at 77–78; Deborah Megivern et al., *Barriers to Higher Education for Individuals with Psychiatric Disabilities*, 26 PSYCHIATRIC REHABILITATION J. 217, 227 (2003). Another problem that students encounter is the disconnect between IDEA and ADA in the documentation

Those previously served by IDEA have some advantage insofar as the transition to post-secondary education must be addressed in the Individualized Education Program (IEP)[206] by the student's sixteenth birthday.[207] The IEP sets out post-secondary educational goals and transition services to reach those goals, including independent living skills.[208] A good transition program also advises the student that colleges and universities have different procedures and resources for students with disabilities.[209] But upon entering college, disabled students discover that the child-centered services of IDEA do not extend to colleges or universities. Instead, students have to self-identify, not an easy task for students coming onto campus with a competitive disadvantage. Furthermore, they are no longer provided services funded by the federal government. Funds come from the institution, and students are not assured that they will get the same accommodations—if any—that they received under IDEA. Indeed, students can find their relationship with the college or university to be adversarial rather than helpful.

Those disabled students who do succeed have made internal decisions about their disability vis à vis their academic experiences. These students have decided to succeed. They have a clear career goal and have reframed their disability experience to account for that disability, their strengths and

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required by postsecondary settings. NAT'L JOINT COMMITTEE ON LEARNING DISABILITIES, THE DOCUMENTATION DISCONNECT FOR STUDENTS WITH LEARNING DISABILITIES: IMPROVING ACCESS TO POSTSECONDARY DISABILITY SERVICES 1 (July 2007), *available at* http://www.ahead.org/uploads/docs/resources/njld_paper.pdf.

206. An Individualized Education Program is a self-encompassing plan for the use of multiple resources, teaching techniques, educational goals, and when necessary behavioral goals. It is more education-oriented than the 504 Plan used in higher education for listing a disabled student's accommodations. *See, e.g.*, Educ. Ctr, *504 Plan vs. IEP: What's the Difference?*, ED-CENTER.COM, http://www.ed-center.com/504 (last visited Mar. 2, 2012).

207. 20 U.S.C. 1414(d)(1)(A)(i)(VIII) (2010); 34 C.F.R. § 300.320(b) (2011).

208. 34 C.F.R. § 300.43 (2011). "*Transition services* means a coordinated set of activities for a child with a disability that . . .[i]s designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education." *Id.* (emphasis added).

209. U.S. Dept of Educ. Office of Civil Rights, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, (Sept. 2011), *available at* http://www2.ed.gov/print/about/offices/list/ocr/transition.html; Amy G. Dell, *Transition: There Are No IEP's in College*, TENJ.EDU (2004), http://www.tcnj.edu/~technj/2004/transition.htm; Stephanie Monroe, *Dear Parent Letter*, ED.GOV (Mar. 16, 2007), http://www2.ed.gov/about/offices/list/ocr/letters/parent-20070316.html.

weaknesses, and their goals.[210] Having assumed that orientation, these students are persistent, are focused on goals that tap into their strengths while minimizing their weaknesses, have learned creativity, and have developed a supportive social network.[211] These students are self-determined and actively engaged in the academic process.

This intentionality and self-determination are habits of the mind that should be instilled in all students upon entering college, either before they set foot on campus or through intensive orientation. Emerging adults are increasingly unprepared psychologically for the duties and responsibilities they are supposed to undertake and are often incompetent to engage in the academy.[212] Intentional self-determination rather than the self-absorption of emerging adulthood may not only increase academic success, it may be one way to prevent some of the mental health problems the environment itself causes. Entering students need to be taught how to deal with the separation from their known environments as well as with their individuation.[213] They need to be taught that they have to engage actively and intentionally in their education.[214] "[O]pen institutional approaches recognize both the transitional nature of this highly vulnerable time of life and the need for programs on campuses that can nurture their students and provide the emotional support that all of them—not just those with specific mental health problems need in order to survive."[215]

Today, the traditional notions of dropping a kid off at college or university and hoping she will cope hold true for a smaller proportion of freshman than in years past. Instead, those assumptions can do enormous harm to the unprepared freshman, who is vulnerable without the

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210. Tina M. Anctil et al., *Academic Identity Development Through Self-Determination: Successful College Students with Learning Disabilities*, 31 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 164, 172 (2008).

211. *Id.* Students with disabilities must be self-advocates to get the support they need from their institutions. Therefore, they are engaged in problem-solving, they are self-aware, and they set goals. In particular, they recognize that their academic success requires developing support systems on campus and forming relationships with faculty. Getzel & Thoma, *supra* note 205, at 80–81.

212. *See generally* Vanessa Kahen Johnson et al., *Managing the Transition to College: Family Functioning, Emotion Coping, and Adjustment in Emerging Adulthood*, 51 J. COLL. STUDENT DEV. 607, 608 (2010).

213. *Id.* at 607.

214. Am. Psychol. Ass'n, *Increasing Student Success Through Instruction in Self-Determination*, APA.ORG (July 21, 2004), http://www.apa.org/research/action/success.aspx; Christine D. Bremer et al., *Self-Determination: Supporting Successful Transition*, 2 RES. TO PRACTICE BRIEF 1 (April 2003), *available at* http://www.ncset.org/publications/researchtopractice/NCSETResearchBrief_2.1.pdf; Wendy M. Wood et al., *Promoting Student Self-Determination Skills in IEP Planning*, 36-3 TEACHING EXCEPTIONAL CHILD. 8 (2004), *available at* http://www.transitiontocollege.net/percpubs/SelfDeterminationArticle.pdf.

215. Massie, *supra* note 19, at 659.

appropriate tools to cope, thus resulting in or exacerbating mental disorders. If institutions become more deliberate about such transitional and systemic instruction, they will benefit not just those with pre-existing mental disorders but all their students laboring under a maturational gap that makes them unprepared for campus life and its rigors.

C. Warnings to Parents: Responsibilities, Involvement, & Information Sharing

Families have a significant effect on student success.[216] The student who comes from a cohesive family unit is more likely to sail easily through emerging adulthood.[217] However, even a strong family environment may not be sufficient if the student's emotional coping skills are deficient.[218] Consequently, families should be informed of the psychological struggles their children might encounter in college, particularly if doing so will ameliorate student adjustment problems that might lead to mental illness on campus. Emerging adulthood is a maturational period that asks for a more continuing parental role than in previous generations, but higher education is neither a parent nor a surrogate parent.

Just as student transition is important, so too must parents' actions during this transition be more intentional and detailed about their children's emerging adulthood and about their own share of responsibility for their "not-yet-adult" children. That transitional information of course should include detailed materials on the educational service they are paying for. In fact, at least one organization recommends that, when Congress reauthorizes the Elementary and Secondary Education Act, the Act should require that public schools provide students and parents more and better information to inform their college or university choices.[219] Similarly, colleges and universities should better explain their function, their options, their resources, and all other aspects of the academic enterprise.

Colleges and universities need to better educate parents about emerging adulthood and what their children will experience in college. Parents are

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216. Johnson et al., *supra* note 212, at 618 ("[C]ollege students' perceptions of their family environment—namely family cohesion, family expressiveness, and family conflict—are linked to their academic, social, and emotional well-being when making the transition to college.").

217. *Id.* "Although a restructuring of the parent-child relationship occurs during the transition to young adulthood, parental acceptance, empathy, and support remain an essential foundation for healthy adjustment during this period." Charles J. Holahan, *Parental Support and Psychological Adjustment During the Transition to Young Adulthood in a College Sample*, 8 J. FAM. PSYCHOL. 215, 215 (1994).

218. Holahan, *supra* note 217, at 215.

219. Julie Maragetta Morgan, *Buying College: What Consumers Need to Know*, CTR. FOR AM. PROGRESS 6 (Mar. 14, 2011), *available at* http://www.americanprogress.org/issues/2011/03/pdf/buying_college.pdf.

no more aware of the ramifications of emerging adulthood and entry to college and university life than their children are, and their involvement is more integral to their children's success than ever before. As one educational tool, colleges and universities would do well to provide each freshman student's parents a copy of *College of the Overwhelmed*[220] before they move furniture into the dormitory. Parents need to be told that today's college and university students are capable of achieving success in both college and life.[221] However, parents also need to be told that such success will be achieved differently and that traditional expectations of a smooth, linear trajectory through college or university and then into the workplace may require adaptation of family expectations. Thus, the parents' transition package must prepare them for the realities of emerging adulthood and what parents should expect in terms of their child's ability (or inability) to adapt.

Such maturational and psychological transition is especially important for parents of mentally ill students. Parents of students who have received IDEA services are aware of resources that are available in K-12 education. However, colleges and universities need to reach out during transition to advise parents of available services, especially of any campus offices that afford disability services[222] and mental health counseling. Indeed, *all* parents should be given this detailed information for all eventualities. A family that understands the importance of such services is more likely to convey that sense of acceptability to their children and thereby make their use more acceptable and less stigmatizing. Parents that are informed of these services can then suggest them to their children when students refuse to otherwise seek out on-campus assistance.

Through this transition, parents and even institutions need to understand that a balance of involvement and disengagement is integral to emerging adulthood as a bridge to maturity, not to a continuing dependence. Because the law turns over educational and treatment records to children at eighteen,[223] parents must delicately balance their child's need for independence and need for support.[224] However, institutions can assist in the process by deliberately informing parents of the available services and enlisting them directly in the processes.

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220. RICHARD KADISON & THERESA FOY DEGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT (Jossey-Bass 2004).

221. *See, e.g.*, Jeffrey Jensen Arnett, *Oh, Grow Up! Generational Grumbling and the New Life Stage of Emerging Adulthood—Commentary on Trzesniewski & Donnellan (2010)*, 5 PERSP. ON PSYCHOL. SCI. 89, 89 (2010).

222. Massie, *supra* note 19, at 658.

223. Pauline Jivanjee et al., *The Age of Uncertainty: Parent Perspectives on the Transitions of Young People with Mental Health Difficulties to Adulthood*, 18 J. CHILD. & FAM. STUD. 435, 443 (2009).

224. *Id.*

That also means involving parents when students are in psychological trouble. The institutional notion that the lives of their students are "private" and that parents and other outside authorities should not be notified under privacy laws[225] rests on the erroneous assumption that these students can independently order their lives. Many cannot. Whatever "culture of privacy" higher education has cultivated to encourage or respect student independence[226] is distinct from the prohibition against revealing student records under privacy laws. Regardless of that prohibition, the Family Educational Rights and Privacy Act (FERPA) has a health and safety emergency exception that allows an institution to reveal "personally identifiable information from an education record to . . . parents . . . to protect the health or safety of the student or other individuals."[227] Furthermore, that which happens in public—that which is observed in the classroom or dormitory—is a matter that is no longer confined to an "education record."[228] Dangerous acts can be revealed and often should be revealed to parents when their children are in trouble.[229]

Clearly, private or privileged mental illness and medical information should not be carelessly bandied about on campus. On the other hand, cooperation and collaboration among the institution, the student, and the parents require that all the interested parties be involved, and involvement requires notification. In these cases, determining whether a student's parents should be notified is not a privacy or confidentiality matter nor should it be an institutional "lesson" in independence. Emerging adults tend to have fewer higher-order problem-solving skills and less ability to make mature judgment calls, so leaving disclosure decisions to those

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225. *See, e.g.*, 20 U.S.C. § 1232g (2010).

226. Elizabeth Bernstein, *Delicate Balance: Colleges' Culture of Privacy Often Overshadows Safety: Laws Allow Disclosure of Troubling Behavior But Many Schools Resist*, WSJ.COM (Apr. 27, 2007), http://online.wsj.com/article/SB117763681568684306.html.

227. 34 C.F.R. § 99.36 (2011). *See generally* Allison B. Newhart & Barbara F. Lovelace, *FERPA Then and Now: Tipping the Balance in Favor of Disclosure of Mental Health Information under the Health and Safety Emergency Exception*, 2009 URMIA J. 19 (2009). FERPA's recently amended regulations make it easier for institutions to contact parents about health and safety emergencies by removing the strict construction requirement. *Id.* at 22. *See also* Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, WINTER 2008 PERSP. (2008), *available at* http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspectives%281%29.pdf.

228. *E.g.*, Stuart, *supra* note 8, at 365–68; Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393, 396 (2008). *See also* Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public School Children*, 84 NEB. L. REV. 1158, 1200 (2006).

229. Tribbensee, *supra* note 230, at 402–04.

students is a mistake.[230] Instead, colleges and universities should consider notification policies that allow students and their parents, cooperatively, to decide who should be contacted in an emergency. Parents need not be notified in all circumstances[231] because students need to be given increasing autonomy over their lives. However, parental notification should be required during freshman year,[232] with greater student autonomy upon evidence of greater student maturity.

The parental aspects of the transition to college and university life requires the institution to educate parents about their responsibility to the institution and their children's continuing presence on campus. Unfortunately, "[m]ost families of typically-developing adolescents in the U.S. follow cultural expectations for reducing their major responsibility for their children."[233] Today, parents can no longer assume that their children can make the clean and culturally expected step toward adulthood upon entering college without their assistance. Nor can they foist that responsibility entirely on the institution. So when a college or university does notify a parent of her child's risky behavior and suicidal tendencies, the parent cannot ignore the problem. In a recent and rather disturbing study, researchers discovered that most parents did not engage with the college or university after their child was involved in seriously self-destructive behavior.[234] Fewer than 25% of parents intervened following such episodes, even in the most serious cases requiring hospitalization.[235] Some parents even interfered in the delivery of mental health services to their children.[236] By leaving the responsibility for their obviously vulnerable children to colleges and universities, parents want to make the institutions legally responsible for a special relationship. In this litigious age, that is the last thing an institution should want to undertake, especially when such a relationship is created by default.

The parental role in this transition must therefore impress upon parents the educational necessity of their continued involvement in their children's lives, even after they have matriculated, but also the appropriate maturational evolution of letting go. Indeed, increasing evidence exists that students benefit when the institutions and their parents create a

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230. *See* Hartwell-Walker, *supra* note 190.

231. Thomas H. Baker, *Notifying Parents After a Suicide Attempt: Let's Talk About It*, 34 NAT'L ON-CAMPUS REP. 1 (Jan. 1, 2006).

232. Tribbensee, *supra* note 230, at 410–12.

233. Jivanjee et al., *supra* note 223, at 436.

234. Thomas R. Baker, *Parents of Suicidal College Students: What Deans, Judges, and Legislators Should Know About Campus Research Findings*, 43 NASPA J. 164, 172 (2006).

235. *Id.*

236. *Id.* at 173.

cooperative partnership.[237] Educating parents about the transitional process of emerging adulthood and the risks inherent in college life may be sufficient to persuade parents that their continued involvement is critical in protecting their children, or at the very least, protecting their investment. Such transitional education may also serve as notice to parents of the risks and dangers to their children, sufficient to ease some of the legal obligations from the institution, as do sufficient warnings on any product or service. And if the business model is the governing institutional paradigm, a parental behavior contract—with warnings and notices—could be drafted, spelling out the shared responsibilities and the conditions of waiver and estoppel. Regardless, colleges and universities should heed the conditions under which they are tasked with protecting students and try to shift at least some of that duty to co-equal partners because emerging adults are unable to do so, especially those with mental illness.[238]

Given the maturational risks inherent in this age group, parents in general must be encouraged to participate in their children's higher education experience, not to the point of smothering them but to the point that they acknowledge that institutions cannot be solely responsible for the continuing well-being of their children. By increasing the level of collaboration and engagement with parents, colleges and universities may be relieved of some of the enormous responsibility that derives from the special relationship. Such a comparative "fault" framework of shared responsibility might better balance the demands and needs of these emerging adults in the college and university setting.

D. The "Workplace" & Student Discipline

An additional challenge to mentally ill students is conforming their behavior to student disciplinary codes. Again, institutional adherence to the reactive regimes of the ADA and the Rehabilitation Act invites the compartmentalization of workplace rules violations with student discipline by making disorder-related behavior an incapacitating failure in the workplace. Because dismissal from one institution may have a more lasting impact than losing a particular job, a better approach blends the

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237. Rick Shoup, et al., *Helicopter Parents: Examining the Impact of Highly Involved Parents on Student Engagement and Educational Outcomes*, 10 (June 1, 2009), *available at* http://cpr.iub.edu/uploads/AIR%202009%20Impact%20of%20Helicopter%20Parents.pdf. The "helicopter" parent may not be the model an educational institution wants to encourage, but a recent study suggests the benefits to college students of high parental involvement, especially in students' self-reported gains and higher levels of engagement with the university. *Id.* at 20–21. Interestingly, the study also found that students whose parents are highly involved in their college experience have lower grades. *Id.* at 21.

238. "[M]any parents whose children have disabilities prepare to have continuing roles in their children's lives." Jivanjee et al., *supra* note 223, at 436.

more humane individual approach of IDEA as incorporated into the ADA's and Rehabilitation Act's accommodations requirements.

Under IDEA, children with disabilities "cannot be expelled for conduct that is related to their disabilities[,]"[239] and they are given an opportunity to establish that their behavioral problems may be associated with their disorder under a behavioral assessment and manifestation determination procedure to avoid serious sanctions that might otherwise be given to general education students.[240] If the behavior is related to the disabling condition, then the team that constructs the student's Individualized Educational Program (IEP) must try to adapt that program to deal with the behavior.[241] This is in contrast to the ADA, which only requires an individual assessment when a mentally ill student is identified as a potential threat to others and might be removed from campus.

This is in stark contrast to the Title I employment model that courts are generally inclined to follow for terminating employees for a violation of "workplace" rules, even if such violation is a manifestation of a mental illness.[242] Employers argue that such rules are job-related—consistent with business necessity—so they can terminate a mentally ill employee without violating discrimination statutes.[243] The employee who cannot comply with the rules is no longer otherwise qualified for the position and therefore no longer within the protected statutory class.[244] However, colleges and

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239. Randy Chapman, *The Discipline Process for Students with Disabilities Under the IDEA*, 36 COLO. LAW. 63, 63 (July 2007).

240. 20 U.S.C. § 1415(k)(1)(D)–(F) (2005); Chapman, *supra* note 239, at 65. The 2004 reauthorization of the IDEA sets out disciplinary measures of suspensions for up to ten days and of alternative placements for up to forty-five days for special circumstances, such as possession of weapons, possession or usage of illegal drugs, and serious bodily injury. 20 U.S.C. § 1415(k)(1)(G) (2005); Chapman, *supra* note 239, at 64-65; Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 43–45 (2000). IDEA also allows public schools to suspend disabled students for up to ten days without providing any additional educational services and allows a change in educational placement for up to forty-five days if the student, while in school, carries a weapon, is involved in illegal drugs, or has inflicted serious bodily injury on another. *E.g.*, Chapman, *supra* note 239, at 64; Dupre, *supra*, at 37–40.

241. Chapman, *supra* note 239, at 65.

242. EEOC, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, http://www.eeoc.gov/facts/performance-conduct.html; Michael D. Meuti, *Disabling Legislation: The Judicial Erosion of the ADA's Protection for Employees with Psychiatric Disorders*, 14 STAN. L. & POL'Y REV. 445, 463 (2003).

243. Meuti, *supra* note 242, at 462.

244. "The courts emphasize that a plaintiff must prove discrimination because of disability and state that a plaintiff who was discharged for misconduct cannot prove that the employer discriminated because of the plaintiff's disability." Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with*

universities do not run a traditional workplace by which they can justify the dismissal of students as a "business necessity."

Standing in as higher education's proxy for workplace rules are institutional codes of student conduct. Each college and university has academic standards by which it judges its students, which may include conduct standards.[245] In order to run an enterprise with so many individual customers/employees/products where individuality is encouraged, an institution necessarily demands a certain amount of homogeneity of behavior. Otherwise, students (especially emerging adults) would run amok. Furthermore, certain standards of conduct have traditionally proved successful in inculcating each institution's mission and values. But the notion that student conduct codes are anything but aspirational is foolhardy. "[T]he captains who navigate our ships of higher education know that the calm waters of consistently proper student behavior are unlikely ever to be reached."[246] If that is true, then what rules may a student with a mental disorder violate and yet remain an "otherwise qualified" student?

Unlike objective assessments to determine whether a student has lived up to academic standards,[247] disciplinary codes are elusive measures of determining whether a disruptive student with a mental disorder is "otherwise qualified." As a theoretical matter, articulating the measure is difficult, and institutions receive little guidance beyond citation to the ADA.[248] As a practical matter, colleges and universities have a tough time identifying a rule in a disciplinary code that has been violated by self-destructive behaviors, antisocial behaviors, classroom disruption, and other classic characteristics of mental illness.[249] In other words, institutions have difficulty extricating the behavior of the mental disorder from who that individual is. As a consequence, a disciplinary code as a measure of qualification can instead become a judgment about the student's essence.

Disabilities Act, 57 FLA. L. REV. 187, 213 (2005). If any distinction is drawn at all, it is between conduct that is compelled by the disability and that which can be controlled. *Id.* at 226.

245. Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349, 375 (2008). *See generally* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

246. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 17 (2004).

247. Such objective standards are used to determine whether a student with learning disabilities is otherwise qualified. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691, 700–01 (2009) [hereinafter Rothstein, *High Risk Students*].

248. *See, e.g.*, Jolly-Ryan, *supra* note 63, at 140; Lee & Abbey, *supra* note 245, at 360.

249. Rothstein, *High Risk Students*, *supra* note 247, at 701–02.

Colleges and universities need not fundamentally alter their academic programs, but they do need to make reasonable modifications even to academic requirements.[250] Thus, institutions must accommodate discipline procedures to students with mental illness. The Department of Education's Office of Civil Rights—which addresses complaints filed by college students under both the Rehabilitation Act and the ADA—requires institutions to establish a process for "an individualized consideration of the student's disability, particularly with regard to sanctions, penalties, and adverse restrictions."[251] Thus, institutions may have to make reasonable modifications in their disciplinary policies, practices, and procedures for students with mental illness.[252] Implicit in this accommodation for disciplinary due process is that the disruptive mentally ill may not be treated differently. The mentally ill student must be disciplined comparably to others for the same offense[253] and with the same procedures.[254] And, an institution may not establish different conditions for a mentally ill student.[255] For example, an institution can impose medical requirements for the readmission of all students[256] but may not

250. 42 U.S.C. § 12201(f) (2008). The Rehabilitation Act similarly requires accommodations for disabilities in higher education. 34 C.F.R. § 104.44(a) (2000). An institution may not, however, be required to waive or lower requirements that are essential to its academic program. Guckenberger v. Boston U., 974 F. Supp. 106, 145–46 (D. Mass. 1997).

251. Letter to Woodbury Univ., OCR Docket 09-00-2079, 3 (June 29, 2001), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=tulMV2FrMvg%3d&tabid=313.

252. Letter to Marietta Coll., OCR Docket 15-04-2060, 5 (Mar. 18, 2005), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=26yfG15xOM8%3d&tabid=313.. *See* 34 C.F.R. § 104.37 (2011) (nonacademic services).

253. Meuti, *supra* note 242, at 63. Judicial deference in disciplinary procedures is lower than that for academic decisions under the ADA and the Rehabilitation Act. *See generally* Leonard, *supra* note 129.

254. Letter to St. Joseph's Coll., OCR Docket 02-10-2171 (Jan. 24, 2011) (College, instead of using its emergency suspension procedure for a mentally ill student, used a separate process.), *available at* http://www.galvin-group.com/media/96055/OCR%20Letter%20St%20Joseph's%20College.pdf..

255. Letter to Guilford Coll., OCR Docket 11-02-2003, 13-14 (Mar. 6, 2003), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=ckwX-y99cXk%3d&tabid=313..

256. Letter to Purchase Coll.(SUNY), OCR Docket 02-10-2181,. 2–3 (Jan. 14, 2011) (college had policy for returning to campus after emergency medical evaluation or treatment and required that all students had to follow certain procedures for returning to campus), *available at* http://ncherm.org/documents/OCRLetter_PurchaseCollege.pdf .

impose additional conditions upon a mentally ill student.[257] The most that any institution could do that would be different from the discipline of other students would be to add a due process protection. These additional protections would be analogous to the individual assessments now required before the removal of mentally ill students who are a threat to others.

An "educative" system of discipline as used in IDEA would create a more collaborative and cooperative system for embracing the differences that the mentally ill student presents. When the disorder manifests in behavior that is disruptive, challenging, or even self-destructive, the combined resources of the student, the institution, and the parents will not just create an objective assessment of the student's ability to remain on campus but—similar to IDEA—also formulate a behavioral contract with interventions, responsibilities, and treatments that are tailored to the mental illness.[258] Modeling institutional disciplinary procedures on the pro-active IDEA model is not only more likely to garner better outcomes with the disruptive and behaviorally non-conforming mentally ill students, it will also better comply with the procedures required under the more reactive ADA.[259] Interim remedies or other such summary procedures, although

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257. Letter to Spring Arbor Univ. (Diana Y. Bower), OCR Docket 15-10-2098, 10-12 (Dec. 16, 2010) (mentally ill students required to submit medical documentation not otherwise required by the university's readmission procedures) *available at* http://www.nacua.org/documents/OCRLetter_SpringArborU.pdf. The OCR Letter was quite clear that such preconditions can be imposed for the readmission of a mentally ill student who has been removed because he posed a direct threat to the health and safety of others. *Id.* at 9. This particular student, however, had voluntarily withdrawn and was not under threat of academic or disciplinary dismissal, and the university had never deemed him a direct threat. *Id.* at 11.

258. In order to avoid questions of discrimination, behavior contracts would have to be part of the disciplinary process for all students. *Cf. id*. at 4, 12.

259. *See also* Hubbard, *Myth*, *supra* note 108, at 904–25 (discussing accommodations in the workplace for psychiatric disorders to reduce violence); John D. Thompson, *Psychiatric Disorders, Workplace Violence and the Americans with Disabilities Act*, 19 HAMLINE L. REV. 25, 49–57 (1995). It is beyond the scope of this Article to articulate all the resources and accommodations that higher education could consider. A follow-up Article is in process, joining the resources of IDEA training, disability services, and the law. In the meantime, numerous resources and articles provide some ideas. *See, e.g.*, The JED Foundation, *Student Mental Health and the Law: A Resource for Institutions of Higher Education* (2008), *available at* https://www.jedfoundation.org/assets/Programs/Program_downloads/StudentMentalHealth_Law_2008.pdf; Judge David L. Bazelon Center for Mental Health Law, *Supporting Students: A Model Policy for Colleges and Universities* (May 15, 2007), available at www.bazelon.org/pdf/Supporting Students.pdf; Mark S. Salzer et al., *Familiarity with and Use of Accommodations and Supports Among Postsecondary Students with Mental Illnesses*, 59 PSYCHIATRIC SERV. 370 (2008); Michael N. Sharpe et al., *supra* note 72; Suzanne

proper in the abstract,[260] should not be combined with differing standards nor be the default method of removing the mentally ill student from campus.

Such an educative system of discipline is not unfamiliar to higher education. Colleges and universities already use similar systems for student alcohol abuse, which itself can be viewed as a type of mental disorder. According to the criteria of DSM-IV, "[t]he heavy drinking of some students reaches levels of clinical significance. . . . [N]early one in three college students (including three in five frequent binge drinkers) qualifies for a diagnosis of alcohol abuse, and one in seventeen (one in five frequent binge drinkers) qualifies for a diagnosis of alcohol dependence."[261] Furthermore, college students with alcohol-related issues experience problems in both their academic performance and their living environment.[262] However, under the Drug and Alcohol Abuse Prevention regulations applicable to higher education,[263] institutions exercise a great deal of discretion in disciplining students who violate conduct rules by drinking alcohol. A 1995 survey indicates the following discretionary choices made by administrators for underage, on-campus drinking:

Official Warning	72%
Fine	23%
Community Service	23%
Probation	32%
Suspension	5%
Expulsion	2%
Referral to alcohol education program	47%

Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J. L. & EDUC. 217 (2003). *See also* Leadership 21 Committee, *Campus Mental Health: Know Your Rights: A Guide for Students Who Want to Seek Help for Mental Illness or Emotional Distress*, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW (2008), *available at* http://www.bazelon.org/Portals/0/pdf/YourMind-YourRights.pdf.

260. "Interim" suspensions may be imposed for health and safety reasons, pending a full due process hearing. Stoner & Lowery, *supra* note 246, at 59–60.

261. Henry Wechsler & Toben F. Nelson, *What We Have Learned from the Harvard School of Public Health College Alcohol Study: Focusing Attention on College Student Alcohol Consumption and the Environmental Conditions that Promote It*, 69 J. STUD. ALCOHOL & DRUGS 481, 483 (2008). *See also* John R. Knight et al., *Alcohol Abuse and Dependence among U.S. College Students*, 63 J. STUD. ALCOHOL 263, 263 (2002).

262. James G. Murphy et al., *Alcohol Consumption, Alcohol-Related Problems, and Quality of Life Among College Students*, 47 J. C. STUDENT DEV. 110, 116 (2006). Concurrent mental health issues likely have some impact on those effects. *See, e.g.*, Weitzman, *supra* note 40, at 275.

263. 34 C.F.R. § 86 (2011).

Referral to alcohol treatment program 8%[264]

Perhaps the social acceptance of alcohol abuse makes easier the graduated and discretionary discipline meted out to student alcohol abusers, while the disruptions caused by mentally ill students create more fear. However, the fact remains that alcohol abuse kills and injures more students than any student rampages attributable to mental illness.[265] Nonetheless, many campuses already have in place a system of discipline that accounts for immaturity and holds out the promise of redemption, at least for the disorder of alcohol abuse. The familiarity of such processes should equally enlighten graduated and informed discipline for the disruptive mentally ill students, rather than summary or involuntary removal processes and would avoid any discriminatory applications to similarly situated students.

E. Faculty & Staff: Collaboration & Cooperation

There are at least two implicit benefits of treating the nonviolent mentally ill students with the rest of the general population under an emerging adulthood model. The first is that the behavior of this generation of college and university students is not significantly different from that attributed to the mentally ill and that faculty training for dealing with the larger population's problems may necessarily carry over to dealing with the subpopulation of mentally ill students. The second is that faculty attention

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264. Henry Wechsler et al., *Current Research Summary: Enforcing the Minimum Drinking Age Law: A Survey of College Administrators and Security Chiefs*, HIGHER EDUC. CTR. FOR ALCOHOL & OTHER DRUG PREVENTION 6 (1995), *available at* http://www.higheredcenter.org/files/product/enforce.pdf. Drunken driving offenses elicited discipline from 42% of those surveyed with 17% taking no action at all. When a student overdoses on alcohol and is hospitalized, 80% of the administrators will refer the student to counseling or an educational program, with just over half taking steps to impose discipline. *Id.*

265. Recent data set out the following ugly snapshot of the consequences of annual student alcohol abuse:

> 1825 deaths
> 599,000 unintentional injuries
> 696,000 assault by another student
> 97,000 sexual abuse
> 400,000 unsafe sex
> 25% academic problems
> 1.2 to 1.5% commit suicide

COLLEGE DRINKING, A SNAPSHOT OF ANNUAL HIGH-RISK COLLEGE DRINKING CONSEQUENCES (July 1, 2011), www.collegedrinkingprevention.gov/Stats Summaries/snapshot.aspx (last visited Mar. 2, 2012). Also, students who drink heavily are more likely to have firearms. Matthew Miller et al., *Guns and Gun Threats at College*, 51 J. AM. C. HEALTH 57, 62–63 (2002).

can be directed to the discovery and reporting of violence specifically, rather than worrying about mental illness as an accurate indicator of violence.[266] Furthermore, the matter will become increasingly complicated with the matriculation of returning veterans, many of whom will also bring mental illness with them to campus.[267] As a consequence, "colleges should be committed to the success of all students, including those with . . . mental illnesses."[268] The adjustment of the institution to the mentally ill cannot help but benefit all students.

Accepting the proposition that the best method for integrating the mentally ill into campus life lies within the faculty, the institution's first step in the integration process is increasing faculty and staff understanding that campus disciplinary problems are as much a function of emerging adulthood as of mental illness. Integral to that understanding is increasing awareness that this generation really does have a higher rate of mental illness on campus, regardless of the sources, with a resulting rise in behavioral issues. Along with the increase in the number of college and university students seeking mental health counseling, "[b]ehavioral incidents in classrooms and residence halls, as well as student conduct cases, parallel these increases. Indeed, some campuses report increases that include high numbers of students who are hospitalized."[269]

For the pro-active—and too-often the smaller—campus,[270] intentional educational initiatives directed to faculty and staff on the needs, learning

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266. After Virginia Tech, how institutions should deal with violent students who might rampage on campus has been a hot topic in both legal and social science literature. *See, e.g.*, Christopher Flynn & Dennis Heitzmann, *Tragedy at Virginia Tech: Trauma and Its Aftermath*, 36 THE COUNSELING PSYCHOL. 479 (2008); Jun Sung Hong et al., *Revisiting the Virginia Tech Shootings: An Ecological Systems Analysis*, 15 J. LOSS & TRAUMA 561 (2010); Heather Littleton et al., *Longitudinal Evaluation of the Relationship Between Maladaptive Trauma Coping and Distress: Examination Following the Mass Shooting at Virginia Tech*, 24 ANXIETY, STRESS & COPING 273 (2011); Lucinda Roy, *Insights Gleaned from the Tragedy at Virginia Tech*, 17 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 93 (2010); Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008); Stuart, *supra* note 6; Ben Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?*, 60 FLA. L. REV. 895 (2008).

267. Derek Neuts, *Veteran PTSD and Higher Education-Accommodations and Awareness*, SUITE101.COM (Jan. 12, 2011), http://derek-neuts.suite101.com/veteran-ptsd-and-higher-education--accommodations-and-awarenessn-a331957.

268. Karen Bower, *How Not to Respond to Virginia Tech-I*, INSIDEHIGHERED.COM (May 1, 2007), http://insidehighered.com/views/2007/05/01/bower.

269. Hollingsworth et al., *supra* note 72, at 41.

270. Emerging adults are often happier with and experience greater success at smaller campuses, especially when they have developed a personal relationship with their professors. ARNETT, *supra* note 169, at 137.

styles, and behavior of emerging adults will address the burgeoning mental illness problems they bring to campus. This is particularly important for the faculty. "Students benefit when faculty have an increased awareness and knowledge of the characteristics and needs of students with disabilities."[271] Concomitantly, faculty will have to wrestle with students' lack of preparedness, not just behaviorally but also academically,[272] as a characteristic of contemporary college students. Institutions also may have to make significant curricular decisions about whether this lack of preparedness is a matter for "remediation" or is instead so systemic that all entering students should receive significant training just to participate adequately in higher education. In addition, institutions may have to adapt to the emerging adult "model" of higher education. This model recognizes that "[f]or most emerging adults, entering college means embarking on a winding educational path that may or may not lead to a degree."[273] Unfortunately, personal experience in trying to locate resources for "positive" faculty training and programming reveals the paucity of such resources. Many are studying the phenomenon, but hardly anyone seems to be taking it on tour.[274] On the other hand, colleges and universities have built-in resources in their faculty who could be tapped to present the condition, summarize the literature, and describe the "macro" conditions under which faculty are operating.

The literature also suggests that at least one educational approach on the "micro" level improved success rates for disabled students and therefore could be systemically adopted to improve the success rates for the entire emerging-adult student population. "Universal design" is an educational approach for instructing all students through developing flexible classroom materials, using various technological tools, and varying the delivery of information or instruction."[275] Universal design does not mean lowering expectations or "dumbing down" the curriculum. Rather, it acknowledges that today's students have the capacity to learn the same problem-solving and professional skills as past students but also acknowledges that they will

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271. Elizabeth Evans Getzel, *Addressing the Persistence and Retention of Students with Disabilities in Higher Education: Incorporating Key Strategies and Supports on Campus*, 16 EXCEPTIONALITY 207, 207 (2008).

272. "Students are coming to college less well prepared than in the past. As a result, there is a growing need for remediation." LEVINE & CURETON, *supra* note 53, at 127–28.

273. ARNETT, *supra* note 169, at 125.

274. Locating individuals who have expertise or training in this area is difficult, even through extensive internet searches. Even more scarce are those individuals who act as public speakers or as consultants for higher education. In any event, the author believes it would be inappropriate to "advertise" such consultants in an academic journal.

275. Polly Welch, *What is Universal Design?* (2012), *available at* www.ud education.org/resources/62.html (excerpt from book).

not learn those same skills in the traditional format. This process does not trump the academic freedom to teach content but enhances the delivery of that content by giving faculty the tools to deal with students who learn and process in different ways than the teacher, which otherwise makes traditional delivery of content challenging.[276] Clearly, just adding technology, such as PowerPoint or Twitter, to one's teaching methods is insufficient without considering whether these features accomplish appropriate teaching goals, attain learning objectives, and meet student abilities and needs. Becoming more intentional about explicit strategies for teaching may make it easier to meet the implicit challenges emerging adults bring to campus.

The second aspect of faculty and staff training must address the distinction between the dangers of violence and the "dangers" of mental illness. This component of faculty and staff training is critical. Since the rampages at Virginia Tech and Northern Illinois, institutions have walked a very fine line between a violation of due process rights of their mentally impaired students and risk management.[277] Fear of liability has displaced the considered opinion of whether the mentally ill really are a threat to others.[278] As a consequence, institutions have been doing a thorough job of training faculty and staff on being alert to, reporting about, and dealing with violent students and following emergency procedures. However, thus far, training for identifying the violent student inexorably is intertwined with the indicia of mental illness, either by accident, by overbreadth, or by public fears.

Instead, institutions must also be proactive in distinguishing the violent mentally ill student from the nonviolent mentally ill. Although the public's perceived risks of violence by the mentally ill are not entirely groundless,[279] the actual risk of violence by the mentally ill is relatively low and usually derives from individuals who have dual diagnoses or severe disorders and who are not taking their medications. Making the risk even more serious, third-party strangers are significantly less likely to be

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276. Ironically, one of the toughest and most hostile educational programs—law schools—is acknowledging the realities of learning theory, teaching methods, and disabilities in teaching today's students. *See, e.g.*, WILLIAM M. SULLIVAN ET AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); J. Patrick Shannon, *Who Is an "Otherwise Qualified" Law Student? A Need for Law Schools to Develop Technical Standards*, 10 U. FLA. J.L. & PUB. POL'Y 57 (1998); Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219 (2004); Peterson & Peterson, *supra* note 67; Shapiro, *supra* note 67.

277. Wolnick, *supra* note 164, at 1011.

278. *See, e.g.*, Thompson, *supra* note 259, at 25.

279. Hubbard, *Myth*, *supra* note 108, at 867.

victims of the mentally ill than are their family members.[280] "[E]xperts overwhelmingly agree that the mere diagnosis of an individual with a serious mental illness does not lead to the conclusion that she is likely to engage in violence."[281] However, news coverage and other mass media depict the mentally ill as being perhaps the most dangerous demographic.[282] As a consequence, public perceptions that the mentally ill are violent have increased, despite the exceptionally small risk to the public,[283] while high-profile college rampages have unnerved the public in general and campus stakeholders in particular.[284]

The faculty-staff training program must educate on the lack of reliable means for detecting whether another rampage will occur. Institutions do not have the professional expertise to identify students who will kill. No one does.[285] The rampage killer shares characteristics of millions of other

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280. MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (2001), *available at* http://surgeongeneral.gov/library/mentalhealth/chapter1/sec1.html#mental_disorders.

281. Hubbard, *Myth*, *supra* note 108, at 869; Hollingsworth et al., *supra* note 72, at 43. *But see* Kristy A. Mount, Note, *Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 107–08 (2002) (describing the relationship between young-adult violence and serious mental disorders when combined with substance abuse or lack of treatment).

282. SAMHSA Resource Ctr. to Promote Acceptance, Dignity and Social Inclusion, *Violence and Mental Illness: The Facts*, http://stopstigma.samhsa.gov/topic/facts.aspx (last visited Mar. 2, 2012).

283. MENTAL HEALTH, *supra* note 283. However, "members of the general public who have greater knowledge about or experience with mental illness are less likely to stigmatize, at least in terms of stereotypes of dangerousness." Patrick W. Corrigan et al., *Familiarity with and Social Distance from People Who Have Serious Mental Illness*, 52 PSYCHIATRIC SERV. 953, 956 (2001).

> 284. Violence against others [on college campuses] has even lower rates of prevalence on campuses. College students ages eighteen to twenty-four experience lower violent crime rates than nonstudents of the same age, and the majority (93 percent) of crimes occur off-campus. . . . However, campus disasters, combined with reports about student suicide, increases in serious mental health issues, and other troubled behaviors, create a heightened perception of risk for all campuses and their stakeholders. Anticipated risk, direct and vicarious violence, or serious mental health disturbances have the potential to disrupt and terrify any group of students and all who are concerned about them.

Hollingsworth et al., *supra* note 72, at 42–43. Indeed, "[t]oday's students are frightened. They are afraid of getting hurt. Nearly half of all undergraduates (46 percent) worry about becoming victims of violent crime." LEVINE & CURETON, *supra* note 53, at 93.

285. Williamson, *supra* note 266.

college students.[286] But what should not be a marker is the mere suspicion of mental illness. Faculty and staff need to be better informed of these distinctions, especially given the large number of mentally ill students on campus and the legal consequences of merely characterizing someone as mentally ill under the ADA.

Many institutions and mental health counseling centers are doing great work in embracing the mentally ill, and their educational resources are a great source of educational information. Faculty and staff training requires this type of sophistication, rather than instruction from law enforcement, to distinguish violent behavior from behavior that is merely a manifestation of mental illness. Although faculty and staff might prefer clear-cut standards to follow, such standards are simply not possible to generate. But "one of the most effective ways of identifying students in distress is to provide training to people of all levels and positions on campus."[287]

Intertwined with the identification of students with problems is college mental health education.[288] Faculty need to be educated on their leadership role in supporting those students who have been identified as having mental illness and fully integrate these students into the academy instead of treating them as outliers. Faculty can be at the forefront of acquainting themselves with their mentally ill students to reduce their stigma on campus and to assuage their own fears by understanding that mental illness does not necessarily presage violence. The mentally ill student benefits from academic integration, more than from removal from the academy.[289] "Most students experiencing psychiatric problems recover, and for many the recovery is facilitated by an environment which recognizes that healthy facets of a person's identity are not necessarily eliminated by a mental illness."[290]

If faculty are to serve their students effectively, they must also seek to serve those with mental illness. By being attentive to the needs of mentally ill students and to the successful self-determination of those students, faculty and staff can better serve all their students as these emerging adults make the educational adjustment to higher education.

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286. *Id.* at 910–11.

287. Newhart & Lovelace, *supra* note 227, at 25. *See also* CORNELL UNIV., RECOGNIZING AND RESPONDING TO STUDENTS IN DISTRESS: A FACULTY HANDBOOK (2011), *available at* http://dos.cornell.edu/dos/cms/upload/244734_StuHndBk_allPgs_LoRes.pdf.

288. *E.g.*, Gerald Stone, *Mental Health Policy in Higher Education*, 36 COUNSELING PSYCHOL. 490, 498 (2008).

289. Frances L. Hoffmann & Xavior Mastrianni, *Psychiatric Leave Policies: Myth and Reality*, 6 J. COLL. STUDENT PSYCHOTHERAPY 3, 14 (1992).

290. *Id.* at 18.

VI. EMERGING ADULTHOOD: "IT'S MY LIFE AND IT'S NOW OR NEVER"[291]

The ironic circumstance facing colleges and universities today is that addressing the challenges and behavior of mentally ill students is the same as addressing the challenges and behavior of all their students. Emerging adulthood has changed the demographics of the student population in ways that institutions are only just now beginning to realize. Traditionally, universities have made a distinction between the mentally ill and the general population when addressing student conduct. The mentally ill student is more likely to be lumped in with the violent student rather than the general population, even if the student is not a violent threat. A better recognition of the systemic mental health problems emerging adults bring to campus will more effectively serve those students who enter with mental illness, and will perhaps prevent the manifestation of mental illness on the campus.

Furthermore, a shift in attention to the overall student population may portend a shift in the legal relationship among institutions, students, and parents. Rather than a business relationship with three distinct litigation interests in both business and tort matters, the integration of all three stakeholders into a more meaningful relationship places a lower duty on the institution while increasing the responsibilities of parents and students. If "institutions of higher education have significant and unique power to make campuses more or less safe,"[292] then they likewise have the unique power to channel joint responsibilities for their emerging adults[293] with the ultimate goal of creating a better atmosphere for the continuing progress of the child-student, most particularly for those students who are mentally ill.

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291. JON BON JOVI, MAX MARTIN, & RICHARD S. SAMBORA, *It's My Life*, on CRUSH (Island Records 2000).

292. Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267, 348 (2011).

293. "All who work with emerging adults need to join together to understand the changing world in which students live and grow." Hollingsworth et al., *supra* note 72, at 51.

TO TAX, OR NOT TO TAX, THAT IS THE QUESTION: SEARCHING FOR A SOLUTION TO THE INCREASING COMMERCIALIZATION OF INTERCOLLEGIATE ATHLETICS

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INTRODUCTION

On October 2, 2006, Representative William M. Thomas of the House Ways and Means Committee sent an eight-page letter to National Collegiate Athletic Association (NCAA) President Myles Brand. The letter asked the NCAA to provide "information on whether major intercollegiate athletics further the exempt purpose of the NCAA and, more generally, educational institutions."[1] Thomas's letter to the NCAA created a firestorm of public debate regarding whether the NCAA and athletic departments deserve tax exemption in light of their exponentially increasing commercialization.[2] In a twenty-five-page response letter, Brand attempted to justify the tax-exemption for intercollegiate athletics by explaining its important connection to the educational experience.[3] He claimed that what athletes "learn on the playing field or court is integral to their educational experience," and that athletes learn "[l]essons on leadership and how to follow, on self-discipline and self-sacrifice, on teamwork and hard work, and learning to pursue excellence . . . ."[4] Americans have a unique connection to sports and surely understand Brand's comments on a visceral level, but has intercollegiate athletics strayed too far from the path? The consideration of major conference realignment in college football,[5] the dawning of the Texas Network,[6] and

1. Letter from Rep. Bill Thomas, Chairman, House Comm. on Ways & Means, to Dr. Myles Brand, President, NCAA (Oct. 2, 2006), *available at* http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm [hereinafter *Thomas Letter*].

2. *See, e.g.*, Daniel Golden, *Tax Breaks for Skyboxes: Suite Fees at College Stadiums Are Charitable Gifts, Sparking Building Room—And Scrutiny*, WALL ST. J., Dec. 27, 2006, at B1; Greg Johnson, *Coaches' Pay Put Colleges to the Test*, L.A. TIMES, Jan. 16, 2007, at A1; Greg Johnson, *Lawmaker Challenges NCAA on Tax Exemption*, L.A. TIMES, Oct. 6, 2006, at D13; Selena Roberts, *Big-Time College Sports May Be Due For an Audit*, N.Y. TIMES, Oct. 29, 2006, at SP1; George F. Will, *Tax Breaks for Football*, WASH. POST, Oct. 25, 2006, at A17.

3. *See* Letter from Dr. Myles Brand, President, NCAA, to Rep. Bill Thomas, Chairman, House Comm. on Ways & Means 1 (Nov. 13, 2006), *available at* http://www.nacua.org/documents/NCAALetter_TaxExempt_ResponsetoHouseWaysMeansCmte.pdf [hereinafter *Brand Letter*].

4. *Id*. at 4.

5. *See* Gene Wojciechowski, *Ex-SEC Commish Discusses Expansion*, ESPN (Jun. 11, 2010, 1:26 PM), http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=5272309&sportCat=ncf.

6. *See Texas, ESPN Announce New Network*, ESPN (Jan. 19, 2011, 5:51 PM), http://sports.espn.go.com/espn/news/story?id=6037857.

CBS's decision in 2011 to air the opening rounds of the NCAA men's basketball tournament instead of President Obama's news conferences[7] are just three examples from the recent past suggesting that perhaps intercollegiate athletics has sacrificed the educational experience for the commercial experience. Bearing this in mind, should colleges and universities, and the NCAA lose their tax-favored status? Are there perhaps other avenues of relief?

In exploring these issues, this Note proceeds in five parts. Part I details the historical development of intercollegiate athletics. Although American intercollegiate athletics began as a mere "jolly lark"[8] between members of the Harvard and Yale crew teams on Lake Winnipesaukee in New Hampshire,[9] the current state of college athletics is far removed from these humble beginnings; the overall history paints a story of increasing commercialization. Part II surveys public and governmental responses to this increasing commercialization of intercollegiate athletics—from a 1929 report issued by the Carnegie Commission[10] to a March 2011 call to restrict eligibility for the NCAA men's basketball tournament.[11] Of particular import to this Article, much of the inquiry has concerned whether or not the increasing commercialization of college athletics threatens the tax-exempt status of universities and the NCAA (or at least whether they should be subjected to the Unrelated Business Income Tax). In order to understand this particular inquiry, Part III will provide a primer on applicable tax-exempt law. Part IV will then proceed to apply these tax rules to intercollegiate athletics, and ultimately will conclude that despite increasing commercialization, colleges and universities, and the NCAA are at little risk of losing their tax-exempt status (or being subject to the Unrelated Business Income Tax) under current tax law. Finally, Part V will analyze whether this result is normatively correct.

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7. *NCAA Tourney Ratings Up 16 Percent*, ESPN (Mar. 18, 2011, 6:34 PM), http://sports.espn.go.com/ncb/tournament/2011/news/story?id=6234366.

8. RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 28 (1988).

9. *Id*. at 27–28.

10. *See* Charles Farrell, *Historical Overview*, *in* THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT 3, 8 (Richard E. Lapchick & John Brooks Slaughter eds., 1989).

11. Arne Duncan, Op-Ed., *The Real March Madness: Stop Rewarding Schools that Don't Educate Their Players*, WASH. POST, Mar. 17, 2011, at A21.

I. THE HISTORICAL DEVELOPMENT OF INTERCOLLEGIATE ATHLETICS: A STORY OF INCREASING COMMERCIALIZATION

A. The Emergence of Intercollegiate Athletics: A Student Run Phenomenon

Intercollegiate athletics can be traced back to an 1827 cricket match in England between the University of Oxford and the University of Cambridge.[12] Two years later, in 1829, the universities of Oxford and Cambridge again met, but this time for a crew race.[13] It would be more than two decades until the birth of American intercollegiate athletics, when on August 3, 1852, the crew teams of Harvard and Yale raced on Lake Winnipesaukee in New Hampshire.[14] The next intercollegiate sport to appear was baseball with Amherst playing Williams on July 1, 1859.[15] The turning point in intercollegiate athletics, however, was the emergence of intercollegiate football with Rutgers playing Princeton in New Brunswick, New Jersey on November 6, 1869.[16]

During these formative years, college and university administrators not only considered intercollegiate sports to fall outside of their institution's function but also considered it to detract from educational pursuits because of the tendency for students to spend their time on athletics at the expense of their education.[17] As a result, intercollegiate athletics were originally entirely organized and run by students.[18] College and university administrators might have put aside their concern that athletics detracted from the educational experience and allowed for this autonomous

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12. SMITH, *supra* note 8, at 6.

13. *Id*. at 7.

14. *Id*. at 3–4. As the reader will soon understand, the story of intercollegiate athletics is one of increasing commercialization. One might imagine that there was not even a trace of commercialization at such an early stage of intercollegiate athletics, and this would make sense considering that the crew race between Harvard and Yale was completely self-organized and described by the participants as merely a "jolly lark." *Id*. at 28. Interestingly enough, however, commerce was at least partially responsible for the birth of American intercollegiate athletics. *See id*. at 3. After all, James Elkins, a railroad magnate, approached a member of the Yale Boat Club and presented him with an offer too good to pass up: "If you will get up a regatta on the Lake between Yale and Harvard, I will pay all the bills." *Id*. at 3. Elkins believed that hosting the race on one of the stops on his unprofitable Boston-Montreal line would increase profits for his railroad. *Id*. at 3–4.

15. *Id*. at 219. For more information regarding the emergence and development of intercollegiate baseball see *id*. at 52–66.

16. Joanna Davenport, *From Crew to Commercialism—The Paradox of Sport in Higher Education*, *in* SPORT AND HIGHER EDUCATION 5, 7 (Donald Chu et al. eds., 1985).

17. *Id*. at 6–7.

18. *Id*. at 6.

arrangement to continue, but the emergence of football only fueled concerns because of the "violence and brutality" of the sport.[19] As the sport became even more violent with the introduction of set formations,[20] college and university administrators called for the outright banning of football on campuses because they thought it was completely at odds with the educational mission of their institutions.[21]

In 1905, only thirty-six years after its inception, intercollegiate football had reached a turning point: eighteen players were killed and 143 were seriously injured while playing football in that year alone.[22] In response, President Roosevelt charged a committee with the task of reforming the sport.[23] Representatives of approximately thirty major institutions gathered in New York and ultimately formed the Intercollegiate Athletic Association of the United States (IAAUS) in 1906.[24] In 1910, the IAAUS changed its name to the National Collegiate Athletic Association (NCAA).[25] Although some college and university administrators might have preferred to completely ban football (and perhaps sports altogether), the formation of the NCAA was a compromise solution. While sports were not banned from campuses, the NCAA provided college and university administrators with the opportunity to supervise and control intercollegiate athletics.[26] The founding constitution of the NCAA makes this supervisory arrangement clear: "[i]ts object shall be the regulation and supervision of college athletics throughout the United States, in order that the athletic activities in the colleges and universities of the United States may be maintained on an ethical plane in keeping with the dignity and high purpose of education."[27] To establish their supervisory control, some college and university

19. SMITH, *supra* note 8, at 67–69.

20. *Id.* at 88–94. As an example, Harvard introduced the "Flying Wedge," a formation developed by Lorin F. Deland in 1892. *Id*. at 90–92. Deland was a Boston businessman who had no connection to Harvard and was not even a fan of football. *Id*. Instead, Deland was a military strategist who adopted Napoleon's principle on the concentration of force to develop a violent and brutal football formation. *Id*.

21. *Id*. at 131. Some administrators succeeded, and football was banned at certain times at Brown, Yale, Williams, and West Point. *Id*. at 69. Furthermore, "[a]t Harvard, the annual 'Bloody Monday' contest on the first day of each fall term became such a ferocious meeting of the college new-comers and the cocky sophomores that the faculty banned the annual battle in 1860." *Id*. at 68.

22. Davenport, *supra* note 16, at 7.

23. *Id*.

24. *Id*. at 8.

25. *Id*.

26. *See* Allen Guttmann, *The Anomaly of Intercollegiate Athletics*, *in* RETHINKING COLLEGE ATHLETICS 17, 18–19 (Judith Andre & David N. James eds., 1991).

27. Davenport, *supra* note 16, at 8.

administrators created departments of physical education and placed intercollegiate sports into these departments.[28]

B. From Student-Run Activities to Quasi-Commercial Enterprises

Under the guidance of the NCAA, and with the advent of commercial radio, intercollegiate sports saw a period of boom in the 1920s.[29] The Great Depression and World War II stymied the boom period, but the end of the war and the advent of national television[30] created a resurgence of intercollegiate athletics.[31] Not only was there simply a resurgence of the popularity of intercollegiate athletics, but also it is arguable that commercialization can be traced back to this time period—a time period when money became a driving factor.[32] It was during this time that some "college athletic departments became significant revenue generators."[33] It was also during this time that many athletic departments separated themselves from control of their institution's physical education department.[34]

In large part due to the popularity of Division I Football Bowl Subdivision (FBS)[35] football and Division I men's basketball (and the revenue-generating potential of these sports), the commercialization of intercollegiate athletics has continued to grow since the 1950s until the

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28. Guttmann, *supra* note 26, at 19.

29. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 71–72 (2000).

30. Interestingly enough, at one time, both the NCAA and college athletic programs did not want to televise football games because of the belief that it would hurt ticket sales. *See* Davenport, *supra* note 16, at 12. Considering that the majority of the costs were already "borne by the institutions themselves or subsidized by ticket sales," however, broadcasting rights were potentially very lucrative. DUDERSTADT, *supra* note 29, at 73. Once this became apparent to college and university athletic departments, they reversed their original stance. *See* Davenport, *supra* note 16, at 12.

31. Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 790 (2010).

32. *Id*.

33. *Id*.

34. *Id*.

35. For most intercollegiate sports the NCAA divides programs into three divisions. *See Differences Among the Divisions*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/Differences+Among+the+Divisions/ (last updated Dec. 11, 2011). For purposes of intercollegiate football the NCAA further subdivides Division I into two subdivisions: the Football Bowl Subdivision (formerly Division I–A) and the Football Championship Subdivision (formerly Division I–AA). *Id*.

present day.[36] For example, in 1999, CBS and the NCAA renewed their agreement for broadcast rights to the men's basketball tournament for $6 billion.[37] The eleven-year renewal agreement covers the years 2003 to 2013 at $545 million per year.[38] Furthermore, a May 2009 Congressional Budget Office (CBO) paper, entitled *Tax Preferences for Collegiate Sports*, states that the 2008 NCAA men's basketball tournament generated revenue of approximately $143 million for college and university athletic departments and that FBS bowl games generated about the same amount of revenue.[39] The CBO paper also contains data illustrating that the average 2004 to 2005 athletic program revenues for Division I colleges and universities with FBS and men's basketball programs was $35.2 million.[40]

Not only are athletic departments generating revenue like big businesses, but they are also spending money like big businesses. For example, according to a 2009 study, Division I athletic departments with FBS and men's basketball programs increased spending by an average of 10.7% annually from 2004 to 2007.[41] This increased spending is even more noteworthy in light of the fact that the annual average increase in overall nonathletic spending during the same time period was only 4.7%—less than half of the annual increase in athletic spending.[42] A contributor to these skyrocketing expenditures is coaches' salaries. In 2007, for example, the average annual salary of the 120 FBS coaches exceeded $1 million, and this figure does not include perks and bonuses such as cars and country club memberships.[43] Over a dozen coaches make at least $2 million with some coaches making significantly more than that.[44] For example, in December 2009, the University of Texas renegotiated head football coach

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36. *Id*. at 791.

37. *CBS Renews NCAA B'Ball*, CBS MONEY (Nov. 18, 1999, 8:39 PM), http://money.cnn.com/1999/11/18/news/ncaa.

38. *Id*.

39. CONG. BUDGET OFFICE, TAX PREFERENCES FOR COLLEGIATE SPORTS, at vii (2009).

40. *Id*. at 4.

41. JONATHAN ORSZAG & MARK ISRAEL, COMPASS LEXECON, THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN UPDATE BASED ON 2004-2007 DATA 3–4 (2009), *available at* http://web1.ncaa.org/web_files/DI_MC_BOD/DI_BOD/2009/April/04,%20EmpiricalEffects.pdf (the study, although representing only the views of the authors was commissioned by the NCAA). The study also found data that supports the existence of an "arms race," which is "a situation in which the athletic expenditures by a given school tend to increase along with expenditures by *other* schools in the same conference." *Id*. at 11.

42. *Id*.

43. *See* Steve Wieberg & Jodi Upton, *College Football Coaches Calling Lucrative Plays*, USA TODAY (Dec. 5, 2007, 1:56 PM), http://www.usatoday.com/sports/college/football/2007-12-04-coaches-pay_N.htm.

44. *Id*.

Mack Brown's contract to increase his salary from $3 million to at least $5 million for the remainder of his contract through 2016.[45] Furthermore, it is not just the salaries of the coaches. The athletic directors at a number of schools also make a significant amount of money. For example, Jeremy Foley, the Athletic Director at the University of Florida, for example, tops the list at $965,000.[46]

It is obvious that today's intercollegiate athletics are a far cry from the 1852 crew match between Harvard and Yale, a race that was described by one of the competitors as a "jolly lark."[47] Furthermore, three recent events seem to suggest that there is no end in sight to the increasing commercialization of intercollegiate athletics. First, during the summer of 2010, the major conferences in college football flirted with the idea of significant conference realignment.[48] Taken to the extreme possibility, realignment could result in a number of conferences vanishing and college athletics being ruled by as few as five "super-leagues" composed of sixteen teams or more.[49] With conferences being set up in such a manner, some student-athletes would be required on occasion to travel to locations two time zones away to compete. The intercollegiate system would resemble professional sports teams sending millionaires to major cities for competition. This possibility was ultimately avoided, at least temporarily, but the possibility remains. Second, on January 19, 2011, the University of Texas announced a twenty-year deal for $300 million with ESPN.[50] As part of the deal, ESPN will develop, launch, operate, and distribute the Longhorn Network, a station dedicated to University of Texas sports and news.[51] Finally, CBS's decision to air first round games of the 2011 NCAA basketball tournament either in lieu of or simultaneously with President Obama's news conferences seems to offer a final exclamation point on the commercial focus of intercollegiate athletics today.[52]

For the Thursday round games, CBS decided to not cover Obama's news conference at all, and instead opted to summarize his speech in a one-

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45. *Brown to Receive $5M a Season*, ESPN, Dec. 10, 2009, http://sports.espn.go.com/ncf/news/story?id=4728932 (last visited March 12, 2012).

46. *See* Curtis Eichelberger, *Florida Enters BCS Title Game With Top-Paid Athletic Director*, Bloomberg News (Jan. 6, 2009, 1:41 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYYY_mDwYMkY&refer=us.

47. Smith, *supra* note 8, at 28.

48. *See* Wojciechowski, *supra* note 5.

49. *Id*.

50. *See Texas, ESPN Announce New Network*, *supra* note 6.

51. *Id*.

52. *See NCAA Tourney Ratings Up 16 Percent*, *supra* note 7; Burgess Everett, *Obama, NCAA Tourney Share Stage*, Politico (Mar. 18, 2011, 8:28 PM), http://www.politico.com/blogs/onmedia/0311/Obama_NCAA_tourney_share_stage.html.

minute report aired during a commercial break in NCAA game coverage within thirty minutes of the news conference.[53] For the Friday round games, CBS took a different approach that at least provided coverage for Obama's news conference.[54] Rather than completely air the games over the news conference, CBS ultimately decided to run "a split screen, with audio of Obama and his picture on the top, and a silent broadcast of the game on the bottom."[55] CBS News President, David Rhodes, justified the separate treatment by stating that U.S. military involvement was more newsworthy than the Japanese radiation consequences,[56] but both decisions can be seen to reflect how commercially driven intercollegiate athletics has become.[57]

II. PUBLIC AND GOVERNMENTAL RESPONSE TO THE COMMERCIALIZATION OF INTERCOLLEGIATE ATHLETICS

For as long as intercollegiate athletics has been popular, there has been public concern regarding its rightful role and proper scope in colleges and universities. As early as the initial boom period in the 1920s, the public became attuned to the issue of commercialism in college athletics. In 1929, for example, the Carnegie Commission released a report entitled *American College Athletics*, which found "rampant professionalism, commercialization, and exploitation that were corrupting virtually all aspects of intercollegiate athletics."[58] The Carnegie Report concluded:

> In the United States the composite institution called a university is doubtless still an intellectual agency. But it is also a social, a commercial, and an athletic agency, and these activities have in recent years appreciably overshadowed the intellectual life for which the university is assumed to exist . . . . The question is not so much whether athletics in their present form should be fostered by the university, but how fully can a university that fosters professional athletics discharge its primary function.[59]

Although the Carnegie Report did not lead to any reform, it stands as the first evidence of public discontent.

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53. *See NCAA Tourney Ratings Up 16 Percent*, *supra* note 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. Thursday's games averaged 7.4 million viewers, which was an increase of 16% from last year. *Id.* Since big viewership equates to big money, it is easy to infer CBS's motives regarding their decisions concerning Obama's press conferences.

58. Farrell, *supra* note 10, at 8 (citing HOWARD JAMES SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS (1929)).

59. Guttmann, *supra* note 26, at 120.

It did not take long for the critics to suspect that the commercialization of intercollegiate athletics not only threatened the *educational integrity* of colleges and universities, but that it also threatened *the tax-exempt status* of both the athletic departments and their sponsoring colleges and universities. For example, only two years after the Carnegie Report was published, the Carnegie Foundation warned that athletic departments would be taxed once legislators realized "that intercollegiate football games . . . are merely amusement enterprises masquerading in the guise of education."[60] Despite this warning, athletic programs avoided tax scrutiny for a number of decades. The first shot across the bow occurred, however, in the summer of 1977 when the Internal Revenue Service (IRS) asserted that the sale of broadcast rights amounted to "unrelated business income," which was taxable to the colleges and universities receiving the money.[61] Although the IRS ultimately reversed its position by issuing two formal rulings stating that broadcasting revenues were not subject to the unrelated business income tax,[62] it still had fired an important warning shot—athletic programs could potentially be subject to tax if they ventured too far into the commercial world.[63]

The IRS again responded to the increasing commercialization of intercollegiate athletics a little over a decade later. In 1991, the IRS

60. Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 COLUM. L. REV. 1430, 1440 (1980) (quoting H. SAVAGE, J. MCGOVERN & H. BENTLEY, CURRENT DEVELOPMENTS IN AMERICAN COLLEGE SPORT 33 (Carnegie Foundation for the Advancement of Teaching Bull. No 26) (1931)).

61. *Id*. at 1431.

62. *See* Rev. Rul. 80-295, 1980-2 C.B. 194; Rev. Rul. 80-296, 1980-2 C.B. 195; *see also* Brett T. Smith, Note, *The Tax-Exempt Status of the NCAA: Has the IRS Fumbled the Ball?*, 17 SPORTS LAW. J. 117, 129 (2010). The IRS had already determined that admission receipts did not amount to unrelated business income and ultimately determined that broadcasting revenue should not amount to unrelated business income either because there was no rational tax distinction between people viewing a game live and people viewing a game on television. *Id*. It also helped that Southern Methodist University, Texas Christian University, and the University of Kansas, the three institutions that stood to pay the tax, enlisted the help of a former IRS Commissioner and fought back ferociously. *See* Kaplan, *supra* note 60, at 1431.

63. It should be noted that the purpose of this section is to illustrate the various instances of public and governmental reaction to the increasing commercialization of intercollegiate sports. Naturally, legal arguments overlap, especially when the IRS has attempted to impose an unrelated business income tax as a consequence of increasing commercialization. This section, however, will not delve into these legal arguments. Rather, the legal arguments will be fully explored in Section IV of this Note, after the history and reaction to the rise of intercollegiate athletics are established.

published two Technical Advice Memoranda (Bowl TAMs)[64] finding that payments from businesses to sponsor the Mobil Cotton Bowl[65] and John Hancock Bowl[66] were unrelated business income taxable to the bowl organizations.[67] The overall effect of the Bowl TAMs was that sponsorship fees paid by a business to a university or bowl association was taxable because it was merely advertising payments. Although intercollegiate athletics could not count on the IRS to reverse its position this time, Congress stepped in by amending the unrelated business income tax rules to eliminate the possibility that corporate "sponsorship payments" could be taxed under this theory.[68]

Although intercollegiate sports again found a way to avoid the potential tax consequences of increased commercialization, it did not come without cost. For one, intercollegiate athletics had to spend a great deal of time and resources lobbying for and defending their interests in these battles.[69] Perhaps much more importantly, however, the battles with the IRS in the 1970s and 1990s led to heightened public scrutiny, with many mainstream

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64. I.R.S. Tech. Adv. Mem. 92-31-001 (Oct. 22, 1991), 1991 PLR LEXIS 2722; I.R.S. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991), 1991 PLR LEXIS 1778.

65. The sponsorship payments at issue for the Cotton Bowl involved a $1.5 million contract between the Cotton Bowl Athletic Association (CBAA) and Mobil Oil Corporation (Mobil), which included the following provisions: (1) the CBAA had to change the name of the *Cotton Bowl* to the *Mobil Cotton Bowl*, as well as add the Mobil logo to the Cotton Bowl logo; (2) The new logo and name had to be used exclusively and mentioned in all press releases; (3) The CBAA had to imprint the new logo in a prominent spot on the field; (4) the CBAA had to display Mobil's commercials on the jumbotron and broadcast Mobil's commercials over the P.A. system; (5) Mobil could cancel the contract if the Cotton Bowl was not televised; (6) and the CBAA was entitled to an additional sponsorship fee if the Cotton Bowl met a certain Nielsen rating threshold. *See* I.R.S. Tech. Adv. Mem. 92-31-001 (Oct. 22, 1991), 1991 PLR LEXIS 2722.

66. The provisions of the contract at issue for the *John Hancock Bowl* included the following: (1) the sponsor was able to design the game's name and logo and include the sponsor's name and logo; (2) the sponsor would purchase a number of thirty second commercials from the *John Hancock Bowl*; (3) the new logo would be placed prominently around the field and stadium and on the player's uniforms; (4) and the sponsor's commercial advertisements would air during the game's commercial breaks. *See* I.R.S. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991), 1991 PLR LEXIS 1778.

67. I.R.S. Tech. Adv. Mem. 92-31-001 (Oct. 22, 1991), 1991 PLR LEXIS 2722.

68. *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 965, 111 Stat. 788, 893-94 (codified at I.R.C. § 513(i) (2006)). *See generally* Ethan G. Stone, *Halos, Billboards, and the Taxation of Charitable Sponsorships*, 82 IND. L.J. 213 (2007).

69. *See* Lobbying Expenses in Sports, Street & Smiths's Sports Bus. J., Jan. 14, 2008, available at http://www.sportsbusinessjournal.com/article/57760.

newspapers picking up the issue.[70] Although the fire of public scrutiny largely subsided with time, the embers still remained. It would not take much to reignite the fire, and the conclusions of a 2001 report by the Knight Commission heightened concern over the issue again:

> After digesting the extensive testimony offered over some six months, the Commission is forced to reiterate its earlier conclusion that "at their worst, big-time college athletics appear to have lost their bearings." Athletics continue to "threaten to overwhelm the universities in whose name they were established." Indeed, we must report that the threat has grown rather than diminished. More sweeping measures are imperative to halt the erosion of traditional educational values in college sports.[71]

Ultimately, the fuel that set the fire ablaze again was a letter sent by a California legislator to the NCAA.[72] At least partially motivated by rising salaries of head coaches, Representative William M. Thomas of the House Ways and Means Committee sent an eight-page letter to NCAA President Myles Brand on October 2, 2006, asking the NCAA to provide "information on whether major intercollegiate athletics further the exempt purpose of the NCAA and, more generally, educational institutions."[73] Thomas's letter to the NCAA reignited interest among both the press and the average blogger, and the legitimacy of the tax-exemption for the NCAA and athletic departments has been of popular concern ever since.[74] In fact, a Google blog search of "NCAA Tax Exemption" for the period from October 5, 2006, to June 1, 2007, revealed 2,145 entries on the subject.[75]

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70. *See IRS Returns Again to Bowl Controversy*, WASH. POST, Jan. 20, 1993, at C2; Richard Sandomir, *Tax Ruling Worries Officials of Bowls*, N.Y. TIMES, Dec. 6, 1991, at B9; *IRS Moves to Tax College Football Bowls on Payments*, L.A. TIMES, Jan. 20, 1993, at D2; David S. Hilzenrath, *College Football Coaches Score a Tax Touchdown in House*, WASH. POST, Nov. 4, 1993, at B11.

71. KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 11 (2001) *available at* http://knightcommission.org/images/pdfs/2001_knight_report.pdf [hereinafter A CALL TO ACTION].

72. *See Thomas Letter*, *supra* note 1. In question two, Thomas specifically mentioned that "highly paid coaches" are a reason why "many believe that major college football and men's basketball more closely resemble professional sports than amateur sports." *Id*. Also important to Thomas were the things that the IRS and intercollegiate athletics have already fought over: "corporate sponsorships" and "multimillion dollar televisions deals." *Id*.

73. *Id*.

74. *See, e.g.*, articles cited *supra* note 2.

75. John D. Colombo, *The NCAA, Tax Exemption, and Collegiate Athletics*, 2010 U. ILL. L. REV. 109, 110 n. 3 (2010).

As yet another recent example of intercollegiate athletic scrutiny, a Washington political action committee, Playoff PAC, filed a twenty-seven-page complaint with the IRS against BCS Bowls on September 23, 2010.[76] Playoff PAC reviewed over 2,300 pages of tax records and public documents and determined that the BCS Bowls were abusing their tax-exempt status by running what should be charitable enterprises as "their own private fiefdoms."[77] Of particular note, the Playoff PAC found inflated salaries were paid from charitable funds.[78] For example, "[t]he Sugar Bowl's top three execs received $1,225,136 in fiscal year-end (FYE) 2009 on revenue of $12.7 million, meaning that just three people skimmed almost $1 of every $10 the Bowl earned."[79] Furthermore, Fiesta Bowl CEO John Junker's "total compensation package from all Fiesta Bowl-related entities was $592,418 for FYE 2009, nearly quadruple the CEO pay at similarly sized charities."[80] The Playoff PAC also found frivolous spending such as the Orange Bowl spending $535,764 on "gifts," $331,938 for "parties" and a "summer splash," and $42,281 for "golf."[81] Finally, the Playoff PAC found that the Fiesta Bowl made undisclosed lobbying payments and political contributions with charitable funds.[82]

As perhaps the most recent example of intercollegiate athletic scrutiny, U.S. Secretary of Education Arne Duncan wrote a *Washington Post* op-ed on March 16, 2011. In his op-ed, Duncan backed a proposal that had been made for the past ten years by Knight Commission officials. The proposal requires that any team that fails to score a 925 out of 1,000 on the NCAA's multiyear Academic Progress Rate (APR) scale (which amounts to graduating at least half of the players on a given team) shall be barred from participating in that sport's NCAA tournament.[83] A Knight Commission

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76. Playoff PAC Complaint against College Football's Bowl Championship Series (Sept. 23, 2010), *available at* http://www.playoffpac.com/blog/read.aspx?id=287 [hereinafter Playoff PAC Complaint].

77. Katie Thomas, *Political Heavy Hitters Take on College Bowls*, N.Y. TIMES, Jan. 10, 2011, at A1.

78. Playoff PAC Complaint, *supra* note 76, at 1.

79. *Id*.

80. *Id*.

81. *Id*. at 3. Other items of note: the Fiesta Bowl spent $1,325,753 on "Fiesta Frolic," an "annual weekend golf retreat for college-football officials at a Phoenix-area resort." The Fiesta Bowl also spent $444,948 on "hospitality," and the Sugar Bowl spent $710,406 on an impossibly vague category called "special appropriations." *Id*. at 3.

82. *Id*. at 2.

83. *See* Duncan, *supra* note 11. Ten out of the sixty-eight teams that competed in the 2011 NCAA Tournament failed to meet the threshold APR score and would have been banned from competing under this proposal: The University of Alabama at Birmingham (APR: 825), The University of Texas at San Antonio (APR: 825), The University of California, Santa Barbara (APR: 902), Morehead

analysis recently revealed that, over the preceding five years, almost $179 million had been paid out to tournament teams that were not on course to graduate at least half of their players.[84] Duncan thought that this was wrong and stated that "it is time that the NCAA revenue distribution plan stopped handsomely rewarding success on the court with multi-million dollar payouts to schools that fail to meet minimum academic standards."[85] The concern is clear: why should intercollegiate athletics continue to receive favorable treatment and large amounts of cash if they abandon the supposed educational purpose for which they stand?

III. AN INTRODUCTION TO THE NON-PROFIT TAX EXEMPTION AND THE UNRELATED BUSINESS INCOME TAX

A. Tax Exemption Under I.R.C. § 501(c)(3)

Section 501(c)(3) of the Internal Revenue Code of 1986 (I.R.C. or The Code) is the textual source that provides colleges and universities (as well as the NCAA) with their tax-exempt status.[86] In relevant part, the specific section states that the following organizations are exempt:

> Corporations, . . . or foundation[s], *organized and operated exclusively for* religious, charitable, scientific, testing for public safety, literary, or *educational purposes, or to foster national or international amateur sports competition* (but only if no part of its activities involve the provision of athletic facilities or equipment), . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[87]

State (APR: 906), Alabama State (APR: 907), Syracuse (APR: 912), Purdue (APR: 919), San Diego State (APR: 921), The University of Southern California (APR: 924), and Kansas State (APR: 924). *See* Chris Good, *The Teams Arne Duncan Wants Out of the NCAA Tournament*, THE ATLANTIC (Mar. 17, 2011, 4:37 PM), http://www.theatlantic.com/politics/archive/2011/03/the-teams-arne-duncan-wants-out-of-the-ncaa-tournament/72642/.

84. *Arne Duncan Follows Push for Reform*, ESPN (Mar. 17, 2011, 4:39 PM), http://sports.espn.go.com/ncb/tournament/2011/news/story?id=6228459. For more information regarding the Knight Commission's findings, *see* RESTORING THE BALANCE: DOLLARS, VALUES AND THE FUTURE OF COLLEGE SPORTS, *available at* http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf.

85. Duncan, *supra* note 11.

86. *See* I.R.C. § 501(c)(3) (2006).

87. *Id.* (emphasis added).

At the most basic level, tax exemption under § 501(c)(3) requires that two tests are met: (1) the "organizational test" (from the "organized" language); and (2) the "operational test" (from the "operated" language).[88] The organizational test requires that any organization seeking to obtain a tax exemption must demonstrate that it was established to promote a tax-exempt purpose.[89] In order to adequately demonstrate that the organization was established to promote a tax-exempt purpose, the organization's articles of organization[90] must limit its purpose to one, or more, of the exempt purposes provided in section 501(c)(3).[91] Furthermore, the articles of organization must not authorize the organization to conduct activities which are "in themselves . . . not in furtherance" of the exempt purpose.[92] In other words, the organizational test is a formal test that merely requires the organization to ensure that it has followed certain technicalities.

In addition to satisfying the technical organizational test, however, an organization that seeks tax-exempt status must also satisfy the operational test, which requires that the organization demonstrate that its activities substantively further an exempt purpose.[93] In other words, rather than merely looking to the stated purpose of the organization, the operational test looks to the actual motivation of the organization.[94] Ultimately, the operational test is meant to ensure that the organization is engaged "primarily in activities which accomplish one or more . . . exempt purpose."[95] Through either statute, Treasury Regulations, IRS interpretations, or judicial opinions, the operational test imposes the following five requirements: (1) the organization must ensure that its net revenue does not benefit a private shareholder or individual (private

88. *See generally* Treas. Reg. § 1.501(c)(3)-1 (2008).

89. *Id*. § 1.501(c)(3)-1(b)(1)(i) (2008). "Organized" has been interpreted to mean "established to promote" or "created to perform" within the context of the federal tax code. *See also* Samuel Friedland Found. v. United States, 144 F. Supp. 74, 84 (D.N.J. 1956).

90. The regulations define "articles of organization" as "the trust instrument, the corporate charter, the articles of association, or any other written instrument by which an organization is created." Treas. Reg. § 1.501(c)(3)-1(b)(2) (2008).

91. *Id*. § 1.501(c)(3)-1(b)(1)(i)(a) (2008). In the case of colleges and universities (and their athletic departments), the stated purpose is education. In the case of the NCAA, the stated purpose is to foster national or international amateur sports competition. *See* I.R.C. § 501(c)(3) (2006).

92. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(B) (2008).

93. *Id*. §1.501(c)(3)-1(c)(1) (2008).

94. As John D. Colombo eloquently characterized it: "One might think of the organizational test, therefore, as embodying a requirement that an organization have a prima facie charitable purpose and then comply with several distinct operational limitations in order to achieve exempt status." Colombo, *supra* note 75, at 114.

95. Treas. Reg. § 1.501(c)(3)-1(c)(1) (2008).

inurement doctrine);[96] (2) the organization cannot be an "action organization," which means that a substantial part of its activities cannot seek to influence legislation or partake in political campaigning;[97] (3) the organization cannot partake in illegal activities or activities that violate a clearly established "fundamental" public policy;[98] (4) the organization cannot partake in activities that confer an excessive benefit on individuals outside of the charitable class ("private benefit" doctrine);[99] and (5) the organization must not run significant commercial businesses ("commerciality limitation" doctrine).[100] The determination of whether or not an organization passes the operational test is a question of fact, which requires an analysis of the specific facts and circumstances of each case.[101]

A deceptive modifier of the organizational and operational tests is the word "exclusively." Although the reader might have already noticed that the operational test requires that "exclusively" not actually be interpreted in the plain meaning sense of the word, a more direct explanation is important. In 1945, the Supreme Court determined that so long as the substantial portion of the university's activities constitutes tax-exempt activities, the "exclusively" language is satisfied.[102] In other words, "exclusively" actually means substantially[103] or primarily, and the first factor of the operational test makes this clear. So long as an organization is

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96. *Id*. § 1.501(c)(3)-1(c)(2).

97. *Id*. § 1.501(c)(3)-1(c)(3).

98. Colombo, *supra* note 75, at 115, *citing* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy."); Rev. Rul. 75-384, 1975-2 C.B. 204 (stating that an educational organization that promoted civil disobedience was not exempt because it violated the prohibition on engaging in illegal activity).

99. Colombo, *supra* note 75, at 115.

100. *Id*. at 1126.

101. *See* St. Louis Union Trust Co. v. United States, 374 F.2d 427, 432 (8th Cir. 1967).

102. *See* Better Bus. Bureau of Wash., D.C., Inc. v. United States, 326 U.S. 279, 283 (1945). It should be noted that the Court in *Better Business Bureau* was actually dealing with section 811(b)(8) of the Social Security Act, but courts have found it "substantially the same as § 501(c)(3) of [the Code]." Stevens Bros. Found., v. Comm'r, 324 F.2d 633, 638 (8th Cir. 1963).

103. Of course there is even a wrinkle within the wrinkle. An organization's tax exemption is not threatened even if more than an insubstantial part of its activities involves a trade or business, which is a non-exempt activity, if "the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business." Treas. Reg. § 1.501(c)(3)-1(e)(1). This is related to, but different than, the UBIT. Rather, this deals with the commercial activity limitation of the operational test.

primarily engaged in tax-exempt purposes, the "exclusively" language is satisfied.[104]

B. The Unrelated Business Income Tax

Even if an organization has passed through the statutory hoops to gain tax-exempt status under section 501(c)(3), a corporate tax may still be applied to net revenues from an "unrelated trade or business" of the tax-exempt organization.[105] Understanding the Unrelated Business Income Tax (UBIT) requires the synthesis of Code Sections 511-513, which ultimately reveal that the business activities of a tax-exempt organization will only be subject to UBIT if: (1) the income is from a trade or business; (2) the trade or business is regularly carried on by the organization; and (3) the conduct of the trade or business is not substantially related to the organization's performance of its exempt functions.[106] Even if an exempt organization's business activities meet the statutory definition of an "unrelated trade or business," the organization can still avoid the imposition of UBIT if it falls under one of three exceptions stated in section 513(a)(1)-(3), which exclude any trade or business:

> (1) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or
>
> (2) which is carried on, in the case of an organization described in section 501(c)(3) or in the case of a college or university described in section 511(a)(2)(B), by the organization primarily for the convenience of its members, students . . . ; or
>
> (3) which is the selling of merchandise, substantially all of which has been received by the organization as gifts or contributions.[107]

Two final notes about UBIT are worth mentioning. First, and most importantly, the presence of UBIT does not affect the underlying tax-exempt status of an organization in any way.[108] In other words, the UBIT provisions in the Code do not speak at all to whether a charity will lose its overall exempt status if it undertakes a trade or business of a certain size or type. Second, by way of the "fragmentation rule," the IRS is able to apply the UBIT to separate revenue streams, even if those revenue streams would

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104. *See* Treas. Reg. § 1.501(c)(3)-1(c)(1). This interpretation might seem odd because it goes against the obvious plain meaning sense of the word, and although Colombo's analysis might not provide much solace, it hits the nail on the head: "Remember, folks, that this is the IRC, where a "person" includes a partnership, corporation, etc." Colombo, *supra* note 75, at 114 n.17.

105. *See generally* I.R.C. §§ 511–13 (2006).

106. Treas. Reg. § 1.513-1(a) (1983).

107. I.R.C. § 513(a)(1)-(3) (2006).

108. *See* I.R.C. § 501(b) (2010).

normally be considered to be a part of one single business.[109] For example, the IRS may determine that sales of coffee mugs at a museum are subject to the UBIT but sales of cards with art reproductions are not.[110]

IV. APPLICATION OF NON-PROFIT TAX LAW TO INTERCOLLEGIATE ATHLETICS

A. Tax Exemption Under I.R.C. Section 501(c)(3)

Armed with an introductory understanding of non-profit tax law, this subsection explores whether the increasing commercialization of intercollegiate athletics risks the tax-exempt statuses of colleges and universities, or the NCAA. As a preliminary matter, the reader should understand that "it makes no sense to talk about 'college athletics' as being tax-exempt."[111] Entities, rather than particular activities of those entities, are what technically are considered as tax-exempt.[112] In other words, revenues obtained through operation of an athletics department may be tax-free if the overall activities of that department are part of a tax-exempt entity.[113] Therefore, when determining whether revenue from college athletic departments are tax-free, the threshold question is whether the college or university in which it resides is a tax-exempt entity.[114]

i. Organizational Test

Colleges and universities are clearly organized for "educational" purposes, which is defined in the regulations as: "(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community."[115] Therefore, colleges and universities are universally recognized as section 501(c)(3) tax-exempt

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109. *See* I.R.C. § 513(c) (2010).

110. *See, e.g.*, Rev. Rul. 73-105, 1973-1 C.B. 264 (finding that sales of art reproductions were not subject to UBIT because they were substantially related to the museum's exempt purpose of promoting public understanding of art, but sales of general souvenirs were subject to UBIT).

111. Colombo, *supra* note 75, at 117.

112. *See id*.

113. *See id*. Of course, not every activity of a tax-exempt organization is free from tax. As already explained above, the UBIT allows the IRS to tax revenues from activities that constitute unrelated trades or businesses even though those activities are run by an otherwise tax-exempt entity. *See supra* Part III.B.

114. *See id*.

115. Treas. Reg. §§ 1.501(c)(3)-1(d)(3)(i)(a), (b) (1982). It should be noted that most colleges and universities also have a "scientific" basis for exemption because they engage in research "carried on in the public interest." *See* Treas. Reg. § 1.501(c)(3)-1(d)(5) (1982) (defining "scientific" and "scientific research").

entities because they are organized for an explicitly stated charitable purpose: education.[116] In contrast to the obvious qualification of a college or university as a tax-exempt entity under section 501(c)(3), the NCAA was on shakier grounds through 1976. Thanks to a broad reading of the word "educational," certain athletic related organizations qualified for section 501(c)(3) status before 1976.[117] But the NCAA arguably could not have relied on these interpretations because of the fact that the IRS had seemed to reserve the exemption for organizations that provided athletic education, such as Little League baseball.[118] Luckily for the NCAA, however, Congress passed an amendment to section 501(c)(3) in 1976, which made "foster[ing] national or international amateur sports competition" a prima facie charitable purpose.[119] As John D. Colombo notes, "[e]ven if one believes that Division I football and basketball programs are no longer 'amateur athletics,'" it would still be difficult to claim that the NCAA is not a tax-exempt entity because it also "fosters competitions in college tennis, baseball, wrestling, track, gymnastics, and all sorts of other 'nonrevenue' sports that surely would meet anyone's definition of 'amateur athletics.'"[120]

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116. As already seen in the context of the meaning of the word "exclusively," the Code is not always interpreted as the plain meaning would suggest. Colombo explains the wrinkle regarding the list of tax-exempt purposes under section 501(c)(3):

> Although the statute seems to make "charitable" one of several possible purposes that are exempt under § 501(c)(3), in fact, an organization must conform to common law definitions of charity to obtain exemption under this subsection. The listing of religious, educational, and other purposes is best thought of as a sort of presumptive list—that is, religious organizations are presumed to be charitable organizations, but in fact simply being a religious (or educational) organization standing alone is insufficient to be tax exempt. Rather, an entity must prove it is a *charitable* religious organization, or a *charitable* educational organization in order to obtain § 501(c)(3) exemptions.

Colombo, *supra* note 75, at 113 n.13. *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 586–89 (1983) (rejecting Bob Jones University's argument that it did not have to meet the common law standard of charity because it was a legitimate educational institution).

117. Colombo, *supra* note 75, at 118.

118. *See id*.

119. Tax Reform Act of 1976, Pub. L. No. 94-455 § 1313(a), 90 Stat. 1520, 1730 (codified as amended at I.R.C. § 501(c)(3) (2006)). It is also notable that even without this statutory change, the NCAA probably would have been viewed as engaging in a charitable purpose considering the Tenth Circuit's decision in *Hutchinson Baseball Enterprises v. Commissioner*, finding that "the furtherance of recreational and amateur sports" is a charitable activity. 696 F.2d 757, 762 (10th Cir. 1982).

120. Colombo, *supra* note 75, at 119.

ii. Operational Test

Merely being capable of forming an organization with a stated exempt purpose, of course, is not enough. Doing so only satisfies the organizational test's requirement of a prima facie charitable purpose.[121] But the organization must still prove that it is "primarily" engaged in charitable activities, and it does so by successfully jumping through the five limitations of the operational test described above.[122] Generally only three of the five limitations are potentially applicable in the world of intercollegiate athletics: the private inurement limitation, the private benefit limitation, and the commercial activity limitation. Of course, an athletic department or the NCAA might theoretically engage in activities that would violate the illegal activity/public policy limitation and the political action limitation, but for purposes of this paper, these possibilities are not considered.

1. Private Inurement

Section 503(c)(3) explicitly states that "no part of the net earnings [of a tax-exempt organization may] inure[] to the benefit of any private shareholder or individual."[123] It is well settled that this operational limitation is meant to prohibit a "siphoning off" of the tax-exempt organization's assets to an "insider."[124] As part of the operational test, the traditional consequence for siphoning off assets to an insider was the elimination of the tax-exempt status for the entity in question, but more forgiving consequences were proposed in the early 1990s and became law in 1996.[125] Rather than "blowing up"[126] the tax-exempt status of the entity in question, section 4958 imposes excise taxes on an "excess benefit transaction," which is defined as a transaction where "the value of the economic benefit provided exceeds the value of the consideration . . . received . . . ."[127] Furthermore, the legislative history of section 4958

121. *Id*.

122. *See* text accompanying *supra* notes 93–101.

123. I.R.C. § 501(c)(3) (2006).

124. Colombo, *supra* note 75, at 120, *citing* United Cancer Council, Inc. v. Comm'r, 165 F.3d 1173, 1176 (7th Cir. 1999) ("A charity is not to siphon its earnings to its founder, or the members of its board, or their families, or anyone else fairly to be described as an insider, that is, as the equivalent of an owner or manager.").

125. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168 § 1311(a), 110 Stat. 1452, 1475 (1996) (codified as amended at I.R.C. § 4958).

126. Colombo, *supra* note 75, at 120.

127. I.R.C. § 4958(c)(1)(A) (2010). Excess benefit transactions only occur between a tax-exempt organization and a "disqualified person," which is defined as a person who is (or was in the preceding five years) "in a position to exercise substantial influence over the affairs of the organization." *Id*.

makes it clear that unless the violations are particularly egregious, the excise tax avenue should be pursued rather than blowing up the tax-exempt status of the entity involved.[128]

There is a natural inclination to think that the exponential rise in coaches' salaries must amount to a private inurement transaction or an "excess benefit transaction." After all, a classic example of a private inurement transaction is when a charitable organization pays an insider more for his services than they are actually worth (paying an unreasonable salary).[129] The Treasury Regulations associated with section 4958, however, make it clear that this is not the case for coaches' salaries.[130] When determining what amounts to "reasonable compensation," for example, the Treasury Regulations explain that (1) the fair market value for similar services *including the for-profit sector* is considered;[131] and (2) the entire compensation package of the employee is considered.[132] Considering that many NFL and NBA coaches (the for-profit comparison) are paid well over three or four million dollars per year,[133] there is no legal support for the argument that coaches' salaries should either be subject to an excise tax or risk a college or university's tax exemption.

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128. *See* H.R. REP. NO. 104-506, at 59 n.15 (1996). In 2008, the IRS set forth regulations that describe when the elimination of the organization's tax exemption should be pursued. *See* T.D. 9390, 2008-18 I.R.B. 855 (codified at Treas. Reg. § 1.501(c)(3)-1(f)).

129. *See* Colombo, *supra* note 75, at 120.

130. *See* Treas. Reg. § 53.4958-4(b)(1)(ii) (2009).

131. *Id*. at § 53.4958-4(b)(1)(ii)(A) ("The value of services is the amount that would ordinarily be paid for like services by like enterprises (*whether taxable or tax-exempt*) . . . .") (emphasis added). *See also* H.R. REP. NO. 104-506, at 56 n.5 (1996) ("[T]he Committee intends that an individual need not necessarily accept reduced compensation merely because he or she renders services to a tax-exempt, as opposed to a taxable, organization.").

132. Treas. Reg. § 53.4958-4(b)(1)(ii)(B) (2009) ("[C]ompensation for purposes of determining reasonable under section 4958 includes all economic benefits provided by an applicable tax-exempt organization in exchange for the performance of services.").

133. As an NFL coach of the Miami Dolphins, Nick Saban was paid $4.5 million per year, which means that he actually took a pay cut to become the head coach at Alabama. Associated Press, *Saban's $4 Million Salary Raises Questions*, MSNBC, Jan. 4, 2007, http://nbcsports.msnbc.com/id/16472828/. Furthermore, Mike Holmgren of the NFL's Seattle Seahawks was believed to be owed $9 million for his services in 2008. Gerry Dulac, *The Money Question: It's Not Everything, But It Is Something*, PITTSBURGH POST-GAZETTE, Dec. 31, 2006, at D-1, *available at* http://www.post-gazette.com/pg/06365/750301-66.stm. Finally, an article in the *Gatson Gazette* reported that Phil Jackson of the NBA's Los Angeles Lakers was making over $10 million a year as far back as 2007. Richard Walker, *Phil Paid Top Dollar Yet Again*, GATSON GAZETTE, Feb. 16, 2007, at 5C, *available at* http://www.gastongazette.com/sports/million-3839-salary-year.html.

2. Private Benefit

The private benefit doctrine, a doctrine which dictates that a tax-exempt organization can lose its exemption if it confers an excessive benefit on "outsiders,"[134] derives from IRS and court interpretations of Treasury Regulation section 1.502(c)(3)-1(d)(1)(ii), which states:

> An organization is not organized or operated exclusively for [a charitable purpose] unless it serves a public rather than a private interest. Thus, to meet the requirement [for tax exemption], it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.[135]

The seminal case establishing the private benefit doctrine is *American Campaign Academy v. Commissioner*.[136] The questionable entity at issue in the case was an organization that trained individuals in the art of political campaigning.[137] Although the organization was technically involved in education, the Tax Court found that the organization could not qualify for a tax exemption because it benefited the Republican Party—almost all of the individuals trained by the organization subsequently worked for Republican candidates.[138]

Although it is not clear from *American Campaign Academy*, a 1987 IRS General Counsel's Memorandum makes it clear that the private benefit doctrine is essentially a balancing test between the private benefit received by various individuals and organizations from a certain kind of charitable activity and the charitable benefits produced by the same charitable activity.[139] Utilizing such a balancing test, an argument can be made that

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134. The private benefit doctrine is similar to the private inurement doctrine of section 4598, but instead of applying to transactions with "insiders," the doctrine applies to transactions with "outsiders." Colombo, *supra* note 75, at 122. Furthermore, the private benefit doctrine can theoretically apply to fair market value transactions. *Id*.

135. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2008).

136. Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989).

137. *Id*. at 1078–79.

138. *Id*.

139. Specifically, the IRS General Counsel's Memorandum stated:

> An organization is not described in section 501(c)(3) if it serves a private interest more than incidentally. If, however, the private benefit is only incidental to the exempt purposes served, and not substantial, it will not result in a loss of exempt status . . . .
>
> A private benefit is considered incidental only if it is incidental in both a qualitative and a quantitative sense. In order to be incidental in a qualitative sense, the benefit must be a necessary concomitant of the activity which benefits the public at large, i.e., the activity can be

the private benefit that universities and the NCAA give to television networks and the professional sports leagues ("outsiders") substantially outweighs any educational benefits that might be provided to the college athletes (the charitable class). As John D. Colombo noted, because the IRS has applied the private benefit doctrine even to arm's length transactions, there is technically no theoretical difficulty in applying it to deals between colleges and universities (and the NCAA), and television networks, even considering the fact that rights fees are paid in exchange.[140] Furthermore, the private benefit received by professional football and basketball organizations can be characterized as the cost avoidance of otherwise having to have a development system.[141]

For various reasons, however, Colombo noted that "a successful private benefit argument [in the context of intercollegiate athletics] seems highly unlikely."[142] Although the private benefit doctrine is potentially broad enough textually to include completely arm's length transactions resulting in a fair market value price,[143] courts inevitably look to some kind of "bad deal" or negligent underpricing that gives an excessive benefit to for-profit outsiders.[144] Since there is no reason to believe that colleges and universities or the NCAA have negligently underpriced their product thereby giving an excessive private benefit to outsiders, a private benefit argument would likely not prove fruitful. Another important reason that the private benefit doctrine has not been construed as applying to intercollegiate athletics, a reason that Colombo failed to address, is the harshness of the consequences. If the IRS were to find private benefit in the context of intercollegiate athletics, colleges and universities as a whole could lose their tax-exempt statuses. This reason alone might go a long way in justifying why the IRS has never shown much inclination in applying the private benefit doctrine to intercollegiate athletics. Like the case for applying the private inurement doctrine to coaches' salaries,

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> accomplished only be benefiting certain private individuals. To be incidental in a quantitative sense, the private benefit must not be substantial after considering the overall public benefit conferred by the activity.

I.R.S. Gen. Couns. Mem. 39,862 (Nov. 22 1991).

140. Colombo, *supra* note 75, at 125.

141. *Id*.

142. *Id*. at 126.

143. *See* John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063, 1067–73 (2006).

144. Colombo noted that the private benefit doctrine is probably better thought of as a doctrine ensuring that there is not a "failure to conserve assets for the benefit of the charitable class." *Id*. at 1084. In other words, it will likely be applied in instances where the charity "*negligently* 'diverts' assets to for-profit interest in arm's length transactions." *Id*. *See also* United Cancer Council v. Comm'r, 165 F.3d 1173, 1179–80 (7th Cir. 1999).

attractive as it might initially sound on paper, the sometimes non-literal construction of tax law prevents such arguments from proceeding any further.

3. Commercial Activity

The commercial activity limitation is best understood as the checks and balances corollary to the IRS's decision to interpret "exclusively" as actually meaning primarily or substantially.[145] Although, an organization is considered to satisfy the operational test "if it engages *primarily*" (as opposed to "exclusively," the literal word used in the statute) "in activities which accomplish one or more . . . [exempt purposes], . . ."[146] the commercial activity limitation illustrates the point of no return: "[a]n organization will not [be regarded as tax-exempt] if *more than an insubstantial* part of its activities is not *in furtherance* of an exempt purpose."[147] Therefore, the crucial questions in determining whether the commerciality limitation applies are (1) whether the activity in question is "more than . . . insubstantial" and, if so, (2) whether the activity in question is "in furtherance" of an exempt purpose.

The meaning of "more than insubstantial" or substantial is clearer than the meaning of "in furtherance." Substantiality is generally measured by calculating size: amount of revenues and/or expenditures *vis-à-vis* other revenues and/or expenditures of the charitable organization as one possibility and the amount of employees engaged in the activity in question as another potentially relevant calculation.[148] In addition to calculations concerned with the size of the activity in question, courts have also suggested that the substantive importance of the activity to the charitable organization is also relevant.[149] With this in mind, the application of the substantiality requirement to intercollegiate athletics (at least for Division I football and basketball) is clear. As Colombo noted, "football and basketball programs often involve tens of millions in revenues and expenditures, employ dozens if not hundreds of people, and are used by

145. *See* Colombo, *supra* note 75, at 1084.

146. Treas. Reg. § 1.501(c)(3)-1(c)(1) (2008) (emphasis added).

147. *Id*. (emphasis added).

148. *See* Colombo, *supra* note 75, at 128, *citing* JAMES J. FISHMAN & STEPHEN SCHWARTZ, TAXATION OF NONPROFIT ORGANIZATIONS 357 (2d ed. 2006) (suggesting use of a "50 percent of total revenue" benchmark for "substantiality"); *see also* Goldsboro Art League v. Comm'r, 75 T.C. 337, 341–42 (1980) (rejecting the IRS's commercial limitation argument in part because of the small amount of receipts involved: $6,500 a year).

149. *See, e.g.*, Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855–56 (10th Cir. 1972) (suggesting that a balancing test be used measuring the importance of the activity in question to the underlying purpose of the organization).

colleges and universities as major generators of alumni interest and donations."[150] For the NCAA, a whopping ninety percent of its budget is comprised of the revenues generated from the NCAA men's basketball tournament.[151] By any understanding of the word "substantial," it seems pretty clear that these facts rise to an adequate threshold.

Despite a more agreed upon understanding of "substantial," however, the meaning of "in furtherance" is much less clear because there are two plausible interpretations: (1) "in furtherance" means that the activity in question must be related functionally to the charitable organization's exempt purpose, or (2) "in furtherance" merely means that the revenue produced from the activity in question must be used to support charitable activities of the organization.[152] The first possibility, that "in furtherance" means that the activity in question must be related functionally to the charity's exempt purpose, equates "in furtherance" to the meaning of "substantially related" for UBIT purposes. As already explained above in Section III, a charity's activities may be subject to UBIT, if, among other things, the conduct of the trade or business is not substantially related to the organization's performance of its exempt functions.[153] The Treasury Regulations associated with the UBIT code section explain that "substantially related" requires a substantial "causal relationship" between the business activities in question and the achievement of exempt purposes of the charitable organization.[154] It is not enough for the destination of the commercial activity's income to be the charity ("destination of income" principle).[155] The activities in question must *functionally* advance the charitable purposes of the organization, rather than advance the purposes of the organization indirectly through mere contribution of funds.

The second possibility, that "in furtherance" merely means that the revenue produced from the activity in question must be used to support charitable outputs, takes the view that although mere contribution cannot shelter the revenues of an unrelated business activity from tax for UBIT purposes, it does protect the tax-exempt status of the entity. In other words, Congress's enactment of the UBIT in 1950 did not repeal the "destination of income"[156] test in relation to the underlying tax-exempt

150. Colombo, *supra* note 75, at 131.

151. Pete Thamel & Richard Sandomir, *Why Would the N.C.A.A. Expand its Tournament? It's About the Money*, N.Y. TIMES, Mar. 13, 2010, at SP1.

152. *See* Colombo, *supra* note 75, at 128.

153. *See supra* Part III.B.

154. Treas. Reg. § 1.513-1(d)(2) (1983).

155. *Id*. ("other than through the production of funds"). *See also* I.R.C. § 513(a) (2006) ("aside from the need of such organization for income or funds or the use it makes of the profits derived").

156. The "destination of income" test establishes the principle that a charity could run a commercial business, and the revenues from that business would be tax-free, so long as the business revenues were used to fund charitable activities.

status.[157] Rather, the "destination of income" test was only repealed for the purpose of ensuring that those activities are taxable as UBIT.[158] While the UBIT enactment ensured that revenues from side business could be taxed even if they were all contributed back to the charity, the enactment said nothing about the underlying tax exemption of the charity.[159] Under this view, even a substantial commercial activity will not endanger the tax-exempt status of the organization, so long as the revenues from the activity are contributed back to the charity.[160]

Although there is no definitive answer regarding the correct interpretation of "in furtherance,"[161] none is needed for the purposes of this paper because each construction leads to the same result when applying the law to intercollegiate athletics—that the tax exemption of universities is likely not at risk from their running of intercollegiate athletics programs.[162]

See Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924). This principle reached its height in *C.F. Mueller Co. v. Comm'r*, where the Third Circuit upheld the tax exemption of Mueller, a macaroni company, merely because it contributed all of its profits to New York University School of Law. *See* 190 F.2d 120, 121–22 (3d Cir. 1951).

157. *See* Colombo, *supra* note 75, at 129.

158. *See id.*

159. *See id.*

160. The revenues will be taxable as UBIT, but they will not endanger the underlying exemption.

161. On the one hand, some cases have sided with the first possible interpretation in finding that a charity's tax exempt status is at risk if it engages in substantial activities with a "commercial hue." *See, e.g.*, Presbyterian & Reformed Publ'g Co. v. Comm'r, 743 F.2d 148, 155 (3d Cir. 1984) ("If, for example, an organization's management decisions replicate those of commercial enterprises, it is a fair inference that at least one purpose is commercial, and hence nonexempt. And if this nonexempt goal is substantial, tax exempt status must be denied."). *See also* Living Faith, Inc. v. Comm'r, 950 F.2d 365, 373–74 (7th Cir. 1991) (applying commercial hue analysis). On the other hand, however, a number of IRS rulings have sided with the second possible interpretation in finding that the tax exemption of a charity is not at risk, even if it operates significant commercial activities, so long as the profits of those activities are used for the charitable purposes of the organization. This has become known as the "commensurate in scope" test. *See* Rev. Rul. 64-182, 1964-1 C.B. 186 (finding that an exempt organization that received a substantial amount of revenue from renting commercial office space was subject to the UBIT because the activity was "unrelated," but the tax-exempt status of the organization was not at risk because the revenues were used to make grants to others charities). *See also* I.R.S. Gen. Couns. Mem. 34,682 (Nov. 17, 1971) ("[T]here is no quantitative limitation on the 'amount' of unrelated business an organization may engage in under section 501(c)(3), other than that . . . [the] charity properties must be administered exclusively in the beneficial interest of the charitable purpose to which the property is dedicated.").

162. Despite the fact that no definitive answer is needed, scholars such as John D. Colombo convincingly argue that the second interpretation of "in furtherance"

Firstly, even if one takes the more restrictive meaning of "in furtherance," which requires that the activities in question be functionally related to the charitable purpose of the organization, the tax-exempt status of colleges and universities would likely not be at risk. This is because the legislative history of the UBIT explicitly created a presumption that intercollegiate athletics is substantially related to education.[163] In addition, the NCAA would likely find little problem under such a standard considering their tax-exempt purpose is the promotion of intercollegiate athletics. Secondly, the application to intercollegiate athletics is even clearer if one takes the second interpretation of "in furtherance," which only requires that revenues generated from commercial activities be used to fund charitable outputs. Considering that both colleges and universities, and the NCAA use the profits generated from Division I basketball and football programs to fund "non-revenue sports" and scholarships, the standard would surely be met under such an interpretation of "in furtherance."[164]

B. Unrelated Business Income Tax (UBIT)

Although it is reasonably clear under current law that the increasing commercialization of intercollegiate athletics will not threaten the *tax-exempt status* of colleges and universities, or the NCAA, this subsection explores whether the *revenues* generated from intercollegiate football and basketball might be subject to taxation as UBIT.[165] As already noted, the

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is the better approach. *See* John D. Colombo, *Reforming Internal Revenue Code Provisions on Commercial Activity by Charities*, 76 FORDHAM L. REV. 667, 672 (2007) ("The only sensible harmonization of these regulations . . . is that in enacting the UBIT Congress did not intend to alter the destination of income test for the purpose of granting exemption to an entity in the first instance.").

163. *See* H.R. REP. NO. 81-2319, at 37 (1950) ("[A] university would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students of other schools."). *See also id*. at 109 ("[I]ncome of an educational organization from charges for admissions to football games would not be deemed to be income from an unrelated business, *since its athletic activities are substantially related to its educational program*.") (emphasis added). The issue will be addressed further in the UBIT section since the more restrictive interpretation of "in furtherance" adopts the UBIT understanding of "substantially related."

164. *Brand Letter*, *supra* note 3, at 1 ("Divisions I and II intercollegiate sports provide $1.5 billion annually in athletic scholarships . . . ."); *id*. at 17 ("These excess revenues are redistributed to support other sports programs that do not generate revenues sufficient to cover expenses . . . ."); *id*. at 22 ("In furtherance of its tax-exempt mission, the NCAA sponsors 88 championships in 24 sports.").

165. The "fragmentation rule" allows the IRS to separately analyze the revenue streams of intercollegiate football and basketball even though those revenue streams normally would be considered to be part of one single business: intercollegiate athletics. *See* I.R.C. § 513(c) (2006).

business activities of a tax-exempt organization will be subject to UBIT if: (1) the income is from a trade or business; (2) the trade or business is regularly carried on by the organization; and (3) the conduct of the trade or business is not substantially related to the organization's performance of its exempt functions.[166] This subsection will consider the "trade or business" and the "regularly carried on" requirements together since their application to intercollegiate athletics is relatively straightforward. The "substantially related" requirement will then be analyzed separately since most of the UBIT application revolves around this concept.

i. "Trade or Business" and "Regularly Carried On"

For purposes of determining whether an activity is subject to the UBIT, "trade or business" is defined as "any activity which is carried on for the production of income from the sale of goods or the performance of services."[167] In a 1978 General Counsel Memorandum, the IRS further defined the test by stating that "the *profit motive* rather than the extent of activity is relevant in determining whether an activity is a trade or business. . . ."[168] In the more than thirty years since the IRS advocated for a profit motive test, more than half of the circuit courts have explicitly agreed by adopting the test.[169] An important inference from the profit motive test is that activities of a charitable organization are not automatically presumed to fall outside of the definition of a trade or business "merely because it does not result in profit."[170] It is the presence of a profit motive rather than the presence of a profit itself that is the key when determining whether the activity in question constitutes a "trade or business." Considering that fifty-three percent of FBS programs and twenty-eight percent of Division I basketball programs turned a profit at the time of the NCAA's response letter to Chairman Thomas, it seems clear that these intercollegiate football and basketball programs constitute a trade or business.[171] Furthermore, because of the profit motive test, even programs that do not generate a profit might still be considered a "trade or business" for UBIT purposes so long as a primary purpose of the program is to produce income.[172]

166. Treas. Reg. § 1.513-1(a) (1983).

167. I.R.C. § 513(c) (2006). *See also* Treas. Reg. § 1.513-1(b) (1983).

168. I.R.S. Gen. Couns. Mem. 37,513 (Apr. 25, 1978).

169. *See, e.g.*, Am. Acad. of Family Physicians v. United States, 91 F.3d 1155, 1157–58 (8th Cir. 1996); Am. Postal Workers Union v. United States, 925 F.2d 480, 483–84 (D.C. Cir. 1991); Fraternal Order of Police, Ill. State Troopers, Lodge No. 41 v. Comm'r 833 F.2d 717, 722 (7th Cir. 1987); Prof'l Insurance Agents of Mich. v. Comm'r, 726 F.2d 1097, 1102 (6th Cir. 1984); Carolinas Farm & Power Equip. Dealers Assoc. v. United States, 699 F.2d 167(4th Cir. 1983).

170. Treas. Reg. § 1.513-1(b) (1983).

171. *See Brand Letter*, *supra* note 3, at 17–18.

172. *See* § 1.513-1(b).

Colombo, for example, noted that a profit motive is "signified by being substantially self-funding," which many programs can claim.[173]

In addition to constituting a "trade or business," the charity's commercial activity must also be "regularly carried on." There are two determinative factors regarding whether a charity's commercial activity meets this second requirement: (1) "the frequency and continuity" of the activities and (2) "the manner in which [the activities] are pursued."[174] If a charity's trade or business is pursued in the same manner and with the same frequency and continuity as a comparable for-profit trade or business, the charity's activities will be considered to meet the "regularly carried on" requirement.[175] Particularly relevant to the case of intercollegiate athletics, if the commercial activity at issue is typically conducted by a for-profit business on a seasonal basis, a charity that conducts the same commercial activity for a "significant portion of the season" is considered to have met the "regularly carried on" requirement.[176] The for-profit comparison for both intercollegiate football and basketball is their professional counterparts: the National Football League (NFL) and the National Basketball Association (NBA). The NFL plays games once a week with both the regular and postseason spanning from September to early February, while intercollegiate football plays games once a week with both the regular and postseason spanning from August to early January.[177] A comparison between the NBA and intercollegiate basketball is not as close of a fit as football, but college basketball still plays games for a "significant portion" of the NBA's season: five months of the year compared to the NBA's eight months.[178] With this in mind, it is clear that the "regularly

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173. Colombo, *supra* note 75, at 136. It should be noted that intercollegiate programs that do not generate a profit would not be subject to UBIT because there would be no tax base to impose the tax, but the point to take from the test is that an activity does not lose its characterization as a "trade or business" merely because it does not turn a profit every year. *But see* Ballard v. Comm'r, 71 T.C.M. (CCH) 2120 (1996) (finding that the intent "to break even" is not an intent to make a profit).

174. *See* § 1.513-1(b).

175. *Id*. at § 1.513-1(c)(1).

176. *See id*. at § 1.513-1(c)(2)(i) ("Where income producing activities are of a kind normally undertaken by nonexempt commercial organizations only on a seasonal basis, the conduct of such activities by an exempt organization during a significant portion of the season ordinarily constitutes the regular conduct of a trade or business.").

177. *Compare* NFL schedule, *available at* http://www.nfl.com/schedules?seasonType=REG *with* College Football schedule, *available at* http://espn.go.com/college-football/schedule.

178. *Compare* NBA Schedule, *available at* http://www.nba.com/mastercalendar/masterCalendar.html *with* College Basketball Schedule, *available at* http://www.cbssports.com/collegebasketball/schedules.

carried on" requirement is met for both intercollegiate football and basketball.[179]

ii. "Substantially Related"

Although the "trade or business" and "regularly carried on" UBIT requirements are clearly met, "the substantially related" requirement poses a significant hurdle for imposing the UBIT on intercollegiate athletics. The Treasury Regulations explain that a charity's activity is "substantially related" to its exempt purpose only if the activity has a "causal relationship to the achievement of [the organization's charitable purpose.]"[180] For a causal relationship to exist, the charity's activity must "contribute importantly to the accomplishment" of its charitable function, and the *activity* itself must functionally contribute to the exempt purpose rather than the mere *contribution* of funds from the activity furthering the exempt purpose.[181]

In considering the application of the "substantially related" standard to intercollegiate athletics, the IRS has relied on the legislative history of the UBIT to bolster its long-standing position that college sports are "integral"

179. Although the "regularly carried on" requirement seems to apply to intercollegiate football and basketball, there is an anomaly that must at least be noted. In 1990, the Tenth Circuit held that the advertising revenue generated from the commemorative programs of the NCAA basketball tournament was not taxable as UBIT because the basketball tournament was not a "regularly carried on" business. Nat'l Collegiate Athletics Assoc. v. Comm'r, 914 F.2d 1417, 1425–26 (10th Cir. 1990). In reaching its conclusion, the court used sports magazines like *Sports Illustrated* as the for-profit analogue, and because these sports magazines are operated year-round, it determined that the NCAA basketball tournament commemorative program was not "regularly carried on" because it did not occur year round. *Id*. at 1425 ("The competition in this case is between the NCAA's program and all publications that solicit the same advertisers. The competition thus includes weekly magazines such as *Sports Illustrated* . . . ."). But this decision has met much criticism. As Colombo notes, for example, "the proper comparison is not *Sports Illustrated*; it is the sales of advertising by the NFL for the playoffs and Super Bowl, or the NBA for its playoffs and Finals, both of which are limited-duration seasonal activities." Colombo, *supra* note 75, at 137. *See also* Treas. Reg. § 1.513-1(c)(2)(ii) (1983) (stating that "intermittent" activities will normally not be subject to UBIT, unless the intermittent activities constitute "the competitive and promotional efforts typical of commercial endeavors."). Probably realizing the faulty reasoning of the opinion, the IRS announced its decision to not acquiesce in the Tenth Circuit's decision, even though it was a favorable ruling for the IRS. *See* Nat'l Collegiate Athletics Assoc., 914 F.2d, *action on dec.*, 1991-15 (July 3, 1991).

180. Treas. Reg. § 1.513-1(d)(2) (1983).

181. *Id*.

to education and therefore "substantially related."[182] After all, when reporting on the UBIT legislation, the House Ways and Means Committee stated that "athletic activities are substantially related to [a university's] educational program."[183] Furthermore, the Senate Finance Committee reported that "[a]thletic activities of schools are substantially related to their educational functions."[184] Because of this longstanding presumption, it has been nearly impossible to characterize an intercollegiate program's activities as not being substantially related to education.[185] Therefore, although intercollegiate athletics satisfies the first two elements of the UBIT analysis, it fails the third element under current law.[186]

V. POSSIBILITIES FOR REFORM

A. Possible UBIT Tax Reforms

One possible tax reform that might alleviate the problems associated with the increasing commercialization of intercollegiate athletics would not even require a change to the existing tax law. Rather, it would only require

182. *See, e.g.*, Rev. Rul. 67-291, 1967-2 C.B. 184 (determining that a "training table" for coaches was an "integral part" of the educational exempt purpose of the university). Rev. Rul. 80-296, 1980-2 C.B. 195 (finding that broadcast revenues were not subject to UBIT because "[a]n athletic program is considered to be an integral part of the educational process of a university, and activities providing necessary services to student athletes and coaches further the educational purposes of the university.").

183. H.R. REP. NO. 81-2319, at 109 (1950).

184. S. REP. NO. 81-2375, at 505 (1950).

185. On two separate occasions the IRS has tried to subject intercollegiate athletics to the UBIT, but the presumption established by the legislative history has been too much to overcome. The first instance occurred in 1977 when the IRS attempted to subject the broadcasting rights of the Cotton Bowl to UBIT, but it later reversed its position in two Revenue Rulings. *See* Rev. Rul. 80-295, 1980-2 C.B. 194; Rev. Rul. 80-296, 1980-2 C.B. 195. For a more in-depth analysis, see Kaplan, *supra* note 60. The second instance occurred in 1991 when the IRS attempted to subject sponsorship fees to the UBIT, but this position was ultimately rejected by statute. *See* I.R.S. Tech. Adv. Mem. 92-31-001 (Oct. 22, 1991); I.R.S. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991); *see also* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 965, 111 Stat. 788, 893–94 (codified at I.R.C. § 513(i) (2006)) (rejecting the IRS's position). For a more in-depth analysis, see Stone, *supra* note 68.

186. The NCAA is a more curious case because it does not benefit from the same "substantially related" presumption that college athletic programs do. But the tax-exempt purpose of the NCAA is also entirely different: the promotion of amateur athletics rather than education. Arguably, no matter how commercialized the NCAA gets, its activities still technically promote amateur athletics. After all, the more publicized intercollegiate athletics become, the more the sports are promoted.

an interpretative change, which would give teeth to an otherwise dormant Treasury Regulation, which states:

> In determining whether activities contribute importantly to the accomplishment of an exempt purpose, the size and extent of the activities involved must be considered in relation to the nature and extent of the exempt function which they purport to serve. Thus, where income is realized by an exempt organization from activities which are in part related to the performance of its exempt functions, *but which are conducted on a larger scale than is reasonably necessary for performance of such functions*, the gross income attributable to that portion of the activities in excess of the needs of exempt functions constitutes gross income from the conduct of unrelated trade or business.[187]

This regulation has largely been overlooked perhaps because of the difficulty in determining whether an activity is conducted on too large of a scale, but if it were applied to intercollegiate athletics, it could be read to require that the revenues generated from college sports be proportionate to their educational contribution. Anything in excess would be taxable. In other words, the presumption would still be that intercollegiate athletics are "substantially related" to education, but if a given program is conducted on too large of a scale, the excessive amount will be deemed not substantially related and taxable.

A second possibility, one suggested by Gabriel A. Morgan while a student at the University of Southern California Gould School of Law, goes even further by completely eliminating the long-standing presumption that intercollegiate athletics is substantially related to education.[188] Following the test used in *American College of Physicians*, Morgan states that an athletic department "contribute[s] importantly" (and therefore is substantially related) to education only if its activities "enrich [the] educational experience of its student-athletes."[189] Morgan suggested three methods of inquiry to determine whether any given athletic department is contributing importantly to education. The first inquiry examines "the number, recency, and severity of NCAA or institutional rule infractions" committed by the athletic program in question.[190] The second inquiry compares the "student-athletes' academic performance to that of the

187. Treas. Reg. § 1.513-1(d)(3) (1983) (emphasis added).

188. *See* Gabriel A. Morgan, Note, *No More Playing Favorites: Reconsidering the Conclusive Congressional Presumption that Intercollegiate Athletics are Substantially Related to Educational Purposes*, 81 S. CAL. L. REV. 149 (2007) (citing United States v. Am. Coll. of Physicians, 475 U.S. 834, 848–49 (1986)).

189. *Id*. at 191.

190. *Id*.

general student body."[191] Finally, the third inquiry compares "graduation rates among student-athletes" with those of "their counterparts in the general student body."[192] In addition to possibly failing the substantial relationship test under any of these three factors, a program that contributes importantly to education might still find itself subject to UBIT under the first possible reform: conducting the program on a greater scale than necessary.

Such reforms, however, are not without their problems. As a preliminary issue, breathing life into the otherwise dormant Treasury Regulation discussed above would introduce an almost intolerable amount of ambiguity into the UBIT determination.[193] How would the IRS fairly distinguish between athletics programs with its only guidance being that the athletic program cannot conduct its activities on so large of a scale as to call into question its connection to education? When thought of from this perspective, it becomes obvious why this Treasury Regulation has not been employed; it is impossible to administer. Furthermore, even though Morgan's suggestion provides a much more specific standard than the indefinable proportional standard, there is still a significant concern regarding horizontal equity. What is an equitable distinction between a program that is not substantially related to education, and, therefore, subject to UBIT, and one that is substantially related to education? Although Morgan's offered solution provides more objectivity to the inquiry, a program that is otherwise identical to another program not subject to UBIT might find itself subject to the tax for incidental reasons out of its control, such as a number of players exercising their legally entitled right to leave the institution early to begin their professional careers. It is unlikely Congress intended for the UBIT to be administered in a fashion that is so ripe for discriminatory treatment.

Furthermore, even if a method can be produced that would fairly impose the UBIT on college programs deserving of the tax, there is a strong possibility that creative accounting would be used to ensure that these programs have no business revenue to tax.[194] John Colombo, for example, referred to the UBIT as a "paper tiger" because "[a]lthough some schools report net positive revenues from football or basketball programs, these revenues are rarely subject to the kind of rigorous cost accounting used in the business world," and if rigorous cost accounting were employed, there would be "no net profit from these programs to tax after factoring in depreciation on athletic facilities and a reasonable apportionment of

191. *Id.*

192. *Id.*

193. Perhaps even more problematic is the fact that some scholars have suggested that such a reading of this Treasury Regulation is "misguided" and taken "out of context." Mitten, Musselman & Burton, *supra* note 31, at 823.

194. Colombo, *supra* note 75, at 142–45.

overhead."[195] Surely, there could be some legislative changes made to prevent such a result, but perhaps it sheds light on the bigger problem—the inadequacy of tax law to fully deal with the increasing commercialization of college sports.

B. Other Possible Reforms

Even putting aside the functional inadequacy of the UBIT to deal with the increasing commercialization of intercollegiate sports, even more problematic is the fact that the UBIT is not even the right theoretical medium for dealing with the problem. As Matthew Mitten, James Musselman, and Bruce Burton have argued, athletic programs allow colleges and universities the ability to meet the following education related objectives: "providing a lens through which the nature, scope, and quality of their higher educational services is discovered by the public; attracting high quality faculty, students, and student-athletes; diversifying their student bodies; forging a continuing bond with alumni, the local community, and other constituents . . . ; and enhancing their institutional reputations."[196] Admittedly, the recent recruiting scandals and the poor academic performance that has accompanied the increasing commercialization of intercollegiate athletics suggest that, for some programs, these benefits have generated great costs.[197] Still, recent appeals to Congress for tax reform constitute a misguided attempt to use the wrong tool to regulate intercollegiate athletics. As Mitten, Musselman, and Burton point out:

> Congress did not intend for the UBIT to be a regulatory device for college or university athletic programs or for any other exempt organization. On the contrary . . . it was intended to address congressional concerns that colleges and universities conducting trades or businesses were able to deprive the government of significant tax revenue from those business operations and enjoy an unfair competitive advantage over commercial business entities required to pay taxes on their income.[198]

For these reasons, the use of the UBIT to regulate intercollegiate athletics is without theoretical and practical justification. As a result, other methods of regulation must be explored.

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195. *Id*. at 135, 143–46.

196. Mitten, Musselman & Burton, *supra* note 31, at 781.

197. *See, e.g.*, Nicholas Stanlet, *NCAA Violations: Recruiting and Player Management System Broken*, BLEACHER REPORT, (Aug. 22, 2011) http://bleacherreport.com/articles/815490-college-football-ncaa-violations-recruiting-and-player-management-system-broken (recruiting scandals); Duncan, *supra* note 11 (poor academic performance).

198. Mitten, Musselman & Burton, *supra* note 31, at 824.

One regulatory alternative suggested by Colombo would be to condition continued tax exemption on certain requirements that colleges and universities must meet.[199] Moving away from the UBIT, which was not designed to incentivize behavior, and towards a results driven alternative would not be unusual as Congress has often used the tax exemption itself as a means to incentivize results.[200] Congress might (1) "require that a certain percentage of revenues from revenue-producing sports such as football and basketball be used to expand nonrevenue athletic opportunities;"[201] (2) impose "targeted expenditure limits, such as capping coaches' salaries or limiting annual expenditures on recruiting or sports facilities;"[202] and (3) require "the NCAA and [colleges and] universities with athletic programs to provide detailed information both on the financial aspects of their programs (using standardized accounting methods) and on the academic progress of student-athletes."[203] Such a regulatory alternative essentially amounts to Congress using tax-exemption status to further the public policy goal of limiting excessive commercialization of intercollegiate athletics.

Although Colombo's alternative is far superior to any reform attempting to use the UBIT as a regulatory tool, it still poses a considerable problem. The threat of revoking tax-exempt status from a college or university that does not abide by Congress's requirements would surely prove to be a powerful motivator for those institutions, but it also limits the requirements that Congress will feel comfortable imposing. In other words, the strength of Colombo's regulatory alternative—the strong motivation inherent in losing tax-exempt status—is also its weakness. Revoking a college or university's tax-exempt status has tremendous consequences for the institution as a whole, and because of this, Congress would probably impose only those requirements that a college or university could easily meet with a reasonable amount of effort. For this reason, it should be of no surprise that Colombo does not suggest that a college or university lose its tax-exempt status if it does not meet certain academic progress thresholds for its student-athletes; losing its tax-exempt status would be too high of a price to pay for such a transgression. Instead, Colombo suggests (1) that colleges and universities disclose information about the academic progress of student-athletes (which is already public information for the most part); (2) that colleges and universities be required to use a certain amount of

199. Colombo, *supra* note 75, at 155.

200. *Id*. One example is section 145, which allows for charities to issue tax-exempt bonds, but only if ninety-five percent of the proceeds from the bonds are used to benefit tax-exempt purposes. *See* I.R.C. § 145 (2006). Another example is § 501(c)(3), which limits lobbying activities of a tax-exempt organization to "substantial" amounts. *See* I.R.C. § 501(c)(3) (2006).

201. Colombo, *supra* note 75, at 156 (emphasis omitted).

202. *Id*. at 157.

203. *Id*. at 113.

revenue from football and basketball to expand nonrevenue athletics (which is already done by most schools); and (3) that there be imposed expenditure limits.[204]

Because imposing expenditure limits, such as capping coaches' salaries, is the only substantial step forward in Colombo's regulation, even his tax-exemption alternative falls drastically short. And so it appears that any tax proposal is inherently flawed. Instead, any real regulatory changes to intercollegiate athletics must start with the NCAA. Borrowing from U.S. Secretary of Education Arne Duncan,[205] a meaningful reform would call for a post-season ban for programs failing to graduate at least half of their players within six years of their matriculation. Furthermore, although programs have been banned from post-season play for committing NCAA violations, the NCAA might consider using this method more frequently. Finally, the NCAA might consider establishing uniform rules regarding spending caps to prevent the "arms race" of intercollegiate athletics. Although these rules might be subject to antitrust litigation under section 1 of the Sherman Act, Congress could exempt them from antitrust law to ensure that the NCAA is able to effectively maintain the amateurism of intercollegiate athletics.[206]

CONCLUSION

It is abundantly clear that intercollegiate athletics is far removed from its rather humble beginnings. For at least a handful of Division I programs, winning has become synonymous with profit, and this has fueled an arms race to build the biggest and best programs in the country. Expressing their concern that intercollegiate athletics has lost its connection to education, politicians and commentators have suggested that tax law should be used to remedy the commercialization of intercollegiate athletics. Although there is surely merit to the concern over the increasing commercialization of intercollegiate athletics, this Note finds that tax law is a poor avenue to remedy the problem. The first problem with utilizing tax law as a remedy became clear after surveying the current doctrine and its application to intercollegiate athletics, which revealed that despite the increasing commercialization of intercollegiate athletics, the current tax law would have to be amended to have any impact on the problem. The second problem with utilizing tax law as a remedy is that even if amendments were made for the specific reason to curb the increasing commercialization of intercollegiate athletics, it would be a rather inefficient and misdirected

204. Colombo, *supra* note 75, at 112–13.

205. Duncan, *supra* note 11 (proposing that teams that fail to score a 925 out of 1,000 on the NCAA's multiyear Academic Progress Rate (APR) scale, which amounts to graduating at least half of the players on the team, shall be barred from participating in the NCAA tournament).

206. *See* Mitten, Musselman & Burton, *supra* note 31, at 830–43.

solution to the problem. Why cut with a machete when you can use a scalpel? Rather than using tax law to remedy the problem, this Note concludes that the NCAA must more effectively regulate the increasing commercialization of intercollegiate sports. The NCAA is more able to institute a more directed solution to the problem of increasing commercialization while still being able to acknowledge the important role that college sports can play in the educational process.

STUDENT PRIVACY, CAMPUS SAFETY, AND RECONSIDERING THE MODERN STUDENT-UNIVERSITY RELATIONSHIP

JASON A. ZWARA *

INTRODUCTION

College and university law is in a period of transition, especially with respect to student privacy and campus security. Several factors are contributing to the uncertainty of the transition. First, colleges and universities are becoming less and less uniform. Academic institutions come in many variations: public or private, religious or secular, big or small, urban or rural, residential or commuter. Crafting legal doctrines to accommodate so many different institutions may seem like an impossible task. Colleges and universities are also seeing changes in student demographics, with more "non-traditional" students, including online and "distance" learning students and older first-time freshman, each year. This

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shift in student demographics comes with new and difficult questions regarding how to provide a safe and secure campus. The legal uncertainty colleges and universities face makes the transition even more difficult.

As of 2009 there were roughly 4,500 degree-granting institutions in the United States, including around 1,700 two-year schools and 2,800 four-year schools.[1] Of the four-year schools, 672 were public institutions and 2,102 were private institutions.[2] The College Board, a leading resource for perspective students, broadly sorts institutions into four categories: universities, liberal arts colleges, community colleges, and vocational/technical schools.[3] Within each category, institutions can be sorted by size, demographics, academic specializations, geographic setting, religious or secular affiliation, and many other classifications.[4]

In 2009, 20.4 million students were enrolled in degree-granting institutions, 12.9 million of whom were enrolled in four-year institutions.[5] Amongst four-year institutions, 7.7 million students were enrolled in public colleges or universities while 5.2 million were enrolled in private institutions.[6] Enrollment in degree-granting colleges and universities grew from 15.3 million students in 2000 (an increase of 33.3%) and 13.8 million students in 1990 (47.8%); enrollment has nearly doubled since 1980.[7]

Enrollment has grown as a result of increases in full-time enrollment and enrollment of older students. Between 1999 and 2009, full-time enrollment grew 45% while part-time enrollment grew 28%.[8] Over the same period, enrollment of students over 25-years old rose 43% while enrollment of students between ages 18 and 24 grew 27%.[9] Another key contributor to growth has been the increase in online or "distance" learning. In 2008, 4.2 million students, about 20% of all students, were taking at least one course online or through distance learning; 770,000, or roughly 4% of all students, were taking their entire program through online or distance learning.[10] Since 2004, the total number of students taking any online or distance courses grew 44%, from 2.9 million.[11] A "college

1. U.S. Census Bureau, *Higher Education – Institutions and Enrollment*, 2012 STATISTICAL ABSTRACT, at 178, tbl.278.

2. *Id.*

3. *Types of Colleges*, COLLEGE BOARD, http://www.collegeboard.com/student/csearch/where-to-start/2.html (last visited Mar. 23, 2012).

4. *Id.*

5. U.S. Census Bureau, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Fast Facts*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=98 (last visited Mar. 23, 2012).

9. *Id.*

10. U.S. Department of Education, National Center for Educational Statistics, *The Condition of Education 2011*, Table A-43-1, at 282–85.

11. *Id.*

student" thus cannot be defined in any single way: while the "traditional" student (a recent high school graduate physically attending full time classes at a four-year institution) is still the majority, colleges and universities must increasingly adapt to serve "non-traditional" students, including commuters, telecommuters, and older students.

Though these changes bring many welcome benefits, they also present colleges and universities with new and difficult questions of student safety and campus security. According to College Bound Network, approximately 40% of public institution students and 64% of private institution students live on campus; another 40% and 19%, respectively, live in off-campus housing while only about 20% and 17%, respectively, live with their parents or other relatives.[12] Although these figures vary greatly from school to school, for most students, the college and university campus is much more than just a classroom, often also serving as workplace, social setting, medical facility, fitness center, and many other functions.[13] Colleges and universities must meet the unique needs of a diverse student population, not only in the classroom, but also for many other services. Providing a safe and secure campus is perhaps the most important of these many functions.

This article considers the unsettled legal framework of campus safety and security confronting colleges and universities as they attempt to navigate a period of transition. It argues for a new approach that would allow and encourage institutions to be proactive in creating safe campuses. By recognizing the unique relationship between an institution and its students, particularly those residing on campus, and adjusting the authority of the institution to maintain a safe environment and enforce campus rules, colleges and universities can adequately balance the interests of safety with the interests of student privacy.

In Part I, this article reviews Fourth Amendment jurisprudence. In Part II, it discusses the evolution of the student-university relationship. Part III looks at search and seizure law on college and university campuses today, showing the uncertainty colleges and universities face in planning campus safety. Finally, Part IV proposes an alternative approach that would allow and encourage colleges and universities to be proactive towards security, rather than reactive and reserved.

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12. *30 Things You Need to Know about Dorm Life*, COLLEGE BOUND NETWORK, http://www.collegebound.net/content/article/30-things-you-need-to-know-about-dorm-life/8850/ (last visited Mar. 23, 2012).

13. *See* Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 431–32 (2007) (comparing universities to modern day "Athenian city-states"); Anne Matthews, *The Campus Crime Wave*, N.Y. TIMES, Mar. 7, 1993, at 38 (noting "many [modern] institutions of higher education are promoting, as never before, the campus as intellectual resort—Club Med with books").

I. MODERN FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[14] Though the phrase "houses, papers, and effects" had previously caused the Supreme Court to focus almost exclusively in property rights, [15] in more recent times the Court has shifted its focus. As far back as 1967, the Court said that "the principal object of the Fourth Amendment is the protection of privacy rather than property, and [the Court has] increasingly discarded fictional and procedural barriers rested on property concepts."[16] Over time, "[t]his shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform."[17] *Katz v. United States* was a watershed decision in this shift of emphasis.[18] In *Katz*, the petitioner challenged the lower court's admittance of evidence obtained by the use of an electronic listening device, attached to the outside of a public phone booth, used to record conversations of the petitioner.[19] The parties argued over whether or not a public phone booth was a "constitutionally protected area" that warranted the protection of the Fourth Amendment.[20] The Court found this to be the wrong inquiry: the question was not whether the specific area was "constitutionally protected" because "the Fourth Amendment protects people, not places."[21] *Katz* expressly rejected the prevailing physical-spaces approach: "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. . . . [T]he 'trespass' doctrine there

14. U.S. CONST. amend. IV.

15. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942) (evidence acquired by attaching a Dictaphone to the exterior of petitioner's house did not violate Fourth Amendment where there was no physical trespass into the house); Weeks v. United States, 232 U.S.383, 390 (1914) (emphasizing the maxim "every man's house is his castle" as the purpose underlying the Amendment); Ex Parte Jackson, 96 U.S. 727, 733 (1877) (emphasizing "papers" in applying the Amendment to sealed, but not unsealed, mail).

16. Warden v. Hayden, 387 U.S. 294, 304 (1967). The Court there noted that, over time, privacy interests had even been recognized in goods which, traditionally, no 'possessory interest' could be held, including stolen goods (Henry v. United States, 361 U.S. 98 (1959) and contraband (Trupiano v. United States, 334 U.S. 699 (1948).

17. *Warden*, 387 U.S. at 304.

18. 389 U.S. 347 (1967).

19. *Id.* at 348.

20. *Id.* at 349–50.

21. *Id.* at 351. The Court added "[i]n the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" *Id.* at 350.

enunciated [in *Goldman v. U.S.*] can no longer be regarded as controlling."[22]

Instead, the application of the Fourth Amendment must turn on whether an individual has an expectation of privacy that society is prepared to protect: in short, whether such an expectation is "reasonable."[23] It is not enough that the individual has a subjective expectation of privacy against government invasion. Moreover, the expectation must be "legitimate."[24] If an expectation of privacy is deemed objectively reasonable, the next inquiry is whether an action of the state, either a search or seizure, was unreasonable.[25]

First, the terms "search" and "seizure" should be defined. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."[26] "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property,"[27] and also when the person himself or herself is seized, as by arrest.[28] The text of the Fourth Amendment expressly imposes two requirements: all searches and seizures must be "reasonable," and, if required, a warrant may not be issued unless (a) probable cause is properly established and (b) the scope of the authorized search or seizure is set out with particularity.[29] Importantly, the Fourth Amendment does not make a warrant an explicit requirement for a search or seizure to be "reasonable." The Court has however, stated that "[t]he Fourth Amendment demonstrates 'a strong preference for searches conducted pursuant to a warrant . . . .'"[30] The preference for a warrant is especially strong for searches or seizures occurring within the home.[31] Thus, despite the emphasis of *Katz* that "the

22. *Katz*, 389 U.S. at 352–53.

23. *See* Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980); United States v. Jacobsen, 466 U.S. 109, 122 (1984).

24. *See* Illinois v. Caballes, 543 U.S. 405, 408–09 (2005) (illicit and illegal behavior typically does not warrant protection because they are not 'objectively reasonable,' meaning that society is not prepared to protect them).

25. *Id.* at 409.

26. *Jacobsen*, 466 U.S. at 113. *See also* Smith v. Maryland, 443 U.S. 735, 739–41 (1979); Terry v. Ohio, 393 U.S. 1, 9 (1968).

27. *Jacobsen*, 466 U.S. at 113. *See also* United States v. Place, 462 U.S. 696 (1983); United States v. Chadwick, 433 U.S. 1, 13–14, n.8 (1977).

28. *See* Scott v. Harris, 550 U.S. 372 (2007).

29. U.S. CONST. amend. IV; *see* Payton v. New York, 445 U.S. 584 (1980).

30. Ornelas v. United States, 517 U.S. 690, 699 (1996) (*quoting* Illinois v. Gates, 462 U.S. 213, 236 (1983)).

31. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("It is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'"); Groh v. Ramirez, 540 U.S. 551, 559 (2004).

Fourth Amendment protects people, not places,"[32] location of the search or seizure undoubtedly plays a significant role in determining the reasonableness of the expectation of privacy. The lesson of *Katz*, however, is that location is not the only factor, nor even a determinative factor.

Though the Fourth Amendment has been "held to apply to" a variety of locations including hotel rooms,[33] rental storage units,[34] rental properties,[35] and even dormitories,[36] these "applications" are used mostly for the categorization of Fourth Amendment cases. "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness,'"[37] and a warrant, therefore, may not be required for a search to be reasonable. In determining "reasonableness," the Court should first look to statutes and common law at the time the Fourth Amendment was enacted,[38] then turn to balancing the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[39] In general, there is a distinction made between police searches for the purpose of law enforcement and searches the government conducts for a variety of other roles, from regulator to employer. For law-enforcement searches, a warrantless search is typically invalid unless falling within one of a number of narrowly defined exceptions the courts have recognized.[40] A search conducted for another non-law-enforcement purpose, unsupported by probable cause, can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[41] Thus, the reasonableness of a search turns not only on the expectation of privacy of an individual, but also on the reason the search is being conducted.

Law enforcement searches and seizures typically require a warrant in order to be reasonable under the Fourth Amendment,[42] though the courts have recognized a number of exceptions to this general rule. Widely

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32. *Katz*, 389 U.S. at 351.

33. Stoner v. California, 376 U.S. 483 (1964); Finsel v. Cruppenink, 326 F.3d 903 (7th Cir. 2003).

34. United States v. Smith, 353 Fed. App'x. 229 (11th Cir. 2009).

35. United States v. Howe, 414 Fed. App'x. 579 (4th Cir. 2011).

36. State v. Houvener, 186 P.3d 370 (Wash. Ct. App. 2008).

37. *Brigham City*, 547 U.S. at 403. *See also* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

38. *See* Virginia v. Moore, 553 U.S. 164, 168 (2008). *See also* Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

39. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (*quoting* Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 619 (1989).

40. Flippo v. West Virginia, 528 U.S. 11, 13 (1999); *Katz*, 389 U.S. at 357.

41. *Vernonia Sch. Dist. 47J*, 515 U.S. at 652 (*quoting* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

42. *Flippo*, 528 U.S. at 13.

recognized exceptions include searches by consent,[43] with probable cause under exigent circumstances,[44] plain-view searches, and searches pursuant to a valid arrest.

Consent is a well-developed exception to the warrant requirement.[45] The rights protected by the Fourth Amendment can be waived, in part because "the community has a real interest in encouraging consent" to searches.[46] Consent does not actually "waive" the protections of the Fourth Amendment; rather, consent makes a search "reasonable."[47] Consent may be granted by any person holding joint control over the premises or information[48] on the understanding that when a person "knowingly exposes" information to another, the expectation of privacy held by the owner is compromised.[49]

Law enforcement is entitled to rely on consent granted by individuals whom they reasonably believe to have common authority over the relevant area.[50] In *Rodriguez*, the respondent's home was searched and he was arrested after consent to search the home was given by a woman the police had reason to believe was the respondent's live-in girlfriend.[51] Police responded to the woman's complaint that the respondent had abused her, accompanied her to the apartment where she told police that the respondent was asleep, entered the apartment after the woman opened the door with her keys, and observed drug paraphernalia and cocaine in plain view inside the apartment.[52] Some time after the arrest, the police learned that the woman no longer resided at the apartment; based on this fact, the lower courts suppressed the evidence obtained in the search.[53] In reversing that decision, the Supreme Court made it clear that the Fourth Amendment protects only against "unreasonable" searches: here, the police were justified in their belief that the woman had equal access to the apartment based on what she told them and the fact that she had keys to the apartment.[54]

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43. See *infra* notes 45–54 and accompanying text.

44. See *infra* notes 55–68 and accompanying text.

45. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973); U.S. v. Matlock, 415 U.S. 164, 168 (1974).

46. *Schneckloth*, 412 U.S. at 243.

47. *Id.*

48. *Matlock*, 415 U.S. at 169.

49. *Katz*, 389 U.S. at 351; *Matlock*, 415 U.S. at 171.

50. Illinois v. Rodriguez, 497 U.S. 177 (1990)

51. *Id.* at 180–81.

52. *Id.* at 179–80.

53. *Id.* at 180.

54. *Id.* at 183. *See also* Brinegar v. United States, 338 U.S. 160, 176 (1949) ("[R]oom must be allowed for some mistakes on [the agents'] part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.").

In *Georgia v. Randolph*, however, the Court clarified that the express consent of one person with apparent control over premises could not go so far as to override the explicit, contemporaneous refusal of consent by another with apparent authority.[55] In *Randolph*, the estranged wife of the respondent called police to the home in which they were currently co-residing, regarding a domestic dispute.[56] When the police arrived, they questioned the respondent and asked for consent to conduct a search, which he refused.[57] The estranged wife, however, told police that there was evidence of drug possession in the home and gave the police consent.[58] The police searched the home, found evidence of drug paraphernalia, and arrested the respondent.[59] In affirming the state supreme court's reversal of the conviction, the Court denied that the consent of the estranged wife was effective, reasoning that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority."[60]

What *Rodriguez*, *Randolph*, and the host of other consent cases have in common is that they ultimately turn on the reasonableness of the circumstances. In *Rodriguez*, it was reasonable for the police to rely on the apparent authority of the woman over the apartment. In *Randolph*, however, it was not reasonable for police to conclude that the ex-wife had greater authority over the residence than did the respondent. *Randolph* summarized this point, stating that the expectations of privacy protected by the Fourth Amendment depend upon "widely shared social expectations."[61]

A second widely-recognized exception to the general warrant requirement comes into play when probable cause exists alongside exigent circumstances, making a warrantless search reasonable. "Exigent circumstances" is a category that catches a wide range of scenarios that make the requirement to obtain a valid search warrant impractical or unduly burdensome, including entering to provide emergency aid,[62] following a suspect into a dwelling in "hot pursuit,"[63] and preventing "imminent destruction of evidence."[64] Exigent circumstances must be accompanied by probable cause to justify a warrantless entry.[65] "Probable cause exists where 'the facts and circumstances within [an officer's]

55. 547 U.S. 103 (2006).
56. *Id.* at 107.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Randolph*, 547 U.S. at 113–14.
61. *Id.* at 111.
62. *See Brigham City*, 547 U.S. at 403.
63. *See* United States v. Santana, 427 U.S. 38, 42–43 (1976).
64. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990). *See also Randolph*, 547 U.S. at 116, n.6 (2006).
65. *Ornelas*, 517 U.S. at 696.

knowledge and of which [he or she] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution'" to believe that "an offense has been or is being committed."[66] Probable cause standards are "fluid concepts that take their substantive content from particular contexts" and cannot be reduced to a rigidly applied set of rules.[67] Additionally, probable cause must be based on individualized suspicion.[68]

In *Brigham City v. Stuart*, police responded to complaints of a large, noisy house party.[69] When they arrived they could see, through a screen door, an altercation breaking out in the home.[70] The police announced their presence and when the fighting did not cease, the police entered the home, broke up the fight, and subsequently arrested the respondent.[71] At trial, the respondent sought to suppress all evidence on the grounds that the entrance, search, and arrest were warrantless and unjustified; the state court agreed.[72] In reversing, the Supreme Court emphasized the importance of objectivity in determining the reasonableness of a warrantless entry.[73] Whether the police had some alternative subjective motive other than providing aid or quelling violence was irrelevant; there existed a sufficient, objective reasonable basis for entering the dwelling under the circumstances.[74] The subjective intent of the officers has no bearing on the Fourth Amendment because the amendment focuses on the individual's expectation of privacy, which turns on the objective reasonableness of the circumstances.[75]

In *Kentucky v. King*, the Court again dealt with a warrantless entry based on exigent circumstances.[76] Police followed the respondent, a suspected drug dealer, to his apartment; when they smelled marijuana coming from inside, they knocked and announced their presence.[77] Shortly thereafter, they heard noises coming from the apartment which led them to

66. *Brinegar*, 338 U.S. at 175–76. The Court has identified numerous factors that are to be considered in determining the "reliability" of information, including the degree to which known facts imply prohibited conduct (Adams v. Williams, 407 U.S. 143, 148 (1972)); the specificity of information received (Spinelli v. United States, 393 U.S. 410, 416–17 (1969)); and the reliability of the source itself (Aguilar v. Texas, 378 U.S. 108, 114 (1964)).

67. *Ornelas*, 517 U.S. at 695–96; *Gates*, 462 U.S. at 230.

68. Chandler v. Miller, 520 U.S. 305, 308 (1997).

69. 547 U.S. at 400–01.

70. *Id.* at 401.

71. *Id.*

72. *Id.*

73. *Id.* at 403.

74. *Brigham City*, 547 U.S. at 406.

75. *Id.* at 404; *see also* Graham v. Connor, 490 U.S. 386, 397 (1989).

76. *King*, 131 S. Ct. at 1849.

77. *Id.* at 1854.

believe the respondent was destroying evidence.[78] The officers announced their intent, knocked down the door, and observed drugs in plain view.[79] The Court found that the numerous circuit-developed tests for "police-created exigency" were fundamentally flawed, in part because they were needlessly overcomplicated.[80] "[T]he answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable. . . ."[81] The Court rejected various circuit tests, which unnecessarily focused on extraneous factors, such as bad faith, reasonable foreseeability, and proper investigative tactics.[82] The Court set forth a broader rule "that the exigent circumstances rule applies when the police do not gain entry to premises by means of an *actual or threatened* violation of the Fourth Amendment."[83]

The Court's rule focuses on the reasonableness of the expectations of the defendant, not on the intent of the police. In *Brigham City*, it was objectively reasonable for the respondent to expect that the police would intervene to provide aid or prevent violence.[84] In *King*, it was reasonable to expect police to conduct an investigation by knocking on the door and announcing themselves, then respond appropriately when they reasonably suspected that evidence of a crime was being destroyed.[85] While the "exigent circumstances" rule is stretched and modified to cover a wide variety of scenarios, it ultimately depends on analyzing the reasonableness of the individual's expectation of privacy.

The courts have recognized that Fourth Amendment analysis must be altered when applied beyond the realm of law enforcement, and have developed alternative approaches for applying the Amendment in other

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78. *Id.*
79. *Id.* at 1854–55.
80. *Id.* at 1859–61.
81. *King*, 131 S. Ct. at 1858.
82. *Id.* at 1859–61.
83. *Id.* at 1862 (emphasis added).
84. 547 U.S. at 406.
85. 131 S. Ct. at 1862:

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time. [Citations omitted.]

"government search" situations. Where "'special needs, beyond the normal need for law enforcement,' make the warrant and probable-cause requirement impracticable,"[86] the same analysis may not be appropriate. In situations where the government acts as an employer,[87] and in closely regulated industries,[88] the Court has found that because of the "special needs" of government beyond law enforcement, a different analytical approach was required, one with less stringent requirements to justify the government conduct.

In *City of Ontario*, the respondent was a police officer employed by the City and was provided a cell phone.[89] The City would bear additional costs if users exceeded the usage limit, therefore, the City established usage rules that reserved the right to monitor and log all usage.[90] After the respondent exceeded his data usage numerous times, the City investigated his usage to determine if an increase in the usage limit would be appropriate.[91] In conducting this inquiry, the City discovered that the respondent was using his phone largely for inappropriate personal use.[92] The respondent challenged the City's investigation, claiming in part that it violated his Fourth Amendment rights.[93]

Even assuming *arguendo* that the respondent had a reasonable expectation of privacy in the text messages and that the City engaged in a Fourth Amendment search, the Supreme Court reversed the circuit court and ruled that "the 'special needs' of the workplace" may justify an exception from the general rule that "warrantless searches 'are *per se* unreasonable under the Fourth Amendment.'"[94] Where the government acts as an employer, rather than in its law enforcement role, a "warrantless search is reasonable if it is 'justified at its inception' and if 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search."[95] Compared to the "exigent circumstances" analysis examined above, the "special needs" exception subjects the government conduct to a significantly lower standard. Although the Court has recognized that "it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior,'"[96] the extent of that protection turns on the

86. City of Ontario v. Quon, 130 S. Ct. 2619, 2628 (2010).
87. *See id.*; Nat'l Treasury Emps Union v. Von Raab, 489 U.S. 656 (1989).
88. *See* Skinner v. Ry. Labor Execs' Ass'n., 489 U.S. 602 (1989).
89. *City of Ontario*, 130 S. Ct. at 2624–25.
90. *Id.*
91. *Id.* at 2626.
92. *Id.*
93. *Id.*
94. *Id.* at 2630.
95. *Id.*
96. New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

"reasonableness" of the expectation given the circumstances surrounding the search. "As with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the Amendment.'"[97] Thus, just as with "exigent circumstances" analysis, the Court must consider the surrounding circumstances when considering "special needs" searches. Whereas an "exigent circumstances" case may turn on the risk that evidence would be destroyed, a "special needs" case may turn on the need of the government, as employer, to efficiently provide benefits to employees.

Searches within public schools are another major category of "special needs" searches. In these cases, several unique circumstances are in play. First, the government is acting in a unique role in a school setting. It is acting in neither its law enforcement nor its employer role when it is educating students. Second, the persons typically being searched are students and, more often than not, are minors. These two important factors must play an important role in balancing the needs of the government against the individual's expectation of privacy. The Supreme Court has addressed school searches at the elementary or secondary school level in three notable cases. It does not appear that the Court has ever addressed a search case on a college or university campus.

In *New Jersey v. T.L.O.*, a high school principal searched a student's purse following suspicion that the student had been smoking cigarettes in the school lavatory.[98] In that case, the Court expressly held that the Fourth Amendment applies in the context of a public school.[99] The Court nonetheless went on to hold that the search of the student's purse was reasonable.[100] Emphasizing that "what is reasonable depends on the context within which a search takes place,"[101] the Court engaged in a lengthy discussion of balancing the competing interests,[102] ultimately concluding:

> that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.[103]

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97. O'Connor v. Ortega, 480 U.S. 709, 716 (1987). *See also T.L.O.*, 469 U.S. at 337.

98. *T.L.O.*, 469 U.S. at 328.

99. *Id.* at 333–34.

100. *Id.* at 343.

101. *Id.* at 337.

102. *Id.* at 337–43.

103. *Id.* at 341.

The Court continued on: "[b]y focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[104]

In *Vernonia School District 47J v. Acton*, the Court again took in the "special needs" presented by a school district.[105] In *Acton*, the school district conducted random drug testing of student athletes participating in inter-scholastic athletic leagues in order to protect their health and safety.[106] The Court found that "[s]omewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[107]

Most recently, in *Safford Unified School Dist. v. Redding*, the Court revisited administrative searches in schools to reinforce the importance of analyzing the "reasonableness" of the circumstances surrounding the search.[108] There, a school district conducted a search of the respondent, a thirteen-year-old female student, based on the statements of two other students that the respondent gave them prescription strength pain-killers.[109] After confronting the respondent, who denied any participation, the school principal ordered the school nurse to search the respondent's bag and clothing, including her underwear, for the drugs.[110] The Court engaged in a lengthy discussion of the pertinent circumstances that would contribute to the "reasonableness" of the search, similar to its discussion in *T.L.O.*, ultimately finding that in these circumstances the search was not reasonable.[111] In reaffirming *T.L.O.*, the Court

> [made] it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.[112]

Fourth Amendment cases fall into a wide variety of headings, including "consent," "exigent circumstances," "special needs," and "school searches." Courts inevitably create shorthand for common cases, a practice

104. *Id.* at 343.
105. 515 U.S. at 646.
106. *Id.*
107. *Id.* at 657.
108. 129 S. Ct. 2633 (2009).
109. *Id.* at 2638.
110. *Id.*
111. *Id.* at 2641–43.
112. *Id.* at 2643.

that risks obscuring the true focus of the analysis. It is therefore extremely important to keep in mind that at the heart of each of these categories is a common balancing test, weighing the reasonableness of the individual's expectation of privacy against the reasonableness and necessity of the government action in light of all the surrounding circumstances. Courts may use a variety of tests and rules in common cases, however supporting each approach is the overall reasonableness of the conduct and the reasonableness of the expectation. The individual elements of the analysis are especially important to keep in mind when applying the Fourth Amendment in less common scenarios, such as searches on college campuses.

II. THE STUDENT-UNIVERSITY RELATIONSHIP

The early period of American higher education, prior to the 1960s, was exclusively associated with the doctrine of *in loco parentis*.[113] *In loco parentis* is a simple legal premise, though it is often misconstrued and misapplied. *In loco parentis* was applied in the early period of higher education law to prevent courts or legislatures from intervening in the student-university relationship, thus insulating the institution from criminal or civil liability or regulation. The doctrine is made up of "three indelible features": first, the power of the institution is "one to discipline, control and regulate" students; second, the power is "paternal"; and third, the power is a "contractual delegation" of authority from the parents of a student to the college or university.[114] Importantly, *in loco parentis* is not a rule forcing the college or university to act as a parent would; rather, as applied, it prevents the court from intervening into the student-university relationship, just as the court would not intervene into the parent-child relationship.[115]

Two early twentieth century cases help explain the doctrine. In *Gott v. Berea College*, the court refused to intervene when a student brought suit against the college challenging a rule prohibiting students from going to certain off-campus locations.[116] Specifically citing the doctrine, the court held that "[c]ollege authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of pupils, and . . . to that end [may make] any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose."[117] In *Stetson*

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113. Case law employing *in loco parentis* extends well into the mid-nineteenth century. *See* Pratt v. Wheaton Coll., 40 Ill. 186 (1866); Hill v. McCauley, 3 Pa. C. 77 (Pa. County Ct. 1887).

114. ROBERT BICKEL & PETER LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE? 23 (1999) [hereinafter BICKEL & LAKE].

115. *See* Peters, *supra* note 13, at 434–35.

116. 161 S.W. 204 (Ky. 1913).

117. *Id.* at 206.

University v. Hunt, the university suspended a student for "[o]ffensive habits that interfere with the comforts of others . . . ."[118] Without discussing the details of the offense, the court deferred to the authority and rules of the university, however vaguely they were written or however inconsistently they were applied.[119] *Gott* and *Hunt* show that *in loco parentis* "was not about university *duties* towards students but about university rights and *powers* over students."[120]

Courts began to shift away from *in loco parentis* beginning in the civil rights era of the 1960s through a number of cases addressing student claims for constitutional rights, in particular due process rights and free speech.[121] The change came first at public colleges and universities, where students prevailed in challenging the procedures used to discipline students. *Dixon v. Alabama State Board of Education* is a critical decision in this transition period.[122] In *Dixon*, six black students were expelled from Alabama State College for what was described as "[c]onduct [p]rejudicial to the [s]chool" shortly after the students participated in a civil rights demonstration.[123] The students were not provided a hearing or more specific justification.[124] The Fifth Circuit reviewed only the issue of whether the students were entitled to any form of due process, overturning the "longstanding protections against judicial review of university action that deprived students of their right to attend the university."[125] The Fifth Circuit concluded that students at public colleges and universities were entitled to "at least fundamental due process" because "education is so basic and vital in modern society" that a student could not be expelled without, at the very least, fair notice and some form of a disciplinary hearing.[126] Other cases followed in which students prevailed on similar arguments claiming a variety of constitutional rights.[127]

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118. 102 So. 637 (Fla. 1924).

119. *Id.* at 640.

120. BICKEL & LAKE, *supra* note 114, at 23.

121. *See* Peters, *supra* note 13, at 436 ("Unwilling to accept a system of paternalistic control and a lack of civil rights, [] students successfully challenged the insularity of the *in loco parentis* college, winning their own fundamental civil rights and subjecting college decisions to judicial review and basic legal standards.").

122. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

123. *Id.* at 152.

124. *Id.* at 154.

125. BICKEL & LAKE, *supra* note 114, at 38.

126. *Id.*

127. *See, e.g.*, Healey v. James, 408 U.S. 169 (1972) (public university cannot deny recognition of a student organization based solely on disagreement with political views); Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (public university cannot censor editorial content of student-run

The reasoning in *Dixon* is critical to understanding how the doctrine of *in loco parentis* was unraveled. The Court subtly recognized that the contractual arrangement was not between the parents and the state, wherein the parents delegated the "parental" authority over the student to the college or university. Instead, the arrangement was between the college or university and the students *themselves*. Later cases would make this point even clearer in holding private colleges and universities to a similar standard. In *Corso v. Creighton University*, for instance, the Eighth Circuit upheld a student's challenge to his expulsion on the grounds that the university had failed to provide the level of due process it had promised to the student.[128] The court concluded that a "contract" had been formed between the university and the student, based on the student handbook and other publications the university had provided students, and the university had promised to follow an established procedure before disciplining the student.[129] Because the student was a party to the agreement, not simply a beneficiary as under *in loco parentis*, the court and the state may fairly intervene to protect each party's legal rights.[130]

With the demise of *in loco parentis*, courts addressing student suits against colleges and universities were faced with the task of determining what duty the institution owed the student. Many courts answered this question simply: colleges and universities were, by and large, merely "bystanders" to student life and therefore owed no duty.[131] "Bystander era" courts responded to the fall of *in loco parentis* by concluding that if colleges and universities did not stand in the place of the parent because students were, at least constitutionally, adults, then the student-university relationship should be no different than any other commercial transaction. Colleges and universities "sold" an education and students paid for that commodity: as such, the college or university owed the student no special duty extending beyond that commercial transaction.[132]

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newspaper); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) ("misconduct" as standard for disciplinary action is unconstitutionally vague).

128. 731 F.2d 529 (8th Cir. 1984).

129. *Id.* at 530.

130. *Id.* at 531.

131. Bickel and Lake discuss at length the four most noteworthy cases of the "bystander era," wherein the court held that a college or university could not be liable because it owed no duty to the student bringing suit. *See* BICKEL & LAKE, *supra* note 114, at 49–65. These cases (Bradshaw v, Rawlings, 612 F. 2d 135 (3d Cir. 1979), Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981), Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986), and Rabel v. Illinois Wesleyan Univ., 514 N.E. 2d 552 (Ill. App. Ct. 1987)) involve a variety of fact patterns but are similar in their analysis.

132. *See* BICKEL & LAKE, *supra* note 114, at 82. *See also* Peters, *supra* note 13, at 444.

Though the "bystander era" cases were the most prominent and notable to arise out of the post-*in loco parentis* era,[133] there were several cross-current cases which employed the same duty analysis to conclude that a college or university *did* owe students a special duty and therefore could be held liable. For example, in *Mullins v. Pine Manor College*, a female student was attacked in her dormitory by a non-student.[134] The court found the college could be held liable because it stood in a "special relationship" to residential students, thus creating a duty to use reasonable care to protect the students from foreseeable harms.[135] In *Mintz v. State of New York*, though the university was deemed not liable for injuries suffered by the student on a sponsored camping trip, the court relied on the fact that the university had taken "all reasonable and necessary precautions" to protect the student, not on the argument that the university did not owe the student any duty in the first place.[136] Many commentators mistakenly viewed these cross-current cases as a return to *in loco parentis.*[137] The cross-current cases were actually quite similar to the "bystander era" cases, however, in that both strains focused on the issue of what duty the institution owed to the students. The two approaches merely came to different answers to this question.

Thus, moving into the twenty-first century, the question "what is the nature of the student-university relationship?" remains far from settled. While the post-*in loco parentis* cases have agreed that the focus is on the question of duty, there has been no consensus on what exact duty is owed. Courts have employed a variety of analogies and models based on the particular facts of a case,[138] including business-consumer, parent-child, bystander-stranger, landlord-tenant, fiduciary, and employer-employee

133. Bickel and Lake argue that the "bystander era" cases, and the four mentioned *supra* note 131 in particular, gained prominence in the college and university law community largely because of the "politics" of college and university litigation. Because college and university lawyers tend to take "the long view," whereas student-side attorneys are more interested in their client's immediate interests, college and university lawyers have been able to have a far greater impact on how the law of higher education is shaped. *See* BICKEL & LAKE, *supra* note 114, at 89–91.

134. 449 N.E. 2d 331 (Mass. 1983).

135. *Id.* at 335–36 (discussing two theories on the duty of care owed to students).

136. 362 N.Y.S.2d 619 (N.Y. App. Div. 1975).

137. *See* James J. Szablewicz & Annette Gibbs, *College's Increasing Exposure to Liability: The New* In Loco Parentis, 16 J.L. & EDUC. 453 (1987). *See also* Perry Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986).

138. *See* Peters, *supra* note 13, at 444; Oren R. Griffin, *The Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 418 (2007).

analogies.[139] This uncertainty has left college and university administrators in the unenviable position of having to guess how a court will respond in a given situation. The result is that colleges and universities have become *reactive* rather than *proactive* to issues of student safety and look to insulate themselves from liability, rather than actively constructing a safe environment for students and staff.

Robert Bickel and Peter Lake have proposed an alternative approach called the "facilitator university" model, in which the institution "balances rights and responsibilities—it is neither extremely authoritarian nor over solicitous of student *freedom*."[140] The "facilitator" model splits the difference between a controlling *in loco parentis* model and a hands-off "bystander" model by recognizing that while the college or university is not a substitute for a parent, it nonetheless stands in a unique relationship to its students.[141] Moreover, this unique relationship is a product of the unique circumstances and characteristics of the college or university. As pointed out above, no two colleges or universities are exactly alike.[142] Therefore, it makes little sense to hold them all to the same standard. Nor should the duty owed by one college or university be determined based upon the duty owed by another institution. The duty a particular college or university owes to its students depends on the many qualities that make that institution unique and that led the student to enroll there in the first place. Bickel and Lake point out that a crucial difference between institutions of higher education and many other organizations are that the former "have a strong flavor . . . of being voluntary associations."[143] As Kristen Peters suggests, modern-day colleges and universities represent "Athenian city-states" in many ways: students, professors, administrators and staff choose to work or study at a particular institution for any number of factors, including size, location, convenience, focus of study, and cost.[144]

These and many other factors will no doubt impact what a student expects from the institution as well as what the institution expects from its students. These factors should also guide the courts in determining what duty is appropriate, thus allowing colleges and universities to be proactive towards campus safety and use what "reasonable care" is appropriate. The "facilitator" model takes a step forward by "imagin[ing] law . . . as a positive tool of empowerment in its efforts to increase safety and promote an educational environment"[145] and should be a model for approaching the student-university relationship.

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139. *See* BICKEL & LAKE, *supra* note 114, at 161–63, tbl.1.
140. *Id.* at 192.
141. *Id.*
142. *See supra* notes 1–132 and accompanying text.
143. BICKEL & LAKE, *supra* note 114, at 199.
144. Peters, *supra* note 13, at 431–32.
145. BICKEL & LAKE, *supra* note 114, at 212.

III. SEARCH AND SEIZURES ON CAMPUS

Case law involving searches and seizures of college and university dormitories did not begin turning up until after the "student revolution" of the 1960s secured basic constitutional rights for students. Several of the earliest decisions involving on-campus searches paralleled the "bystander era" approach for college and university liability: since colleges and universities were only "bystanders" to the college and university student beyond the classroom, they could not be held liable for injuries suffered by students. It also meant that colleges and universities could not assert any special authority to enforce rules and regulations.

In *Smyth v. Lubbers*, several students brought suit against Grand Valley State College, challenging the institution's search of the students' dormitories without a warrant as unconstitutional.[146] The College had established a "room entry" policy notifying students of the circumstances under which the College may enter a student's room with or without consent.[147] Pursuant to this policy, three college officials, assisted by two campus police officers, conducted searches of student dorm rooms and uncovered drugs and drug paraphernalia.[148] The students in question were arrested for drug offenses. In finding for the students and excluding the evidence from the criminal prosecution, the court analogized a dorm room to a home and found the College's rules against drug possession "track[ed] federal and state laws."[149] Thus, since the campus rules served the same purpose as criminal laws, rather than any academic or educational purpose, the court analogized the students to "person[s] suspected of a criminal offense, and [thus] the search and seizure in question [was] as hostile and intrusive as the typical policeman's search for a seizure of the instrumentalities of crime in a person's home."[150] The campus rules against drug possession, in the court's view, could only serve as an internalized alternative to criminal proceedings; therefore the College was required to fully abide by the Fourth Amendment.[151]

The "college as mere educator" argument was also employed in *Morale v. Grigel*.[152] There, school officials of a public technical college responded to a report of stolen goods by searching student dorm rooms.[153] The officials searched plaintiff's room without prior notice or consent and found drugs, but not the stolen items.[154] The college then brought

146. 398 F. Supp. 777 (W.D. Mich. 1975).
147. *Id.* at 782.
148. *Id.* at 781.
149. *Id.* at 787.
150. *Id.* at 788.
151. *Smyth*, 398 F. Supp at 787.
152. 422 F. Supp. 988 (D.N.H. 1976).
153. *Id.* at 992–93.
154. *Id.*

disciplinary action against the plaintiff.[155] Though the court balanced "the need to search against the invasion which the search entails," the court concluded "[a] college cannot, in this day and age, protect students under the aegis of *in loco parentis* authority from the rigors of society's rules and law, just as it cannot, under the same aegis, deprive students of their constitutional rights."[156]

Smyth and *Morale* point out the double-sided nature of the "bystander era" model. An institution cannot avoid liability by claiming it owed no special duty to a student, then turn around and claim special authority to restrict student's rights when it comes to searching dorm rooms. Thus, because the school failed to establish "a clearly distinguishable and separate *educational* interest . . . [t]he presence or absence of stealing on a campus does not disrupt or disturb the operation of its *academic* function"[157] and the college could not claim the authority to conduct a search for stolen property without a warrant. The institution served only an educational function and bore no other "special relationship" with its students.

As in the "bystander era" of tort liability, however, there were also several cross-current cases. In *People v. Haskins*, a college official at a private college conducted a search for drugs in a student's dorm room.[158] Upholding the validity of the search, the court found it "unnecessary to decide whether the [private] college is a governmental agency"; rather, "because of the unique circumstances of cases resulting from searches by school officials, they should be all judged by the same standards."[159] All colleges and universities, public or private, have a substantiated interest in enforcing their rules in order to maintain a safe and secure campus that is inherent in their academic nature. The court saw no reason why the outcome of a search by a college or university official in order to enforce a campus rule or regulation should have a different outcome merely because the institution was public as opposed to private. Therefore, colleges and universities, both public and private, should be provided the authority and leniency to enforce these rules for purposes other than criminality.[160]

Subsequent case law has failed to generate a clear consensus and, just as in the tort liability context, has left colleges and universities guessing how a

155. *Id.* at 994.

156. *Id.* at 997.

157. *Morale*, 422 F. Supp. at 998 (emphasis added).

158. 48 A.D.2d 480 (N.Y. App. Div. 1975).

159. *Id.* at 481–83.

160. *See also* State v. Kappes, 550 P.2d 121 (Ariz. App. Div. 1976) (search of campus dorms by resident assistants for 'safety and maintenance' purposes that uncovered evidence of drug use "served the internal requirements of the university" and thus did not implicate the Fourth Amendment).

court will rule in any given case. The cases, fairly limited in number, turn on a wide variety of justifications, leaving institutions with little guidance.

Some courts focused only on whether the individual conducting the search was a private citizen or whether he or she was charged with state authority. In *State v. Keadle*, a public university resident assistant (RA) was conducting standard maintenance inspections of the lighting of all dorm rooms when he discovered what he believed to be a stolen stereo in the defendant's room.[161] The RA contacted his supervisor, who confirmed that the stereo was stolen, and Keadle was arrested on theft charges.[162] The court held the evidence admissible in criminal proceedings against the defendant since the RA was a private actor not performing a state function or a college or university function, even though he was ostensibly in the room to conduct his official duties as a university representative.[163] The court reasoned that the RA was "motivated by reasons independent of a desire to secure evidence to be used in a criminal conviction," and that excluding the evidence would serve no useful deterrent function against illegal government searches under the Fourth Amendment.[164]

In *Commonwealth v. Neilson*, public college officials discovered drugs and drug paraphernalia in the defendant's room during a routine maintenance inspection.[165] The officials summoned campus police who documented the evidence and contacted local police.[166] The court held the initial search by campus officials and campus police proper, but the involvement of local police improper. Even though it occurred well after the drugs were discovered and documented, the dorm room search raised a Fourth Amendment issue.[167] Since "the sole purpose of the warrantless police entry into the dormitory room was to confiscate contraband for purposes of a criminal proceeding," the entry of local police was improper.[168]

In *State v. Sinclair*, on the other hand, the defendant's room was searched by private college campus police in pursuit of an alleged campus

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161. 277 S.E.2d 456 (N.C. 1981).

162. *Id.* at 457.

163. *Id.* at 459, n.11.

164. *Id.* at 460. *See also* Duarte v. Commonwealth, 407 S.E.2d 41 (Va. App. Ct. 1991) (dean of private college conducted search as a private individual, even though she had been in contact with local law enforcement and turned over evidence of drug use to local police).

165. 666 N.E.2d 984 (Mass. App. Ct. 1996).

166. *Id.* at 985.

167. *Id.* at 986.

168. *Id.* at 987. *See also* State v. Ellis, 2006 WL 827376 (Ohio Ct. App. 2006) (initial search by resident assistant was proper as a search by a private citizen but subsequent local police involvement in seizing uncovered evidence was improper).

rule violation.[169] The campus officers uncovered evidence of drug use and contacted local law officials, who obtained a warrant prior to seizing the evidence.[170] The court distinguished private campus police from local law enforcement, stating the former were not bound by the Fourth Amendment.[171] *Sinclair*, *Ellis*, *Keadle*, *Duarte*, and *Neilson* turned on a single factor: the identity of the person conducting the search.

Other recent cases turned on whether the student whose dormitory was being searched had given consent through a housing agreement. In *Grubbs v. State*, a resident assistant at a public university responded to complaints of drug use by plaintiff.[172] With the assistance of campus police the RA entered plaintiff's dorm room and discovered evidence of drug use.[173] The court rejected plaintiff's motion to exclude the evidence, pointing out that the housing agreement the plaintiff had signed provided "ample authority for the RA's entry" in order to "fulfill [his] daily duties . . . or in cases of reasonable suspicion of activity endangering the individual or the community."[174] In *State v. Jordan*, a private university campus official provided access to the defendant's dorm room to a police detective during the investigation of an alleged rape.[175] The police had narrowed their investigation to two possible dorm rooms and received permission from the university dean to look inside and photograph from the hallway, but not enter, the defendant's dorm room.[176] The court held that the police conduct violated the Fourth Amendment based on the conclusion that there was no evidence that the defendant had agreed in any way to give the university permission to allow such access.[177] Had there been evidence that the defendant had agreed to give the university permission to grant access, such as through a housing agreement as in *Grubbs*, the conduct may well have been permitted.

Still other cases retained the idea that a college or university served only the role of educator and therefore bore no additional relationship with students, even with regards to other services that the college or university provided. In *State v. Houvener*, public university campus police responded to a report of a theft in a campus dormitory.[178] The officers were walking down the hall on the defendant's floor when they overheard loud music and voices in the defendant's room that led the officers to believe the defendant

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169. 2005 WL 2077942 (Ohio Ct. App. 2005).

170. *Id.* at *1.

171. *Id.* at *2.

172. 177 S.W.3d 313 (Tx. App. Ct. 2005).

173. *Id.* at 316.

174. *Id.* at 319 (citation omitted).

175. 225 P.3d 1211, 2010 WL 921144 (Kan. App. Ct. 2010) (unpublished table decision).

176. *Id.* at *1.

177. *Id.* at *2.

178. 186 P.3d 370 (Wash. App. Div. 2008).

was the culprit.[179] The officers knocked on the defendant's door, who upon questioning admitted he was in possession of the stolen goods.[180] The officers had the defendant retrieve the stolen goods then arrested him; at no point did the officers enter the defendant's room. Despite this, the court held the arrest and seizure of evidence was improper because the defendant had a reasonable expectation of privacy in the *hallway* of his dormitory, in addition to his room.[181] The court reasoned that, absent a valid warrant, the campus police had no greater right than a private citizen to be present on the defendant's dormitory floor, regardless of the fact that the university supplied campus police with all-access keys.[182] This conclusion likens the college or university to an ordinary landlord, denying any special relationship between the institution and its residential students.

The various outcomes of these cases leave colleges and universities guessing as to how a court will approach a given situation. In order to allow and encourage colleges and universities to take a proactive stance on campus safety, they must first have a clear idea of the standards and rules courts will apply. The courts, therefore, should adopt a new approach that offers guidance to institutions of higher education while at the same time remaining flexible enough to adapt to the unique circumstances and characteristics of each institution.

IV. APPLYING THE "FACILITATOR" RELATIONSHIP TO ON-CAMPUS SEARCHES

Colleges and universities are facing a major period of transition along with grave uncertainty in the legal framework of higher education. Student demographics are changing dramatically, with increasing numbers of "non-traditional" students including older first-time students and online and distance-learning students, and institutions must adapt quickly. At the same time, colleges and universities are confronted with an uncertain legal framework regarding questions of institutional liability for student injuries and the authority of the institution to enforce rules and regulations. Bickel and Lake's proposed "facilitator model"[183] provides a more stable framework to address the former issue. What remains, then, is a parallel framework that responds to the latter issue and gives colleges and universities the authority and ability to create and sustain a safe, secure campus.

179. *Id.* at 371.
180. *Id.*
181. *Id.* at 373.
182. *Id.* at 375.
183. BICKEL & LAKE, *supra* note 114, at 163.

A. The Insufficiency of a Contract-Based Theory of the Student-University Relationship

Following the Civil Rights era, the doctrine of *in loco parentis* quickly wore away. Students demanded that colleges and universities recognize their rights. They would not allow these institutions to act as parents, treating them like children, when in the eyes of the law they were adults.[184] As a result, the relationship between colleges and universities and their students swung dramatically in the other direction. Instead of colleges and universities having a parental relationship with students, the relationship was transformed into a set of mere contractual duties and obligations by each party.[185]

A 1981 article entitled *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship* outlined the contract theory which contemporary courts were developing as an alternative to the *in loco parentis* doctrine.[186] The contract-based theory developed because the student-university relationship, at its most basic, is a contractual one. If *in loco parentis* was stripped away, what is left is an agreement by the college or university to grant a degree to students, provided they meet the agreed-upon requirements. However, Nordin was keenly aware that modern colleges and universities did more than simply grant degrees. Still, she argued that the contract theory provided a system of accountability of the college or university to the student that courts could review.[187] Nordin's contract-based theory emphasized maximizing the value a student received and holding both parties to the promises made.

The shortcoming of the contract-based theory is that no single express contract exists between the student and the college or university. Instead, the contract "is an implied, or quasi-contract with the relationship being contractual in nature even without an express contract."[188] Instead of a single contract, or even a series of related documents, spelling out the duties of the college or university to the student and the student to the

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184. *Id.* at 160. This is especially true following the ratification of the twenty-first Amendment in 1971, lowering the voting age from twenty-one to eighteen, thus granting most college-aged persons the right to vote. *Id.* at 49–51.

185. *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984) (expulsion of student reversed because university failed to provide the student the level of due process it had contractually agreed to); *Grubbs*, 177 S.W. 3d at 313 (university allowing local police to look inside student's dorm room because the housing contract did not provide such authority to the university).

186. Virginia D. Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141 (1981).

187. *Id.* at 149. "Modern universities cannot confine themselves to classroom teaching, research and the discipline of students. Their size alone . . . dictates the need for a greater and greater proportion of purely administrative activity." *Id.*

188. *Id.* at 156.

college or university, the "quasi-contract" is made up of a myriad of written requirements, oral representations, advertising materials, and other reasonable expectations of the two parties.[189] This model puts the onus on a student seeking to enforce the bargain by producing evidence that he or she had reasonably relied on representations of the college or university as having created a contractual duty.[190]

The contract-based theory is valued not because it creates a universally applicable standard of duty between the college or university and the student, but rather because it creates an evidentiary standard for students bringing claims of liability against the college or university. Instead of creating the system of accountability that Nordin envisioned, the contract-based theory encouraged colleges and universities to *minimize* their duty to students in order to avoid liability and accountability. As Nordin notes in her conclusion,

> [t]his [contractual] approach means that both the parties and the courts must pay more attention to the development of a meaningful, realistic description of the mutual obligations of universities and students. . . . [Several opinions] have noted that the student-university relationship is fundamentally a major power imbalance, one of the most imbalanced situations left in society.[191]

The fundamental error of the contract-based theory of the student-university relationship is that this relationship is *not* akin to an ordinary arms-length consumer-producer relationship. Indeed, the exact opposite of what Nordin suggests should happen will happen: colleges and universities are encouraged to minimize their accountability by making even written statements of duties vague, rather than explicitly spelling out what duty they owe to students.

B. Alternatives to the Contract-Based Theory

The most compelling argument against the contract-based theory to the student-university relationship is that it oversimplifies the relationship and ignores the reality that students do have a unique relationship with their college or university, especially in the modern era. In an early post *in loco parentis* case, *Moore v. Troy State University*, the Court struggled with defining the student-university relationship.[192] "The college does not stand, strictly speaking, *in loco parentis* to its students, nor is their relationship

189. *See id.* at 156 n.63.

190. Nordin emphasizes the need for the student to hold the university accountable: "When substantial sums of money are paid out, some measure of accountability does seem appropriate, particularly when matters of scholarly expertise are not involved." Nordin, *supra* note 186, at 150.

191. *Id.* at 180.

192. 284 F. Supp. 725 (M.D. Ala. 1968).

purely contractual . . . [instead,] *[t]he relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student*."[193] For example, the Court noted that while the student has a right to privacy, which cannot be expressly waived through a housing contract, the university nonetheless has an "affirmative obligation" to create a safe, healthy, secure environment for its students pursuant to the overarching goal of providing an education.[194] These "competing interests" must be balanced differently from the way in which they might be balanced in other contexts beyond the quad. Similarly in *People v. Haskins*, the Court recognized that while the student-university relationship was not exactly the same as the relationship between a student and an elementary or secondary school, the two surely shared many characteristics; thus it was logical to consider the latter relationship when developing the former.[195]

A contract-based theory of the student-university relationship fails to adequately consider the unique circumstances of the college and university campus. College and university students living in dormitories are not the same as individuals living in an apartment complex. They live where they do for a very specific purpose and have different expectations of their "landlord." The college or university is not merely providing a room for rent; it is expected to create a very specific and complex community. Students require a safe, secure, and healthy atmosphere where they can pursue their studies, build a community, mature as adults, and explore their independence.[196]

In *Protecting the Millennial College Student*, Kristen Peters proposed an alternative to the contact-based theory of the student-university relationship.[197] Peters argued that "the [contract] model . . . devalues the college-student relationship by analogizing the relationship to that of a common business and consumer."[198] This analogy is simply misplaced, and to continue operating a system of law that tries to mold the college and university experience to fit the law, rather than the other way around, accomplishes nothing. Peters proposed what she called the "Millennial Model."[199] Under this model, the mutual reliance under contract theory is retained on the understanding that each party to the relationship is involved with the other partially out of self-interest.[200] The model, however, sheds

193. *Id.* at 729 (emphasis added).

194. *Id.*

195. 48 A.D.2d 480, 483 (N.Y. App. Div. 1975).

196. *See* Peters, *supra* note 13, at 431 (*citing* Anne Matthews, *The Campus Crime Wave*, N.Y. TIMES, Mar. 7, 1993, at SM38) (comparing the college and university campus to a "modern day Athenian city-state" or an "intellectual resort").

197. Peters, *supra* note 13, at 431.

198. *Id.* at 462.

199. *Id.*

200. *Id.*

the false belief that this mutual reliance means that the parties are equal. Instead, the "Millennial Model" recognizes a power imbalance in the institution's favor and uses it to justify a heightened responsibility for the institution.[201] Under the "Millennial Model," the college or university acts similarly to a fiduciary or a guardian and owes a non-contract based duty to the students in terms of providing a safe, secure, and conducive-to-study environment where students may learn and mature into responsible, independent adults, without harming themselves or, more importantly, their peers.[202]

Peters' "Millennial Model" shares several attributes with Bickel and Lake's "Facilitator Model." She dismisses the Bickel and Lake model because it retains a consumer-oriented basis, thinking of a college or university as "a bundle of services."[203] Peters is wrong to do this. The "Facilitator Model" shares a great deal with Peters' own model. The "Facilitator Model" neatly splits the difference between *in loco parentis* and a contract-based theory. It attempts to place the student-university relationship as a middle point between the student-elementary/secondary school relationships evoked in *T.L.O.* and *Redding*,[204] and the relationship between homeowners or apartment dwellers and police.

C. The Student-University Relationship as a Critical Factor in the "Reasonableness" of Campus Searches

The three Supreme Court school search cases are a good starting point for applying the "Facilitator Model" to issues of on-campus searches and seizures. In *T.L.O.*, a high school principal searched a student's purse on a report that the student was smoking on school grounds.[205] In *Acton*, the school district required high school athletes to submit to random drug testing as a prerequisite to participation.[206] Most recently in *Redding*, a high school principal ordered a female student to be searched following reports that the student was giving prescription pain killers to other students.[207] In each of these cases the Supreme Court recognized that the inquiry into the "reasonableness" of a search in the secondary school

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201. *Id.* at 465 n.235. Peters adopts as a definition for "special relationship doctrine": "The theory that if a state has assumed control over an individual sufficient to trigger an affirmative duty to protect that individual . . . then the state may be liable for the harm inflicted on the individual by a third party." Peters, *supra* note 13, at 465 n.235 (*quoting* BLACK'S LAW DICTIONARY 1422 (8th ed. 2004)).

202. Peters, *supra* note 13, at 432.

203. *Id.* at 464.

204. *See supra* notes 98–112 and accompanying text.

205. 469 U.S. at 335.

206. 515 U.S. at 657.

207. 129 S. Ct. at 2633.

context hinged on factors and circumstances unique to that setting and therefore required a more lenient standard than would apply outside of the school.[208] Searches in the elementary and secondary school context fall into the "special needs" category the Supreme Court discussed in cases such as *City of Ontario v. Quon*[209] and *Skinner v. Railway Labor Executives' Association*.[210] Where "'special needs, *beyond the normal need for law enforcement*,' make the warrant and probable-cause requirement impracticable," the court must pay special attention to the "reasonableness" of the interest of the entity conducting the search.[211]

The characteristics of the modern institution of higher education are not identical to those of elementary and secondary schools, but surely they are not so different as to wholly ignore the analogy. Rather, the relationship between students and colleges and universities should serve as a "stepping stone" from the schoolyard to the real world and should be balanced appropriately. The college or university experience is more than just a contract between student and institution for a degree. It is a period of transition from the closely supervised period of childhood to the full independence of adulthood for many students. Increasingly, it serves as a similar transitional period for "non-traditional" students, including returning veterans and "second career" young adults. To ignore this reality and adopt a contract-based theory of the student-university relationship, with its unprecedented imbalance of power,[212] forces colleges and universities to adapt to a legal framework that is inconsistent with what colleges and universities have become. Instead, the law must adapt to the modern institution, the many roles it plays for its students beyond just an educator, and the evolving demographics of the student population.

Bickel and Lake, with their "Facilitator Model," and Peters, with her "Millennial Model," have put forth alternatives that focus on the responsibility of colleges and universities to provide safe and secure campuses and environments for students based upon the unique relationship between the two parties. These models must also supply institutions of higher education with the authority and autonomy needed to construct safe campuses. It does little good to give colleges and universities greater duties and responsibilities to students without also

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208. *See, e.g.*, *T.L.O.*, 469 U.S. at 341 ("By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.").

209. 130 S. Ct. at 2619 (government conducted searches in its role as employer).

210. 489 U.S. at 602 (government conducted searches in "closely regulated industries").

211. *City of Ontario*, 130 S. Ct. at 2628 (emphasis added).

212. *See* Nordin, *supra* note 186.

equipping them with the means necessary to meet these demands. The principles of the "Facilitator Model," which "balances rights and responsibilities . . . [being] neither extremely authoritarian nor overly solicitous of student *freedom*,"[213] can easily be adapted to the Fourth Amendment "special needs" framework. The college and university setting and the unique nature of the student-university relationship are critical factors that must be given special consideration in balancing the "reasonableness" of students' expectations of privacy and the interests of the institution in conducting searches and seizures to ensure a safe campus and a secure environment that promotes education.

Applying the "Facilitator Model" would result in different results for a number of the cases cited above. In *State v. Houvener*,[214] for example, where campus police in the hallway of a dormitory overheard the defendant's comments suggesting his involvement in campus burglaries, the questioning of the defendant and seizure of evidence of a burglary were deemed improper because the defendant had a reasonable expectation of privacy in the dormitory hallway. Under the "Facilitator Model," however, the court would be encouraged to consider the responsibility of the university to provide a safe and secure campus environment, which explains the university's rationale in providing campus security with unfettered access to campus buildings, including dormitories. The university gave campus police building access cards so they could provide surveillance and investigate complaints and reports.[215] By ignoring the college or university's role here, the *Houvener* court failed to balance the interests of both the student and the college or university. Application of the "Facilitator Model" in other cases would similarly encourage courts to explicitly balance the divergent interests of the student and the college or university.

CONCLUSION

The "Facilitator Model" places significant emphasis on the university's duty to students separate and distinct from any contractual obligation, creating a duty that accounts for the unique and special relationship between the college and university and its students. Bickel and Lake argue for the application of their model in order to address issues of college and university liability for injuries suffered by students. The "Facilitator Model" would impose non-contract based duties on the institution, therefore making it subject to liability if it failed to perform those duties. This approach, they argue, would allow and encourage colleges and universities to use the law "as a positive tool of empowerment in its efforts

213. BICKEL & LAKE, *supra* note 114, at 192.

214. 186 P.3d at 370. *See supra* notes 178–82 and accompanying text.

215. *Houvener*, 186 P.3d at 372–73.

to increase safety and promote an educational environment."[216] This article argues that this model should be applied to endow colleges and universities with the tools and authority necessary to fulfill the duties imposed on them when applying the Fourth Amendment "special needs" analysis to on-campus searches and seizures. As in the elementary and secondary school settings, on-campus searches and seizures are conducted for reasons "beyond the normal need for law enforcement."[217] Thus, these searches should be analyzed under a "reasonableness" standard.

The "Facilitator Model" finds a middle ground between an impractical "universal duty" that every college and university owes to every student and the unpredictable system established by contract theory, where the duties and responsibilities of the college and university to the student depend upon countless express and implied contracts. This model also allows colleges and universities to adapt to their particular circumstances, such that an urban campus can respond differently than a rural campus, and a community college can respond differently than a research university. Above all else, the focus on "reasonableness" provides consistency to institutions. When a college or university understands what is expected of it and how a court will judge its conduct, the institution can establish proper codes of conduct containing procedures to ensure it meets the duty it owes to its students. The modern college or university is far from its early roots and is experiencing a period of transition in uncertain legal times. Contract-based theories of the student-university relationship have held back institutions' efforts to adapt too long. The "Facilitator Model" and the idea that a college or university owes a special duty to students should be reconsidered and adopted by the courts to assist institutional transition into the new era of higher education.

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216. BICKEL & LAKE, *supra* note 114, at 212.
217. *City of Ontario*, 130 S. Ct. at 2628.

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