

# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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## INTRODUCTION

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### **The Debate Over Campus-Based Gun Control Legislation**

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As part of the *Journal of College and University Law*'s symposium on campus violence, this article explores the changing landscape of gun control legislation, specifically the nuances of concealed carry laws and their impact on the higher education environment. Varying perspectives and rationales concerning campus violence and gun control are discussed, and campus-based best practices are outlined. College and university initiatives related to policy development and interventions are shared in order to assist higher education leaders to prepare their campuses for legislative changes that shape the contours of campus safety and security.

### **Dealing with Students with Psychiatric Disorders on Campus: Legal Compliance and Prevention Strategies**

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According to data collected by the United States government, approximately 27 percent of individuals between the ages of eighteen and twenty-four have a diagnosable mental illness. In 2012 alone, 21 percent of college and university students had sought treatment for mental health issues that year. The prevalence of mental illness on college and university campuses, and particularly that of untreated mental illness, has resulted in strategies to address the problematic behavior, the underlying mental illness, or both—and has also, in some cases, created legal liability for colleges and universities and the staff who were trying

to protect both the students with mental illness and the campus community at large. As part of the *Journal of College and University Law*'s symposium on campus violence, this article will examine the legal protections for students with psychiatric disorders, the limits placed on faculty and administrators who wish to protect these students and those that they may do harm to, and the strategies that some institutions have adopted in order to identify at-risk students and intervene before they harm themselves or others.

**The Devil is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?**

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Though FERPA was originally passed with the intention of allowing students access to their own education records, the Act has since been amended many times, and it is no longer clear what qualifies as an "education record" or who has access to those records. Today, colleges and universities use FERPA to protect a broad range of information from disclosure, but press outlets that want access to information claim that colleges and universities are protecting too much under the guise of FERPA. Press outlets have focused on two main arguments to gain access to information held by colleges and universities: (1) the First Amendment freedom of the press and its related right to access certain information, and (2) the right to access public records under state open records laws. However, neither of these avenues has produced the access desired by the media. Going forward, press outlets may be more likely to reach outcomes in their favor if, instead of arguing that they simply have a right to access the information, they argue

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THE *JOURNAL OF COLLEGE & UNIVERSITY LAW*  
PRESENTS:

ARMED VIOLENCE ON CAMPUS: A SEARCH  
FOR SOLUTIONS

INTRODUCTION

JOHN H. ROBINSON\*

On March 27, 2014, the *Journal of College and University Law* sponsored a day-long symposium on how American colleges and universities should handle the threat of gun violence on their campuses. There was a time when there would have been no perceived need for such an event—a time when colleges and universities may have seemed like havens from the heartless world that had generated and sustained them. Like our primary and secondary schools, our churches and day-care centers, our court-houses and military bases, our public events intended to celebrate the ability of the human spirit to drive the human body to feats of endurance that most of us can barely imagine, and even like public appearances by world leaders, the college campus was immune to the ills that plagued the world around them—or so we imagined. For Americans, the assassination of Abraham Lincoln and three of his successors in office and the near-fatal attacks on the lives of three other presidents should have been enough to convince us that death stalks our public figures whenever they appear in public. Likewise, the senseless killings perpetrated by Timothy McVeigh and his accomplices of one hundred and sixty-eight people in a federal building in Oklahoma City, Oklahoma, on April 19, 1995, should have heightened our awareness of the rise in violent crime in places previously thought to be insulated from such evil. Nevertheless, we continued to perceive schools—college and university campuses in particular—as protected from the violence that plagued our society on an all-to-regular basis. Unfortunately, tragedies such as the senseless killings perpetrated by Eric Harris and Dyl-

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an Klebold at Columbine High School in Jefferson County, Colorado, four years and one day after McVeigh's atrocity; by Seung-Hui Cho at Virginia Tech in Blacksburg, Virginia, on April 16, 2007; by Adam Lanza at Sandy Hook Elementary School in Newtown, Connecticut, on December 14, 2012; and by Elliot Rodger at the University of California, Santa Barbara, on May 24, 2014, have disabused us of whatever illusions of immunity to lethal violence we may have had about schools and their campuses.

Now that we have all become acutely aware that our college and university campuses are much more vulnerable than we had allowed ourselves to believe, a host of new questions press upon our minds. Are our campuses not only not immune to lethal violence, but, relatively speaking, are they more beset by it than is the world that surrounds them? Is the level of lethal violence on campus that currently exists simply another sad fact of modern life, or can we control and reduce it through special initiatives? And, if we can succeed in reversing the rising level of violence on our campuses through such initiatives, which measures offer the best promise of producing that positive change, and what costs can we expect to accompany those steps? We must also ask, is lethal violence on campus, at its core, a criminal issue, best addressed by the criminal process and whatever punishments that process generates, or is it actually a mental health issue, best delegated to mental health professionals for both its prevention and, when that fails, its remediation? To the extent that we see lethal violence on campus as a mental health problem, is it inextricably intertwined with the problem of student suicide such that we will never get a handle on the former problem until we have figured out how best to address the latter problem? And, if we do see lethal violence on campus—whether directed at others in the form of homicide or at the agent in the form of suicide—as a mental health problem, are institutional leaders constrained in their responses to that problem by Section 504 of the Rehabilitation Act of 1973, by the Americans with Disabilities Act, or by other statutes? Finally, and much more urgently now than before June 26, 2008, when the United States Supreme Court announced in *District of Columbia v. Heller* that the Second Amendment contained an individual right to keep and bear arms, how should institutional leaders intent upon reducing the chance of lethal violence on their campuses deal with the fact that some students, some faculty members, and some staff members will see themselves as entitled by the federal Constitution, their state's constitution, or by state statutes, to carry a weapon, especially a concealed weapon, while on campus?

Some of these questions are easy to answer, and some of those answers are somewhat consoling. Speaking generally, college students are significantly less likely to suffer lethal violence than are their non-student peers. Those students are also safer on campus than they are off-campus when it comes to suffering any crime of violence. But other questions are harder to answer, and the answers to those questions may not be particularly consoling. The current state of psychology and psychiatry does not allow

practitioners in those fields to predict accurately which students are so likely to commit an act of lethal violence if left to their own devices that it is legally and morally appropriate for the institutions that they attend to place significant limits on their freedom based only upon a prediction of dangerousness. When institutions impose limits on particular students' freedom because those students have been identified by psychiatrists, psychologists, or other mental health professionals as likely to engage in violent behavior in the near future, some future acts of violence may well be avoided, but only at the cost of a troublesomely high number of false positives and false negatives. To be more concrete, for every Seung-Hui Cho who never kills an innocent student because school officials have intervened and detained, suspended, or expelled him, there could be several other students whose freedom school officials have similarly burdened but who would never have acted on any homicidal impulse, and still other students who escape the attention of school officials and ultimately do act on their homicidal impulses. Worse still, it could well be the case that an institutional policy of imposing severe limitations on the freedom of those students who are thought to be likely to engage in risky, disruptive or violent behavior has the counter-productive effect of preventing students who need help from getting that support.

So, if psychology and psychiatry lack the ability to predict dangerousness in ways that make it legally and morally defensible to act upon such predictions, should prudent institutional administrators rely only on the criminal justice system—with its after-the-fact objective of determining who should be blamed and incarcerated and who should be excused and hospitalized—as the only legally and morally defensible way to deal with the threat of lethal violence on campus? Or can the police—those employed by colleges and universities and by surrounding municipalities—work with campus mental health professionals and student affairs offices to develop ways to respond promptly and intelligently to threats of violence, as well as confine and contain such violence as soon as possible? Moreover, can they do that without running afoul of any state or federal law? These were among the fundamental questions that confronted our symposiasts. The three articles that follow this introduction address only a fraction of the issues that were addressed on that day. Our hope, however, is that in addition to their intrinsic value, these articles convey some of the sense of urgency that our symposiasts felt as they addressed a complex array of pressing and serious issues related to the problem of lethal violence on campus and the role that the Second Amendment might play in compounding or reducing that problem.

The first of the three articles printed here is by Brandi Hephner LaBanc, Kerry Brian Melear and Brian O. Hemphill. Brandi Hephner LaBanc is the Vice-Chancellor of Student Affairs at the University of Mississippi; Kerry Brian Melear is an Associate Professor of Leadership and Counselor Education at the University of Mississippi; and Brian O.

Hemphill is the President of West Virginia State University. Their article is entitled, *The Debate Over Campus-Based Gun Control Legislation*. It combines a survey of the quickly changing state of the law relating to concealed carry on campus with a set of suggested best practices for college and university administrators who are trying to keep their campuses safe from lethal violence. The authors take the position that “[l]egislation that supports putting firearms in the hands of our students does nothing more than create a climate of fear and unrest among the young people we are attempting to protect and educate.” Still, the suggestions that they make are sensitive to the differing statutory schemes affecting concealed carry on campus that are in effect in several states.

The second article printed here is by Barbara Lee, a Professor of Human Resource Management at Rutgers University. Her article, entitled, *Dealing with Students with Psychiatric Disorders on Campus: Legal compliance and Prevention Strategies*, begins with a summary of the most recent research on the relationship between mental illness, especially serious mental illness, and a propensity for violence, whether self-inflicted or aimed at others. The article then focuses on the how the Department of Education’s Office for Civil Rights (“OCR”) has addressed a set of recent cases involving colleges and universities that dealt with disruptive students in ways that may have violated either Section 504 of the Rehabilitation Act or the Americans with Disabilities Act, or both. Finally, Professor Lee extracts from those OCR cases ten strategies for institutions of higher education to use when they are dealing with disruptive or risky students whose behavior may have stem from a psychiatric disorder. Professor Lee’s goal in this article is to “help colleges respond lawfully and productively to emergency situations.” As easy to achieve as this goal might appear to be, the OCR investigations that Professor Lee summarizes in her article reveal how difficult it has been for many colleges and universities to achieve this goal when dealing with actual instances of disruption by students with a serious mental illnesses.

The third article printed here is by Susan Hanley Duncan, the Interim Dean of the Louis D. Brandeis School of Law at the University of Louisville. Her article is entitled, *The Devil is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?* In the months immediately preceding and following our symposium, no form of campus-based violence has received more attention than the sexual violence visited upon female students by their male counterparts. While this form of violence is rarely lethal and while it does not always involve an armed assault on its victims, it surely deserves attention when the general issue before us is the challenge of reducing the incidence of violence on our campuses. In her article, Dean Duncan first describes the scope of the campus sexual assault problem. She then she presents the three principal federal laws relating to sexual violence on campus: Title IX of the Education Amendments of 1972; the Jeanne Clery Act of 1988, and the



Campus SaVE Act of 2013. Dean Duncan also sketches the measures taken by OCR to assist colleges and universities in their efforts to comply with relevant federal law, especially as that body of law has been interpreted by the Supreme Court. Because the Campus SaVE Act is so recent, Dean Duncan devotes a good part of her article to what it is that the act requires of colleges and universities, to disputes over the probable effectiveness of the act, and to issues left unresolved by this piece of legislation. As is true of the first two articles printed here, Dean Duncan concludes by offering suggestions regarding the strategies that colleges and universities should adopt in order to decrease the incidence of sexual assault on their campuses.

I commend each of these articles to the careful attention of our readers.

# THE DEBATE OVER CAMPUS-BASED GUN CONTROL LEGISLATION

BRANDI HEPHNER LABANC, KERRY BRIAN MELEAR  
& BRIAN O. HEMPHILL\*

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#### INTRODUCTION

Almost weekly, the news of a public shooting somewhere in the United States breaks into television programs or alerts smart phones. The stories that are most galvanizing to the general public are mass shootings and the storyline each time is eerily familiar. Typically, the gunman opens fire among numerous, random bystanders in a public space and ends the event with a self-inflicted wound resulting in his death. Mass shootings fall under the category of mass murder, which is defined by the Federal Bureau of Investigation (FBI) as “a number of murders (four or more) occurring during the same incident, with no distinctive time period between the different murders.”<sup>1</sup> Although a mass murder database does not formally exist, research indicates the United States averages about twenty mass shootings each year and there is little evidence to support the notion the number of mass shootings has increased markedly.<sup>2</sup>

Whether formally defined as a mass shooting or not, public shootings occur on college campuses. For the purposes of this article, “mass shootings” will refer to the murder of four or more victims, while “public shootings” will refer to shootings that occur in public spaces and involve by-

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1. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 8 (July 2008), available at <http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-july-2008-pdf>.

2. James A. Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, HOMICIDE STUDIES 1 (2013).

standers.<sup>3</sup> These shootings are a constant reminder to the students, faculty, and staff at every college and university of the risk to which they are exposed. During the first month of 2014 alone, four campus shootings (Purdue University,<sup>4</sup> Widener University,<sup>5</sup> South Carolina State,<sup>6</sup> and Tennessee State University<sup>7</sup>) occurred. Reports of these shootings do not linger long in the headlines—to the media, they pale in comparison to mass shootings. But despite the perceived newsworthiness of such public shootings, lives were lost by gunfire in a place that has long been a safe haven for diverse communities. These sad stories refocus those in higher education on this critical topic and leave many perplexed as to how to find a solution to this violence.

After every public shooting, especially those deemed mass shootings, it seems the debate over the “right” solution is rekindled. Many college presidents blame access to guns and call for more restrictive gun laws.<sup>8</sup> Other individuals claim that upholding the liberties afforded by the Second Amendment is paramount and will provide opportunities for citizens to proactively respond in public shooting scenarios.<sup>9</sup> Still others blame the state of mental health care in America<sup>10</sup> or fault the proliferation of violence in movies, on television and in video games.<sup>11</sup> These situations also spur on discussions concerning how America’s deteriorating social fabric has contributed to the perceived increase in public shootings and the culpa-

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3. J. Pete Blair, M. Hunter Martaindale & Terry Nichols, *Active Shooter Events from 2000 to 2012*, FBI L. ENFORCEMENT BULL. (Jan. 7, 2014), <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012>.

4. Nick DeSantis, *Student is Killed in Shooting at Purdue U.*, CHRON. HIGHER EDUC., Jan. 21, 2014, <http://chronicle.com/blogs/ticker/one-dead-in-shooting-at-purdue-u/71591>.

5. *The Big Story: Student Shot on Widener Univ. Campus in Pa.*, ASSOCIATED PRESS, Jan. 21, 2014, <http://bigstory.ap.org/article/person-shot-campus-widener-university-pa/>.

6. Nick DeSantis, *Football Player Is Killed in Shooting at South Carolina State U.*, CHRON. HIGHER EDUC., January 24, 2014, <http://chronicle.com/blogs/ticker/student-is-injured-in-shooting-at-south-carolina-state-u/71791>.

7. Kevin Young, *TSU Officials: No One Associated with Univ. Involved in Shooting*, NBC NEWS NASHVILLE, Feb. 11, 2014, <http://www.wsmv.com/story/24569556/tsu-police-investigating-shooting-on-campus>.

8. *An Open Letter to Our Nation’s Policy Leaders*, COLL. PRESIDENTS FOR GUN SAFETY, Dec. 19, 2012, <http://collegepresidentsforgunsafety.org/>.

9. David Kopel, *Guns in America: Arming the Right People Can Save Lives*, L.A. TIMES, Jan. 15, 2013, <http://articles.latimes.com/2013/jan/15/opinion/la-oe-kopel-guns-resistance-nra-20130115>.

10. Todd J. Jasper & Alisha Griswold, *A Cross-Disciplinary Approach to Preventing Active Shooter Incidents*, 2 IAEM BULL. 30, 6, 13 (2013), available at <http://toddjasper.com/2013/06/26/a-cross-disciplinary-approach-to-preventing-active-shooter-incidents/>.

11. Mike Jaccarino, *‘Training Simulation’: Mass Killers Often Share Obsession with Violent Video Games*, FOXNEWS.COM, Sept. 12, 2013, <http://www.foxnews.com/tech/2013/09/12/training-simulation-mass-killers-often-share-obsession-with-violent-video-games/>.

bility of America's crisis of masculinity for the behavior of gunmen.<sup>12</sup>

This debate has taken hold on almost every college or university campus in the United States. In particular, campuses are grappling with how to best align their own campus policies to changing gun laws in their states. In the wake of such deadly and senseless massacres on the campuses of Virginia Tech, Northern Illinois University, and Oikos University, it is clear this issue is prime for political and media fodder.<sup>13</sup> Despite the frequent reminders of public shootings in the nightly news and the public outcry for meaningful change, state gun law trends seem to weave a different narrative. Many campus leaders are calling for more restrictive laws, including those that increase scrutiny during background checks, limit magazine sizes, and deny access to guns for those with documented mental illnesses.<sup>14</sup> In direct opposition to this advocacy, many legislatures (often influenced by powerful lobbyists) are passing legislation that expands concealed carry rights and offers greater availability to guns.

The gun control issue resonates with educators at all levels, but it is particularly intense within the higher education community because the latest trend in legislation is to exclude provisions prohibiting guns on campus.<sup>15</sup> Campuses are no longer a safe haven and traditional approaches to campus security must be re-conceptualized. For some colleges and universities across the country, long-held firearms bans are being lifted, policies altered, and concealed weapons allowed in vehicles and the classroom. At the University of Colorado, where the state supreme court ruled that the university must allow concealed weapons on campus, these changes are being met with anger, uneasiness, and understandable concern.<sup>16</sup> Meanwhile, the Texas state legislature introduced a bill that would grant permit-carrying students the right to carry concealed weapons onto college campuses.<sup>17</sup> In 2013, at least nineteen states proposed legislation that would enable concealed carry on campus.<sup>18</sup> The question has now become: does

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12. Douglas Kellner, *School Shootings, Crises of Masculinities, and the Reconstruction of Education: Some Critical Perspectives*, in *SCHOOL SHOOTINGS: INTERNATIONAL RESEARCH, CASE STUDIES, AND CONCEPTS FOR PREVENTION* 497 (N. Bockler et al. eds., 2012).

13. See, e.g., Daniel de Vise, *Oikos, Va. Tech Shooters May Have Shown Warning Signs*, WASHINGTONPOST.COM, Apr. 17, 2012, [http://www.washingtonpost.com/blogs/college-inc/post/oikos-va-tech-shooters-may-have-shown-warning-signs/2012/04/17/gIQAIfwzNT\\_blog.html](http://www.washingtonpost.com/blogs/college-inc/post/oikos-va-tech-shooters-may-have-shown-warning-signs/2012/04/17/gIQAIfwzNT_blog.html) (reacting to the incidents at Virginia Tech, Northern Illinois University, and Oikos University).

14. See *supra* text accompanying note 7.

15. *Guns on Campus' Laws for Public Coll. and Univ.*, ARMED CAMPUSES (2013), <http://www.armedcampuses.org/>.

16. Dan Frosch, *University is Uneasy as Court Ruling Allows Guns On Campus*, N.Y. TIMES, Sept. 22, 2012, at A22.

17. Daniel Charnoff, *Guns Have No Place On College Campuses*, DAILY TROJAN, Mar. 3, 2011, <http://dailytrojan.com/2011/03/03/guns-have-no-place-on-college-campuses/>.

18. *Guns on Campus: Overview*, NAT'L CONFERENCE OF STATE LEGIS. (Mar. 7,

allowing students to carry concealed weapons onto campus and into our classrooms make our learning environments safer? The laws are changing, campus administration is adapting, yet the violence continues. The intent of this article is to review the rapidly changing landscape related to concealed carry legislation, consider arguments for and against guns on college campuses in the United States, and to explore campus best practices related to weapons policies and interventions.

## I. THE CHANGING LANDSCAPE OF GUN CONTROL LEGISLATION

Gun control legislation affecting higher education has been enacted across the country and across a range of alternative postures in the wake of campus tragedies during recent years. The Second Amendment has long played a central role in debates concerning gun control, and state laws shape the contours of higher education policy and practice in this regard. This section briefly outlines the Second Amendment and related United States Supreme Court decisions, and then surveys state firearm laws that resonate within higher education, including state laws permitting concealed weapons on campus and other gun-related legislation.

### A. The Second Amendment and the United States Supreme Court

The Second Amendment of the United States Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>19</sup> The language of the amendment has long generated discussion and debate regarding whether it may apply collectively or individually to citizens.

In 2008, the United States Supreme Court rendered a decision in *District of Columbia v. Heller*<sup>20</sup> that settled the question, narrowly ruling that the Second Amendment protects the individual’s right to possess firearms to be used for a lawful purpose, such as self-defense.<sup>21</sup> In *Heller*, the Supreme Court struck down a District of Columbia law prohibiting the possession of firearms, concluding that the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation.”<sup>22</sup> The ruling upset the Court’s previously long-held posture—articulated in 1939 in *United States v. Miller*<sup>23</sup>—disfavoring an individual application of the Second Amendment. In *Miller* the Court concluded that the purpose of the

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2014), <http://www.ncsl.org/research/education/guns-on-campus-overview.aspx>.

19. U.S. CONST. amend. II.

20. 554 U.S. 570 (2008).

21. *Id.* at 635. See Kyle Hatt, Note, *Gun-Shy Originalism: The Second Amendment’s Original Purpose in District of Columbia v. Heller*, 44 SUFFOLK U. L. REV. 505 (2011).

22. 554 U.S. at 592.

23. 307 U.S. 174 (1939).

Second Amendment was drawn toward the militia.<sup>24</sup> In 2010, the Court revisited the Second Amendment and buttressed its individual applicability, holding in *McDonald v. City of Chicago*<sup>25</sup> that a ban on handguns in Chicago was unconstitutional because the right to keep and bear arms is protected by the Second Amendment, which applies to the states by incorporation through the Due Process Clause of the Fourteenth Amendment.<sup>26</sup>

### B. State Laws Affecting Higher Education Policy and Practice

State legislation concerning firearms on campus varies widely according to the carriage and demeanor of a particular region. As Lisa A. LaPointe noted, “[i]t is clear that both sides in the debate over concealed carry on college campuses have strong convictions, with neither side willing to concede.”<sup>27</sup> Although the majority of colleges and universities prohibit guns on campus, federal law provides no guidance with regard to such prohibitions, and states are divided on the matter.<sup>28</sup>

In the wake of the previously mentioned campus tragedies, as well as the 2012 shootings at Sandy Hook Elementary School, in which 26 students and staff were killed,<sup>29</sup> state legislative activity concerning firearms on college and university campuses has intensified. According to the National Conference of State Legislatures,<sup>30</sup> there are currently twenty-one states that ban concealed weapons on college and university campuses,<sup>31</sup> and in twenty-two states the decision whether to permit or allow concealed weapons is reached individually by the college, university, or governing system.<sup>32</sup>

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24. *Id.* at 178.

25. 130 S. Ct. 3020 (2010).

26. *Id.* at 3050.

27. Lisa A. LaPointe, *The Up and Down Battle for Concealed Carry at Public Universities*, J. OF STUDENT AFFAIRS 16, 19 (2009–2010), available at [http://www.sahe.colostate.edu/Data/Sites/1/documents/journal/2010\\_Journal\\_of\\_Student\\_Affairs.pdf](http://www.sahe.colostate.edu/Data/Sites/1/documents/journal/2010_Journal_of_Student_Affairs.pdf).

28. David Skorton & Glenn Altschuler, *Do We Really Need More Guns On Campus?*, FORBES, Feb. 21, 2013, <http://www.forbes.com/sites/collegeprose/2013/02/21/guns-on-campus/>.

29. See Matt Flegenheimer, *Final Report on Sandy Hook Killings Sheds New Light on Gunman's Isolation*, N.Y. TIMES, Dec. 27, 2013, at A17.

30. See *Guns on Campus: Overview*, *supra* note 18.

31. *Id.* The states are California, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas and Wyoming.

32. *Id.* The states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia.

### C. Legislation Permitting Concealed Carry on the College Campus

Seven states have passed laws specifically providing for concealed carry permits on college campuses.<sup>33</sup> Of these, Utah is the only state to specifically identify publicly-funded colleges and universities as governmental entities lacking the authority to ban concealed carry permits on their premises.<sup>34</sup> As a result, all ten institutions allow concealed carry on their campuses.<sup>35</sup>

In Wisconsin, while allowing concealed carry is required by law, colleges and universities may prohibit it by clearly and prominently posting signage at all entrances to a building.<sup>36</sup> Similarly, in Kansas, concealed carry permits are not prohibited on college campuses; however, Kansas law permits institutions to prohibit concealed carry in buildings considered appropriately secure by clearly posting signage.<sup>37</sup> Governing boards in Kansas may apply for exemptions every four years.<sup>38</sup> In Mississippi, a 2011 law holds that a person who is licensed to carry a concealed weapon and voluntarily completes an instructional training course covering the safe handling of firearms offered by an instructor certified by a nationally recognized firearms training organization, or any other organization approved by the Department of Public Safety, may carry a concealed weapon on a college or university campus.<sup>39</sup>

### D. 2013 Legislation Affecting Higher Education

Firearm-related legislation affecting public institutions of higher education passed in four states in 2013: Alaska,<sup>40</sup> Arkansas,<sup>41</sup> Texas,<sup>42</sup> and New York.<sup>43</sup>

In sweeping language, the Alaska legislature passed a measure prohibiting state and municipal agencies (including the University of Alaska) from using assets to implement or aid in the implementation of any federal law that would infringe on the rights of Alaskans under the Second Amendment to keep and bear arms.<sup>44</sup> This measure was introduced as part of a per-

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33. *Id.* The states are Colorado, Idaho, Kansas, Mississippi, Oregon, Utah, and Wisconsin.

34. *Id.* See UTAH CODE § 53-5a-102 (2013).

35. See *Guns on Campus: Overview*, *supra* note 18; UTAH CODE § 53-5a-102 (2013).

36. WIS. STAT. § 943.13 (1m)(c) (2011).

37. KAN. STAT. ANN. § 75-7c10 (2012).

38. *Id.*

39. MISS. CODE ANN. § 97-37-1 (2011).

40. H.B. 69, 28th Leg., Reg. Sess. (Alaska 2013) available at [http://www.legis.state.ak.us/basis/get\\_bill.asp?bill=HB69](http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB69).

41. Act. No. 226. H.B. 1243, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

42. TEX. BUS. & COM. CODE § 411.2032 (2013); S.B. 1907, 83d Leg. (Tex. 2013).

43. NY Safe Act of 2013, S. 2230, Senate Assemb. (N.Y. 2013).

44. H.B. 69, 28th Leg., Reg. Sess. (Alaska 2013) available at [http://www.legis.state.ak.us/basis/get\\_bill.asp?bill=HB69](http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB69).



ceived movement toward express protection of Second Amendment rights.<sup>45</sup>

In Arkansas, the legislature passed a controversial bill that allows employees who are properly trained and licensed to carry concealed handguns to do so on postsecondary campuses, provided that the governing board does not adopt a policy prohibiting the activity.<sup>46</sup> Any such policies expire after one year and must be annually readopted.<sup>47</sup> This bill contains an opt-out provision, and every university in the state has chosen to do so,<sup>48</sup> garnering national attention in the process.<sup>49</sup>

Texas legislation in 2013 concerned the transportation and storage of firearms or ammunition on private and public college and university campuses by those individuals holding concealed carry permits.<sup>50</sup> According to this statute, institutions of higher education cannot adopt or enforce any measure that prohibits or restricts the storage or transportation of a firearm or ammunition in a locked, privately owned vehicle by any person (student or otherwise) who holds a valid concealed carry permit in Texas.<sup>51</sup>

Finally, New York's state law, the Secure Ammunition and Firearms Enforcement (SAFE) Act,<sup>52</sup> passed as a direct result of the Newtown tragedy, was perhaps the most well-known piece of gun control legislation in 2013. Because it is currently the subject of much litigation, this act will be discussed in more detail in Part II.

## II. LITIGATION, INSTITUTIONAL POLICIES, AND STATE LAWS AFFECTING HIGHER EDUCATION

Recent court rulings in Oregon and Colorado successfully overturned long-standing campus bans on firearms. In 2011, the Oregon Court of Ap-

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legis.state.ak.us/basis/get\_bill.asp?bill=HB69.

45. See Bruce Parker, *Nullification-lite: Why States are Stepping in to Protect the Second Amendment from the Feds*, THE DAILY CALLER, Dec. 18, 2013, <http://dailycaller.com/2013/12/18/nullification-lite-why-states-are-stepping-in-to-protect-the-second-amendment-from-the-feds/>.

46. Act. No. 226, H.B. 1243, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

47. *Id.*

48. *Laws Taking Effect Friday in Arkansas*, ARKANSASMATTERS.COM, Aug. 16, 2013, <http://www.arkansasmatters.com/story/d/story/laws-taking-effect-friday-in-arkansas/37417/qFDZ395-j021U36nx0E7yA>.

49. See, e.g., Tyler Kingkade, *Arkansas Coll. Reject Concealed Carry On Campus Under Loosened Gun Law*, HUFFINGTON POST, June 24, 2013, [http://www.huffingtonpost.com/2013/06/24/arkansas-concealed-carry-on-campus-colleges\\_n\\_3492425.html](http://www.huffingtonpost.com/2013/06/24/arkansas-concealed-carry-on-campus-colleges_n_3492425.html).

50. TEX. BUS. & COM. CODE § 411.2032 (2013).

51. *Id.*

52. NY Safe Act of 2013, S. 2230, Senate Assemb. (N.Y. 2013).

peals invalidated an Oregon State Board of Higher Education administrative rule that imposed sanctions on persons who possess or use firearms while on university property, concluding that it exceeded the scope of the agency's authority.<sup>53</sup> The ruling stirred considerable controversy and was closely followed by academic and media news outlets.<sup>54</sup> The appellate court's ruling elicited an administrative response: in 2012 the Oregon Higher Education Board unanimously adopted a policy that banned guns from classrooms, buildings, residence halls, and sporting events, although the policy did not extend to holders of concealed carry permits.<sup>55</sup> The Oregon university system ultimately elected not to appeal the court's ruling. Rather, the chancellor of the university system indicated instead that other procedures were viable: "Instead [of appealing], we have started work on internal processes that are already in place or that we can put in place that will maintain a reasonable and satisfactory level of campuses safety and security."<sup>56</sup>

In *Regents of the University of Colorado v. Students for Concealed Carry on Campus*, the Supreme Court of Colorado addressed whether the University's 1994 campus weapons ban violated the Colorado Concealed Carry Act (CCA) and the Colorado Constitution's right to bear arms.<sup>57</sup> The suit was initiated by a pro-concealed carry student organization and initially dismissed by a Colorado district court.<sup>58</sup> However, the court of appeals reversed the lower court's decision and the Supreme Court of Colorado affirmed, holding:

The CCA's comprehensive statewide purpose, broad language, and narrow exclusions show that the General Assembly intended to divest the Board of Regents of its authority to regulate concealed handgun possession on campus. Accordingly, we agree

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53. *Oregon Firearms v. Bd. of Higher Educ.*, 264 P.3d 160, 165 (Or. Ct. App. 2011).

54. *See, e.g.*, Allie Grasgreen, *Guns Come to Campuses*, INSIDE HIGHER ED, Oct. 3, 2011, [http://www.insidehighered.com/news/2011/10/03/concealed\\_carry\\_in\\_oregon\\_wisconsin\\_and\\_mississippi\\_means\\_changes\\_for\\_college\\_and\\_university\\_campuses#sthash.GTJLE3.dpbs](http://www.insidehighered.com/news/2011/10/03/concealed_carry_in_oregon_wisconsin_and_mississippi_means_changes_for_college_and_university_campuses#sthash.GTJLE3.dpbs); Bill Graves, *Oregon Court of Appeals Rejects Univ. System's Ban on Guns On Campus*, OREGONIAN, Sept. 28, 2011, [http://www.oregonlive.com/education/index.ssf/2011/09/oregon\\_court\\_of\\_appeals\\_reject.html](http://www.oregonlive.com/education/index.ssf/2011/09/oregon_court_of_appeals_reject.html); Josh Keller, *Oregon Court of Appeals Strikes Down Univ. System's Ban on Firearms*, CHRON. HIGHER EDUC., Sept. 28, 2011, <https://chronicle.com/article/Oregon-Court-Strikes-Down/129184/>.

55. Bill Graves, *Oregon State Board of Higher Education Resorts to Policy to Ban Guns on Campus*, OREGONIAN, Mar. 2, 2012, [http://www.oregonlive.com/education/index.ssf/2012/03/oregon\\_state\\_board\\_of\\_higher\\_e\\_7.html](http://www.oregonlive.com/education/index.ssf/2012/03/oregon_state_board_of_higher_e_7.html).

56. Bill Graves, *Oregon Univ. System Will Not Appeal Court Decision Allowing Guns on Campus*, OREGONIAN, Nov. 8, 2012, [http://www.oregonlive.com/education/index.ssf/2011/11/oregon\\_university\\_system\\_will\\_1.html](http://www.oregonlive.com/education/index.ssf/2011/11/oregon_university_system_will_1.html).

57. 271 P.3d 496 (Colo. 2012).

58. *Id.* at 497.

with the court of appeals that, by alleging the Policy violates the CCA, the Students have stated a claim for relief.<sup>59</sup>

The court's decision led to unease among faculty and staff of Colorado colleges and universities, pitting them against gun rights proponents who argued that they should not be denied the right to protect themselves.<sup>60</sup> In a statement underscoring the tension between concerned administrators and the court, the president of the University of Colorado noted his disagreement with the ruling:

We are disappointed the Colorado Supreme Court determined that the Board of Regents does not, in this instance, have the constitutional and statutory authority to determine what policies will best promote the health and welfare of the university's students, faculty, staff and visitors, whose safety is our top priority . . . . The Board of Regents is in the best position to determine how we meet that imperative.<sup>61</sup>

Unlike in Oregon and Colorado, sweeping gun legislation passed in New York largely survived its first legal test in federal court. As previously noted, in early 2013, the New York State Assembly passed the SAFE Act,<sup>62</sup> which received bi-partisan support and was signed into law just over one month after the tragic campus shootings at Sandy Hook Elementary School.<sup>63</sup> Included among its many provisions was a ban on the sale of assault weapons, a requirement directing mental health professionals to report patients believed to be a danger to themselves or others, a requirement for background checks related to the private sale of guns, and a ban on magazines holding more than seven rounds of ammunition.<sup>64</sup>

The law immediately gave rise to litigation. In *New York State Rifle and Pistol Association, Inc. v. Cuomo*,<sup>65</sup> gun owners, purveyors, and gun rights organizations challenged the law in federal court, arguing, inter alia, that its provisions violated the Second Amendment.<sup>66</sup> A federal district court

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59. *Id.* at 498–499.

60. *See* Frosch, *supra* note 16.

61. *See* Allie Grasgreen, *State Supreme Court Rules Colorado Regents Can't Ban Guns*, INSIDE HIGHER ED, Mar. 6, 2012, <https://www.insidehighered.com/news/2012/03/06/state-supreme-court-rules-colorado-regents-cant-ban-guns>. For a discussion of administrative concerns regarding concealed weapons on campus, see THOMAS L. HARNISCH, AM. ASS'N OF STATE COLL. AND UNIV., *CONCEALED WEAPONS ON STATE COLL. CAMPUSES: IN PURSUIT OF INDIVIDUAL LIBERTY AND COLLECTIVE SECURITY* (2008) (making the administrative case against concealed weapons through the lens of campus security and student well-being).

62. NY Safe Act of 2013, S. 2230, Senate Assemb. (2013).

63. *See* Kay Koplovitz, *At Last, Real Bipartisan Leadership on Gun Control—Governor Cuomo Takes The Lead*, HUFFINGTON POST, Jan. 17, 2013, [http://www.huffingtonpost.com/kay-koplovitz/new-york-gun-control\\_b\\_2495313.html](http://www.huffingtonpost.com/kay-koplovitz/new-york-gun-control_b_2495313.html).

64. *Id.*

65. No. 13-CV-291S, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013).

66. *Id.* at \*5.

largely disagreed, however, concluding that many of the major provisions of the law “further the state’s important interest in public safety, and do not impermissibly infringe on Plaintiffs’ Second Amendment rights.”<sup>67</sup> While the district court struck down the provision limiting magazines to seven rounds,<sup>68</sup> gun control advocates considered the ruling a victory nonetheless.<sup>69</sup>

### III. A DIFFERENCE OF OPINIONS

The question of whether to allow guns on campus has been hotly debated for years. As discussed earlier, most states currently ban guns on the campuses of public and private colleges and universities. However, the rapidly shifting legislative landscape leaves one to wonder if the list of five states with active laws allowing concealed firearms on campus will double or triple. If so, how will this change the face of higher education?

The logic behind legislation allowing concealed carry on college and university campuses seems to boil down to a simple assumption: “To stop gun violence, let’s give everyone a gun.”<sup>70</sup> However, as Gary Olson, former provost of Idaho State University, noted, “[t]here is no recorded incident in which a victim—or spectator—of a violent crime on a campus has prevented that crime by brandishing a weapon.”<sup>71</sup> Furthermore, the presence of guns on campus may frustrate efforts by campus law enforcement to secure a campus in the event of an emergency because police officers face the additional challenge of having to discern which armed individual is the active shooter. Regina G. Lawson, Chief of Police at Wake Forest University, commented, “[w]hen you’re responding to a situation like that, and someone’s in plain clothes with a gun, who’s the bad guy? Who are you going to take out to save the lives of the 10,000 other students you’re trying to protect?”<sup>72</sup>

With cries of Second Amendment rights and basic freedom infringement from all directions, Kutztown University in Pennsylvania has become ground zero for the gun debate in America. Kutztown updated its firearms policy on campus following suggestions from attorneys from the Pennsylvania State System of Higher Education (PASSHE). Under the amended policy, students with permits can carry weapons outdoors on campus and,

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67. *Id.* at \*27.

68. *Id.*

69. See, e.g., *Victory in the Courts: N.Y.’s New Gun Law Largely Upheld By Fed. Dist. Judge*, LAW CTR TO PREVENT GUN VIOLENCE, Jan. 7, 2014, <http://smartgunlaws.org/victory-in-the-courts-new-yorks-new-gun-law-upheld-by-federal-district-judge/>.

70. Jess Coleman, *Colleges Are Safest With No Guns*, POLICYMIC, Aug. 10, 2011, <http://www.policymic.com/articles/1312/colleges-are-safest-with-no-guns>.

71. Gary A. Olson, *Campuses Under Fire*, CHRON. HIGHER EDUC., June 13, 2012, <http://chronicle.com/article/Campuses-Under-Fire/132223/>.

72. See Skorton & Altschuler, *supra* note 28.

with special permission, into buildings and events.<sup>73</sup> Following a firestorm convergence of media coverage on Kutztown's campus, PASSHE instructed the fourteen state-owned universities to maintain "status quo" until a task force could determine the best course of action moving forward.<sup>74</sup>

#### A. Arguments for Conceal and Carry on College Campuses

With intense scrutiny focused on this issue, it is important to examine the logic that impels gun rights supporters to seek the allowance of conceal and carry on college campuses. The most vocally trumpeted arguments stem from advocacy for the constitutionally granted Second Amendment right to bear arms. For instance, Students for Concealed Carry contend that lawful, permit-carrying citizens should be allowed the constitutional freedom to protect themselves in any venue, including on college campuses.<sup>75</sup> Gun rights proponents believe anyone who is motivated to incite a massacre will not heed any university policy banning firearms. They further argue that, should a situation involving an active shooter arise, the lawfully armed would be in an ideal position to step in and assist authorities, thereby protecting themselves and potentially saving lives in the process.<sup>76</sup> Supporters of gun rights look to Liberty University in Lynchburg, Va., where students are subject to some of the strictest policies in the nation, to support their argument.<sup>77</sup> There, students are prohibited from watching R-rated movies, swearing, and attending dances.<sup>78</sup> Yet, in 2011, Liberty's Board of Trustees lifted their longstanding ban on weapons.<sup>79</sup> University president and chancellor Jerry Falwell, Jr., spoke in favor of the lifted ban, arguing that "[i]t adds to the security and safety of the campus and it's a good thing."<sup>80</sup>

#### B. Arguments Against Allowing Weapons in the Classroom, Athletic

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73. KUTZTOWN UNIVERSITY, POSSESSION OF DEADLY OR OFFENSIVE WEAPONS ON KUTZTOWN UNIV. CAMPUS (2013), available at <http://www.kutztown.edu/admin/AdminServ/policy/pdfs/A&F-030.pdf>.

74. Matt Assad, Bill Landauer & Daniel Patrick Sheehan, *Pa. Higher Education Officials Put The Brakes on New Campus Gun Policies*, MORNING CALL, May 10, 2013, available at [http://articles.mcall.com/2013-05-10/news/mc-pennsylvania-guns-on-campus-20130510\\_1\\_kutztown-university-kutztown-president-f-javier-cevallos](http://articles.mcall.com/2013-05-10/news/mc-pennsylvania-guns-on-campus-20130510_1_kutztown-university-kutztown-president-f-javier-cevallos).

75. See generally STUDENTS FOR CONCEALED CARRY, <http://concealedcampus.org/about/> (last visited Apr. 6, 2014).

76. Frosch, *supra* note 16.

77. Mollie Reilly, *Liberty University Reverses Campus Gun Ban*, HUFFINGTON POST, Nov. 21, 2011, [http://www.huffingtonpost.com/2011/11/21/liberty-university-gun-ban\\_n\\_1105506.html](http://www.huffingtonpost.com/2011/11/21/liberty-university-gun-ban_n_1105506.html).

78. Kevin Roose, *Surprises from Liberty University: What I Learned as an Undercover Evangelical*, HUFFINGTON POST, May 5, 2009, [http://www.huffingtonpost.com/kevin-roose/surprises-from-liberty-un\\_b\\_196882.html](http://www.huffingtonpost.com/kevin-roose/surprises-from-liberty-un_b_196882.html).

79. LIBERTY UNIVERSITY, WEAPONS POLICY (2013), available at [http://www.liberty.edu/media/1370/Weapons\\_Policy\\_Revision\\_1.pdf](http://www.liberty.edu/media/1370/Weapons_Policy_Revision_1.pdf).

80. Reilly, *supra* note 77.

### Events and Vehicles

There are many compelling arguments for a laxer grip on gun regulations in America, but one voice that has been irresponsibly removed from the debate is that of the student attending class each day on America's college and university campuses. An April 2013 "National Guns Survey" found that "the views of American adults younger than 30 largely mirror the views of Americans overall in supporting tougher legislation to reduce gun violence."<sup>81</sup> The survey further detailed that "[m]illennials oppose guns on college campuses and in classrooms" and "are even more adamant that they don't want to be on college campuses where students are carrying firearms" because students with guns would make those surveyed feel decidedly "less safe."<sup>82</sup> Another survey conducted by Ball State University questioned 1,600 students at fifteen higher education institutions in the Midwest.<sup>83</sup> The survey found 78 percent of the students "were not supportive of concealed handguns on campuses and would not obtain a permit to carry handguns on campus if it were to become legal."<sup>84</sup>

Many college and university administrators across the country agree with this student perspective. In 2013, The University of Alabama took a stand to ban guns everywhere on campus, including athletic events.<sup>85</sup> The University recognizes a limited number of reasonable exceptions, such as law enforcement officers who are on campus and university teams or coursework that involve guns (such as the ROTC).<sup>86</sup> Legislation that supports putting firearms in the hands of our students does nothing more than create a climate of fear and unrest among the young people we are attempting to protect and educate.<sup>87</sup>

### IV. CAMPUS-BASED BEST PRACTICES

It is easy to see how these colliding forces—high profile public shoot-

81. Ronald Roach, *College Student Voices Heard During Gun Debate*, DIVERSE ISSUES HIGHER EDUC., Apr. 18, 2013, <http://diverseeducation.com/article /52782/>; GBA STRATEGIES, NATIONAL GUNS SURVEY (2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/04/CAP-Guns-FQ-0413a.pdf>.

82. Roach, *supra* note 81.

83. See WISH-TV/BALL STATE UNIV., 2013 HOOSIER SURVEY (2013), available at [http://bowencenterforpublicaffairs.org/wp-content/uploads/2013/11/BowenCenterFinalDocument\\_HR.pdf](http://bowencenterforpublicaffairs.org/wp-content/uploads/2013/11/BowenCenterFinalDocument_HR.pdf).

84. Stacie Jackson, *Study: Guns on Campus A No-Go for Midwest Students*, THE LANTERN, Sept. 26, 2013, available at <http://thelantern.com/2013/09/study-guns-campus-go-midwest-students/>.

85. UNIVERSITY OF ALABAMA, UNIVERSITY OF ALABAMA DANGEROUS WEAPONS & FIREARMS POLICY (2013), available at <http://policies.ua.edu/weapons.html>.

86. *Id.*

87. Stephen Dethrage, *Updated University of Alabama Policy Bans Guns Everywhere on Campus, Even at Games; Violators Face Ban*, AL.COM (Aug. 21, 2013, 6:30 AM), [http://blog.al.com/tuscaloosa/2013/08/updated\\_ua\\_policy\\_bans\\_weapons.html](http://blog.al.com/tuscaloosa/2013/08/updated_ua_policy_bans_weapons.html).

ings and broadening gun laws—create an untenable dilemma for higher education. Administrators are faced with the challenge of balancing Second Amendment rights with the creation of an environment that is most conducive to learning and academic exploration. This leaves higher education leaders in the proverbial “cross hairs” of this debate. To that end, campus practitioners—those involved with setting, implementing, and enforcing policy—must frequently examine their policies and practices to assure that the campus is in compliance and doing what it can to create a safe environment for all of its constituents.

#### A. Policy Review and Development

Regardless of whether a college or university administration is pro- or anti-gun, one fact remains apparent: it is imperative that each institution develop clear, concise, and effective policies to guide students, educators, and staff. To that end, there are acknowledged best practices to guide campus administrators in policy development that will add to the safety of our students and institutions.<sup>88</sup>

First, with the frequent shifts in legislation, each campus should consider an annual review of policy and procedures. An ad hoc committee comprised of a myriad of representatives can complete this annual review. Consider inviting representatives that bring pragmatic perspectives—legal, law enforcement, housing, conduct, etc. It will be important to collaborate with individuals that have a depth of knowledge regarding state laws and how they interplay with campus policies. Reaching out to colleagues in other states will also be beneficial and help expedite policy development. In addition, colleges and universities should appoint someone to specifically monitor developing legislation in order to anticipate the next wave of changes that may impact campus operations.

Second, it is important for administrators to engage the campus in an educated debate. Take a close look at the culture of your campus, city, and region. Consult a wide range of sources within your scope (e.g., faculty, staff, students, alumni, parents and even members of the surrounding community). Seek the advice of legal counsel, risk managers and campus security, as they will play a substantial role in carrying out campus weapons policies. Tenaciously pool varying opinions from all sides of the debate, taking care to include individuals who are the most vocal and will be most directly affected by the policies implemented.

Third, realize exceptions to the policy are vital. To simply establish a blanket ban on weapons precludes the validity and need for such organizations as ROTC, martial arts-related activities and rifle teams.

Fourth, research has shown that thoughtful gun policies and laws will

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88. See, e.g., CAMPUS SAFETY & SEC. PROJECT, RESULTS OF THE NATIONAL CAMPUS SAFETY AND SECURITY PROJECT SURVEY (2008), available at <http://www.nacubo.org/Documents/Initiatives/CSSPSurveyResults.pdf>.

help avoid the creation of an underground gun culture.<sup>89</sup> Engendering an environment in which students feel the need to hide weapons eliminates the ability to manage risks on campus. Look closely at local culture and attitudes towards guns. For instance, a blanket gun ban on a campus could generate confusion or anger in a region where recreational hunting activities are prevalent. Such a maneuver sets the stage for students to go to extreme lengths to retain access to weapons.

Fifth, in the implementation of policy language, create a sound and specific definition of what constitutes a “weapon.” Policies should detail explicit verbiage with categories not only for firearms, but other “weapons” such as knives, hunting utilities (such as cross-bows), explosives and fake weapons (such as water pistols and plastic knives).<sup>90</sup> Policies should also allow and clearly define exceptions such as kitchen and pocket knives. Once the campus’s definition of a weapon is complete, it is important to determine and clearly state the recourse for policy violations. Allow for flexibility in behavioral penalties based on a case-by-case review, but be clear that violators will experience swift recourse from campus officials.

Finally, campus weapons policies should be applicable to everyone, including faculty, staff, students and visitors.<sup>91</sup> Make sure this critical information is published in student, faculty and staff handbooks, as well as being easily accessible on the campus website. Student orientations and employee training sessions should include a thorough review of the campus weapons policy. Additionally, institutions with a large contingent of outside guests, such as visitors to on-campus sporting events, should work to advertise their policy and display posters bearing the information or distribute handbills. Though the national opinion regarding guns on college and university campuses remains divided,<sup>92</sup> with careful planning, preparation and policy implementation, greater safety can be achieved within our scholastic environments.

Once a policy has been updated or developed, communication of this policy is paramount. Communication must be redundant and thorough so that faculty and staff can be fully apprised of what is expected. Utilize campus e-mail, websites, social media and various departmental and leadership meetings. It is important to fully explain the context of any changes and describe the major procedural changes that will be apparent. Encourage faculty and staff support and involve them in an effective communication plan aimed toward students. A separate communication plan should be developed for incoming students, current students, and the families of stu-

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89. See MAYORS AGAINST ILLEGAL GUNS, TRACE THE GUNS: THE LINK BETWEEN GUN LAWS AND INTERSTATE GUN TRAFFICKING 20 (2010), available at [http://www.mayorsagainstilllegalguns.org/downloads/pdf/trace\\_the\\_guns\\_report.pdf](http://www.mayorsagainstilllegalguns.org/downloads/pdf/trace_the_guns_report.pdf).

90. See *infra* Appendix (giving examples of various weapon policies).

91. *Id.*

92. See CBS/NEW YORK TIMES POLL—FEB. 19–23, POLLINGREPORT.COM, <http://www.pollingreport.com/guns.htm> (last visited Aug. 27, 2014).



dents. Campus administrators should note that research continues to indicate that safety is a factor in college choice.<sup>93</sup> Both students and parents place a high value in the security of the campus grounds, so clear and thoughtful communication will enable college and university administrators to implement policies more effectively.

#### B. Primary and Secondary Interventions

Once campus leaders have developed and implemented an effective weapons policy, it is critically important to develop community-based prevention interventions, as well as monitoring mechanisms. Campuses should employ individuals responsible for violence prevention education and outreach. These individuals can work directly with faculty, staff, and students to better train the community on how to identify violent behavior, respond in a productive manner and report appropriately. Campus violence prevention strategies should be well-planned and offered in as many venues as possible.

It is also important to keep in mind that suicide is a form of violence. Gary Pavela reminds us that, “[m]ost rampage shootings are also suicides. Reaching out to students at risk of suicide—affirming that those who seek professional help deserve respect for their courage and wisdom—is imperative.”<sup>94</sup> In fact, 67 percent of the shooters involved in active shooter incidents between 2000 and 2012 stopped themselves by taking their own life before police arrived.<sup>95</sup> Having faculty, staff and students aware of how they can help someone in distress is a critical, but often overlooked, prevention strategy in reducing incidence of violence.

An obvious partner in violence prevention is the campus police department or local city/municipal police. Many police departments have education specialists or officers who are tasked with providing outreach and prevention-based messages. Teaming up with law enforcement facilitates educational objectives, but more importantly, officers help train community members on how they can best respond in coordination with police efforts. A recent study found that in 33 percent of the active shooter events, the shooter was stopped by the non-violent intervention of a potential victim.<sup>96</sup>

For campus-based police departments, there is a good deal to consider given the new landscape of concealed carry legislation and related campus

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93. See Jeff E. Hoyt & Andrea B. Brown, *Identifying Coll. Choice Factors To Successfully Market Your Institution*, 78 COLL. AND UNIV. JOURNAL 3 (2003); Greg M. Broekemier & Srivatsa Seshadri, *Differences in College Choice Criteria Between Deciding Students and Their Parents*, 9 J. MARKETING FOR HIGHER EDUC. 1 (1999).

94. Gary Pavela, *Fearing Our Students Won't Help Them*, CHRON. HIGHER EDUC., Feb. 29, 2008, <http://chronicle.com/article/Fearing-Our-Students-Wont/6617/>.

95. J. Pete Blair, M. Hunter Martaindale & Terry Nichols, *Active Shooter Events from 2000 to 2012*, FBI L. ENFORCEMENT BULL., Jan. 7, 2014, available at <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012>.

96. *Id.*

policies. More and more, campus law enforcement will find themselves addressing individuals with guns or other weapons (lawful or otherwise). Due to this increasing exposure, law enforcement agencies must evaluate their training programs to assure that officers have the tactical training necessary to respond to an active shooter scenario. Additionally, police departments may want to provide medical training for their officers or employ the Rescue Task Force concept.<sup>97</sup> A Rescue Task Force partners responding law enforcement with armored emergency medical team personnel. The medical team “enter[s] attack sites to stabilize and rapidly remove the injured, while a ballistic or explosive threat still may exist.”<sup>98</sup> Lastly, law enforcement agencies should be sure they are equipped properly—proper guns, ammunition, and protective equipment are all important considerations.

Another critical community-based prevention mechanism is the establishment of a cross-functional threat assessment team. In a 2013 report, the American Psychological Association indicated such teams “bring community stakeholders together in a collaborative, problem-solving mode, with a goal of preventing individuals from engaging in gun violence, whether directed at others or self-inflicted.”<sup>99</sup> Some states, such as Virginia and Illinois, have passed legislation regarding the use of threat assessment teams on their campuses.<sup>100</sup> This community-based approach of assessing potential risks and gathering information and data from numerous campus constituents is a powerful and supportive approach to managing threats and potentially eliminating violence on campus. Ideal campus partners might be invited from the counseling center, legal affairs, police department, housing, conduct office and human resources. Each campus needs to have a meaningful dialogue in order to discern the most effective team composition given their campus condition and context. Coupling a threat assessment team with an effective outreach program can effectively elevate awareness among the community and create communication patterns that will help reduce the exposure for violent behavior. “Primary prevention programs can reduce risk factors for violence in the general population. Secondary prevention programs can help individuals who are experiencing emotional difficulties or interpersonal conflicts before they escalate into violence . . . .”<sup>101</sup>

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97. *Id.*

98. *Id.*

99. AM. PSYCHOLOGICAL ASS'N, GUN VIOLENCE: PREDICTION, PREVENTION, AND POLICY 24 (2013), available at <http://www.apa.org/pubs/info/reports/gun-violence-report.pdf>.

100. See VA. CODE ANN § 23-9.2:10 (2013); 29 ILL. ADMIN. CODE § 305.60(c) (2013).

101. Rhea Farberman, *Report: Threat Assessment Most Effective Way to Prevent Gun Violence*, UVA TODAY, Dec. 12, 2013, <http://news.virginia.edu/content/report-threat-assessment-most-effective-way-prevent-gun-violence>.

Beyond threat assessment, campus leaders must be prepared for when gun violence occurs. With proactive training and education as well as vigilant assessment of risk factors, the hope is that gun-related deaths and injuries will be avoided or mitigated. Best practices dictate that proper planning for an active shooter event is necessary. Crisis response teams should be identified, trained and empowered to lead in the event of a campus shooting. These groups should practice through the use of table top exercises and simulations to best understand how campus entities will collaborate to manage crisis.

#### CONCLUSION

When it comes to higher education there is an important truth: students cannot learn in the atmosphere of fear and intimidation that weapons on campus create. Likewise, faculty and staff seek security in their workplace in order to more effectively develop the leaders of tomorrow. It is clear the legislation related to gun control continues to shift and reinvent itself across this country. As higher education professionals, we must be informed and adaptable in order to best protect our colleges and universities and the individuals they serve. The college and university campus should be carefully designed to offer safety and respite from the cruelties of our modern world. Achieving that environment will foster the learning and security that the scholars and leaders of tomorrow need to find and pursue their passion.

## APPENDIX: VARIOUS EXAMPLES OF CAMPUS CONCEALED CARRY POLICIES

Updated firearms and weapons policies of various institutions across the country have been provided as examples. Each policy effectively outlines the university's stance on weapons, provides concise direction about definitions of a weapon, exceptions that may occur, and recourse to violators. These examples also highlight the types of policy implementation variations that can occur from one college or university.

A. Northern Illinois University Concealed Carry Policy<sup>102</sup>

The Illinois General Assembly has passed the Illinois FIREARMS ACT “conceal and carry.” The Act authorizes public and private universities to promulgate policy regulating the use of weapons on campuses. The President is proposing the adoption of a University Conceal and Carry Policy and an amendment to the current Workplace Violence Prevention Policy. The policy is attached for Board of Trustees discussion and approval.

...

Concealed Carry—University Policy Under 430 ILCS 66—Illinois Firearm Concealed Carry Act.

## Statement of Purpose

Northern Illinois University (hereafter referred to as “NIU” or “University”) hereby establishes the NIU Concealed Carry Policy (hereafter referred to as “Policy”) pursuant to the 2013 Illinois Firearm Concealed Carry Act (430 ILCS 66) and its enabling regulations, and the authority granted by the Northern Illinois University Law (10 ILCS 685). NIU is committed to providing a safe and secure environment for the NIU community and its guests. In support of this commitment, NIU establishes restrictions on the ability to carry firearms or weapons on the NIU campus in accordance with the Board of Trustees' authority to promulgate rules and regulations and the 2013 Illinois Firearm Concealed Carry Act.

## Persons Covered by this Policy

This Policy applies to all employees, students, persons conducting business, or individuals visiting the NIU campus, as “Campus” is defined in this Policy. Visitors include, but are not limited to, prospective students, former students and their respective families.

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102. NORTHERN UNIV., NORTHERN UNIVERSITY CONCEALED CARRY POLICY (2013) *available at* [http://www.niu.edu/board/policies/Concealed\\_Carry\\_University\\_Policy\\_082913.pdf](http://www.niu.edu/board/policies/Concealed_Carry_University_Policy_082913.pdf).

## Prohibited Activities

### *Weapons or Firearms*

NIU maintains a Weapons and Firearms-Free Campus. "Campus" includes, but is not limited to, the NIU campus in DeKalb; regional campuses in Hoffman Estates, Naperville and Rockford; the Lorado Taft Field campus outside Oregon, Illinois; and sites, whether owned, leased or controlled by NIU, where NIU programs, activities and classes are held. No person covered by this policy, unless authorized by law or specifically exempted by federal or state law or NIU regulation, is authorized to possess a weapon or firearm while engaged in NIU-related business or activities.

It is the Policy of NIU to prohibit:

(1) Any person covered by this Policy from possessing a weapon or firearm on property owned, leased or controlled by NIU, even if that person has a valid federal or state license to possess a weapon or firearm.

(2) Any person covered by this Policy from displaying, brandishing, discharging or otherwise using any and all weapons or firearms, including concealed weapons or firearms.

### *Other Prohibited Activities*

It is the Policy of NIU to prohibit all persons covered by this Policy from making threats, bullying, intimidating or engaging in acts of violence. Such behavior or actions will not be tolerated and may result in discipline, up to and including but not limited to, immediate discharge, expulsion, and/or banishment from Campus.

### *Exceptions*

The provisions of this Policy do not apply to the possession of weapons or firearms in NIU vehicles, NIU buildings, on NIU grounds, or at any NIU-sponsored activity if the possession of weapons or firearms is related to one of the following exceptions:

a. The weapon or firearm is used in connection with a weapons safety course or weapons education course offered in the regular course of business or approved and authorized by NIU.

b. The weapon or firearm is carried by a full-time law enforcement officer required to carry a weapon or firearm as a condition of his or her employment; the weapon or firearm is carried by an enforcement officer from an external agency conducting official business at NIU; or any other exception is deemed necessary as determined by the NIU Chief of Police.

c. The weapon or firearm is used in connection with sanctioned classes, athletics, or recreational sports practices, games, matches, tournaments or events on Campus when the activity requires the use of such weapons or firearms (e.g., fencing, starter pistols and archery).

d. The use of simulated weapons or firearms in connection with NIU-related theatrical productions.

The exceptions to the prohibitions of concealed carry do not apply to off-duty law enforcement officers on Campus, including off duty law enforcement officers attending classes as students.

#### Locations at Which Policy Applies

For purposes of this Policy, “property of NIU” includes any vehicle, building, classroom, laboratory, medical clinic, hospital, artistic venue, or entertainment venue whether owned, leased or operated by NIU, and any real property, including parking areas, sidewalks and common areas under the control of NIU.

This Policy also applies to all University-related organization property whether leased or owned by NIU, and all NIU-officially-recognized organization property whether leased or owned by NIU.

NIU’s Division of Finance and Facilities, in consultation with NIU’s Division of Student Affairs and Enrollment Management and NIU’s Department of Police and Public Safety, shall determine placement of clearly and conspicuously posted signs at all building and restricted parking area entrances stating that concealed firearms are prohibited. Signs shall be in accordance with the design approved by the Illinois State Police.

The Division of Finance and Facilities, in consultation with other relevant divisions of NIU and executive management, shall be responsible for the placement and maintenance of signage at building and restricted parking area entrances where vehicles containing weapons or firearms are prohibited.

#### Parking

A weapon or firearm may be transported into an unrestricted parking area within a vehicle if the weapon or firearm and its ammunition remain locked in a case out of plain view within the parked vehicle. Certain parking areas on Campus may be designated as areas where weapons and firearms are not permitted. “Case” is defined as a glove compartment or console that completely encases the weapon or firearm and its ammunition, the trunk of the vehicle, or a weapon or firearm carrying box, shipping box or other container. The weapon or firearm may only be removed for the limited purpose of storage or retrieval from within the trunk of the vehicle. A weapon or firearm must first be unloaded before removal from the vehicle.

#### Storage and Confiscation of Weapons or Firearms

The primary place of storage for a weapon or firearm is within a locked case out of plain view within a parked vehicle in an unrestricted parking area. When storage of a weapon or firearm in a vehicle is not practical, the weapon or firearm may also be stored with the NIU Department of Police

and Public Safety. Prior arrangements should be made with the Department of Police and Public Safety when using its storage services, which is available 24 hours a day, 7 days a week.

All persons arriving on the NIU campus in DeKalb with a licensed weapon or firearm who cannot store their weapon or firearm in their vehicle must proceed immediately to the dispatch facility of the NIU Department of Police and Public Safety at 375 Wirtz Drive, DeKalb to temporarily secure their weapon or firearm. Individuals are required to present their valid concealed carry license, their valid state Firearm Owners Identification card, and their valid state-issued driver's license or state ID, in order to check in and check out weapons or firearms. Weapons or firearms shall be checked out immediately prior to leaving the NIU campus in DeKalb.

All persons who seek storage of a licensed weapon or firearm at any other NIU location (including, but not limited to, the NIU campuses in Hoffman Estates, Naperville and Rockford and the Lorado Taft Field campus outside Oregon, Illinois) must make prior arrangements with the NIU Department of Police and Public Safety.

The Reserve Officers' Training Corp shall develop protocols for storage, maintenance and safety of weapons used as part of its program, as approved by the Provost or his/her designee.

#### Enforcement

Any individual visiting or conducting business on the property of NIU found to have carried a weapon or firearm onto the property of NIU knowingly, or under circumstances in which the person should have known that he or she was in possession of a weapon or firearm, may be banned from the NIU Campus.

Any student found to have carried a weapon or firearm onto the property of NIU knowingly, or found to be carrying a weapon under circumstances in which the student should have known that he or she was in possession of a weapon or firearm, may be subject to discipline up to and including, but not limited to, expulsion from NIU.

Any employee found to have carried a weapon or firearm onto the property of NIU knowingly, or found to be carrying a weapon or firearm under circumstances in which the employee should have known that he or she was in possession of a weapon or firearm, may be subject to discipline up to and including, but not limited to, immediate termination of employment, subject to such other employment rules or regulations in place.

Any individual found to have carried a weapon or firearm onto the property of NIU knowingly, or found to be carrying a weapon or firearm under circumstances in which the individual should have known that he or she was in possession of a weapon or firearm, may be subject to administrative action by NIU and possible arrest and prosecution. Violations of this Policy may result in referrals to external law enforcement agencies.

### Reporting Requirements

NIU's Board of Trustees authorizes the President of NIU to promulgate protocols for the implementation of this Policy including, but not limited to, delegating required reporting responsibilities and protocols related to storage and confiscation of weapons or firearms.

### Distribution of Information Regarding Policy

NIU's Division of University Relations, in consultation with other relevant divisions of NIU and executive management, shall be responsible for the development and distribution of information regarding this Policy to the NIU campus community, NIU media outlets and external audiences.

### Definitions

A. "Bullying" is defined as: Conduct by any person covered by this Policy that is intended or that a reasonable person would know is likely to harm students by substantially interfering with educational opportunities, benefits, or programs of one or more students, faculty members or employees, or conduct that adversely affects the ability of a student to participate in or benefit from NIU's educational programs or activities by placing the student, faculty member or employee in reasonable fear or actual and substantial physical harm, mental harm or emotional distress.

B. A "firearm" is defined as: a loaded or unloaded handgun. A "handgun" is defined as any device which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas that is designed to be held and fired by the use of a single hand.

C. A "weapon" is defined as: Any device, whether loaded or unloaded, that shoots a bullet, pellet, flare or any other projectile including those powered by CO<sub>2</sub>. This includes, but is not limited to, machine guns, rifles, shotguns, handguns or other firearm, BB/pellet gun, spring gun, paint ball gun, flare gun, stun gun, Taser or dart gun and any ammunition for any such device. Any replica of the foregoing is also prohibited.

Any explosive device including, but not limited to, firecrackers and black powder.

Any device that is designed or traditionally used to inflict harm including, but not limited to, bows and arrows, any knife with a blade longer than three inches, hunting knife, fixed blade knife, throwing knives, dagger, razor or other cutting instrument the blade of which is exposed.

APPROVED by action of the Board of Trustees Aug. 29, 2013.



### B. Ball State University Weapons Policy<sup>103</sup>

Ball State University recognizes the importance of providing a climate which is conducive to the safety of all members of the University community. To aid in the accomplishment of this objective:

A. Faculty, Professional Personnel and Staff employees of Ball State University, students, visitors, guests and all other individuals are prohibited from possessing or carrying weapons of any kind while on University property, regardless of whether they are licensed to carry the weapon or not. Such prohibition extends to such individuals having such weapons in briefcases, purses, tool boxes, personal vehicles, or other personal property or effects.

B. The only exceptions to this policy are: (a) firearms in the possession of University police officers and other individuals who have written authorization from the University's Director of Public Safety to carry such weapons; (b) firearms in the possession of sheriffs, police officers, law enforcement officers and correctional officers, who are duly authorized by law to carry such firearms; (c) equipment, tools, devices and materials which are prescribed for use by authorized University employees as a condition of employment or class enrollment; and (d) legal chemical dispensing devices, such as pepper sprays, that are sold commercially for personal protection.

C. University property includes all University owned, leased, or otherwise controlled building and lands. University vehicles are covered by this policy at all times whether or not they are on University property.

D. University sanctions will be imposed on offenders as appropriate and, in addition, criminal charges may be filed.

E. For the purposes of this policy, "weapons" include but are not limited to: (a) firearms, such as handguns, shotguns, rifles, pellet guns, machine guns, stun guns, Tasers, or electronic stun weapons; (b) explosives, such as bombs, grenades, blasting caps, or other containers containing explosive substances; and (c) other equipment, material and devices that, in the manner they are used could ordinarily cause harm, or are readily capable of causing serious bodily injury. The items described in clause (c) include, but are not limited to, knives (except small personal pocket knives with folding blades that are less than three (3) inches long.), tear gas, chemical substances, brass knuckles, clubs, or chains.

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103. BALL STATE UNIV., BALL STATE UNIVERSITY WEAPONS POLICY: APPENDIX O (2014) *available at* <http://cms.bsu.edu/about/administrativeoffices/studentrights/policiesandprocedures/studentcode/appendixo>.

### C. Seattle University Firearms and Weapons Policy<sup>104</sup>

Seattle University is committed to ensuring a safe and secure environment for the University community. This policy is a proactive step towards reducing the risk of injury or death associated with intentional or accidental use of firearms and weapons.

#### Policy

All members of the Seattle University community, including faculty, staff, students and visitors are prohibited from possessing, discharging, or otherwise using firearms, explosives or weapons (“weapons”) on University premises without the expressed authorization of the Director of Campus Public Safety, whether or not the person has been issued a federal or state license to possess such weapons.

All members of the Seattle University community are also prohibited from possessing weapons while working or attending University or University-related events, whether or not the event is on University premises.

Any person violating this policy will be subject to disciplinary action including but not limited to suspension, expulsion, termination, removal from University premises or events and/or criminal prosecution.

Suspected violations of this policy should be reported immediately to the Department of Campus Public Safety at (206) 296-5911.

#### Exceptions

The following exceptions apply to this policy:

- Commissioned law enforcement officers in performance of their official duties.
- Military personnel in performance of their official duties.
- Armored vehicle guards.
- An individual using or possessing a weapon in connection with a scheduled educational, recreational or training program or activity authorized in writing by the Director of Campus Public Safety and under the supervision of a University employee.
- Additional exceptions to this policy may be requested in writing to the Director of Campus Public Safety. The Director will review requests on a case-by-case basis with University Counsel.

#### Definitions

- Firearm – Any device that shoots a bullet, pellet, flare, tran-

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104. SEATTLE UNIV., SEATTLE UNIVERSITY FIREARMS AND WEAPONS POLICY, <http://www.seattleu.edu/Policies/> (last visited May 28, 2014).

quillizer, dart, or other projectile, whether loaded or unloaded, including those powered by CO<sub>2</sub>. This includes but is not limited to guns, air guns, dart guns, pistols, revolvers, rifles, shot guns, cannons, and any ammunition for any such device.

- Weapon – Any device that is designed to or traditionally used to inflict serious bodily injury. This includes but is not limited to:
  - Firearms, slingshots, switchblades, daggers, swords, blackjacks, brass knuckles, bows and arrows, tasers, hand grenades, knives with blades three (3) inches or longer, nunchucks, and throwing stars; or
  - Any object that could be reasonably construed as a weapon; or
  - Any object legally controlled as a weapon or treated as a weapon under the law.
- Explosives – Any dangerous chemicals, substances, mixtures or compounds capable of or intended to cause injury to another, or possessed in negligent disregard for the safety of self and others. This includes but is not limited to firecrackers, gunpowder, and dynamite.

#### D. The University of Alabama Dangerous Weapons & Firearms Policy<sup>105</sup>

##### Purpose

The University of Alabama seeks to maintain a welcoming and safe educational environment for students, employees and visitors, and adopts this policy for possession of dangerous weapons and firearms on campus and at events.

##### Definitions

- “Campus” means all property owned, leased or controlled by the University and any affiliated foundation or health care entity, including buildings and outdoor premises, such as parking lots and other outdoor property.
- “Dangerous weapon” is defined to include:
  - Any device that shoots or delivers a bullet, BB, pellet, arrow, dart, flare, electrical charge, or other projectile,

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105. UNIV. OF ALABAMA, THE UNIVERSITY OF ALABAMA DANGEROUS WEAPONS & FIREARMS POLICY (2013), *available at* <http://policies.ua.edu/weapons.html>.

whether loaded or unloaded, including those devices powered by CO<sub>2</sub>.

- Any explosive device, including fireworks.
- Any instruments/devices that are designed or may be used as a weapon to injure or threaten another individual, including non-culinary knives with a blade greater than four (4) inches.
- A firearm, as defined herein, is not included in this definition of dangerous weapon.
- “Firearm” means a pistol, handgun, rifle, or shotgun, and any ammunition.

#### Policy Statement, Application, & Enforcement

Except as otherwise stated in this policy or as otherwise allowed by law, the University prohibits the possession, transportation and use of firearms and other dangerous weapons on campus. This policy applies to all persons on campus, including faculty, staff, students, contractors, patients and visitors. University students may not possess firearms at any time on campus (except as expressly authorized by the University of Alabama Police Department (UAPD)). UAPD provides temporary storage for firearms lawfully possessed by students at its headquarters.

Dangerous weapons are not allowed on campus at any time. Any dangerous weapons may be confiscated.

Faculty and staff may not possess firearms on campus or while otherwise engaged in duties associated with their employment, except for a firearm properly maintained in a personal vehicle in a manner consistent with Alabama law.

Consistent with Alabama law, all persons (including concealed carry permittees) are strictly prohibited from possessing firearms: (1) at facilities that provide inpatient or custodial care of patients with psychiatric, mental or emotional disorders; and (2) at locations where guards and other security features are employed, such as athletic events.

This policy will be published in staff, faculty, and student handbooks, and supersedes any contrary provisions.

Persons on campus and in violation of University policy are trespassers and may be dealt with accordingly, including, but not limited to, being removed from campus and receiving a written directive to remain off campus. Contractors and vendors are expected to comply with policy and contract terms. Violations of Alabama law may be dealt with by appropriate law enforcement. Student violations may be addressed in accordance with the Code of Student Conduct as well as other applicable policies and may include sanctions, up to and including expulsion. Employee violations may be resolved in accordance with employer policies, up to and including termination.

### Exceptions

This policy does not prohibit use or possession of dangerous weapons or firearms by: (1) certified law enforcement officers acting within the scope of their employment; (2) private security, who with express prior permission of UAPD, possess firearms or dangerous weapons while in the employ of the University or for a permitted event; and (3) members, coaches and authorized staff of a recognized team or course who are acting within the scope of activities that UAPD has pre-approved (e.g. ROTC members). This Policy also does not apply to UAPD officers who are attending classes as students. If, however, UAPD officers are not in uniform during class, they must keep their weapons concealed. Any other use or possession of dangerous weapons or firearms on campus must be authorized by UAPD.

# DEALING WITH STUDENTS WITH PSYCHIATRIC DISORDERS ON CAMPUS: LEGAL COMPLIANCE AND PREVENTION STRATEGIES

BARBARA A. LEE\*

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## INTRODUCTION

According to data collected by the United States government, approximately 27 percent of individuals between the ages of eighteen and twenty-four have a diagnosable mental illness.<sup>1</sup> Although suicide is the eighth leading cause of death for Americans of all ages, it is the second leading cause of death for young adults between the ages of eighteen and twenty-four.<sup>2</sup> A 2012 survey by the American College Health Association found that 21 percent of college and university students had sought treatment for mental health issues that year.<sup>3</sup> Yet, despite the prevalence of mental illness among college and university students, many do not seek either ac-

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1. *Mental Health: What a Difference Student Awareness Makes*, SAMHSA.GOV, <http://www.promoteacceptance.samhsa.gov/publications/collegelife.aspx> (last visited Sept. 20, 2014).

2. *NAMI on Campus*, NAT'L ALLIANCE ON MENTAL ILLNESS, [http://www.nami.org/Template.cfm?Section=NAMI\\_on\\_Campus&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=19&ContentID=12235](http://www.nami.org/Template.cfm?Section=NAMI_on_Campus&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=19&ContentID=12235) (last visited Sept. 20, 2014).

3. AMERICAN COLLEGE HEALTH ASSOCIATION, AMERICAN COLLEGE HEALTH ASSOCIATION-NATIONAL COLLEGE HEALTH ASSESSMENT II: REFERENCE GROUP EXECUTIVE SUMMARY SPRING 2012 15 (2012), *available at* [http://www.acha-ncha.org/docs/ACHA-NCHA-II\\_ReferenceGroup\\_ExecutiveSummary\\_Spring 2012.pdf](http://www.acha-ncha.org/docs/ACHA-NCHA-II_ReferenceGroup_ExecutiveSummary_Spring 2012.pdf).

commodations or treatment. In a survey conducted by the National Alliance on Mental Illness in 2011, of the college and university student respondents who stated that they had a psychiatric disorder, only half of those respondents had disclosed the disorder to their college or university.<sup>4</sup>

Although several campuses have experienced shootings in the past decade, beginning with the massacre at Virginia Tech,<sup>5</sup> data from the Bureau of Justice Statistics shows that college and university students are less likely to experience violence than nonstudents between the ages of eighteen and twenty-four.<sup>6</sup> According to a Bureau of Justice Statistics study, most crimes against college and university students occur off campus, and the number of violent incidents involving college and university students actually decreased during the time period of the study.<sup>7</sup>

Nevertheless, college and university students, their families, and faculty and staff have been alarmed at the violence that has occurred on campuses that otherwise seem safe and welcoming. The prevalence of mental illness on college and university campuses, and particularly that of untreated mental illness, has resulted in strategies to address the problematic behavior, the underlying mental illness, or both—and has also, in some cases, created legal liability for colleges and universities and the staff who were trying to protect both the students with mental illness and the campus community at large.

This article will examine the legal protections for students with psychiatric disorders, the limits placed on faculty and administrators who wish to protect these students and those that they may do harm to, and the strategies that some institutions have adopted in order to identify at-risk students and intervene before they harm themselves or others.

### I. MENTAL ILLNESS AND VIOLENCE

Scholars differ over the propensity of individuals with mental illness for violence. While some data show that individuals with psychiatric disorders are no more likely to be violent than individuals without these disorders,<sup>8</sup> a

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4. NATIONAL ALLIANCE ON MENTAL ILLNESS, COLLEGE STUDENTS SPEAK (2011), available at [http://www.nami.org/Content/NavigationMenu/Find\\_Support/NAMI\\_on\\_Campus1/collegereport.pdf](http://www.nami.org/Content/NavigationMenu/Find_Support/NAMI_on_Campus1/collegereport.pdf), at 9.

5. For example, students were killed at Northern Illinois University (2008), San Jose State University (2011), and Santa Monica College (2013), among several other incidents.

6. KATRINA BAUM & PATSY KLAUS, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995-2002 1 (2005), available at <http://www.bjs.gov/content/pub/pdf/vvcs02.pdf>.

7. *Id.*

8. For a brief summary of research findings on violence and mental illness, see *Violence and Mental Illness: The Facts*, SAMSA.GOV, <http://promoteacceptance.samhsa.gov/publications/facts.aspx?printid=1>.

study of individuals with “serious” mental illnesses, such as schizophrenia, major depression, or bipolar disorder, found that such individuals were two to three times more likely to be “assaultive” than individuals who did not have these disorders.<sup>9</sup> The data also showed that the lifetime prevalence of violence for individuals with serious mental illnesses was 16 percent, compared to 7 percent for individuals who did not have a serious mental illness.<sup>10</sup> On the other hand, the author noted that individuals who do not have a serious mental illness but who engage in substance abuse are seven times more likely to engage in violence than those who are not substance abusers.<sup>11</sup> So, despite the increased potential for a student with a psychiatric disorder to engage in violence, the vast majority of individuals with these disorders are not violent to others, although they may be a risk to themselves.<sup>12</sup>

In addition to being concerned about the risk of violence against others, college and university faculty and administrators are also worried about students who engage in forms of self-harm, such as self-mutilation and suicide. While college and university students are less likely to attempt or commit suicide than non-students,<sup>13</sup> campuses across the country are struggling to monitor student behavior and to prevent students from harming themselves. In some instances, students who are suicidal use violence against others in order to cause their own deaths.<sup>14</sup> As such, suicide prevention is another important strategy to reduce campus violence.<sup>15</sup>

9. Richard A. Friedman, *Violence and Mental Illness: How Strong is the Link?* 355 N. ENGL. J. MED. 2064 (2006) (defining “assaultive” as physically attacking another with a weapon, such as a knife or a gun). *Id.*

10. *Id.*

11. *Id.* See also Melissa Grunloh et al., *Mental Illness and Violent Behavior in School: A Primer for College Administrators*, 7 CAMPUS SAFETY & STUD. DEVEL. 6 (2007) (summarizing research on other factors related to violent behavior).

12. See, e.g., Susan P. Stuart, “*Hope and Despondence*”: *Emerging Adulthood and Higher Education’s Relationship with its Nonviolent Mentally Ill Students*, 38 J.C. & U.L. 319 (2012) (arguing that colleges and universities should not force mentally ill students who are disruptive but not violent off campus as a strategy to prevent campus violence).

13. The suicide rate for college students is approximately one-half the suicide rate for individuals in the same age group who are not college students. M.M. Silverman et al., *The Big Ten Suicide Study: A 10-Year Study of Suicides on Midwestern Campuses*, 27 SUICIDE LIFE THREAT BEHAVIOR 285 (1997).

14. For example, the student who killed students and faculty members at Virginia Tech subsequently turned his weapon on himself. The shooter in the Sandy Hook Elementary School tragedy took his own life immediately after killing twenty-six individuals. Michael Martinez, *Newtown a Year Later: Nation Reflects on Legacy of its 2nd-Deadliest Mass Shooting*, CNN.COM, Dec. 14, 2013, [http://www.cnn.com/2013/12/14/us/newtown-sandy-hook-shooting-anniversary/index.html?iid=article\\_sidebar](http://www.cnn.com/2013/12/14/us/newtown-sandy-hook-shooting-anniversary/index.html?iid=article_sidebar).

15. A discussion of student suicide prevention is beyond the scope of this paper. A useful resource is THE JED FOUNDATION, FRAMEWORK FOR DEVELOPING INSTITU-



## II. LEGAL PROTECTIONS FOR STUDENTS WITH PSYCHIATRIC DISORDERS

Colleges and universities face legal liability if students are injured or killed while on campus or while attending campus functions.<sup>16</sup> They may also face legal liability if they mishandle efforts to respond to problematic behavior by students with psychiatric disorders, either by requiring the students to engage in certain prophylactic behaviors (such as taking prescribed medication) or placing them on involuntary medical leave.<sup>17</sup> Colleges and universities have been found liable for student suicides<sup>18</sup> and have also faced legal liability for insisting that students who are disruptive or who engage in risky behavior withdraw from classes and leave campus until their conditions have stabilized.<sup>19</sup>

The major sources of protection for students with psychiatric disorders are Section 504 of the Rehabilitation Act of 1973<sup>20</sup> and Titles II and III of the Americans with Disabilities Act.<sup>21</sup> Both laws protect individuals who have a physical or mental disorder, who have a record of such a disorder, or

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TIONAL PROTOCOLS FOR THE ACUTELY DISTRESSED OR SUICIDAL COLLEGE STUDENT (2006), [https://www.jedfoundation.org/assets/Programs/Program\\_downloads/Framework\\_color.pdf](https://www.jedfoundation.org/assets/Programs/Program_downloads/Framework_color.pdf).

16. Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008). For example, a college may face claims for negligence, wrongful death, misrepresentation, and breach of contract, among others. *See, e.g.*, *Butler v. Maharishi Univ. of Mgmt.*, 589 F. Supp. 2d 1150, 1169–70 (S.D. Iowa 2008) (denying the university's motion for summary judgment in a case where a parent of student murdered by fellow student sued the university for premises liability, fraudulent misrepresentation, and negligence).

17. *See infra* Part III.

18. *See, e.g.*, *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL1869101 (Mass. Super. Aug. 29, 2005) (ruling that the claims of parents of a student who was an apparent suicide must be litigated). In *Shin*, the parties reached a settlement so there was no finding on liability. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED, April 4, 2006, <http://www.insidehighered.com/news/2006/04/04/shin>. *See also* *Schiesler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

19. For example, OCR determined that Bluffton University had impermissibly required a student who attempted suicide to take an involuntary medical leave. Letter to Bluffton Univ., OCR Docket No. 15-04-2042 (Dec. 22, 2004), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=LWFnT1VirFU%3D&tabid=313> [hereinafter *Bluffton Letter*]. In addition to potential legal liability, there may be ethical issues involved. Students often need to remain enrolled at their college or university in order to be covered by student health insurance and to receive mental health treatment from the college's or university's mental health service providers.

20. 29 U.S.C. § 794 (2012). The Rehabilitation Act is a "Spending Clause" measure that applies to entities that receive federal funds.

21. 42 U.S.C. § 12131–65 and 12181–89 (2012). Public colleges and universities are covered by Title II, and private universities are covered by Title III. For a thorough discussion of the elements of a Section 504 or ADA claim and the 2008 amendments to the ADA, see Laura Rothstein, *Disability Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691 (2005). *See also* LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* §§1:12 – 1:21 (4th ed. 2013).

who are regarded as disabled.<sup>22</sup> The disorder must “substantially interfere” with one or more “major life activities,” such as sleeping, caring for oneself, concentrating, and learning.<sup>23</sup>

The requirements of both laws with respect to students with disabilities are virtually identical. The student must provide documentation of a recognized disability,<sup>24</sup> and he or she must request accommodations to enable him or her to function in classes and in campus life. Students are expected to follow the college’s or university’s rules and codes of conduct; failure to do so may result in a determination by the U.S. Department of Education’s Office for Civil Rights (“OCR”) or a court ruling that the student is not “qualified” because complying with a campus conduct or honor code is an essential function of being a student.<sup>25</sup> Section 504 of the ADA does not protect students who are not “qualified” individuals with a disability.<sup>26</sup>

OCR enforces both laws as they apply to students with disabilities.<sup>27</sup> The U.S. Department of Justice enforces Title II in public entities that are not colleges and universities;<sup>28</sup> therefore, its regulations affect enforcement of the ADA with respect to public colleges and universities.

Colleges and universities are not required to provide accommodations to students who have not disclosed a disability, either physical or mental. Once the student provides documentation of a disability, the college is required to consider whether and what reasonable accommodations may be appropriate.<sup>29</sup> As noted earlier, many students with psychiatric disorders do not disclose their disorders and thus are not eligible for accommodations. If they engage in disruptive conduct and the college or university requires the student to receive counseling or other forms of treatment, the student may assert that the college or university “regards” the student as disabled—a potential violation of the ADA.<sup>30</sup> On the other hand, if the col-

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22. *Davis v. Univ. of N.C.*, 263 F.3d 95, 99 (4th Cir. 2001). Disability discrimination claims brought under Section 504 and under the ADA are analyzed in the same way. *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 n. 5 (8th Cir. 1999).

23. 42 U.S.C. § 12102(2) (2012).

24. Students with psychiatric disorders must provide a diagnosis of a disorder recognized in the fifth edition of the *Diagnostic and Statistical Manual* published by the American Psychological Association (known as the *DSM-V*). But simply having a diagnosis is not enough for protection under either law. The disorder must “substantially limit” one or more major life activity.

25. *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998). *See also* *El Kouni v. Trustees of Boston Univ.*, 169 F. Supp. 2d 1 (D. Mass. 2001).

26. *Id.*

27. *See About OCR*, U.S. DEP’T OF EDUC., [www2.ed.gov/about/offices/list/ocr/aboutocr.html](http://www2.ed.gov/about/offices/list/ocr/aboutocr.html) (last visited Sept. 22, 2014).

28. *See Disability Rights Section*, U.S. DEP’T OF JUSTICE, [www.justice.gov/crt/about/drs/](http://www.justice.gov/crt/about/drs/) (last visited Sept. 22, 2014).

29. 34 C.F.R. § 104.12; 42 U.S.C. § 12182(b)(2)(A).

30. *See* 34 C.F.R. § 104.3(j)(2)(iv).

lege or university does not respond to disruptive conduct, the student's misconduct may escalate into self-harm or harm to others. Whether or not the student has a documented psychiatric disability, the college or university may charge students engaging in misconduct with a violation of the college or university's code of student conduct and impose discipline.<sup>31</sup>

Both laws require colleges and universities to provide "reasonable accommodations" or adjustments to academic requirements, student policies, and other requirements to "qualified students"<sup>32</sup> unless the student poses a "direct threat." If a direct threat is established, then the college or university is not required to accommodate the student unless the accommodation would remove the threat.<sup>33</sup> Colleges and universities in the past have responded to students who threatened self-harm by determining that the student was a "direct threat."<sup>34</sup> In some cases, colleges and universities place the student on an involuntary medical leave.<sup>35</sup>

Until 2010, OCR had interpreted the term "direct threat" to encompass threats of self-harm or threats to others.<sup>36</sup> In 2010, the U.S. Department of Justice issued new final rules implementing Title II of the ADA which narrowed the definition of "direct threat" to apply only to an individual who is a threat to others, but not to himself or herself.<sup>37</sup> OCR adopted this new definition of direct threat, limiting the ability of colleges and universities to remove a student from campus who was a danger to himself or herself (such as a suicidal student), but who was not a danger to others.<sup>38</sup>

OCR guidelines require that the college engage in an "interactive process" with the student to determine whether accommodations or adjustments would mitigate the effect of the student's disability.<sup>39</sup> This is partic-

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31. See generally GARY PAVELA, *THE DISMISSAL OF STUDENTS WITH MENTAL DISORDERS* (1985).

32. A "qualified" student is one who can meet the academic and technical standards of the institution or academic program. 34 C.F.R. § 104.3(l)(3) (2012).

33. See, e.g., 28 C.F.R. § 35.139(a).

34. See, e.g., Letter to Woodbury Univ., OCR Docket No. 09-00-2079 (June 29, 2001), available at [http://webcache.googleusercontent.com/search?q=cache:pGs1Cvkkf50J:www.nacua.org/lrs/nacua\\_resources\\_page/studentsuicide/p\\_woodbury.doc+&cd=1&hl=en&ct=clnk&gl=us&client=safari](http://webcache.googleusercontent.com/search?q=cache:pGs1Cvkkf50J:www.nacua.org/lrs/nacua_resources_page/studentsuicide/p_woodbury.doc+&cd=1&hl=en&ct=clnk&gl=us&client=safari) [hereinafter Woodbury Letter].

35. See, e.g., Bluffton Letter, *supra* note 19. See also Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Analysis*, 34 J.C. & U.L. 349 (2008) (discussing "mandatory withdrawals" and the ADA and Section 504 standards applicable to such leaves).

36. See Paul Lennon & Elizabeth Sanghavi, *New Title II Regulations Regarding Direct Threat: Do They Change How Colleges and Universities Should Treat Students Who are Threats to Themselves?* 10 NACUA Notes no.1 (Nov. 1, 2011).

37. 75 Fed. Reg. 56180 (Sept. 15, 2010).

38. See Lennon & Sanghavi, *supra* note 36 (providing a discussion of the revised "direct threat" regulations and guidelines for revising involuntary withdrawal policies).

39. See, e.g., Woodbury Letter, *supra* note 34. The institution must establish a process for "an individualized consideration of the student's disability particularly with

ularly important in cases involving students with psychiatric disorders who have engaged in, or threatened to engage in, self-harm. Any college or university that fails to use the interactive process may be deemed by OCR to have violated disability discrimination laws.<sup>40</sup>

### III. THE “INTERACTIVE PROCESS” AND “DIRECT THREAT”

When students engage in risky or disruptive behavior, several issues arise that have both legal and policy implications. Is the student’s behavior a risk to the student, or to other students or the campus community? Can the student function, or is some intervention needed? Can the college or university require a student to obtain counseling or other mental health services as a condition of remaining enrolled? Can the college or university force a student to leave campus until the student can provide documentation that he or she can return and function in a manner that is not disruptive or potentially dangerous to the student or others?

College and university administrators dealing with students whose behavior is disruptive or risky have, in some cases, placed the student on an involuntary medical leave without providing due process.<sup>41</sup> In other cases, administrators have placed students on involuntary medical leave without going through the “interactive process” required by Section 504 and the ADA.

A college or university must engage in a two-step process in order to comply with OCR’s requirements with respect to dealing with disruptive or at-risk students. First, the college or university must determine whether the student poses a direct threat to others. According to the ADA Title II regulations (which OCR also follows with respect to enforcing Section 504),

In determining whether an individual poses a direct threat to the health or safety of others, a public entity 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 policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.<sup>42</sup>

Next, the college or university must engage in an interactive process

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regard to sanctions, penalties, and adverse restrictions.” *Id.* at 3.

40. See, e.g., Letter to Guilford Univ., OCR Docket No.11-02-2003 (Mar. 6, 2003) [hereinafter Guilford Letter]; Bluffton Letter, *supra* note 19.

41. See, e.g., Guilford Letter, *supra* note 40.

42. 28 C.F.R. § 35.139(b) (2014). The definition of “direct threat” in the ADA Title III regulations is virtually identical. 28 C.F.R. § 36.208(b) (2014).

with the student.<sup>43</sup> This is a form of due process that allows the student to respond to the details of the direct threat analysis, to provide additional information (including medical information), and to correct any incorrect information. At this point, a range of options is typically discussed, including treatment interventions or modifications, academic or living adjustments, and voluntary or involuntary leaves of absence.

Since the release of the revised ADA Title II in 2010, there have been several OCR letter rulings on the issue of direct threat and involuntary leaves of absence. In a case brought under Section 504 against Spring Arbor University, a student claimed that the university had discriminated against him on the basis of a psychiatric disability by imposing a number of conditions prior to allowing him to return from a voluntary leave of absence.<sup>44</sup> After transferring from another college, the student told an admissions representative about his bipolar disorder and requested the need for certain academic accommodations.<sup>45</sup> The admissions representative did not refer the student to the disability services office nor inform anyone at the university that the student had requested accommodations.<sup>46</sup> The student did not seek accommodations when he arrived on campus and engaged in behavior that fellow students found disruptive and troubling.<sup>47</sup> In October of his first semester at the university, he was told to meet with the vice president for student development.<sup>48</sup> The vice president attempted to persuade the student to sign a behavioral contract.<sup>49</sup> The student became upset and requested a voluntary withdrawal on medical grounds.<sup>50</sup> At the time of his withdrawal, his academic performance was satisfactory and he had not been charged with any violations of the university's code of conduct.<sup>51</sup>

In May the student requested permission to be readmitted and requested off-campus housing as an accommodation.<sup>52</sup> The university required the student to submit a "Section 504 plan" and letter from his therapist as a condition of his return.<sup>53</sup> In addition to the plan and letter, the university required the student to obtain permission from several departments (such as

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43. Woodbury Letter, *supra* note 34.

44. Letter to Spring Arbor University, OCR Docket No. 15-10-2098 (Dec. 16, 2010), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=WgmoOxFqnto%3D&tabid=313> [hereinafter Spring Arbor Letter].

45. *Id.* at 2.

46. *Id.*

47. *Id.* at 4.

48. *Id.* at 2.

49. *Id.* at 4.

50. *Id.*

51. *Id.* at 3.

52. *Id.*

53. *Id.*

the registrar, financial aid, and the business office) to re-enroll.<sup>54</sup>

OCR found that the university had discriminated against the student by requiring the “504 plan” as a condition of readmission.<sup>55</sup> The actions taken prior to his withdrawal, including the attempt to have him sign a “behavioral contract,” were evidence that the university regarded the student as disabled.<sup>56</sup> Furthermore, there was no evidence that the university had a routine practice of requiring evidence from other students who had withdrawn, whether for medical or other reasons, that they were able to function at the time they applied for readmission.<sup>57</sup> Because the student was in good academic and disciplinary standing at the time of his withdrawal, OCR determined that he was a “qualified person with a disability” and thus protected by Section 504.<sup>58</sup>

OCR also found that the university had not taken the steps to determine whether or not the student was a direct threat to others.<sup>59</sup> At the time the student withdrew, he was seen as disruptive, but not as dangerous to others.<sup>60</sup> At the time of his application for readmission, no one at the University had had sufficient interaction with the student to determine whether he posed a direct threat at that time.<sup>61</sup> OCR stated:

Under OCR policy, nothing in Section 504 prevents educational institutions from addressing the dangers posed by an individual who represents a ‘direct threat’ to the health and safety of others . . . . Following a proper determination that a student poses a direct threat, an educational institution may require as a precondition to a student’s return that the student provide documentation that the student has taken steps to reduce the previous threat (e.g., followed a treatment plan, submitted periodic reports, or granted permission for the institution to talk to the treating professional). However, educational institutions cannot require that a student’s disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications.<sup>62</sup>

The next OCR opinion following revision of the Title II regulations involved Purchase College, a member of the State University of New York

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54. *Id.*

55. *Id.* at 11.

56. *Id.* at 10.

57. *Id.* at 11.

58. *Id.*

59. *Id.* at 11.

60. *Id.* at 12.

61. *Id.*

62. *Id.* at 9.

System.<sup>63</sup> The student complainant, who filed a claim under Section 504, asserted that the college had forced him to take an involuntary medical leave after he experienced a “psychiatric crisis” (a suicide attempt) and was hospitalized.<sup>64</sup> The student, who had been diagnosed with bipolar disorder, claimed that the College did not engage in a direct threat analysis, did not permit him to submit documentation from a therapist unaffiliated with the College, and did not provide him with a method to submit a formal grievance concerning the imposition of involuntary leave.<sup>65</sup>

At the time of the complaint, Purchase’s policy for students who wish to return to classes after undergoing emergency medical treatment required any such student to be assessed by either the counseling center (for psychiatric emergencies) or the student health center (for physical trauma or illness), so that any need for accommodations or academic adjustments could be assessed.<sup>66</sup> OCR found that policy to be non-discriminatory, since it treated all health emergencies equally and did not apply only to students with disabilities.<sup>67</sup>

According to OCR’s findings, when a counselor evaluated the student, the student provided information from his private therapist and submitted to a lengthy assessment interview with the counselor.<sup>68</sup> After reviewing the documentation from the counselor and the student’s own therapist, the associate dean concluded that the stressors that had prompted his suicide attempt (marijuana use and a difficult relationship with a girlfriend) had gone unabated, and determined that the student was not ready to return to his classes.<sup>69</sup> The associate dean also agreed with the counselor that the student required additional intensive therapy and outpatient treatment.<sup>70</sup> The associate dean notified the student that he could choose a voluntary leave or she would place him on an involuntary leave; she also informed him of his right to appeal that determination.<sup>71</sup> The student chose the voluntary leave, and did not appeal the determination that the leave was necessary.<sup>72</sup>

Because the college considered information from the student’s own therapist—although it chose to rely on its own therapist’s differing judgment—OCR determined that the college engaged in the required interactive process and followed its policy consistently with respect to disabled and non-

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63. Letter to Purchase College, OCR Docket No. 02-10-2181, available at [http://ncherp.org/documents/OCRLetter\\_PurchaseCollege.pdf](http://ncherp.org/documents/OCRLetter_PurchaseCollege.pdf).

64. *Id.* at 2.

65. *Id.*

66. *Id.* at 2–3 (discussing “Policy 3”).

67. *Id.* at 3.

68. *Id.* at 3.

69. *Id.* at 4.

70. *Id.* at 4 n.7.

71. *Id.*

72. *Id.*

disabled students.<sup>73</sup> OCR did, however, require the college to revise its Section 504 policy to provide contact information for its Section 504 compliance officer.<sup>74</sup>

A third OCR decision following the revision of the Title II regulations involved Saint Joseph's College in Brooklyn, New York.<sup>75</sup> In this case, a female student—who had not disclosed a disability nor requested accommodations—grabbed a male student, insisted they were married, and would not release him.<sup>76</sup> The student was suspended from campus, but was allowed to return several days later when her therapist provided medical clearance for her to return.<sup>77</sup> A second similar incident occurred a week later, and the student was hospitalized.<sup>78</sup> The following day, the college's Behavioral Assessment Committee ("BAC") convened without the student present and recommended that the student be suspended on an emergency basis.<sup>79</sup> The college suspended the student without providing the student with an opportunity to meet with the BAC or the associate dean who made the suspension decision.<sup>80</sup> Although the college had a procedure for providing due process in emergency suspension situations, this process was not used because of the BAC recommendation.<sup>81</sup> OCR determined that the college had used the BAC process rather than its emergency suspension process in two earlier incidents, both of which involved student misconduct that administrators suspected were related to mental health issues.<sup>82</sup>

The student claimed that the college regarded her as disabled, and OCR agreed.<sup>83</sup> There was no written policy explaining the BAC process, nor was there an opportunity for the student to meet with the BAC to appeal its recommendation or the decision of the associate dean.<sup>84</sup> When the student asked to return to the college at the beginning of the following semester, the BAC met again, and again determined that she should not return.<sup>85</sup> According to OCR, the student was again not permitted to meet with the BAC

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73. *Id.* at 5.

74. *Id.*

75. Letter to St. Joseph's College, OCR Docket No. 02-10-2171 (January 24, 2011), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=IV5EzSZQtDo%3D&tabid=313> [hereinafter St. Joseph's Letter].

76. *Id.* at 2.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 3.

81. *Id.*

82. *Id.*

83. *Id.* at 5 ("Based on statements made by College staff during interviews and in documentation, OCR concluded that the College regarded the Student as a person with a disability.").

84. *Id.* at 3.

85. *Id.* at 4.



nor given the opportunity to present information or witnesses on her own behalf; rather, the BAC merely informed the student that she had violated the code of student conduct.<sup>86</sup> The BAC did not advise the student of any right to appeal the recommendation or her right to have a hearing before the student judicial committee, which included student members.<sup>87</sup> Two months later, the student's father contacted the college and requested the college to readmit his daughter.<sup>88</sup> The father also informed school officials that the student was taking her medication and was stable.<sup>89</sup> However, the BAC recommended against her return because it had no "new evidence" concerning her mental health.<sup>90</sup> In a letter to the student, the BAC advised her of its decision but did not include any information concerning her right to appeal the decision or submit additional information on her mental health status.<sup>91</sup>

OCR faulted the college for not advising the student of her due process rights under its emergency suspension policy and for using the BAC only for students with suspected mental disorders.<sup>92</sup> OCR stated that both the emergency suspension policy and the BAC process must be available to disabled and nondisabled students alike in order for the college to be in compliance with Section 504.<sup>93</sup> It also required that the BAC option provide due process protections equal to those of the emergency suspension policy.<sup>94</sup>

In a fourth case, OCR found that Fordham University had engaged in discriminatory behavior in violation of Section 504.<sup>95</sup> There, the university required a student returning from a medical withdrawal to provide documentation from a psychiatrist and a psychologist that he was fit to return, as well as meet with the university's psychologist and agree to a "statement of expectations."<sup>96</sup> OCR noted that Fordham students returning from a medical withdrawal related to psychiatric disorders were required to provide this documentation regardless of the nature and severity of their disorders.<sup>97</sup> In contrast, for students seeking readmission after a medical withdrawal for

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 4–5.

91. *Id.* at 5.

92. *Id.*

93. *Id.*

94. *Id.*

95. Letter to Fordham University, OCR Docket No. 02-10-2013 (Nov. 17, 2011), available at [http://www.nacua.org/documents/FordhamU\\_OCRLetter\\_November2011.pdf](http://www.nacua.org/documents/FordhamU_OCRLetter_November2011.pdf).

96. *Id.* at 2.

97. *Id.*

reasons unrelated to a psychiatric disorder, the University made a case-by-case determination of what type of documentation was required. In this case, OCR found that the university regarded the student as disabled but did not make an individualized determination as to what type of documentation was necessary.<sup>98</sup> Such behavior had the effect of subjecting the student to discrimination on the basis of disability.<sup>99</sup>

A fifth matter involving a recent OCR investigation—but one that did not result in a formal finding—involved Western Michigan University.<sup>100</sup> There, a student had attempted suicide and was placed on an involuntary medical leave.<sup>101</sup> He filed a complaint with OCR for disability discrimination, and, before OCR had completed an investigation, the University voluntarily resolved the complaint.<sup>102</sup> One provision of the resolution agreement allowed the student to return to campus.<sup>103</sup> Another item in the resolution agreement committed Western Michigan to revise its code of student conduct and other policy documents to provide that the same procedures will be used to deal with misconduct by students with psychiatric disorders as those that are used for all students unless the student at issue poses a direct threat to others.<sup>104</sup> Less than a month after his victory from OCR, the student committed suicide.<sup>105</sup>

In a sixth instance, OCR investigated a complaint against Princeton University, and ultimately concluded that the university's decision to require a student who had attempted suicide four times to take an involuntary leave and to be evaluated by its campus disability services office before being granted permission to re-enroll, did not violate Section 504.<sup>106</sup> According to the student's complaint, the university required the student to withdraw from his classes on a voluntary basis and restricted his access to the campus after the student was hospitalized for a fourth suicide attempt.<sup>107</sup> In response, the student requested a part-time academic schedule, off-campus

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98. *Id.* at 4.

99. *Id.*

100. Christina Cantero, *Western Michigan University Revises Policy Related to Students Showing Suicidal Tendencies*, MLIVE.COM, Dec. 29, 2013, [www.mlive.com/news/kalamazoo/index.ssf/2013/12/western\\_michigan\\_university\\_re\\_15.html](http://www.mlive.com/news/kalamazoo/index.ssf/2013/12/western_michigan_university_re_15.html).

101. *Id.*

102. *Id.*

103. Allie Grasgreen, *Who Protects the Suicidal?* INSIDE HIGHER ED, January 2, 2014, <http://www.insidehighered.com/news/2014/01/02/suicide-ocr-again-tells-colleges-not-remove-self-threatening-students>.

104. *Id.*

105. *Id.*

106. OCR Letter to President Shirley Tilghman, OCR Docket No. 02-12-2155 (Jan. 18, 2013), <http://www.nacua.org/securedocuments/resourcepagedocs/distressedSuicidalSs/PrincetonOcrletter.pdf/> (on file with author).

107. *Id.* at 2.

housing, and a one-semester leave of absence.<sup>108</sup>

The student acknowledged that he had not registered with the Office of Disability Services because he needed no accommodations for his bipolar disorder and depression, nor had he requested the accommodations he claimed to have requested. Following his release from the hospital, two members of the university's counseling and psychological services office evaluated the student.<sup>109</sup> The counselors determined that the student posed a very high suicide risk because he refused to engage in recommended in-patient treatment, continued to engage in drug and alcohol abuse, and did not appear to understand the seriousness of his disorder.<sup>110</sup> OCR determined that the university's policy with respect to students whose health or well-being is affected was applied to both disabled and nondisabled students alike, and thus found no discrimination against the student with respect to the leave of absence or the refusal to reinstate him on the basis of his current unstable condition.<sup>111</sup>

Following Princeton's refusal to allow the student to re-enroll, the vice president informed the student of his right to appeal the determination. The vice president met with the student and reviewed all documentation regarding his suicide attempt and the evaluations performed by the campus counseling department and the student's own therapist.<sup>112</sup> OCR determined that this individualized assessment complied with its regulations.<sup>113</sup>

The final issue involved the university's requirement that the student provide documentation that he could manage his behavior and the stress of being re-enrolled before being given permission to return. The form that the student was required to fill out and the required review by the disability services office was used for any student who withdrew from the University "in all situations similar to the complainant's circumstances."<sup>114</sup> Having found in the Princeton's favor on all of the student's allegations, OCR dismissed the complaint.<sup>115</sup>

These cases provide examples of the approach taken by the OCR to student claims of disability discrimination when the students have engaged in disruptive or risky behavior. Although this small number of cases is not sufficient to support sweeping pronouncements about institutional compliance with Section 504, the outcomes of these cases suggest strategies that colleges and universities can use to respond appropriately to students who

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108. *Id.* at 5.

109. Discrimination Complaint, Princeton Univ., U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (July 6, 2012).

110. *Id.* See also OCR Letter to President Shirley Tilghman, *supra* note 106.

111. OCR Letter to President Shirley Tilghman, *supra* note 106.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

engage in such behavior and avoid potential findings of disability discrimination. The next section discusses some of these strategies.

#### IV. OBSERVATIONS AND SUGGESTIONS FOR PRACTICE

OCR rulings and the mental health literature suggest several strategies for dealing with students whose behavior is disruptive or risky. It is important to understand that each student must be assessed individually, taking into consideration not only possible mental health issues, but substance abuse issues as well.<sup>116</sup> It is also important to recognize that, in some situations, a quick response is necessary to protect the student or others from harm, and college and university officials may have to provide due process and other protections after removing the student from campus (for a hospitalization, for example). Nevertheless, the following suggestions may be helpful for colleges and universities to consider.

1. Misconduct has many causes. Students who engage in disruptive or risky behavior may or may not have a psychiatric disorder. Staff should, at least initially, deal with the behavior, not its cause. Students who have not disclosed a disability and who violate an institution's code of student conduct should be held responsible for their actions, and may be suspended or expelled for serious misconduct.<sup>117</sup> However, if the student discloses a disability and the behavior is linked to that disability, the student may be entitled to adjustments of the school's disciplinary process (but not its conduct rules).
2. Colleges and universities should review their policies for dealing with students whose behavior suggests that they may have a psychiatric disorder. One source of advice is the *Model Policy for Colleges and Universities* developed by the Jed Foundation, which focuses on depressed and suicidal students.<sup>118</sup>
3. Emergency withdrawal or leave policies should be applied equally to all students, whether or not they have a disability. If a student, or the institution, determines that the student cannot currently function in the campus setting, the process should be the same, regardless of whether or not the student's conduct is relat-

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116. See *supra* Part I, which notes that abusers of drugs and alcohol are far more likely to engage in violent or disruptive behavior than are individuals with a psychiatric disorder.

117. See generally PAVELA, *supra* note 31.

118. THE JED FOUNDATION, SUPPORTING STUDENTS: A MODEL POLICY FOR COLLEGES AND UNIVERSITIES (2007), available at <http://www.bazelon.org/pdf/SupportingStudents.pdf> [hereinafter SUPPORTING STUDENTS].

ed to a disability.<sup>119</sup> An individualized determination should be made for every student<sup>120</sup> and every student should be given the opportunity to meet with and provide information to a behavioral assessment team, if one is in place, or whoever decides whether or not the student may remain on campus.<sup>121</sup>

4. Re-enrollment or readmission policies should apply uniformly to all students on campus who are separated from school because of misconduct or health emergencies.<sup>122</sup>

5. If a behavioral assessment team is used to make determinations as to whether a student with a disability has violated the code of conduct, the student should have the same due process rights as are provided for students who use the campus judicial process.<sup>123</sup>

6. Colleges and universities should make individualized determinations as to whether a particular student is a direct threat to others. If a student is not a direct threat to others but is engaging in conduct that is either potentially harmful to himself or herself or disruptive, college or university officials should determine whether the student is “qualified” under the institution’s academic and technical standards.<sup>124</sup> This includes the student’s ability to abide by the code of conduct. Included in this individualized assessment should be a discussion of potential reasonable accommodations or adjustments that could enable the student to remain on campus. For example, if the trigger for problems seems to be the residence hall form of housing, an accommodation could include off-campus housing.<sup>125</sup>

7. In conducting an individualized assessment, school officials

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119. See OCR Letter to President Shirley Tilghman, *supra*, note 106.

120. The Jed Foundation’s *Framework for Developing Institutional Protocols*, *supra* note 15, has helpful suggestions for creating an individualized approach to emergency medical leaves.

121. *Supporting Students*, *supra*, note 118.

122. OCR Letter to President Shirley Tilghman, *supra* note 106.

123. St. Joseph’s Letter, *supra* note 75.

124. *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996). Specific examples of academic and technical standards include: 1) intellectual, conceptual, and integrative skills, such as the ability to read, conduct research, and synthesize information; 2) communication skills, such as the ability to communicate orally and in writing with others; 3) behavioral and social attributes, including the ability to interact civilly with others; 4) attendance and participation, including the ability to regularly and punctually attend class; and 5) time management, including the ability to meet deadlines. DARBY DICKERSON, NASPA LEADERSHIP EXCHANGE, MANDATORY WITHDRAWAL AND LEAVE OF ABSENCE REVISITED 28-29 (2007) (cited by THE JED FOUNDATION, STUDENT MENTAL HEALTH AND THE LAW: A RESOURCE FOR INSTITUTIONS OF HIGHER EDUCATION (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156124)).

125. Lennon & Sanghavi, *supra* note 36.

should allow the assessed student to provide documentation from his or her therapist or other health care provider, as well as consider that documentation when determining the course of action.<sup>126</sup> This should be done both before the student takes a leave of absence and while school officials evaluate whether the student may return to campus.

8. Train staff members who meet with transfer students or admitted students who disclose a disability to refer any such students to the college or university's disability services office. Staff should also be trained to contact that office to ensure that the student has followed through.<sup>127</sup>

9. Train faculty and staff on how to respond to disruptive or threatening students in a classroom, office, or student activities setting.<sup>128</sup>

10. If a college or university has no threat assessment committee (behavioral assessment team, etc.), it should create one and train its members.<sup>129</sup>

The above suggestions are simply a beginning, and may not address all of the issues posed by students who engage in disruptive or risky behavior. However, these suggestions should help colleges and universities respond lawfully and productively to emergency situations, and they will help colleges and universities avoid legal liability while striving to meet the needs of these students.

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126. Letter to Georgetown Univ., OCR Docket No. 11-11-2044 (Oct. 13, 2011), available at [http://www.nacua.org/documents/GeorgetownU\\_OCRLetter\\_October2011.pdf](http://www.nacua.org/documents/GeorgetownU_OCRLetter_October2011.pdf).

127. Spring Arbor Letter, *supra* note 44.

128. Stuart, *supra*, note 12. See, e.g., 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](http://dos.cornell.edu/dos/cms/upload/244734_StuHndBk_allPgs_LoRes.pdf).

129. For a good source of training materials for threat assessment teams, see U.S. DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, CAMPUS THREAT ASSESSMENT CASE STUDIES (2012), available at [http://www.nacua.org/sec\\_uredocuments/resourcepagedocs/DistressedSuicidalSs/CampusThreatAssessmentCaseStudies.pdf](http://www.nacua.org/sec_uredocuments/resourcepagedocs/DistressedSuicidalSs/CampusThreatAssessmentCaseStudies.pdf).



# THE DEVIL IS IN THE DETAILS: WILL THE CAMPUS SAVE ACT PROVIDE MORE OR LESS PROTECTION TO VICTIMS OF CAMPUS ASSAULTS?

SUSAN HANLEY DUNCAN\*

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## INTRODUCTION

Campus violence, especially sexual harassment which includes sexual violence, remains a major issue facing colleges and universities today. Colleges and universities must not abrogate their legal obligations to law enforcement; they have a shared responsibility under federal civil rights laws to proactively provide safe environments for students to live and learn. Despite several laws addressing the problem, guidance from federal agencies, and greater education efforts, the statistics still reflect a sad reality— young people in colleges and universities, especially young women, are not safe. The White House Council on Women and Girls released a report in January 2014, *Rape and Sexual Assault: A Renewed Call to Action*, which portrayed a frightening landscape of sexual violence on college campuses, in the military, and among certain defined populations including LGBT individuals and Native American women.

More needs to be done now. To that end, President Obama and Congress recently revised legislation hoping these modifications would make college and university campuses safer. In addition, the President formed a White House Task Force to Protect Students from Sexual Assault, a task force of senior administration officials to provide him with recommendations within ninety days on the topic of best practices for preventing and responding to sexual assault and rape. In addition, he requested that the task force explore how well universities and colleges are complying with the law, and provide him with ideas on how to increase transparency with enforcement and encourage better collaboration between governmental agencies enforcing the law.

This renewed focus on campus sexual assaults comes at the same time the new Campus Sexual Violence Elimination Act (Campus SaVE Act) goes into effect on March 7, 2014. This new law seeks to increase transparency, accountability, and education surrounding the issue of campus violence, including sexual assaults, domestic violence, dating violence and stalking. The law remains hotly debated within victim advocate circles and college and university administrators as to whether it will help victims or reduce their protections under Title IX. All the interested parties agree, however, that the law leaves many questions unanswered and are anxiously watching the negotiated rulemaking process in hopes for more clarity.

This paper will first briefly give a context for the sexual assault problem

by exploring the statistics and the impact of campus violence on its victims. Part Three will review the existing law and the recent amendments to those laws. Part Four will consider the reactions to these changes. Part Five will outline the questions and concerns that still remain. The last section will highlight important strategies schools should adopt.

### I. THE SCOPE OF CAMPUS SEXUAL ASSAULT PROBLEM

The statistics are sobering. The American Association of University Women (AAUW) collects statistics from a variety of sources that reflect a widespread problem of campus sexual assaults and rapes which remains largely unreported:<sup>1</sup>

- In a nationally representative survey of adults, 37.4% of female rape survivors were attacked between ages eighteen and twenty-four.
- In a study of undergraduate women, nineteen percent had experienced attempted or completed sexual assault since entering college.
- Ninety-five percent of attacks are unreported, making sexual assault the “silent epidemic.” Sexual assault remains the most drastically underreported crime.
- Thirteen percent of women are stalked during the academic year, and each stalking episode lasts an average of sixty days.
- Ninety percent of women know the person who sexually assaulted or raped them.
- Forty-two percent of college women who are raped tell no one about the assault.
- Five percent of rape incidents are reported to the police. Ten times more rapes are reported to crisis lines than are reported to the police.
- Forty-two percent of raped women expect to be raped again.
- Although the majority of sexual violence acts involve women, men also are victims of this violence.<sup>2</sup>

Studies specific to campus sexual assaults produce findings that show:

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1. *Your Talking-Points Memo on Campus Sexual Assault*, AAUW, <http://www.aauw.org/resource/campus-sexual-assault-talking-points/> (last visited Sept. 12, 2014).

2. See generally MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* (1997).

- many assaults involve alcohol and/or drugs;<sup>3</sup>
- many assaults take place at a party;
- assailants are not strangers but known to their victims; and
- women are most at risk during the first weeks of freshman and sophomore year.<sup>4</sup>

Acquaintance rape victims suffer many of the same effects as stranger rape victims including: “shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction.”<sup>5</sup> These various conditions contribute to a drop off in academic performance and an inability to attend classes regularly.<sup>6</sup> Some students even drop out of school altogether because they must risk encountering their perpetrator on campus.<sup>7</sup>

Despite these statistics, colleges and universities rarely expel the perpetrators, often doling out little or no punishments greater than a slap on the

3. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014), *available at* [http://www.whitehouse.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf).

The dynamics of college life appear to fuel the problem, as many survivors are victims of what’s called ‘incapacitated assault’: they are sexually abused while drunk, under the influence of drugs, passed out, or otherwise incapacitated. Perpetrators often prey on incapacitated women, and sometimes surreptitiously provide their victims with drugs or alcohol. Perpetrators who drink prior to an assault are more likely to believe that alcohol increases their sex drive – and are also more likely to think that a women’s drinking itself signals that she’s interested in sex.

*Id.* at 14.

4. RANA SAMPSON, U.S. DEP’T OF JUSTICE PROBLEM ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDE SERIES NO. 17, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 7 (2003), *available at* <http://www.cops.usdoj.gov/files/RIC/Publications/e07063411.pdf>.

5. *Id.* at 8.

6. AAUW, *supra* note 1. The AAUW website offers the following observations about Academics and Achievement:

- In addition to physical and emotional damage, college students who have been victims of sexual assault suffer from a host of problems that impede their academic achievement.
- In nearly every case, victims cannot perform at the same academic levels that they did prior to the attack.
- Sexual assault sometimes causes students to be unable to carry a normal class load, and they miss classes more frequently. (This is often a result of social withdrawal or a way to avoid seeing the perpetrator.)
- Student victims regularly withdraw from courses altogether.
- In more traumatic incidents, victims leave the school until they recover, sometimes transferring to another college.

*Id.*

7. SAMPSON, *supra* note 4, at 8.

wrist. The Center for Public Integrity and National Public Radio (NPR) joined together to produce an award winning series exploring the problem of sexual assaults on American college and university campuses.<sup>8</sup> The reports uncover that victims find little support on campus, and that often school administrators fail to appreciate research showing many of the perpetrators to be serial rapists.<sup>9</sup>

## II. THE LAW

Several laws affirmatively require colleges and universities to protect students from sexual harassment including sexual violence. These laws focus on prevention by raising awareness of the problem of sexual harassment, including sexual violence, and also provide for investigations and penalties for those schools that do not comply with their obligations under the law.

### A. Title IX

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive federal financial assistance. Title IX states 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.”<sup>10</sup>

Under Title IX, discrimination based on sex includes sexual harassment, sexual violence, and sexual assault.<sup>11</sup> Title IX also prohibits retaliation against individuals who complain about or participate in an investigation regarding an alleged Title IX violation.<sup>12</sup> Title IX requires institutions to

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8. Center for Public Integrity & NPR, *Seeking Justice for Campus Rapes*, NPR, <http://www.npr.org/series/124073905/seeking-justice-for-campus-rapes> (last visited Sep. 12, 2014).

9. Joseph Shapiro, *Rape Victims Find Little Help On College Campuses*, NPR, Feb. 27, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=124148857>; Joseph Shapiro, *Myths That Make It Hard To Stop Campus Rapes*, NPR, Mar. 4, 2010, <http://www.npr.org/templates/story/story.php?storyId=124272157>.

10. Title IX § 901(a), 20 U.S.C.A. § 1681(a) (2012).

11. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). See also U.S. Dep’t of Educ., Off. For Civ. Rts., Dear Colleague Letter (2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Dear Colleague*, April 2011]. Letter includes sexual violence within the definition of sexual harassment. Sexual violence “refers to physical sexual acts perpetrated against a person’s will or where a person may be unable to give consent due to an intellectual or other disability.” *Id.* at 1. Such sexual acts include “rape, sexual assault, sexual battery, and sexual coercion,” and these acts are forms of sexual harassment under Title IX. *Id.* at 1–2.

12. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

stop the harassment, prevent future occurrence, and remedy its effects.<sup>13</sup>

Title IX permits a student to bring a private cause of action for monetary damages against an institution for sexual harassment.<sup>14</sup> The legal standard requires a plaintiff to prove the school to be deliberately indifferent in the face of actual knowledge of harassment that is severe, pervasive, and objectively offensive.<sup>15</sup> In addition to private causes of action, Title IX also contemplates an administrative enforcement which permits the Department of Education's Office for Civil Rights (OCR) to perform compliance reviews, investigate individual complaints which seek injunctive relief, and provide technical assistance.<sup>16</sup> Unlike the legal standard for private causes of action for monetary relief, the legal standard for these administrative proceedings only requires that an institution knew or should have known of the sexual harassment.<sup>17</sup> These investigations allow OCR to review policies and procedures of colleges and universities and their implementation of those policies and procedures. If OCR determines the institution is not in compliance, the institution is given the opportunity to voluntarily comply.<sup>18</sup> The Department of Education rarely suspends funds from the college or university, but instead resolves issues by reaching an agreement with a letter of finding and a voluntary resolution agreement.<sup>19</sup>

Although in principle Title IX gives the Department of Education an excellent enforcement mechanism, in reality this has not been the case. Relatively few students know about the complaint procedure, compliance reviews remain rare absent a complaint, inconsistent investigations occur

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13. 34 C.F.R. § 106.3 (2013); *Dear Colleague Letter*, April 2011, *supra* note 11, at 4 (stating that “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects”).

14. *Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60 (1992).

15. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *Davis*, 526 U.S. at 651.

16. 34 C.F.R. § 100.7 (2013).

17. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at ii–v, 12–13, U.S. DEPT. OF EDUC. (Jan. 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (noting that “if the school knows or reasonably should know about the harassment” is a proper standard in administrative proceedings because of the concern for “possibility of a money damages award against a school for harassment about which it had not known” and noting in footnote 2 that the standard applies “to private actions for injunctive and other equitable relief”). *See also* U.S. DEPT. OF JUSTICE, TITLE IX LEGAL MANUAL, *available at* <http://www.justice.gov/crt/about/cor/coord/ixlegal.php>.

18. 34 C.F.R. § 100.7(d) (2013).

19. Nancy Chi Cantalupo, *Burying Our Head in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L. J. 205, 234 (2011).

between schools, and the agency rarely rules against schools.<sup>20</sup> The difficulty in obtaining records of the investigations also makes it challenging to collect and compile a comprehensive list of the Department of Education's findings and sanctions.<sup>21</sup> Perhaps in response to these criticisms, the Department of Education recently published two high profile resolution agreements with the University of Montana and the University of Notre Dame.<sup>22</sup> These agreements provide a template for other institutions regarding their obligations and responsibilities under Title IX. The agreements reinforce important components of the law which require institutions to make sure their student bodies are well informed about sexual harassment policies and procedures and that investigations will be taken seriously and conducted in a timely manner.

### B. Clery Act<sup>23</sup>

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), enforced by the United States Department of Education, requires all colleges and universities that receive federal aid to report annual crime statistics and campus security information. This law is named in honor of Jeanne Clery, who was raped and killed while a freshman at Lehigh University.<sup>24</sup> Congress amended the statute to institute a sex offender notification requirement and campus emergency response protocols.<sup>25</sup> In addition, later amendments made it illegal to retaliate against the victim or whistleblowers.<sup>26</sup>

The Clery Act is quite extensive and requires colleges and universities to:

- Publish an Annual Security Report (ASR).
- Have a public crime log.
- Disclose crime statistics for incidents that occur on cam-

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20. Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NPR, Feb. 10, 2010, <http://www.npr.org/templates/story/story.php?storyId=124001493>.

21. Cantalupo, *supra* note 19, at 236–42.

22. U.S. DEP'T OF JUSTICE & DEP'T OF EDUC., RESOLUTION AGREEMENT: AMONG THE UNIVERSITY OF MONTANA–MISSOULA, THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, EDUCATIONAL OPPORTUNITIES SECTION AND THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS (2013), *available at* <http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf>; U.S. DEP'T OF JUSTICE & DEP'T OF EDUC., RESOLUTION AGREEMENT: UNIVERSITY OF NOTRE DAME (2011), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-b.pdf>.

23. 20 USC § 1092(f)(1)–(15) (2012).

24. *Summary of the Jeanne Clery Act*, CLERY CTR., <http://clerycenter.org/summary-jeanne-clery-act> (last visited Sep. 12, 2014). By its 1998 amendments Congress renamed the Campus Security Act in honor of Jeanne Clery.

25. *Id.* These changes resulted from the 2000 and 2008 amendments.

26. *Id.* The 2008 amendment made this addition.

pus, in unobstructed public areas immediately adjacent to or running through the campus and at certain non-campus facilities.

- Issue timely warnings about Clery Act crimes which pose a serious or ongoing threat to students and employees.
- Devise an emergency response, notification, and testing policy.
- Compile and report fire data to the federal government and publish an annual fire safety report.
- Enact policies and procedures to handle reports of missing students.<sup>27</sup>

As with Title IX, the Department of Education rarely fines colleges and universities for Clery Act violations. NPR reported that the Department of Education has only fined six colleges and universities.<sup>28</sup>

### C. Guidance on Sexual Harassment from the Department of Education

In an effort to assist colleges and universities in complying with the law, the Department of Education Office for Civil Rights periodically issues guidance documents which contain information that educational institutions can use when investigating and resolving allegations of sexual harassment. Very comprehensive guidance documents were issued in 1997,<sup>29</sup> and another document was issued in 2001 that incorporated two Supreme Court cases on the topic.<sup>30</sup> At the time of Title IX's passage, there was uncertainty whether it included sexual harassment. In the 1990s, the Supreme Court decided this in the affirmative with two cases. The first involved alleged sexual harassment between a student and a teacher, and the second case involved peer-on-peer sexual harassment.<sup>31</sup> The Supreme Court adopted a standard for when an educational institution would be liable for a private action under Title IX for monetary damages.<sup>32</sup> For liability, the Court re-

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27. *Id.*

28. Shapiro, *supra* note 20.

29. Office for Civil Rights, *Sexual Harassment Guidance 1997*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited Sept. 12, 2014).

30. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC., Jan. 19, 2001, <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

31. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

32. *Davis*, 526 U.S. at 651; *Gebser*, 524 U.S. at 277.

quired actual knowledge of a school official who had authority to address the harassment, deliberate indifference by that official, and harassment that was “severe, pervasive, and objectively offensive.”<sup>33</sup>

As discussed above, the Revised Guidance made clear that the Supreme Court opinions with their legal standards applied to private actions, not administrative proceedings.<sup>34</sup> Other highlights included:

- Emphasizing that separate policies and grievance procedures help the community understand the nature of sexual harassment and that it will not be tolerated.
- Giving guidance on actions schools could take when a victim wanted to remain anonymous.
- Identifying which employees needed to be trained and the content of the trainings. In particular, the Department emphasized what the Title IX coordinator needed to know including basic definitions and familiarity with how grievance procedures operate.
- Supplying examples of how to eliminate hostile environments when many students were involved.<sup>35</sup>

The Department of Education issued a Dear Colleague letter in 2011 that supplemented its previous guidance.<sup>36</sup> Highlights of that letter included:

- Schools are not relieved of their investigatory obligations just because law enforcement is also investigating the behavior. In addition, schools need to address the effects of the harassment before the investigation is concluded.
- The correct standard for grievance procedures is preponderance of evidence, not clear and convincing.
- Both parties must have equal access to evidence, the same opportunities to present witnesses, have an attorney present, or appeal a decision.
- Grievance procedures must be posted and include timeframes for all major stages of the procedure. Victims must be advised of their right to file a grievance.
- All institutions must identify and publish the name of a Title IX coordinator and ensure that person is properly trained in both sexual harassment and the grievance procedures.
- Schools may have an obligation to investigate off campus activities if the effects create a hostile environment on campus.
- FERPA does not prohibit, and Title IX requires, the outcome of a disciplinary proceeding against a perpetrator be communicated to the

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33. *Davis*, 526 U.S. at 633.

34. *See supra* note 17 and accompanying text.

35. *See id.*

36. *Dear Colleague Letter*, April 2011, *supra* note 11.



witness.

- Institutions are encouraged to develop proactive measures to prevent sexual harassment including preventive education programs and victim resources.

#### D. The Campus Sexual Violence Elimination Act

As part of the Violence Against Women Reauthorization Act (VAWRA), President Obama signed into law in March 2013 a new provision known as the Campus Sexual Violence Elimination Act (Campus SaVE Act) which imposes new obligations on colleges and universities.<sup>37</sup> The Campus SaVE Act codifies some, but not all, of the provisions in the April 2011 Dear Colleague Letter. Institutions now have new reporting requirements, new student disciplinary requirements and new requirements to educate students and employees about sexual violence. Specifically, institutions as part of their annual reporting requirements under the Clery Act must report by October 1, 2014, incidents of domestic violence, dating violence, and stalking that are reported to campus security authorities or local police agencies.<sup>38</sup> In addition, institutions must report on programs they use for prevention of these offenses as well as the procedures they utilize, including the standard of evidence used for disciplinary procedures.<sup>39</sup>

The new changes address necessary components of prevention and awareness programs, including bystander intervention education for all incoming students and new employees; however, the statute does not make clear whether these programs must be mandatory or just available.<sup>40</sup> The prevention and awareness programs must be ongoing and should include risk reduction tips and warning signs of abusive behavior.<sup>41</sup> Investigations and disciplinary proceedings should be conducted by school personnel who receive specific training on domestic violence, sexual assault, and stalking.<sup>42</sup>

In addition, several directives relate to what procedures must be used in investigating and conducting student disciplinary hearings. Some of the additions center upon providing certain information and services to the victim. Information must be given to the victim about the disciplinary policy and potential sanctions as well as contact information for counseling services, legal assistance, and medical care.<sup>43</sup> Victims can request a change in

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37. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013).

38. *Id.* at § 304(a)(1)(B)(iii).

39. *Id.* at § 304(a)(5).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

academic, living, transportation, and working situations to avoid a hostile environment.<sup>44</sup> Colleges and universities must also assist them if they want to obtain or enforce a no contact directive or restraining order.<sup>45</sup> Finally, campus authorities must assist victims if they choose to report the incident to law enforcement.<sup>46</sup>

Other rights apply to both the victim and the accused, including that proceedings be prompt, fair, and impartial.<sup>47</sup> Both parties may have others present at the proceeding, and both shall be simultaneously informed of the outcome in writing.<sup>48</sup> Although the policy describing the disciplinary policy must include the standard of evidence to be used, no specific standard is articulated in the statute itself.<sup>49</sup> The 2011 Dear Colleague letter specifies the standard as “preponderance of the evidence”, but Congress did not incorporate this standard into the statute, which is causing confusion about what standard institutions are required or permitted to use. Finally, institutions must address in their policies how victims’ confidentiality will be protected.

#### E. Reactions to the Campus SaVE Act

One can feel sympathy for campus administrators faced with complying with so many laws. The Campus SaVE Act adds yet another layer of directives and guidance that campus administrators must integrate with the previous body of guidance which is not always consistent. Despite this, many sexual assault advocates hailed the new legislation as a major advance for women.<sup>50</sup> Lawmakers also celebrated its passage with its sponsors promising it would give colleges and universities more guidance and provide the public with more information.<sup>51</sup>

Although many advocacy groups pushed for its passage, some warn that the Campus SaVE Act does not codify the Dear Colleague letter, but instead waters down the protections afforded under Title IX. An especially vocal critic is Wendy Murphy, a New England attorney specializing in

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44. *Id.*

45. *Id.* See amended ¶ 8(B)(iii)(IV).

46. *Id.* See amended ¶ 8(B)(iii)(III)(bb).

47. *Id.* See amended ¶ 8(B)(iv)(I)(aa).

48. *Id.* See amended ¶ 8(B)(iv)(II-III).

49. *Id.* See amended ¶ 8(A)(ii).

50. Tyler Kingkade, *College Sexual Assault Victim Advocates Hail VAWA Passage*, HUFFINGTON POST, Mar. 1, 2013, [http://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vawa\\_n\\_2786838.html](http://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vawa_n_2786838.html).

51. Kristin Lombardi, *Campus Sexual Violence Elimination Act Headed For President’s Signature*, CTR FOR PUBLIC INTEGRITY, Mar. 1, 2013, <http://www.publicintegrity.org/2013/03/01/12259/campus-sexual-violence-elimination-act-headed-presidents-signature>.

crime victims, women, and children.<sup>52</sup> She attacks the law on several fronts and questions whether it is a result of the lobbying of elite schools which the OCR has been investigating for years.<sup>53</sup> In particular, she takes issue with the standard of evidence provision, arguing that institutions could now choose a more stringent standard than the “preponderance of evidence” that the Dear Colleague letter previously instructed institutions to use with sexual harassment investigations.<sup>54</sup> She also raises concerns over the mandate to apply state criminal law standards to a determination of whether a federal civil rights violation occurred.<sup>55</sup> For example, she points to criminal law standards pertaining to sexual assault that require proving non-consent, penetration, and force as compared to federal civil rights laws that merely require that the sexual assault be “unwelcome,” offensive and based on sex.<sup>56</sup>

On February 24, 2014, a University of Virginia rape victim filed a lawsuit to halt the implementation of the Campus SaVE Act scheduled to go into effect on March 7.<sup>57</sup> She filed the lawsuit to prevent provisions of the new Campus SaVE Act from being applied to her previously filed Title IX lawsuit.<sup>58</sup> The underlying Title IX lawsuit centers upon an allegation that the University of Virginia mishandled her rape investigation by falsifying medical records and destroying photographs of her injuries.<sup>59</sup> The Department of Education and the Department of Health and Human Services investigation of UVA is now over 18 months old.<sup>60</sup> The lawsuit requests that Campus SaVE not be applied by the agencies to the ongoing investigation because the changes in the law would be detrimental to her case.<sup>61</sup> She argues that the new law allows a change to the standard of evidence which provides her with less protection and thereby negatively impacts her claim.<sup>62</sup> She asks the court to not only halt the implementation of the

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52. Wendy Murphy, *The Harsh Truth About Campus Sexual Assault*, WENDY MURPHY LAW, <http://wendymurphy.com/the-harsh-truth-about-campus-sexual-assault/> (last visited Sep. 12, 2014).

53. *Id.*

54. *Id.*

55. Wendy Murphy, *Campus ‘SaVE’ Law Does Exact Opposite*, WOMEN’S ENEWS, Jan. 22, 2014, <http://womensenews.org/story/education/140121/campus-save-law-does-exact-opposite#.Uz8FeagwdcY>.

56. *Id.*

57. James R. Marsh, Press Release: *Landmark Civil Rights Action Filed By Campus Rape Victim to Halt New Federal Law*, PR NEWSWIRE, March 2, 2014, <http://www.prnewswire.com/news-releases/landmark-civil-rights-action-filed-by-campus-rape-victim-to-halt-new-federal-law-248124061.html>.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Campus SaVE Act in her case, but for all women, alleging it is unconstitutional on several grounds because it treats victims of sexual violence differently than other protected class categories.<sup>63</sup> Multi-year Title IX investigations against Harvard and Princeton continue which could also be impacted by the change in law.<sup>64</sup>

The press release quotes Dr. Bernice Sandler:

SaVE places a greater burden of proof on the victim, while also subjecting women to disparate legal protections depending on where their college is located because SaVE incorporates state criminal law standards into assessments of federal civil rights violations. Title IX, as a federal law, was intended to protect the rights of all women equally, no matter where they go to college. I hope the federal court takes steps to protect women's right to equality and safety in education.<sup>65</sup>

The outrage over the proper standard of evidence originates not only from the victims but also the accused. Several men who were disciplined for a Title IX offense recently filed lawsuits against their universities.<sup>66</sup> Like their female accusers, these men also use Title IX to allege that their rights were violated.<sup>67</sup> Specifically the men complain about a lack of training of officials, subpar investigations, and a bias against them.<sup>68</sup> Lawsuits were filed against Xavier University, Vassar College, Williams College, Bucknell University, St. Joseph's University, and College of the Holy Cross.<sup>69</sup> In one of the cases, a former basketball player sued Xavier over his expulsion for a sexual assault after the County Prosecutor did not bring rape charges, finding the sex to be consensual.<sup>70</sup>

### III. ISSUES THAT REMAIN: THE NEGOTIATED RULEMAKING PROCESS

The Department of Education is currently engaged in negotiated rule-making which will culminate in new regulations to implement the changes that the Violence Against Women Act (VAWA) made to the Clery Act.<sup>71</sup> Proposed regulations will probably not be available until late 2014 and un-

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63. *Id.*

64. Wendy Murphy, *supra* note 52.

65. Marsh, *supra* note 57.

66. John Lauerman, *College Men Accused of Sexual Assault Say Their Rights Violated*, BLOOMBERG, Dec. 16, 2013, <http://www.bloomberg.com/news/2013-12-16/college-men-accused-of-sexual-assault-say-their-rights-violated.html>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Negotiated Rulemaking 2013-2014 Violence Against Women Act (VAWA)*, U.S. DEP'T OF EDUC., available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html>.

til then institutions are to “make a good faith effort to comply with the statutory requirements.”<sup>72</sup> Prior to the three negotiation sessions, the Department held three conference calls with institutional administrators, campus public safety officials, and advocacy groups to help get feedback and set the agenda.<sup>73</sup> Questions that arose during these calls centered upon:

- how new crimes would be reported;
- how new terms would be defined;
- how VAWA would impact institutional disciplinary proceedings and crime investigations;
- how the Clery Act will interact with institutional responsibilities under Title IX;
- how institutions would implement the new education and training requirements; and
- possible content guidelines for the new education and training requirements.<sup>74</sup>

Three negotiation sessions occurred during spring of 2014. In addition, the Department of Education published issue papers to help direct the discussions. Nine primary negotiators and nine alternative negotiators from different constituencies took part in the negotiated rulemaking with three Department of Education representatives and two facilitators.<sup>75</sup> The Department of Education representatives introduced each section of the regulations by walking the participants through the text and the rationale behind the choices made. The facilitators then allowed the negotiators to comment on the provisions. At the end of the meetings, the public participants could offer their commentary. AAUW blogged the proceedings and interested

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72. Lynn Mahaffie, *Implementation of Changes Made to the Clery Act by the Violence Against Women Reauthorization Act of 2013*, INFORMATION FOR FINANCIAL AID PROFESSIONALS, May 29, 2013, <http://www.ifap.ed.gov/eannouncements/052913ImplementofChangesMade2CleryActViolenceAgainstWomenReauthorizationAct2013.html>.

73. Summary of the Conference Calls with Campus Safety Advocates (Dec. 17, 2013), <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawacall-safetyadvocs.html>; Summary of the Conference Calls with Institutional Administrators (Dec. 11, 2013), <http://www2.ed.gov/policy/highered/hearulemaking/2012/vawacall-institadmin.html>; Summary of the Conference Calls with Public Safety Officials (Dec. 12, 2013), <http://www2.ed.gov/policy/highered/hearulemaking/2012/vawacall-publicsafety.html>.

74. *See supra* note 73.

75. Negotiators represent many different stakeholders including various institutions' representatives (two-year public, four-year public, private non-profit, private for-profit), LGBT representatives, campus safety officials, campus safety advocates, legal assistance organizations, student affairs representatives, students, etc. For a full list of negotiators, see U.S. DEP'T OF EDUC., VAWA NEGOTIATED RULEMAKING COMMITTEE 2013, *available at* <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf> (last visited Sep. 12, 2014).

parties can read the postings at their website.<sup>76</sup>

A. What definitions should we establish for new terms in the statute?<sup>77</sup>

Several new terms were added to the Clery Act that remain undefined in the regulations. One sticking point with using the same definitions that the Violence Against Women Act uses is that certain definitions are dependent upon the definition given in a particular jurisdiction. For example, the VAWA domestic violence definition specifically refers to the domestic or family violence laws of the jurisdiction. This becomes problematic for colleges and universities with campuses in multiple jurisdictions and will make it difficult to compare data between colleges and universities located in various jurisdictions. Further complicating the matter is that the definitions used in the Clery Act for reporting criminal offenses may be different than those required to be used for training students and employees. Training programs must use statutory definitions found in their respective jurisdictions.<sup>78</sup> What this could mean is that institutions will be forced to report incidents that occur on campus based on definitions in the regulations implementing the Clery Act, but these incidents may not actually be a crime in the jurisdiction.<sup>79</sup>

The definitions for dating violence and stalking also leave ambiguities. For example, what duty do colleges and universities have to investigate the nature of a dating relationship to ascertain whether it meets the definition of either stalking or dating violence? Some may argue that asking the victim about the nature of the relationship should be sufficient.<sup>80</sup> Several issues surround the stalking term, including how it differs from intimidation. Another major uncertainty is how to report cyberstalking since it does not neatly fit into any of the existing geographical categories currently used for reporting. The initial recommendations from the subcommittee would re-

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76. *Live Blog Covers New Campus Sexual Assault Rules*, AAUW, Jan. 13, 2014, <http://www.aauw.org/2014/01/13/live-blog-campus-sexual-assault-rules/>; *Live Blog: Campus SaVE Rulemaking Day Four*, <http://live.24liveblog.com/1259191> (Feb. 25, 2014).

77. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMMITTEE, ISSUE PAPER #1, available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue1definitions.pdf> [hereinafter *Issue Paper #1*].

78. Hillary L. Pettegrew, *The Campus SaVE Act: A Compliance Guide*, UNITED EDUCATORS RISK RESEARCH BULLETIN, available at [https://www.ue.org/Libraries/Corporate/The\\_Campus\\_SaVE\\_Act\\_A\\_Compliance\\_Guide.sflb.ashx](https://www.ue.org/Libraries/Corporate/The_Campus_SaVE_Act_A_Compliance_Guide.sflb.ashx).

79. *Live Blog*, *supra* note 76. The posting at 16:00 on Day One discusses this very point. More discussion on this can be found on Day Two at 14:50–15:08.

80. See *Issue Paper #1*, *supra* note 77, at 2. An incident may be labeled dating violence if the perpetrator is one “who is or has been in a social relationship of a romantic or intimate nature with the victim.” *Id.*

quire reporting of cyberstalking when the activity is sent or received on campus, but negotiations still continue on this point.<sup>81</sup> Other definitional issues arise when attempting to harmonize the FBI's definitions of sex offenses with VAWA's definitions.

Finally, the education programs required by the statute leave many questions unresolved. Institutions want more direction about the distinction between primary and ongoing prevention and awareness programs. Also, confusion exists about the meaning of "ongoing," "campaign," "awareness programming," "primary prevention," and "bystander intervention." Early negotiations define primary prevention as education that is designed to prevent sexual violent behavior from occurring by promoting positive and healthy behaviors based on a public health model.<sup>82</sup> In contrast, awareness programming focuses more on intervention and making sure participants know how to support and respond to sexual violence once it occurs.<sup>83</sup> More guidance needs to be given on how institutions are expected to track participation in these trainings.<sup>84</sup> Finally, the statute requires ongoing training for faculty and students but does not specifically mention staff, a major population on campus who interact with students on a regular basis (e.g. Resident Advisors, Advisors, Teaching Assistants, etc.) and often receive reports of sexual harassment.

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81. U.S. DEP'T OF EDUC., STALKING SUBCOMMITTEE RECOMMENDATIONS, *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-stalkingrecomm.pdf>.

82. U.S. DEP'T OF EDUC., PREVENTION-TRAINING SUBCOMM, PREVENTION RECOMMENDATIONS, *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-preventiontrng.pdf>

83. *Id.*

84. Some confusion currently exists as to whether these trainings must be mandatory. The Department of Education appears to be taking the position that these programs are not mandatory. *See Live Blog: Campus SaVE Rulemaking Day Four*, AAUW (Feb. 25, 2014, 11:14 AM), <http://live.24liveblog.com/1259191>. "Department indicating they see no reason that these programs should have mandatory attendance by all students." *Id.* Thinking the trainings would be mandatory spurred some universities to start designing programs to reach all students. For example, the University of Louisville initially planned for new students to complete the alcohol.edu/Haven (Helping Advocated for Ending Violence Now) computer module, which can track completion. AlcoholEdu/Haven, UNIV. OF LOUISVILLE, <http://louisville.edu/campushealth/alcoholedu-haven> (last visited Sep. 12, 2014). Students not completing the module would be unable to register for spring classes until they complete it. *Id.*

B. How should institutions count and disclose statistics for reported offenses in the new crime categories?<sup>85</sup>

Several issues surround how institutions will tally and disclose information. Currently, institutions count multiple offenses that take place within a single incident differently depending on how they are categorized. For example, the protocol for some incidents counts only the most serious offense (e.g. a murder and not a rape) while at other times, offenses are counted individually if they involve a specific offense such as a hate crime. The Department of Education must decide whether these new offenses will be included in a Hierarchy Rule of reporting or reported individually in a different place of the report.<sup>86</sup> In addition, problems may arise when using the FBI's Uniform Crime Reporting system to count incidents of domestic violence, dating violence, and stalking incidents. The Clery Act does not require the reporting of simple assaults. Under the FBI reporting system, stalking is reported as a simple assault as well as domestic violence and dating violence that does not involve serious injuries or use of a weapon. One can imagine this simple assault classification will result in many incidents not being reported because much of the violence on campuses involves threatening behavior which does not rise to the more dangerous terrorism type behaviors that are associated with long-term relationship domestic violence.<sup>87</sup> Moreover, the institutional safety officers expressed specific concerns about making sure the definitions are clear enough for officers to make judgments and avoid engaging in fine distinctions in the field which would be burdensome and lead to inconsistent application.<sup>88</sup> Although officers are well accustomed to what qualifies as domestic violence, they are not as familiar with how to identify dating violence.<sup>89</sup>

Additional issues arise with stalking since it involves a pattern of behav-

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85. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #2: COUNTING REPORTED OFFENSES IN NEW VAWA CATEGORIES, *available at* <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue2counting.pdf>.

86. At the time this article was written, the negotiators had not reached consensus about this issue and a subcommittee was going to be formed to discuss it further. Additional work is necessary to resolve this point as some negotiators think counting this would lead to a skewed perception of over-counting while others think not counting would fail to provide a clear picture of what is occurring on campuses. Telephone Interview by Susan Duncan with Holly Rider-Milkovich, Four Year Public Institutions Non-Federal Alternate Negotiator & Director, Sexual Assault Prevention and Awareness Center and Co-Chair, Abuse Hurts Initiative, Univ. of Michigan (Feb. 27, 2014) [hereinafter Interview with Holly Rider-Milkovich].

87. Telephone Interview by Susan Duncan with Sharon LaRue, Director, University of Louisville PEACC Program (Feb. 26, 2014) [hereinafter Interview with Sharon LaRue].

88. Interview with Holly Rider-Milkovich, *supra* note 86.

89. *Id.*



ior and institutions will need guidance whether they must report the first incident or wait until a certain number of incidents have occurred. Again, this presents problems because one could argue one incident of stalking may be serious enough if the individual is in fear of his or her life or safety.<sup>90</sup> Initial subcommittee recommendations advise that the passage of time between stalking incidents supports counting each as a separate incident.<sup>91</sup>

C. What process should institutions use for cases involving sex offenses and related incidents?<sup>92</sup>

Many questions revolve around the Campus SaVE Act's modification of the procedures institutions will now be required to follow as well as information they will be required to share with students about those procedures. The statute requires institutions to identify the standard of evidence that will be used in disciplinary procedures. Previous guidance from the Department of Education required institutions to use a preponderance of the evidence standard for sexual harassment matters, but, by failing to incorporate this standard into the law, Congress arguably allowed colleges and universities to make individualized decisions on the appropriate standard of evidence. During the rulemaking sessions, the Department of Education articulated that it would be statutory overreach to require a preponderance of evidence standard on matters that did not involve elements of sexual harassment, but that standard was still required for all sexual harassment matters.<sup>93</sup> Nevertheless, institutions may still choose to use that standard even for non-sexual harassment matters. Regardless, since most incidents of domestic or dating violence do involve elements of sexual harassment, the preponderance of evidence standard will be mandated much of the time.<sup>94</sup>

A similar question arises as to whether appeals must be granted or if that is left with the institution's discretion.<sup>95</sup> A persistent complaint of previous Title IX procedures was the often-lengthy time it took for an investigation to be completed. The new law requires that the proceedings provide a "prompt, fair and impartial investigation and resolution", but debate still

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90. Interview with Sharon LaRue, *supra* note 87.

91. U.S. DEP'T OF EDUC., VAWA STALKING SUBCOMM., STALKING RECOMMENDATIONS, available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-stalkingrecomm.pdf>.

92. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #3: LEGAL PROCESSES IN CASES INVOLVING SEX OFFENSES AND RELATED INCIDENTS, available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue3disciplinary.pdf>.

93. Interview with Holly Rider-Milkovich, *supra* note 86.

94. *Id.*

95. Another issue is the dearth of information available to victims on the process used with appeals.

exists whether that requires the final determination to be completed within any specified timeframe. Other provisions suffering from vagueness include the type of training required for the decision-makers of the disciplinary proceedings as well as how to provide simultaneous written decisions to the parties. Questions still remain about the role of a representative at the proceedings and what they can and cannot do, including examining witnesses. Specifically, some state laws or institutions allow the accused to have an attorney and the question arises about whether that right should also be given to the accuser.<sup>96</sup> The Department of Education's position remains that students have a right to any person they choose to be their advisor and campuses can limit the advisor's roles as long as that is applied equally to both parties.<sup>97</sup> Finally, some gaps in the statute surfaced that need to be resolved. For example, the current statute does not prohibit an institution from requiring a victim to sign a "gag order" before releasing the final determination, despite previous guidance from the Department of Education that colleges and universities may not engage in such a practice.

As currently written, the law requires institutions to only provide final determinations and sanctions, but no rationale for these decisions. Not providing the rationale makes it very difficult for victims to determine whether they should appeal or not. For example, when a complaint is dismissed and no rationale is communicated to the victim, a person has no ability to evaluate whether the investigation and/or decision were misguided or were fair. The Department of Education did not include any regulations regarding whether rationales may or may not be included in the first version of the regulations, because they were still conferencing with the FERPA experts concerning the legality of such a requirement.<sup>98</sup>

D. What is the applicable jurisdiction for purposes of certain disclosures?<sup>99</sup>

Jurisdictions define the terms domestic violence, dating violence, stalking, and consent differently or not at all. As a result, during the negotiated

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96. Interview with Sharon LaRue, *supra* note 87. Some movement is gaining traction to train attorneys to serve as advocates for the victims. Often the accused brings counsel, yet the accusers do not engage counsel because of financial barriers or not wanting to tell their family. Unlike in a criminal proceeding when the victim can discuss the case with a prosecutor, this lack of an attorney to guide the victim in student proceedings seems to make the process unjust.

97. Interview with Holly Rider-Milkovich, *supra* note 86. Some negotiators continue to object to the presence of attorneys.

98. *Id.*

99. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #4: APPLICABLE JURISDICTION, *available at* <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue4jurisdiction.pdf>.

rulemaking process, the agency will need to grapple with how to handle these discrepancies and still make the definitions meaningful to the public. In addition, schools need guidance on the appropriate jurisdiction they should select to ascertain the legal definitions and how much deference this decision will receive.

E. What technical changes are necessary to update the Clery Act regulations and reporting systems?<sup>100</sup>

Issue Paper #5 serves as a placeholder to remind the agency to make changes to the Clery Act regulations and reporting system to reflect recent changes in other laws. These include changes concerning the memorandum of understanding between campus security personnel and law enforcement, incorporating an anti-retaliation clause into the regulations, and updating the bias categories in hate crimes as well as the definitions of sex offenses.

#### IV. IMPORTANT STRATEGIES SCHOOLS SHOULD ADOPT

As important as it is to have strong laws coupled with rigorous enforcement, colleges and universities must utilize additional non-legal strategies in their efforts to decrease sexual harassment on campus. Institutions can implement some of these while they wait on further clarity from the Department of Education's regulations. Although space prevents a thorough discussion of these strategies, they deserve to at least be highlighted.

A. Involve the Student Advocates from the Beginning

When developing procedures, institutions should strongly consider allowing reports to not only be made to the Dean of Students office or Public Safety officers, but also to the student advocate's office. A referral to the advocate's office from the Dean of Students or Public Safety does not produce the same result as having a person meet with the advocate at the time of the report to process the experience.<sup>101</sup> One more step in the system can be discouraging for a victim in a time of crisis. Research demonstrates that immediate advocacy helps the student recover in a timely manner and

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100. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #5: TECHNICAL CHANGES, available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue5technical.pdf>.

101. Rebecca Campbell, *Rape Survivors' Experiences with the Legal And Medical Systems: Do Rape Victim Advocates Make A Difference?* 12(1) VIOLENCE AGAINST WOMEN 30 (2006); Rebecca Campbell et al., *The Effectiveness Of Sexual Assault Nurse Examiner (SANE) Programs: A Review Of Psychological, Medical, Legal, And Community Outcomes*, 6(4) TRAUMA, VIOLENCE, AND ABUSE 313 (2005) (examining studies finding victims experience secondary trauma when reporting to police, prosecutors, or medical personnel).

move on to achieve their academic and life goals.<sup>102</sup> Protocols should be revised to incorporate the advocate from the first initial stages.

#### B. Educate and Empower the Bystanders

Both the President and Vice President continue to challenge this nation to change its attitude about sexual assault and view it as a crime and not a private matter. When drafting the initial Violence Against Women Act, then Senator Biden stated,

Through this process, I have become convinced that violence against women reflects as much a failure of our nation's collective moral imagination as it does the failure of our nation's laws and regulations. We are helpless to change the course of this violence unless, and until, we achieve a national consensus that it deserves our profound public outrage.<sup>103</sup>

Myths continue to persist as well as rape and sexual assault supportive attitudes.

Current research indicates that then Senator Biden was absolutely right in his assessment that attitude and behavioral change will not occur until the broader community becomes involved.<sup>104</sup> Sexual assault prevention cannot be limited to professionals in the field, but rather requires the general public to take responsibility for its elimination.<sup>105</sup> Strategies need to move beyond policies and procedures to changing climates making sexual violence an unacceptable norm and therefore more unlikely to occur.<sup>106</sup> A wealth of research exists exploring what motivates and deters bystanders from getting involved, including not understanding the need, lacking the skills to intervene, and viewing costs as outweighing the benefits.<sup>107</sup>

The role of bystanders remains a key component then to successful violence prevention strategies.<sup>108</sup> Many evidence based bystander intervention trainings exist including the one designed by Dr. Dorothy Edwards.<sup>109</sup> The

102. Campbell et. al., *supra* note 101; Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. OF INTERPERS. VIOLENCE 1239 (2001).

103. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra* note 3, at 33–34.

104. Victoria L. Banyard, Elizabeth G. Plante & Mary M. Moynihan, *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32(1) J. OF CMTY. PSYCHOL. 61, 64 (2004).

105. *Id.*"

106. *Id.* at 66.

107. *Id.* at 67–69. *See also* Victoria L. Banyard, Mary M. Moynihan & Maria T. Crossman, *Reducing Sexual Violence on Campus: The Role of Student Leaders as Empowered Bystanders*, 50(4) J. OF C. STUDENT DEV. 446, 449 (2009).

108. Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES, Feb. 9, 2014, at ED14.

109. *The Green Dot etc. Strategy*, GREEN DOT ETCETERA,

Green Dot Bystander Training empowers individuals to use their voices to produce a change in a climate that until now either accepted sexual violence or at least turned the other way.<sup>110</sup> The concept is a simple one that asks participants to imagine a map with red dots symbolizing all the acts of violence that occur within their community. These red dots reflect a single choice to harm another.<sup>111</sup> The participants then imagine if they could cover the map with green dots, which symbolizes a single choice of action which makes it less likely for a red dot to happen.<sup>112</sup> The training addresses the challenges and barriers that exist for students trying to intervene in a situation.<sup>113</sup> By offering a framework that includes a multifaceted approach of either directly intervening, delegating, or distracting, acts of violence can be prevented by the bystanders.<sup>114</sup> The belief behind the training is that cultural changes only occur when enough individuals believe their voice matters.<sup>115</sup> This training will be most impactful if conducted during the first few weeks of the semester, which are considered high-risk times for sexual assault.<sup>116</sup>

### C. Engage Men Directly

An important dynamic to changing the culture is to redefine the discussion that often characterizes sexual assault as a woman's issue. Men too experience sexual assault although not at the same levels as women.<sup>117</sup> Men's involvement, however, in preventing sexual assault against women is vital because of their ability to influence and change social norms among their peers.<sup>118</sup> Men commit the majority of sexual assaults, although only a minority of men commit assaults.<sup>119</sup> All men, however, will be necessary to deconstruct stereotypes and correct myths and misperceptions that con-

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[http://www.livethegreendot.com/gd\\_strategy.html](http://www.livethegreendot.com/gd_strategy.html) (last visited Sep. 12, 2014); *Connections with Renee Shaw (#841): Dorothy J. Edwards*, KETVIDEO (July 26, 2013) [http://www.ket.org/cgi-bin/cheetah/watch\\_video.pl?nola=KCWRS+000841](http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=KCWRS+000841) [hereinafter KET].

110. KET, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See SCARCE, *supra* note 2.

118. Patricia M. Fabiano et al., *Engaging Men as Social Justice Allies in Ending Violence Against Women: Evidence for a Social Norms Approach*, 52:3 J. OF AM. COLL. HEALTH 105, 105 (2003).

119. Michael Flood, *Changing Men: Best Practice In Violence Prevention Work With Men*, HOME TRUTHS CONFERENCE: STOP SEXUAL ASSAULT AND DOMESTIC VIOLENCE: A NATIONAL CHALLENGE (2004), available at [http://www.aifs.gov.au/acssa/docs/Flood\\_Vioprev\\_HT.pdf](http://www.aifs.gov.au/acssa/docs/Flood_Vioprev_HT.pdf).

tribute to the gender inequality which enables gender-based violence.<sup>120</sup> Barriers exist to engaging men, including resistance by them, but recent research on this topic as well as male initiatives around the country should help guide colleges and universities.<sup>121</sup>

#### D. Address Alcohol Abuse on Campus

As discussed above, sexual assaults often occur in combination with drinking.<sup>122</sup> Any prevention awareness program needs to also include education about how alcohol plays a key factor in facilitating sexual assault. It seems common sense that educational institutions should couple their trainings on alcohol use and sexual harassment together, however, very few do.<sup>123</sup> In addition, universities and colleges need to carefully evaluate incidents to monitor how often alcohol is a factor. This data will provide a baseline for the school administration to inform decisions about future programming and policies which are necessary for changing campus behavior. Administrators should be careful not to assume that alcohol is the cause of sexual assaults or use it as a scapegoat. Many experts in the field caution that too much focus on alcohol leads to victim blaming and diverts our focus from the true causes of sexual assaults, however, not addressing alcohol use as part of a multifaceted strategy seems ill advised.

#### E. Use Published Sanctions

The Campus SaVE Act requires institutions to publish the possible sanctions, but unless they are used victims will lose confidence in the system and not report. Data exists today that indicates schools do not subject offenders to rigorous sanctions despite their guilt which leaves victims feeling re-victimized.<sup>124</sup> Victims watch to see what happens. The new requirements in the Campus SaVE Act that require institutions to publish

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120. Mary Stathopoulos, *Engaging Men in Sexual Assault Prevention*, 14 ACSSAWRAP 2 (2013), available at <http://www.aifs.gov.au/acssa/pubs/wrap/wrap14/wrap14.pdf>.

121. *Id.* at 13–17.

122. Alyssa S. Kahan, *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS' RISK RESEARCH BULLETIN (2014), available at [https://www.ue.org/Libraries/Corporate/Student\\_Sexual\\_Assault\\_Weathering\\_the\\_Perfect\\_Storm.sflb.ashx](https://www.ue.org/Libraries/Corporate/Student_Sexual_Assault_Weathering_the_Perfect_Storm.sflb.ashx). "In 92 percent of claims with losses, the accuser was under the influence of alcohol, and more than 60 percent of accusers were so intoxicated that they had no clear memory of the assault." *Id.* at 3.

123. Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 6-4 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

124. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY, Feb. 24, 2010, available at <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault>. See also Cantalupo, *supra* note 19.

possible sanctions as part of their procedural notifications duty is a step in the right direction, however, it will be of little value if not utilized.

#### CONCLUSION

Everyone agrees that sexual violence on college and university campuses must be stopped. Unfortunately, for a variety of reasons current laws and regulations did not make this happen. The new Campus SaVE Act provides hope that new requirements will motivate colleges and universities to address the issue with a renewed focus. The new law contains many ambiguities, however, which will need to be addressed in the negotiated rulemaking process or, perhaps, even by the courts. Until more details are fixed, it is too early to determine if this law will be a net positive or negative for victims of sexual assaults. In the interim, institutions will need to use their best efforts to comply with the law and should stay updated on the negotiated rulemaking process and any proposed regulations. No matter what the ultimate verdict is concerning the benefit of the Campus SaVE Act, the good news is that the issue of stopping sexual violence is once more at the forefront of our national discourse.

# FACING THE STUDENT-DEBT CRISIS: RESTORING THE INTEGRITY OF THE FEDERAL STUDENT LOAN PROGRAM

ROBERT C. CLOUD & RICHARD FOSSEY\*

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“A man in debt is so far a slave.”  
—Ralph Waldo Emerson<sup>1</sup>

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1. RALPH WALDO EMERSON, *Wealth, in* THE CONDUCT OF LIFE (1890).



## INTRODUCTION

About twenty-one million Americans are enrolled in colleges, universities, and other postsecondary educational institutions,<sup>2</sup> and a majority of these people are forced to take out student loans to pay for their postsecondary schooling.<sup>3</sup> In 2012, seventy-one percent of graduates from all four-year institutions had student loans averaging \$29,400.<sup>4</sup> At public institutions, two-thirds of the graduates had federal loans, and their average debt was \$25,500; at private, nonprofit colleges and universities, three-quarters of the graduates had borrowed and had an average debt of \$32,300, while eighty-eight percent of the graduates at proprietary (for-profit) institutions had student-loan debt averaging \$39,950.<sup>5</sup>

Currently, more than thirty-seven million people have outstanding college or university loans,<sup>6</sup> and the total amount of student loan debt has reached \$1.2 trillion.<sup>7</sup> About \$1 trillion of the total indebtedness represents outstanding loans in the federally funded student-loan program.<sup>8</sup> Another estimated \$165 billion is owed to private banks and financial institutions that are outside the federal student-loan program.<sup>9</sup>

In recent years, it has become increasingly evident that a great many former students are having difficulty repaying their student loans. According to the Office of the Student Loan Ombudsman of the Consumer Financial Protection Bureau (a federal agency), over fifteen million people have either defaulted on their student loans or are not making payments due to the fact that they obtained an economic hardship deferment or another federally approved forbearance.<sup>10</sup> In fact, only sixty percent of student loan borrowers were making scheduled payments on their loans one year after beginning the loan-repayment period.<sup>11</sup>

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2. Laura G. Knapp et al., *Enrollment in Postsecondary Institutions, Fall 2009; Graduation Rates, 2003 & 2006 Cohorts; and Financial Statistics, Fiscal Year 2009: First Look*, NAT'L CTR. FOR EDUC. STAT. 7 (Feb. 2011), available at <http://nces.ed.gov/pubs2011/2011230.pdf>.

3. *Student Loan Debt Statistics*, AM. STUDENT ASSISTANCE, <http://www.asa.org/policy/resources/stats/> (last visited June 21, 2014).

4. Beckie Supiano, *Borrowers' Average Debt at Graduation Climbs to \$29,400*, CHRON. HIGHER EDUC. (Dec. 4, 2013), <http://chronicle.com/article/Borrowers-Average-Debt-at/143381/>.

5. *Id.*

6. *Student Loan Debt Statistics*, *supra* note 3.

7. Rohit Chopra, *A Closer Look at the Trillion*, CONSUMER FIN. PROT. BUREAU (Aug. 5, 2013), <http://www.consumerfinance.gov/blog/a-closer-look-at-the-trillion/> [hereinafter *A Closer Look at the Trillion*].

8. *Id.*

9. Rohit Chopra, *Student Debt Swells, Federal Loans Now Top a Trillion*, CONSUMER FIN. PROT. BUREAU (July 17, 2013), <http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/>.

10. *A Closer Look at the Trillion*, *supra* note 7.

11. David A. Bergeron, Elizabeth Baylor & Joe Valenti, *Resetting the Trillion-*

We may think of delinquent student-loan debtors as people in their twenties, but not everyone who is behind on a student-loan payment is young.<sup>12</sup> Researchers for the Federal Reserve Bank of New York recently examined the loan status of thirty-seven million student-loan borrowers.<sup>13</sup> Fourteen percent of these borrowers—approximately 5.4 million people—had at least one past-due student-loan account.<sup>14</sup> Of eighty-five billion dollars in total past due balances on student loans, only about twenty-five percent of those past-due balances was owed by borrowers under the age of thirty; forty percent was owed by borrowers at least forty years old; almost one sixth (16.9 percent) of the total outstanding debt was owed by borrowers fifty years old or older; borrowers at least sixty years old owed about five percent of the total outstanding debt.<sup>15</sup>

Student-loan default rates have gone up relentlessly in recent years. In 2007, the United States Department of Education (“DOE”) reported a two-year default rate of just 4.6 percent on loans from the Fiscal Year 2005 cohort of students.<sup>16</sup> In 2013, the DOE reported a two-year default rate for students who began paying back loans in October 2010 of ten percent, more than double the rate reported in 2007.<sup>17</sup> According to the DOE’s most recent report, 14.7 percent of student-loan debtors defaulted on their loans within three years after their repayment obligations began.<sup>18</sup> For students who borrowed money to attend for-profit institutions, the rate is 21.8 percent.<sup>19</sup> And, as this article later explains, the DOE’s official student-loan default rate dramatically understates the true number of student-loan debtors who are defaulting on their loans.<sup>20</sup>

Many factors have contributed to the escalating student-loan default rate

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*Dollar Student-Loan Debt Problem*, CTR. FOR AM. PROGRESS 2 (Nov. 21, 2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/11/TrillionDollarLoans-5.pdf>.

12. Meta Brown et al., *Grading Student Loans*, *Liberty Street Economics*, FED. RES. BANK OF N.Y. (Mar. 5, 2012), <http://libertystreeteconomics.newyorkfed.org/2012/03/grading-student-loans.html#.U0B7VPk7um4>.

13. *Id.*

14. *Id.*

15. *Id.*

16. Press Release, U.S. Dep’t of Educ., *Student Loan Defaults Remain Low* (Sept. 12, 2007), available at <http://web.docuticker.com/go/docubase/20636>.

17. Andy Thomason, *Student-Loan Default Rates Continue Steady Climb*, CHRON. HIGHER EDUC. (Oct. 11, 2013), <http://chronicle.com/article/Student-Loan-Default-Rates/142009/>.

18. *Id.*

19. *Id.*

20. See also Richard Fossey & Robert C. Cloud, *From the Cone of Uncertainty to the Dirty Side of the Storm: A Proposal to Provide Student-Loan Debtors Who Attended For-Profit Colleges with Reasonable Access to the Bankruptcy Courts*, 272 EDUC. L. REP. 1 (2011) [hereinafter Fossey & Cloud, *Dirty Side of the Storm*] (arguing that student-loan default rates are probably double the rate reported annually by the U.S. Department of Education).

in recent years. Students are borrowing more money to attend colleges or universities than they did a few years ago, and many are finding it difficult to repay these larger loan obligations.<sup>21</sup> A struggling economy has also contributed to the problem, as young people have struggled to find jobs that pay enough to service their student loan obligations.<sup>22</sup>

Indeed, a 2013 study by the Center for College Affordability and Productivity reported that nearly half of working college graduates held jobs that did not require a bachelor's degree and thirty-seven percent held jobs that required no more than a high school diploma.<sup>23</sup> "Student-loan programs and federal assistance programs are based on some sort of implicit assumption that we're training people for the jobs of the future," a scholar associated with the Center observed, "[i]n reality, a lot of them are not."<sup>24</sup>

Finally, students attending for-profit colleges and universities account for a disproportionate share of student-loan defaults because many of the students who enroll in for-profit institutions drop out before completing their postsecondary programs, which tend to be much more expensive than comparable programs at public institutions.<sup>25</sup> Numerous studies confirm that students who attend for-profit institutions pay higher tuition on average than students who attend public institutions and have much higher student-loan default rates.<sup>26</sup>

Some overburdened student-loan debtors have attempted to discharge their student loans in federal bankruptcy courts, but they have faced major

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21. Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES, Sept. 13, 2011, at A14.

22. See Sheila Dewan, *In Jobless Youth, U.S. Said to Pay High Price*, N.Y. TIMES, Jan. 7, 2014, at B3. The unemployment rate in the sixteen to twenty-four age bracket was fifteen percent in January 2014. *Id.*

23. Allie Bidwell, *Millions of Graduates Hold Jobs that Don't Require a College Degree, Report Says*, CHRON. HIGHER EDUC. (Jan. 28, 2013), <https://chronicle.com/article/Millions-of-Graduates-Hold/136879/>.

24. *Id.*

25. U.S. SENATE HEALTH, EDUC., LABOR AND PENSION COMM., FOR PROFIT HIGHER EDUC.: THE FAILURE TO SAFEGUARD THE FED. INVESTMENT & ENSURE STUDENT SUCCESS 73 (2012), available at [http://www.help.senate.gov/imo/media/for\\_profit\\_report/PartI.pdf](http://www.help.senate.gov/imo/media/for_profit_report/PartI.pdf) (examining thirty for-profit institutions and finding that fifty-four percent of students who started at these colleges in 2008–2009 left without a degree by 2010) [hereinafter HARKIN COMMITTEE REPORT].

26. See, e.g., U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-10948T 17, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD & ENGAGED IN DECEPTIVE & QUESTIONABLE MARKETING PRACTICES (2010) (finding "that tuition for certificates at for-profit colleges was often significantly more expensive than at a nearby public college") [hereinafter GAO, FOR-PROFIT COLLEGES]; Amy E. Sparrow, *Unduly Harsh: The Need to Examine Educational Value in Student Loan Discharge Cases Involving For-Profit Trade Schools*, 80 TEMP. L. REV. 329, 335 (2007) ("[F]or-profit trade schools cost significantly more than public community colleges and public four-year universities . . .").

obstacles.<sup>27</sup> For one, Congress has passed a series of laws making it increasingly difficult for student-loan debtors to obtain bankruptcy relief.<sup>28</sup> Unless they can show that their student loans constitute an “undue hardship,” student-loan debtors cannot obtain a discharge of their student-loan obligations.<sup>29</sup> The federal courts have adopted a strict standard for determining when the “undue hardship” requirement has been met, with most courts following the so-called *Brunner* test.<sup>30</sup>

Moreover, federal guarantee agencies—the entities charged with collecting student loans in default—have attempted to persuade federal bankruptcy courts to deny bankruptcy relief altogether to student-loan defaulters who file for bankruptcy.<sup>31</sup> These agencies have argued that defaulters should enroll in income-based repayment plans rather than seek a discharge of their student loans. These plans require debtors to make monthly payments on their student loans based on a percentage of their income for an extended period of time—typically twenty to twenty-five years.<sup>32</sup>

This article is organized into six parts and closes with conclusions and recommendations. Part I provides a brief history of the federal student-loan program, including legislative initiatives, public policy, and court decisions impacting the student-loan program since 1958. It also identifies and discusses Congressional actions ensuring easy access to federal student loans, as well as federal legislation mandating the repayment of student loans. Additionally, Part I addresses the United States Supreme Court’s unanimous 2005 decision in *Lockhart v. United States*,<sup>33</sup> in which the Court allowed the offset of Social Security benefits to repay defaulted student loans.<sup>34</sup>

Part II reviews the United States Bankruptcy Code and the six amendments to the Code made between 1976 and 2007 that have made it difficult for insolvent student-loan debtors to discharge their student-loan obligations in bankruptcy. This section also summarizes the *Brunner* test that is used to determine when insolvent student-loan debtors are entitled to have

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27. See discussion *infra* Part II.

28. See *In re Pelkowski*, 990 F.2d 737, 742 (3d Cir. 1993) (quoting 124 CONG. REC. 1793, 1798 (1978)). See also *infra* Part II.

29. 11 U.S.C. § 523 (a)(8) (2012).

30. *In re Brunner*, 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d Cir. 1987).

31. See, e.g., *In re Halverson*, 401 B.R. 378, 382 (Bankr. D. Minn. 2009) (creditors unsuccessfully arguing that the debtor should enroll in an income-based repayment plan rather than have student-loan debt discharged in bankruptcy). *But see In re Stevenson*, 463 B.R. 586, 599 (Bankr. D. Mass. 2011) (creditor successfully arguing that a bankrupt student-loan debtor with a history of homelessness should participate in an income-based repayment plan rather than have student-loan debt discharged in bankruptcy).

32. See, e.g., *In re Halverson*, 401 B.R. at 382; *In re Stevenson*, 463 B.R. at 592.

33. *Lockhart v. United States*, 546 U.S. 142 (2005).

34. *Id.* at 144.

their debts discharged under the Bankruptcy Code's "undue hardship" standard.<sup>35</sup>

Part III argues that student-loan default rates are much higher than the rates reported annually by the DOE. The student-loan default rate for the for-profit college and university sector may be twice as high as the 21.8 percent rate reported by the DOE in October 2013, which only measured defaults that occur within the three years after a student begins repayment.<sup>36</sup>

Part IV examines the for-profit college and university sector, which has a higher default rate on federal student loans than any other sector of post-secondary education. Widely reported instances of fraud, abuse, and misrepresentation in this sector make the for-profit college and university industry a particular concern in terms of its impact on the integrity and solvency of the federal student-loan program.

Part V discusses efforts by the Obama administration to adopt regulations designed to cut down on abuses in the for-profit college and university sector. Under President Obama, the DOE has adopted two sets of comprehensive regulations to this end: the "program integrity rules" issued in October 2010,<sup>37</sup> and the "gainful employment rule" in June 2011.<sup>38</sup> Both sets of regulations triggered litigation by the Association of Private Sector Colleges and Universities. Ultimately, the Association was able to persuade the federal courts to invalidate parts of the Obama administration's reform regulations.<sup>39</sup>

In Part VI, the authors argue that growing student-loan indebtedness—now totaling \$1.2 trillion—undermines the nation's economy and may lead to a national economic crisis. A recent study by the American Institute of Certified Public Accountants ("AICPA") documents the fact that many former postsecondary students are postponing major purchases such as cars and homes due to their heavy student-loan indebtedness and are also postponing plans to marry and have children.<sup>40</sup>

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35. 11 U.S.C. § 523 (a)(8) (2012).

36. See Fossey & Cloud, *Dirty Side of the Storm*, *supra* note 20, at 4–10 (analyzing data from numerous sources and concluding that the student-loan default rate is much higher than reported by the United States Department of Education).

37. Program Integrity Issues, 75 Fed. Reg. 66382, 66932–66975 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600, 602, 603, 668, 682, 685, 686, 690, & 691).

38. Program Integrity: Gainful Employment—New Issues, 75 Fed. Reg. 66665 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600).

39. Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 137 (D.D.C. 2012) (invalidating portions of the Department of Education's gainful employment regulations); Career Coll. Ass'n v. Duncan, 796 F. Supp. 2d 108 (D.D.C. 2011) (invalidating portions of the U.S. Department of Education's program integrity rules), *aff'd in part, rev'd in part*, Ass'n of Private Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

40. *New AICPA Survey Reveals Effects, Regrets of Student Loan Debt*, AM. INST. OF CPAS (May 9, 2013), <http://www.aicpa.org/press/pressreleases/2013/pages/aicpa->

This essay concludes with some proposals for reforming the federal student-loan program and restoring the program's integrity. Specifically, we recommend that the DOE publicly report a more transparent student-loan default rate, that the bankruptcy code be amended to provide relief to insolvent student-loan debtors who have no reasonable prospect of ever paying off their student loans, and that the federal government continue and intensify its efforts to better regulate the for-profit college and university industry in order to reduce fraud and abuse.

#### I. CONGRESS, THE STUDENT-LOAN PROGRAM, AND STUDENT DEBT

The history of the federal student-loan program began in 1958 through the passage of the National Defense Education Act.<sup>41</sup> Under this Act, Congress created a program of National Defense Student Loans ("NDSL"), which opened the door to educational opportunity, economic security, and social mobility for many needy and deserving students.<sup>42</sup>

Prompted by the success of NDSL, Congress passed the Guaranteed Student Loan Program ("GSLP") in 1965 as a part of the Higher Education Act.<sup>43</sup> Also known as Stafford Loans, Guaranteed Student Loans increased access to higher education for students from the lowest income levels, but strict income qualifications on aid recipients precluded the eligibility of many students from middle-income families.<sup>44</sup> Students from middle-income families who did not qualify for financial aid under GSLP provisions were hard pressed to pay for tuition, fees, room, and board because the cost of postsecondary education increased by approximately seventy-seven percent between 1965 and 1975.<sup>45</sup> Middle-income parents with college-aged children appealed to Congress for help, and the access to federal student loans quickly became a political issue.<sup>46</sup>

United States Representatives and Senators alike concluded that it was unfair and discriminatory, not to mention politically naive, to deny federal loans to students whose parents were paying taxes to fund the loan pro-

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survey-reveals-effects-regrets-student-loan-debt.aspx.

41. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (repealed 1970).

42. For a detailed history of the National Defense Education Act and National Defense Student loans, see Pamela Ebert Flattau et al., *The National Defense Education Act of 1958: Selected Outcomes*, IDA SCI. & TECH. INST. (2006), available at <https://www.ida.org/~media/Corporate/Files/Publications/STPIPubs/ida-d-3306.ashx>.

43. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 and 42 U.S.C.).

44. See 20 U.S.C. § 1078(A)(2)(B) and (D) (1976) (imposing a family income eligibility ceiling of \$25,000).

45. H.R. REP. NO. 95-951, at 2 (1978).

46. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 EDUC. L. REP. 11, 14 (2006) [hereinafter, Cloud, *Offsetting Social Security Benefits*].

gram.<sup>47</sup> Consequently, Congress responded with the Middle-Income Student Assistance Act of 1978,<sup>48</sup> which relaxed income requirements, enabling a great majority of students to qualify for federal loan assistance.<sup>49</sup> As a result, the number of loans increased dramatically, and disbursements under the student-loan program tripled within three years.<sup>50</sup> Congress expanded the loan program again in the Higher Education Amendments of 1992,<sup>51</sup> extending the GSLP to include the Federal Family Education Loan Program (“FFELP”),<sup>52</sup> PLUS loans for parents,<sup>53</sup> and the Federal Direct Loan Program.<sup>54</sup>

Over the years, Congress has modified the student-loan program when necessary to meet the changing needs of students, parents, and institutions, always with the intent of ensuring access to postsecondary education for all citizens regardless of economic background. Therefore, federal law and policy have made it easy for most students to borrow money for higher education. To ease the burden of loan repayment, Congress has provided low interest rates, minimum monthly payments, economic hardship deferments, and income-based repayment plans for students who qualify.<sup>55</sup> The student-loan program has enjoyed generous, enthusiastic, and bipartisan support from Congress for more than fifty-five years—support which will likely continue because of the increasing costs of college and university attendance and an abiding faith in the economic and social benefits of affordable postsecondary education.<sup>56</sup> However, there is one important consideration: Congress expects student borrowers to repay their loans.

While underwriting the federal student-loan program and accommodating debtors’ repayment efforts for more than half a century, Congress has made it clear that educational loans should be repaid on time and in full for

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47. *Id.*

48. Middle-Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978).

49. *Id.*

50. MICHAEL MUMPER, REMOVING COLLEGE PRICE BARRIERS: WHAT GOVERNMENT HAS DONE AND WHY IT DOESN’T WORK 90 (1996). See also Angelica Cervantes et al., *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later*, TEX. GUARANTEED STUD. LOAN CORP. (2005), available at [http://www.tgslc.org/pdf/hea\\_history.pdf](http://www.tgslc.org/pdf/hea_history.pdf).

51. Higher Education Amendment of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992).

52. *Federal Family Education Loan Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/ffel/index.html> (last visited June 21, 2014).

53. *Plus Loans, Federal Student Aid*, U.S. DEP’T OF EDUC., <http://www.studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp> (last visited June 21, 2014).

54. *Direct Loans: William D. Ford Federal Direct Loan Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/wdffdl/index.html> (last visited June 21, 2014).

55. Cloud, *Offsetting Social Security Benefits*, *supra* note 46, at 20.

56. C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 86 (2007).

several reasons.<sup>57</sup> Student loans are easy to obtain; they require no collateral or co-signers and are funded by the taxpayers as an investment in the individual student and the nation's future.<sup>58</sup> Historically, repayment of student loans depended on the debtor's honesty, good health, and future income based on completion of his or her education.<sup>59</sup> However, students who default on loans threaten the solvency of the loan program, potentially compromising the rights of future borrowers to benefit from participating in the program.<sup>60</sup>

For these reasons, Congress and the courts have made it quite difficult for student-loan debtors to discharge their student-loan obligations in bankruptcy.<sup>61</sup> Congress has passed a number of laws since 1978 to reduce the possibility of discharge through bankruptcy, including the following: Section 523(a)(8) of the Bankruptcy Code,<sup>62</sup> which precludes discharge of a student loan unless the debtor can show undue hardship (a difficult standard to meet in most courts); the Debt Collection Act of 1982;<sup>63</sup> the Higher Education Technical Amendments of 1991;<sup>64</sup> and the Debt Collection Improvement Act of 1996.<sup>65</sup>

Congress did not clarify in Section 523(a)(8) of the Bankruptcy Code exactly what it meant by the term *undue hardship*; therefore, defining the term is a question of law subject to *de novo* review.<sup>66</sup> Consequently, courts have responded with a number of judicial tests to determine whether a debtor can be expected to repay a student loan.<sup>67</sup> However, decades of case law have failed to create a universally accepted test that can be used to determine whether a student debtor is entitled to loan discharge. Many bankruptcy courts have interpreted undue hardship narrowly and harshly, ruling that debtors cannot discharge student loans unless they demonstrate "a certainty of hopelessness" about their long-term financial situation.<sup>68</sup> Histori-

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57. Cloud, *Offsetting Social Security Benefits*, *supra* note 46, at 14.

58. *Id.* at 11.

59. H.R. REP. NO. 95-595, at 133 (1978).

60. *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993).

61. Cloud, *Offsetting Social Security Benefits*, *supra* note 46 at 21.

62. 11 U.S.C. § 523 (a)(8) (2012).

63. Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (codified as amended in scattered sections of 5, 18, 21, 28, & 31 U.S.C.).

64. Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, 105 Stat. 123 (1991) (codified as amended in scattered sections of 20 U.S.C.).

65. 31 U.S.C. § 3716 (c)(3)(A)(i) (2012). Social Security benefits were made subject to offset (garnishment) to recover defaulted student-loan debts.

66. *In re Roberson*, 999 F.2d at 1132.

67. See Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?* 186 EDUC. L. REP. 783, 791-96 (2004) [hereinafter, Cloud, *Repaying a Student Loan*] (discussing in detail the *Johnson*, *Bryant* Poverty, Totality of Circumstances, and *Brunner* tests for determining undue hardship).

68. Richard Fossey, *The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 32-33 (1997) [hereinafter Fossey, *The Certainty of Hopelessness*] (arguing that bankruptcy courts are too harsh in



cally, undue hardship meant more than temporary, severe financial difficulty; it meant a permanently hopeless economic condition which few debtors could prove.<sup>69</sup> Consequently, few student-loan debtors have been able to meet the high burden of proof required for discharge of a federal student loan.

The Debt Collection Act of 1982 authorized the federal government to offset unpaid loan debts from some federal payments, but not from Social Security benefits.<sup>70</sup> It also specified a ten-year limitation on collection of student-loan debts.<sup>71</sup> Then in 1991, the Higher Education Technical Amendments removed all time limitations on government actions to collect defaulted student loans.<sup>72</sup> As of 1991, therefore, the statute of limitations in the 1982 Act no longer prevented the recovery of long-delinquent student loans, and the only major restriction the government faced in collecting delinquent loans was that Social Security benefits could not be garnished under provisions in the 1982 Debt Collection Act.<sup>73</sup> Accordingly, Congress passed the Debt Collection Improvement Act in 1996 authorizing the federal government to recover delinquent loan debt by offsetting Social Security benefits when necessary.<sup>74</sup> As a result of these Congressional actions, federal law now empowers the government to use all legal means to collect defaulted student loans, no matter how old or delinquent the debt, and federal courts consistently approve government efforts to collect on those debts. For example, in 2005 the Supreme Court ruled unanimously in *Lockhart v. United States* that the DOE can offset Social Security benefits to collect overdue student loans and that there are no time limits on those collection efforts.<sup>75</sup> Clearly, the legislative and judicial branches of government now agree that able-bodied debtors must repay their student loans in good faith unless they can show the court that repayment would cause undue hardship on them and their dependents—a difficult task indeed.<sup>76</sup>

## II. BANKRUPTCY, STUDENT-LOAN DEFAULTS, AND THE *BRUNNER* TEST

The United States Constitution authorizes Congress “to establish . . . uniform laws on the subject of bankruptcies throughout the United

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determining undue hardship in student-loan bankruptcy proceedings).

69. See Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished To Discharge Educational Loans?*, 71 TUL. L. REV. 139, 150-53 (1996).

70. Pub. L. No. 97-365, 96 Stat. 1749 (1982).

71. *Id.*

72. Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, 105 Stat. 123 (1991) (codified as amended in scattered sections of 20 U.S.C.).

73. 96 Stat. at 1749.

74. 31 U.S.C. § 3716 (2012).

75. *Lockhart v. United States*, 546 U.S. 142, 146 (2005).

76. *Id.* at 146-47.

States.”<sup>77</sup> Accordingly, Congress passed the Bankruptcy Act of 1898, which included two public policy priorities: (1) to provide honest debtors with a fresh start, free from oppressive debt, and (2) to guarantee fair treatment for all debtors and creditors.<sup>78</sup> To meet those priorities, Congress enacted the Bankruptcy Reform Act of 1978 which provided debt relief through either Chapter 7 or Chapter 13 of the Bankruptcy Code.<sup>79</sup> Chapter 7 proceedings provide rapid relief to honest, but over-extended, debtors because the debtor relinquishes non-exempt assets to a trustee who sells the assets, distributes the proceeds to creditors, and then discharges all remaining debt. The straightforward and expeditious discharge of debt under Chapter 7 makes it an attractive option for some debtors.<sup>80</sup> Conversely, debtors who file Chapter 13 actions must submit to the court a formal plan for repaying all or a specified portion of their debt, including interest, within three to five years.<sup>81</sup> After the debtor complies with all repayment plan provisions, the court discharges any remaining debt.<sup>82</sup> Chapter 7 proceedings are viewed as debtor-friendly because they facilitate quick relief, while Chapter 13 actions are considered to be creditor-friendly because they require debtors to commit all disposable income to the repayment plan and repay at least a portion of their debt.<sup>83</sup> Petitioners in student-loan bankruptcy proceedings may file under either Chapter 7 or Chapter 13 provisions but must prove undue hardship in either action.<sup>84</sup>

The Higher Education Act of 1965, which authorized the federal student-loan program, originally imposed no restrictions on student-loan debtors filing for bankruptcy.<sup>85</sup> Based on the perception that too many student-loan recipients were filing for bankruptcy soon after graduation with fraudulent intentions to avoid repaying taxpayer-funded loans, Congress passed six laws between 1976 and 2007 to preclude abuse of the student-loan program.<sup>86</sup> The Education Amendments of 1976 prohibited debtors from discharging student loans at any time prior to five years after the repayment period had begun, unless failure to discharge the loan would create “undue

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77. U.S. CONST. art. I, § 8, cl. 4.

78. Thomas J. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420 (1985).

79. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978) (codified as amended in scattered sections of 11 & 20 U.S.C.).

80. 11 U.S.C. § 527 (10)(b) (2012).

81. 11 U.S.C. § 1301-28 (2012).

82. *Id.*

83. Cloud, *Repaying a Student Loan*, *supra* note 67, at 783, 786.

84. Salvin, *supra* note 69, at 145 (1996).

85. Nancy H. Kratzke, *The Disparate Treatment of Student and Family Farmer Debtors: Suggestions for Reform of Bankruptcy Policy*, 16 N. ILL. U. L. REV. 25, 27 (1995).

86. *In re Pelkowski*, 990 F.2d 737, 742 (3d Cir. 1993) (quoting 124 CONG. REC. 1793 (1978)).

hardship” for the debtor.<sup>87</sup> In 1978, Congress passed the Bankruptcy Reform Act, which folded the five-year ban on loan discharge, absent proof of undue hardship, directly into the Bankruptcy Code.<sup>88</sup> In 1990, Congress extended the prohibition against discharging student loans in bankruptcy from five to seven years after the beginning of the repayment period.<sup>89</sup> Then, in 1998, Congress eliminated the seven-year ban on discharge of student loans altogether, imposing the undue hardship burden on all debtors no matter when they sought to discharge a student loan.<sup>90</sup> In 2005, Congress passed legislation requiring student-loan debtors who borrowed from *private* lenders, rather than the federal government, to prove undue hardship as well before their loans could be discharged.<sup>91</sup> Finally, Congress passed the College Cost Reduction and Access Act (“CCRAA”) in 2007.<sup>92</sup> CCRAA increased financial aid and services to students while introducing an income-based repayment option and a loan forgiveness program for loan recipients who qualified.<sup>93</sup>

As noted previously, Congress did not define the term “undue hardship” in the Bankruptcy Reform Act of 1978.<sup>94</sup> In the absence of a clear statement of Congressional intent, many courts have interpreted undue hardship in such a way as to make it extremely difficult for debtors to discharge student loans.<sup>95</sup> Responding to a perceived need, bankruptcy courts developed four judicial tests between 1979 and 1987 to determine whether a given student-loan debtor demonstrated undue hardship.<sup>96</sup> The three-pronged *Brunner* test has emerged as the most frequently used of the four tests.<sup>97</sup> Under the *Brunner* test, student-debtors must prove: (1) that they cannot, based on current income and expenses, maintain a minimal standard of living for themselves and their dependents, if forced to repay their loan(s); (2)

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87. Education Amendments of 1976, Pub. L. No. 94-482, tit. I § 127(a), 90 Stat. 2081, 2141 (1976) (codified at 20 U.S.C. § 1087-3) (repealed 1978).

88. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978) (codified as amended in scattered sections of 11 & 20 U.S.C.).

89. Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat 4789, 4964 (1990) (amending 11 U.S.C. § 523(a)(8)(A)).

90. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998) (amending 11 U.S.C. § 523(a)(8) to eliminate the seven-year repayment exception).

91. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005) (codified at 11 U.S.C. § 523(a)(8)(B) (2012)).

92. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

93. *Id.*

94. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978) (codified as amended in scattered sections of 11 & 20 U.S.C.).

95. Fossey, *The Certainty of Hopelessness*, *supra* note 68.

96. Cloud, *Repaying a Student Loan*, *supra* note 67, at 791-96.

97. *In re Brunner*, 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam). Most courts have endorsed the three-pronged *Brunner* test. *See infra* note 100.

that their precarious financial situation is likely to persist for a significant portion of the repayment period; and (3) that they made good faith efforts to repay their loan(s) evidenced by the number of payments already made on the loan, previous attempts to negotiate alternative repayment plans, and efforts to maximize income and minimize expenses.<sup>98</sup> In all instances, the burden of proof is on the debtor to prove undue hardship to the court.<sup>99</sup>

The Third, Seventh, and Ninth Circuits have adopted the *Brunner* test in adjudicating student-loan discharge claims, while the Sixth Circuit has applied it in previous bankruptcy proceedings.<sup>100</sup> Finally, *Brunner* has also been cited by the Fifth, Tenth, and Eleventh Circuits on occasion, although none of these three courts has adopted *Brunner* as the sole standard in considering undue hardship claims.<sup>101</sup>

In sum, Congress has amended the Bankruptcy Code repeatedly to make it more difficult for student-loan debtors to discharge their student loans in bankruptcy, and the federal courts have interpreted the “undue hardship” requirement in such a way that makes it very difficult for student-loan debtors to obtain bankruptcy relief. Obtaining relief is made even more complicated by the fact that, in order to obtain a discharge of their student loans, debtors are required to file an adversarial proceeding against their creditors, “which is, in essence, a separate lawsuit within the debtor’s underlying bankruptcy case.”<sup>102</sup> Since few student-loan debtors have the resources to pursue litigation against their creditors, it seems likely that many insolvent student-loan borrowers do not even try to obtain a discharge of their student loans through the bankruptcy process.<sup>103</sup>

Scholars have argued that this draconian response to insolvent student-loan debtors is not justified by the fear that college and university graduates will abuse the student-loan program by financing their education and then using the bankruptcy courts to shed their loan obligations. In a 1981 law review article, Janice Kosol observed that only seventeen million dollars had been paid out by the federal government on student-loan bankruptcy claims between 1969 and 1975, which represented only three-tenths of one percent of the seven billion dollars that had been loaned at that time.<sup>104</sup>

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98. *Id.* at 752–58.

99. *Id.*

100. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89 (2002).

101. *Id.*

102. Raul I. Pardo & Michelle R. Lacey, *Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM BANKR. L.J. 179, 188 (2009).

103. *Id.* at 191. “Those debtors who are in the most dire need of relief—that is, those for whom repayment will certainly impose an undue hardship—will likely lack the resources to pursue such relief in the first instance.” *Id.*

104. Janet Kosol, *Running the Gauntlet of “Undue Hardship”—The Discharge of Student Loans in Bankruptcy*, 11 GOLDEN GATE U. L. REV. 457, 462 (1981).

Likewise, Raul Pardo and Michelle Lacy, writing in 2009, concluded that there was little evidence of bankruptcy abuse among student-loan debtors:

Tragically, Congress disregarded empirical evidence from a General Accounting Office study which found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy. Simply put, the discharge of student loans in bankruptcy was too minor to threaten the economic viability of the student-loan program.<sup>105</sup>

### III. THE STUDENT-LOAN DEFAULT RATE: HIGHER THAN IS COMMONLY BELIEVED

The DOE reports annually on the student-loan default rate, providing figures on the percentage of people who default on their student loans within two years (and now within three years) of beginning the repayment phase on their student loans.<sup>106</sup> The default rate has crept up in recent years. The DOE's most recent report indicated that 14.7 percent of students who began repayment between October 1, 2009 and September 30, 2010 defaulted under the three-year measurement standard.<sup>107</sup> For students who attended for-profit institutions, the rate was considerably higher: 21.8 percent defaulted within three years of beginning repayment.<sup>108</sup>

These figures are alarming, but they understate the true number of people who are not making payments on their student loans—whether or not they are technically considered to be in default. As Senator Tom Harkin's Senate Committee report ("Harkin Committee report") on for-profit colleges and universities outlined in detail, many for-profit colleges and universities have undertaken aggressive "default management" initiatives to keep their institutional default rate down.<sup>109</sup> They do this, of course, because institutions that have two-year student-loan default rates of twenty-five percent or more for three consecutive years are barred from participating in the federal student-loan program.<sup>110</sup>

How do the for-profit institutions manage their default rates? According to the Harkin Committee report, for-profits commonly contact former students and encourage them to apply for economic hardship deferments. These deferments are easy to get; sometimes they can be obtained simply by making a telephone call to the appropriate loan servicer.<sup>111</sup> Once a former student has obtained an economic hardship deferment, that individual is temporarily relieved of the obligation of making monthly loan pay-

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105. Pardo & Lacey, *supra* note 102, at 181.

106. *See supra* notes 16–20.

107. Thomason, *supra* note 17.

108. *Id.*

109. HARKIN COMMITTEE REPORT, *supra* note 25.

110. *Id.* (citing 34 C.F.R. § 668.187(a) (2010)).

111. *Id.* at 153.

ments.<sup>112</sup> More importantly, an individual who is not making student-loan payments due to an economic hardship deferment is not counted in an institution's student-loan default rate.<sup>113</sup>

As the Harkin Committee report points out, encouraging former students to apply for economic hardship deferments may not be in the students' best interest. This is because interest accrues on the unpaid balance during the forbearance period when payments are not being paid. For example, a person who accepts an economic forbearance for 36 months will end up owing about 20 percent more over the life of his or her loan.<sup>114</sup>

Of course, it is impossible to say how many people who have economic hardship deferments will eventually begin making monthly loan payments and ultimately pay off their loans. It is clear, however, that a lot of people who have economic hardship deferments are seeing their loan balances increase due to accruing interest. For example, in *In re Halverson*, a 2009 bankruptcy case, Stephen Lee Halverson, a man in his sixties, filed for bankruptcy seeking to discharge almost \$300,000 in student-loan debt.<sup>115</sup> According to the court, Halverson only borrowed \$132,000 to pursue his studies.<sup>116</sup> Unfortunately, a series of negative life circumstances prevented him from paying off his student loans. Nevertheless, he was never in default, having applied for a series of economic hardship deferments over a period of many years.<sup>117</sup> Accruing interest on Halverson's loans caused the loan balance to more than double by the time Halverson filed for bankruptcy.<sup>118</sup>

The *Halverson* case starkly illustrates the consequences of obtaining economic hardship deferments: those who are relieved from making student-loan payments due to economic hardship deferments may find it very difficult, if not impossible, to ever pay off their loans because their loan balances will have ballooned over the years due to accruing interest. According to a recent report issued by the Consumer Financial Protection Bureau, about 6.5 million people are currently in default on their student loans, but an additional 8.9 million people are not making loan payments because they obtained an economic hardship deferment or have loans in forbearance status.<sup>119</sup> Undoubtedly, an unknown percentage of those nine million people have in fact defaulted on their loans in the sense that they will never pay back the full amount of what they borrowed.

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112. Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES, July 30, 2012, at A12.

113. *Id.*

114. *Id.*

115. *In re Halverson*, 401 B.R. 378 (Bankr. D. Minn. 2009).

116. *Id.* at 381.

117. *Id.* at 383.

118. *Id.* at 382.

119. *A Closer Look at the Trillion*, *supra* note 7.

Similarly, approximately 1.6 million people are making student-loan payments under some form of income-based repayment plan, and these payments may not be large enough to cover accruing interest.<sup>120</sup> Thus, even if people faithfully make their loan payments over the extended payment period (twenty or twenty-five years), some people making income-based payments will find their loan balances growing rather than shrinking when their loan payment obligations come to an end.<sup>121</sup>

This phenomenon is illustrated by Haley Schafer, a veterinarian who was profiled in 2013 by the *New York Times*. Schafer borrowed \$312,000 to attend a veterinary school in the Caribbean.<sup>122</sup> She was fortunate to find a job in her chosen field at a salary that is typical for veterinarians with similar practices.<sup>123</sup> To pay off her enormous debt, Schafer elected an income-based repayment plan that bases her monthly payments on a percentage of her income.<sup>124</sup>

Unfortunately for Schafer, her monthly payments have been insufficient to cover accruing interest on her enormous student-loan debt.<sup>125</sup> According to a *New York Times* calculation, Schafer will owe about \$600,000 on her student loans at the completion of her twenty-five-year repayment period, even if she makes every monthly payment.<sup>126</sup> Obviously, Dr. Schafer is not a student-loan defaulter. By all accounts, she is faithfully meeting her repayment obligations. However, a debtor who ends up owing twice what she borrowed after completing her repayment obligations is not truly paying off her loans even though she will never be counted as a student-loan defaulter.

Finally, the DOE does not announce how many people default on their student loans after the three-year measurement period has passed, but the overall default rate would be much higher if the measurement period were extended from three years after the repayment period begins to ten years. A DOE study of student-loan borrowers who graduated from four-year colleges and universities in 1993 had a student-loan default rate of 9.7 percent ten years after graduation.<sup>127</sup> This is double the two-year default rate that the DOE reported for that cohort of borrowers.<sup>128</sup> Among four-year college and university graduates who borrowed \$15,000 or more in student loans,

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120. Tamar Lewin, *U.S. to Contact Borrowers With New Options for Repaying Loans*, N.Y. TIMES, Sept. 25, 2013, at A20.

121. David Segal, *The Vet Debt Trap*, N.Y. TIMES, Feb. 24, 2013, at BU1.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Susan B. Choy & Xiaoa Li, *Dealing with Debt: 1992–93 Bachelor's Degree Recipients 10 Years Later: Postsecondary Education Descriptive Analysis Report*, NAT'L CTR. FOR EDUC. STAT. 43 (June 2006), available at <http://nces.ed.gov/pubs2006/2006156.pdf>.

128. *Id.*

almost one in five had defaulted within ten years.<sup>129</sup>

Another indication that student-loan default rates are alarmingly high can be gleaned from an examination of the private student-loan industry. According to a recent story in the *New York Times*, ITT Educational Services created a separate entity to loan money to its students beyond what they borrowed from the federal student-loan program.<sup>130</sup> That entity recently projected a default rate of fifty-nine percent.<sup>131</sup> The same story reported that private lenders were retreating from the student-loan market.<sup>132</sup> Private student-loan volume shrank from \$22.9 billion in 2008 to only \$6.4 billion in 2013—an indication that private lenders view the student-loan market as becoming riskier for creditors.<sup>133</sup>

When all these factors are taken into account, it seems likely that the student-loan default rate is probably double the three-year default rate reported by the DOE. For students attending for-profit institutions, it seems reasonable to presume that the student-loan default rate is at least forty percent and perhaps higher when measured over the lifetime of students' loan repayment periods.<sup>134</sup> Indeed, according to a *New York Times* article, an independent analysis by the DOE concluded that the repayment rate for students who attended for-profit postsecondary institutions was only thirty-six percent, which indicates a default rate of sixty-four percent—three times the default rate that the DOE reported for for-profit institutions in 2013.<sup>135</sup>

#### IV. THE FOR-PROFIT SECTOR: WHERE STUDENT-LOAN DEFAULT RATES ARE HIGHEST

In 2012, the Senate Health, Education, Labor, and Pensions Committee issued a report on student debt and loan default rates at thirty leading for-profit organizations.<sup>136</sup> The for-profit college and university industry documented significant abuse. Chaired by Senator Tom Harkin, the Senate Committee's two-year investigation found that the for-profit colleges and universities that it examined spent more money on marketing and recruiting than on instruction, showed little concern for the educational needs of non-traditional and vulnerable students, and focused on maximizing shareholder profits above all else.<sup>137</sup>

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129. *Id.*

130. Gretchen Morgenson, *Inspecting a Student Loan Spigot*, N.Y. TIMES, Jan. 19, 2014, at BU1.

131. *Id.*

132. *Id.*

133. *Id.*

134. See Fossey & Cloud, *Dirty Side of the Storm*, *supra* note 20, at 4–10.

135. Tamar Lewin, *Low Loan Repayment Is Seen at For-Profit Schools*, N. Y. TIMES, Aug. 14, 2010, at A13.

136. HARKIN COMMITTEE REPORT, *supra* note 25.

137. Michael Stratford, *Senate Report Paints a Dammning Portrait of For-Profit Higher Education*, CHRON. HIGHER EDUC. (July 30, 2012), <https://chron>



Although the Harkin Committee Report is the most comprehensive study of the for-profit college and university industry, numerous studies and newspaper accounts have reported on fraud, abuse, and poor student outcomes in the for-profit college and university sector. Drake College of Business, a New Jersey for-profit institution, was accused of recruiting students from homeless shelters, signing them up for federal student aid to cover tuition costs, and then paying them stipends to attend classes.<sup>138</sup> According to a number of 2013 newspaper reports, the CEO of Dade Medical College, a high school dropout, stepped down from his leadership position after being charged with perjury for failing to report his conviction of a sex offense.<sup>139</sup> At the time of this incident, Dade Medical College, a for-profit entity, received the vast majority of its operating revenues from federal student aid funds and had low pass rates on the state's nursing exams.<sup>140</sup> Finally, in late 2013, the Colorado Attorney General's Office imposed a \$3.3 million fine on Argosy University, another for-profit institution, for making misrepresentations to students who enrolled in a graduate-level program in psychology.<sup>141</sup>

A 2010 study by the General Accounting Office ("GAO") reported numerous instances of fraud and misrepresentation at the for-profit colleges and universities it investigated. The GAO conducted undercover testing of fifteen for-profit institutions and found that "all 15 colleges made some type of deceptive or otherwise questionable statement to undercover applicants, such as misrepresenting the applicant's likely salary after graduation

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icle.com/article/A-Damning-Portrait-of/133253/. In fiscal year 2009, the thirty for-profit organizations examined by the committee spent \$4.2 billion on marketing, advertising, and recruiting, and \$3.2 billion on instruction. *Id.* Ninety-six percent of the students at those institutions took out federal student loans to attend, and more than half of them had withdrawn by mid-2010. *Id.*

138. Kelly Heyboer & Bob Considine, *U.S. Agency Probes N.J.'s Drake College of Business for Paying Homeless Students*, STAR LEDGER (May 5, 2010), [http://www.nj.com/news/index.ssf/2010/05/drake\\_college\\_to\\_stop\\_recruti.html](http://www.nj.com/news/index.ssf/2010/05/drake_college_to_stop_recruti.html).

139. Michael Vasquez, *Amid Criminal Charges, CEO of Dade Medical College Resigns*, MIAMI HERALD (Oct. 23, 2013), <http://www.miamiherald.com/2013/10/23/3706821/ernesto-perez-resigns-as-head.html>.

140. David Halperin, *\$33 Million Per Year of Your Tax Money to For-Profit College Whose CEO Hid Criminal Record*, HUFFINGTON POST (Oct. 21, 2013), [http://www.huffingtonpost.com/davidhalperin/33-million-per-year-of-yo\\_b\\_4136451.html](http://www.huffingtonpost.com/davidhalperin/33-million-per-year-of-yo_b_4136451.html); Francisco Alvarado, *Dade Medical College Has Powerful Friends but Struggling Students*, BROWARD/PALM BEACH NEW TIMES (Aug. 29, 2013), <http://www.browardpalmbeach.com/2013-08-29/news/dade-medical-college-has-powerful-friends-but-struggling-students/>.

141. Anthony Cotton, *Argosy University Denver Fined \$3.3 Million for Deceptive Practices*, DENVER POST (Dec. 5, 2013), [http://www.denverpost.com/news/ci\\_24663345/argosy-university-denver-fined-3-3-million-deceptive](http://www.denverpost.com/news/ci_24663345/argosy-university-denver-fined-3-3-million-deceptive); L. Wayne Hicks, *Argosy University to Pay \$3.3M to Settle Colorado Lawsuit*, DENVER BUS. J. (Dec. 5, 2013), <http://www.bizjournals.com/denver/news/2013/12/05/argosy-university-pays-colorado-33m.html?page=all>.

and not providing clear information about the college's graduation rate."<sup>142</sup>

For-profit colleges and universities generally charge higher tuition than public institutions. According to the Harkin Committee's report, bachelor's degrees from for-profit institutions were twenty percent more expensive than degrees from analogous flagship public colleges and universities; and two-year associate degrees were four times more expensive than degrees from comparable community colleges.<sup>143</sup> Consequently, ninety-six percent of students who attend for-profit colleges and universities take out student loans compared to thirteen percent of students attending community colleges and forty-eight percent of students who attend four-year public institutions.<sup>144</sup>

Student-loan default rates in the for-profit sector are quite high: according to the DOE's most recent report, more than one in five students who take out student loans default within three years of beginning repayment.<sup>145</sup> The default rate over the lifetime of a student's loan repayment period is undoubtedly much higher, probably at least forty percent.<sup>146</sup> In fact, although loan recipients from for-profit colleges and universities represented only about thirty-two percent of all borrowers beginning repayment in fiscal year 2011, for-profit students accounted for forty-three percent of all defaults in the student-loan program in that particular time frame.<sup>147</sup>

Advocates for the for-profit industry argue that for-profit colleges and universities have higher student-loan default rates because of the challenging student population they serve—disproportionately low-income and minority students.<sup>148</sup> However, a study published in the *Journal of Economic Perspectives* concluded that default rates among students who attend for-profit colleges and universities are significantly higher than for students attending public institutions even when adjustments are made for student demographics.<sup>149</sup> Furthermore, completion rates for students who attend for-profit institutions are low compared to completion rates for students who attend public institutions. At the thirty for-profit institutions studied by the Harkin Committee, fifty-four percent of students who were enrolled during a one-year period between 2008 and 2009 left a college or a univer-

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142. GAO, FOR-PROFIT COLLEGES, *supra* note 26, at 7.

143. HARKIN COMMITTEE REPORT, *supra* note 25, at 3.

144. *Id.* at 7.

145. Thomason, *supra* note 17.

146. Fossey & Cloud, *Dirty Side of the Storm*, *supra* note 20 at 4–10.

147. Thomason, *supra* note 17.

148. See, e.g., Judah Bellin, *The Unacknowledged Value of For-Profit Education*, MANHATTAN INST. FOR POL'Y RES. (April 2013), available at [http://www.manhattan-institute.org/pdf/ib\\_20.pdf](http://www.manhattan-institute.org/pdf/ib_20.pdf) (observing that for-profit colleges and universities serve students who do not thrive at traditional institutions, including minority and low-income students).

149. David Deming, Claudia Goldin & Lawrence Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?* 26 J. ECON. PERSP. 139, 153 (2012) [hereinafter *Nimble Critters*].

sity without obtaining a degree by mid-2010.<sup>150</sup>

The Harkin Committee report's overall negative assessment of the for-profit college and university industry finds support in other independent studies. In the *Journal of Economic Perspectives*, scholars at Harvard University observed the following about student-outcomes at for-profit institutions:

In terms of economic outcomes in the medium-run, for-profit students are more likely to be idle (that is, not working and no longer enrolled in school) six years after starting college. Among students who left school by the 2009 wave of the BPS survey, those from for-profits are more likely to be unemployed and to have experienced substantial unemployment (more than three months) since leaving school.<sup>151</sup>

Without question, the for-profit college and university industry could not survive without federal student aid money. Most receive the vast majority of their revenues from federal student loans or students' Pell Grants.<sup>152</sup> Although the for-profits only enroll about eleven percent of all postsecondary students, they receive about twenty-five percent of federal student aid money—about 32 billion dollars a year.<sup>153</sup>

#### V. THE DEPARTMENT OF EDUCATION'S INTEGRITY RULES AND LITIGATION BY FOR-PROFITS

The Obama administration has recognized problems with the federal student-loan program arising from the for-profit sector and has made repeated efforts to rein in abuses.<sup>154</sup> In October 2010, the DOE issued regulatory guidelines for colleges and universities participating in the federal student-loan program.<sup>155</sup> Although private, non-profit colleges and universities and public postsecondary institutions were also affected by the new regula-

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150. HARKIN COMMITTEE REPORT, *supra* note 25, at 5.

151. *Nimble Critters*, *supra* note 149, at 159.

152. *Id.* at 145.

Because for-profits often cater to independent students and those from low-income families who finance college through Pell grants and federal student loans, they have an intricate relationship with the federal government to ensure they maintain eligibility to receive Title IV federal student aid. The for-profits, like public institutions of higher education, receive an extremely large fraction of their revenues from government sources.

*Id.*

153. *Id.* See also HARKIN COMMITTEE REPORT, *supra* note 25, at 15.

154. See Editorial, *Who Profits? Who Learns?* N.Y. TIMES, July 29, 2010, at A28 (praising the Obama administration for issuing tighter rules for regulating for-profit colleges and universities and vigilantly monitoring them).

155. Press Release, U.S. Dep't of Educ., Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers (October 28, 2010), available at <http://www.ed.gov/news/press-releases/departments-education-establishes-new-student-aid-rules-protect-borrowers-and-tax>.

tions, these new regulations were targeted toward the for-profit college and university industry.<sup>156</sup> Indeed, in a press release explaining the new regulations, the DOE highlighted problems in this sector, pointing out that students at for-profit institutions represented only eleven percent of all higher education students, but they accounted for twenty-six percent of all student loans and forty-three percent of student-loan defaulters.<sup>157</sup>

The new regulations addressed fourteen topics including misrepresentation about program content and aggressive recruiting practices “resulting in students being encouraged to take out loans they could not afford or enroll in programs where they were either unqualified or could not succeed.”<sup>158</sup> A full discussion of these regulations, which totaled 143 pages,<sup>159</sup> is beyond the scope of this article, but they address a wide range of abuses that had been identified in various independent reports.<sup>160</sup>

In June 2011, the DOE published additional regulations requiring certain postsecondary institutions to meet “gainful employment” standards as a condition of participating in the federal student-loan program.<sup>161</sup> According to the DOE’s “Dear Colleague” letter on the topic, the following postsecondary programs would be subject to the new gainful employment regulations: “all non-degree educational programs offered by public and nonprofit institutions and virtually all academic programs offered by proprietary institutions.”<sup>162</sup>

The gainful employment rule is quite complex.<sup>163</sup> In essence, however, the gainful employment rule requires for-profit institutions (and other higher education institutions that offer non-degree programs) to meet one of three metrics in order to remain eligible for participation in the federal student-loan program:

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156. *Id.* (noting rapid growth of default rates at for-profit institutions). *See also* Stephanie J. Gold & Elizabeth B. Meers, *U.S. Department of Education Program Integrity Rules—Part I: State Authorization, Incentive Payments, and Misrepresentation*, 9 NACUA NOTES 13 (June 23, 2011), available at <http://counsel.cua.edu/nacuanotesprogramintegrityrulespartI.cfm>. New Department of Education program integrity rules were “largely directed toward for-profit postsecondary education institutions.” *Id.*

157. *Id.*

158. *Id.*

159. Program Integrity Issues, 75 Fed. Reg. 66932 (Oct. 29, 2010).

160. *See, e.g.*, HARKIN COMMITTEE REPORT, *supra* note 25; GAO, FOR-PROFIT COLLEGES, *supra* note 26.

161. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34386 (June 13, 2011) (promulgating 34 C.F.R. § 668.7(2012)).

162. U.S. Department of Education, *Dear Colleague Letter, Implementation of Regulatory Requirements Related to Gainful Employment Programs* (April 20, 2011), available at [http://www.nacua.org/documents/GEN1110\\_042011.pdf](http://www.nacua.org/documents/GEN1110_042011.pdf).

163. As one commentary pointed out, the DOE required 157 pages to explain the gainful employment rule. *See* Anthony J. Guida, Jr. & David Figuli, *Higher Education’s Gainful Employment and 90/10 Rules: Unintended “Scarlet Letters” for Minority, Low-Income, and Other At-Risk Students*, 79 U. CHI. L. REV. 131, 145 (2012).

- (1) a twelve percent debt-service-to-total-earnings ratio applied to graduates of a program
- (2) a thirty percent debt-service-to-discretionary-income ratio applied to graduates of a program; or
- (3) a thirty-five percent loan-repayment-rate test for any student who attended the program.<sup>164</sup>

An institution that fails all three of these tests for three out of four years would become ineligible for receiving federal student-loan funding.<sup>165</sup>

Both sets of federal regulations—the program integrity rules issued in October 2010 and the gainful employment rule issued in June 2011—were finalized after intense negotiations with the for-profit college and university industry, which was well represented by its attorneys and lobbyists.<sup>166</sup> Some critics maintained that the rules were watered down due to pressure from the for-profit sector.<sup>167</sup> Nevertheless, after the regulations were put in place, an organization representing for-profit institutions sued in federal court seeking to have some aspects of the new regulations overturned.

In *Association of Private Sector Colleges and Universities v. Duncan*,<sup>168</sup> an association of for-profit postsecondary institutions located in Washington, D.C., sued Secretary of Education Arne Duncan and the DOE, arguing that some of the program integrity rules that the DOE had issued in October 2010 violated the Administrative Procedure Act,<sup>169</sup> as well as the United States Constitution. Specifically, the group challenged three categories of the DOE's regulations: compensation, misrepresentation, and state authorization.<sup>170</sup>

The district court rejected most of the Association's claims. In particular, the court rejected the Association's attack on the DOE's compensation regulations, which were intended to stop for-profit institutions from paying bonuses to employees based on the number of students they recruited.<sup>171</sup> As the court noted, the DOE had adopted its compensation regulations because it was concerned about "recruiters who sweet talk unqualified students into

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164. *Id.* at 145–46.

165. *Id.* at 146. *See* 34 CFR § 668.7(i).

166. Charles M. Smith & Dina Rasor, *For-Profit College Reform: How Democratic Power Lobbyists Helped Water It Down*, TRUTH-OUT.ORG (June 7, 2012), <http://truth-out.org/news/item/9633-for-profit-college-reform-how-democratic-power-lobbyists-helped-water-it-down> (reporting on lobbying efforts by for-profit lobbyists that resulted in weakening federal regulations addressing abuses in for-profit college and university industry).

167. *Id.*

168. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 796 F. Supp. 2d 108 (D.D.C. 2011), *aff'd* in part, *rev'd* in part, *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).

169. 5 U.S.C. §§ 553, 701–706 (2012).

170. *Duncan*, 796 F. Supp. 2d, at 115–17.

171. *Id.*

applications for courses and federal loans when there is no realistic chance that the student will gain from the coursework or be able to repay the loan.”<sup>172</sup> In the court’s view, the regulations were not arbitrary, capricious, or contrary to statute; and they did not prohibit for-profit institutions “from rewarding recruiters’ success through other indicia, such as seniority, job knowledge and professionalism, dependability, or student evaluations.”<sup>173</sup> However, the court concluded that the DOE had failed to provide notice and opportunity to be heard with regard to one of the regulations: a rule requiring institutions that offer distance or online educational programs to obtain permission from the states where the institutions are physically located.<sup>174</sup> Accordingly, the court vacated this regulation.<sup>175</sup>

On appeal, the D.C. Circuit affirmed the trial court’s judgment in part but reversed in part.<sup>176</sup> The appellate court concluded that the DOE had not adequately explained its reasoning with respect to two aspects of the compensation regulations, and it instructed the lower court to remand certain parts of those regulations to the DOE for further consideration.<sup>177</sup>

In addition, the D.C. Circuit ruled that the DOE’s misrepresentation regulations exceeded the department’s authority under the Higher Education Act by giving the Secretary of Education the power to take enforcement actions against the Association’s member institutions without adequate procedural safeguards.<sup>178</sup> Further, in the appellate court’s view, the regulations sanctioned misrepresentations that were not covered by the Act and improperly punished misrepresentations that were merely confusing.<sup>179</sup> Finally, the D.C. Circuit upheld the lower court’s determination that the distance education regulation had been adopted without giving the Association’s member institutions adequate notice and opportunity to be heard.<sup>180</sup>

In a separate lawsuit, the Association of Private Sector Colleges and Universities challenged the legality of the DOE’s gainful employment regulations.<sup>181</sup> Title IV of the Higher Education Act requires postsecondary

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172. *Id.* at 121.

173. *Id.*

174. 34 C.F.R. § 600.9(c) (2011).

175. *Duncan*, 796 F. Supp. 2d at 135.

176. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).

177. *Id.* at 449. In particular, the D.C. Circuit Court of Appeals directed the Department of Education to “better explain its decision to eliminate the safe harbor based on graduation rates,” and to “offer a reasoned response to the comments suggesting that the new regulations might adversely affect diversity outreach.” *Id.*

178. *Id.* at 451.

179. *Id.* at 451–53.

180. *Id.* at 462–63.

181. *Ass’n of Private Colls. and Univs. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012). Apparently, the court mistakenly omitted the word “Sector” from the plaintiff’s name. In a subsequent order, the Association’s name was correctly stated. *Ass’n of Private Sector Colls. and Univs. v. Duncan*, 930 F. Supp. 210 (D.C.C. 2013).

institutions offering non-degree programs to “prepare students for gainful employment in a recognized occupation” as a condition for receiving federal student aid money.<sup>182</sup> In issuing its Gainful Employment regulations in 2011, the DOE maintained that it was acting pursuant to this statutory language.

The Association challenged the gainful employment regulations on a variety of grounds. First, it argued “that ‘gainful employment’ unambiguously means ‘a job that pays.’”<sup>183</sup> Thus, in the Association’s view, the DOE had exceeded its statutory authority in measuring gainful employment against a debt-to-income ratio.<sup>184</sup> However, the court rejected the Association’s argument. “The gainful employment regulations,” the court held, “are a reasonable interpretation of an ambiguous statutory command: that the DOE provide Title IV funding only to schools that ‘prepare students for gainful employment in a recognized occupation.’”<sup>185</sup>

Next, the Association argued that the DOE’s debt-to-earnings ratio,<sup>186</sup> as well as its loan repayment test for determining whether an institution’s programs were preparing students for gainful employment<sup>187</sup> were promulgated in an arbitrary and capricious manner in violation of the Administrative Procedure Act.<sup>188</sup> Here, the Association found a sympathetic court. Although the court ruled that the DOE’s debt-to-earnings ratio was the product of rational decision making,<sup>189</sup> it held that the DOE had not engaged in “reasoned decision making” when it promulgated the debt repayment rate.<sup>190</sup> Since the debt repayment test and the debt-to-income test had been designed together and were “intertwined,” the court invalidated the entire debt measure rule.<sup>191</sup>

In order to enforce its debt measure rule, the DOE had promulgated an additional regulation that would have required for-profit institutions to report personally identifiable student information that would be put in a federal database.<sup>192</sup> Since the debt measure rule had been vacated, the court saw little need for the DOE’s disclosure rule, so it vacated this measure as

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182. *Duncan*, 870 F. Supp. 2d at 149.

183. *Id.* at 145.

184. *Id.*

185. *Id.* at 149.

186. 34 C.F.R. § 668.7(a)(1)(ii)((A) & (B)) (2012).

187. 34 C.F.R. § 668.7(a)(1)(i) (2012).

188. *Duncan*, 870 F. Supp. 2d at 149.

189. *Id.* at 153–54 (*citing* *Consumer Alert v. United States Dep’t of Transp.*, 463 U.S. 29, 43 (1983)). The debt to income standards were the product of a “‘rational’ connection between the facts found and the choice ‘made’, and the APA demands no more.” *Id.*

190. *Id.* at 154.

191. *Id.*

192. 34 C.F.R. § 668.6(a) (2011).

well.<sup>193</sup> Nine months after the court issued its ruling, the court denied the DOE's motion to amend the judgment.<sup>194</sup>

In summary, the Association of Private Sector Colleges and Universities brought two separate lawsuits in an effort to invalidate the DOE's gainful employment rule and portions of its program integrity rule. Although both sets of regulations survived, certain parts were invalidated, which hindered the DOE's efforts to rein in abuses in the student-loan program that were centered in the for-profit college and university sector. In one case, the court invalidated regulations intended to rein in abusive compensation practices and institutional misrepresentation,<sup>195</sup> in the other case, the court thwarted the DOE's efforts to enforce the Higher Education Act's "gainful employment" requirement by invalidating its debt measure rule.<sup>196</sup>

In March 2014, the DOE issued new gainful employment regulations, which had been revised to resolve the issues raised by the courts.<sup>197</sup> Secretary Duncan made it clear that the DOE was determined to address problems among for-profit colleges and universities, notwithstanding the sector's successes in the courts. "Higher education should open up doors of opportunity," Duncan said, "but students in these low-performing programs often end up worse off than before they enrolled: saddled by debt and with few—if any—options for a career."<sup>198</sup> Secretary Duncan emphasized that the new regulations would "address growing concerns about unaffordable levels of loan debt for students enrolled in these programs by targeting the lowest-performing programs, while shining a light on best practices and giving all programs an opportunity to improve."<sup>199</sup>

According to the DOE's press release, the regulations were designed so that "career programs would need to meet key requirements to establish that they sufficiently prepare students for gainful employment."<sup>200</sup> Specifically, under the new regulations, for-profit institutions would be required to certify that all gainful employment programs met applicable accreditation standards as well as state and federal licensure standards.<sup>201</sup> In addition, all gainful employment programs would be required to pass certain metrics to

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193. *Duncan*, 870 F. Supp. 2d at 155.

194. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 930 F. Supp. 2d 210 (D.D.C. 2013).

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

196. *Duncan.*, 870 F. Supp. 2d at 133.

197. Press Release, U.S. Dep't of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014), available at <http://www.ed.gov/news/press-releases/obama-administration-takes-action-protect-americans-predatory-poor-performing-ca>.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*



remain eligible for participation in the federal financial aid program. The metrics would include a requirement that graduates' estimated annual loan payments would not exceed twenty percent of their discretionary earnings or eight percent of their total earnings, as well as that the default rate for former students would not exceed thirty percent.<sup>202</sup> Finally, institutions would need to publicly disclose information about their program costs, debt, and performance of their gainful employment programs so that students could make informed decisions before enrolling in a gainful employment program.<sup>203</sup>

Like the previous gainful employment regulations, the DOE's new regulations are quite long, totally over eight-hundred pages.<sup>204</sup> It seems likely that these revised regulations will be the subject of intense lobbying pressures from the for-profit college and university industry and may even engender further litigation.<sup>205</sup>

## VI. STUDENT-LOAN DEBT AND A NATIONAL ECONOMIC CRISIS

The federal student-loan program is now the predominant method of financing higher education in the United States—with about two-thirds of all students borrowing money to attend a college or a university.<sup>206</sup> Unfortunately, it is also the second largest financial balance owed by American citizens, trailing only home mortgage debt.<sup>207</sup> Student debt tripled between 2004 and 2012 with the number of borrowers and average debt per borrower both increasing by seventy percent (an average annual increase of seven percent) for at least four reasons.<sup>208</sup> First, postsecondary education costs continued to increase rapidly, frustrating students' efforts to fund their educational expenses through part-time or even full-time employment.<sup>209</sup> Sec-

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202. *Id.*

203. *Id.*

204. Michael Stratton, *Obama Administration's Proposed Gainful Rewrites Sets Stage for Another Lobbying Blitz*, INSIDE HIGHER EDUC. (Mar. 17, 2014), <http://www.insidehighered.com/news/2014/03/17/obama-administrations-proposed-gainful-rewrite-sets-stage-another-lobbying-blitz>.

205. *Id.*

206. Jeffrey J. Williams, *Academic Freedom and Indentured Students: Escalating Student Debt is a Kind of Bondage*, 98 ACADEME 12 (2012).

207. Meta Brown et al., *Measuring Student Debt and Its Performance*, Staff Report No. 668, FED. RES. BANK OF N.Y. 8 (2014), available at [http://www.newyorkfed.org/research/staff\\_reports/sr668.pdf](http://www.newyorkfed.org/research/staff_reports/sr668.pdf).

208. Donghoon Lee, *Household Debt and Credit: Student Debt*, FED. RES. BANK OF N.Y. 9 (Feb 28, 2013), available at <http://www.newyorkfed.org/news/events/mediaadvisory/2013/Lee022813.pdf>. Student-loan debt was the only kind of household debt that increased between 2004 and 2012. See Brown, *supra* note 207, at 8.

209. See Michelle Jamisko & Ilan Kolet, *Cost of College Degree Soars 12 Fold: Chart of the Day*, BLOOMBERG (August 15, 2012), <http://www.bloomberg.com/news/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day.html> (last visited Jan. 28, 2014). According to a Bloomberg News report, "college tuition

ond, because of work schedules and changing curricular requirements, many undergraduates took five or more years to complete their baccalaureate degrees.<sup>210</sup> Third, the number of students enrolled in graduate school increased, possibly due to the weak job market.<sup>211</sup> Fourth, the federal government offered loan forbearances, economic hardship deferments,<sup>212</sup> and income-based repayment plans to ease the burden of loan repayments, perhaps lulling some students into complacency about the reality of prolonged and heavy debt.<sup>213</sup> Consequently, average student-loan balances increased across all age groups between 2004 and 2012 with average debt levels soaring thirty-three percent for borrowers in the twenty to thirty year-old range.<sup>214</sup>

At the same time, the inflated housing market and related high default rates in the savings and loan industry caused an economic recession. Lending agencies responded by tightening underwriting standards for credit in the economic recovery effort that followed.<sup>215</sup> Already burdened with heavy student-loan debt, many debtors with college or university degrees did not qualify for consumer loans to purchase homes and new automobiles or to invest in business and commercial ventures. Without easy access to credit in a depressed job market, prudent debtors reduced spending on everything except absolute necessities.<sup>216</sup> Consumption of goods and services declined significantly, with disastrous effects on an already weak national economy. In 2011 for example, the number of first-time homebuyers, with a median age of thirty-one, fell to the lowest percentage of homebuyers since 2006, *prima facie* evidence of a stagnant economy.<sup>217</sup>

Without question, the nation's total accumulated student-loan indebtedness is having a significant impact on the nation's economy, forcing millions of Americans to postpone major purchases and delay major life decisions.<sup>218</sup> According to a 2013 survey conducted by the American Institute

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and fees have surged 1,120 percent since records began in 1978, four times faster than the increase in the consumer price index." *Id.*

210. Brown, *supra* note 207, at 8.

211. See Leila M. Gonzales et al., *Graduate Enrollment and Degrees 2002–2012*, COUNCIL OF GRAD. SCHS. (2013), available at [http://www.cgsnet.org/ckfinder/userfiles/files/GEDReport\\_2012.pdf](http://www.cgsnet.org/ckfinder/userfiles/files/GEDReport_2012.pdf).

212. 20 U.S.C. § 1087e(f)(2)(D) (2012) (providing for loan repayment deferments of up to three years for borrowers experiencing "economic hardship").

213. See 20 U.S.C. § 1087e(e) (2012) (authorizing the U.S. Department of Education to provide income-based repayment plans).

214. Meta Brown, *Student Debt Overview*, *Postsecondary National Policy Institute*, FED. RES. BANK OF N.Y. 7 (Aug. 14, 2013), available at [http://www.newyorkfed.org/regional/Brown\\_presentation\\_GWU\\_2013Q2.pdf](http://www.newyorkfed.org/regional/Brown_presentation_GWU_2013Q2.pdf).

215. *Id.* at 21.

216. *Id.*

217. *Student Loan Debt Statistics*, *supra* note 3, at 5.

218. Press Release, Am. Inst. of CPAs, *New AICPA Survey Reveals Effects, Regrets of Student Loan Debt* (May 9, 2013), available at <http://www.aicpa.org/press/pressreleases/2013/pages/aicpa-survey-reveals-effects-regrets-student-loan->

of CPAs (AICPA), forty-one percent of respondents with student-loan debt reported that they had delayed contributions to retirement plans.<sup>219</sup> Forty percent postponed the purchase of a car, twenty-nine percent put off buying a house, and fifteen percent postponed marriage plans.<sup>220</sup> Perhaps the AICPA's most troubling finding was that sixty percent of student-loan borrowers had some regret about the amount of debt they had incurred.<sup>221</sup>

What is at stake if the federal government and higher education leaders do not stabilize and then reduce student-loan debt? At this writing, the United States government has accumulated a national debt in excess of \$17.3 trillion, due in large part to irresponsible fiscal policies and practices, growing entitlement obligations, and deficit spending.<sup>222</sup> Some would argue that the current student-loan reality is a microcosm of the federal fiscal situation and that it could easily lead to another economic crisis.<sup>223</sup> Only time will tell in that regard. It does seem clear, however, that a substantial percentage of Americans may not be able to buy homes and automobiles, start businesses, invest in capital ventures, educate their children, or save for a secure and dignified retirement because they are overly burdened with debt incurred in completing their postsecondary educations.<sup>224</sup>

Changing current policies and practices that compel millions of students to borrow heavily in order to attend colleges and universities will not be easy. Many students do not have the resources to cover college or university expenses on a pay-as-you-go basis, even those who work part-time (or full-time) while attending classes.<sup>225</sup> Furthermore, most colleges and universities, whether public or private, could not survive financially without the revenue generated through the federal student-loan program.<sup>226</sup> As the student-loan program now goes, so goes the solvency of many postsecondary institutions.<sup>227</sup>

Nevertheless, the time has come to address the issue of student indebted-

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219. *Id.*

220. *Id.*

221. *Id.*

222. Elizabeth Williamson, *Lack-of-Color Commentary: Chairwoman Delivers 'Meh'*, WALL ST. J., Feb. 12, 2014, at A4.

223. See Richard Fossey & Robert C. Cloud, *Borrowing Money to Attend College: Could the Rising Level of Student Indebtedness Lead to a National Financial Crisis?* TCHR COLL. REC., July 16, 2008. *But see* Eric Kelderman, *Student Debt Is Growing but Is Not a National Crisis, Speakers Say*, CHRON. HIGHER EDUC. (Aug. 9, 2012), <http://chronicle.com/article/Student-Debt-Is-Growing-but-Is/133517/>.

224. Jayne O'Donnell, *Consumer Protection Chief Talks About Student Loans*, USA TODAY, Aug. 15, 2013, at 3B.

225. See *Student Loan Debt Statistics*, *supra* note 3 (noting that close to sixty percent of all college students borrow annually to cover the costs of postsecondary education).

226. Cloud, *Repaying a Student Loan*, *supra* note 67, at 786–787.

227. *Id.* at 788.

edness. Otherwise, heavy student debt could lead to untenable financial problems for millions of Americans and the nation as a whole. For individual debtors, changes to policy and practice are critically important for their quality of life and peace of mind. In a 2012 article for *Academe* magazine, Jeffrey Williams described escalating student debt as “a kind of bondage, shackling students . . . with long-term loan payments [and] constraining their freedom of choice of jobs and career.”<sup>228</sup> Ironically, the student-loan program was introduced to expand educational opportunities for all United States citizens, liberate minds, and free the human spirit—not shackle college and university graduates with staggering debt that constrains personal freedom and career choices. Clearly, it is time to review the student debt issue.

#### CONCLUSIONS AND RECOMMENDATIONS

The federal student-loan program was implemented in 1965 for the purpose of “keeping the college door open to all students of ability” regardless of socioeconomic background.<sup>229</sup> Consequently, student loans have been easy to obtain and have featured low interest rates, minimum monthly payments, economic hardship deferments, and, more recently, income-based repayment plans.<sup>230</sup> Because the student-loan program lends money to applicants without assessing their risk of default, students who are poor credit risks have received federal loans to pursue postsecondary educational opportunities. The consequences of these altruistic and well-intentioned policies were predictable—heavy student debt and unacceptably high default rates. Clearly, there is now a troubling disconnect between the original purpose of the student-loan program to democratize American higher education and the fiscal policies that are necessary to ensure program solvency and protect borrowers from enslaving debt and inevitable default.

Several higher-education policy institutions have made comprehensive proposals for reforming the federal student-loan program. One proposal, which has been endorsed by several higher-education policy groups, is to extend the student-loan repayment period from ten years to twenty or twenty-five years, with loan payments based on a percentage of the borrower’s income.<sup>231</sup> The Brookings Institute recently made a similar recommenda-

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228. Williams, *supra* note 206, at 11, 15.

229. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

230. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

231. See, e.g., NAT’L ASSOC. OF STUDENT FINANCIAL AID ADMINISTRATORS, REIMAGINING FINANCIAL AID TO IMPROVE STUDENT ACCESS & OUTCOMES 3 (2013), available at <http://www.nasfaa.org/radd-event/> (recommending automatic income-based repayment plan for all borrowers); EDUC. TRUST, DOING AWAY WITH DEBT 6 (2013), available at [http://www.edtrust.org/sites/edtrust.org/files/Doing\\_Away\\_With\\_Debt.pdf](http://www.edtrust.org/sites/edtrust.org/files/Doing_Away_With_Debt.pdf).

tion and further recommended that income-based repayment plans with twenty-five year repayment periods be the default option for all students participating in the federal student-loan program.<sup>232</sup>

A discussion of these policy initiatives is beyond the scope of this article, although we are skeptical of proposals that contemplate a future in which millions of former postsecondary students make student-loan payments over twenty-five years—the majority of most people’s working careers. Instead we make three modest proposals that are designed to give a clearer picture of the student-loan crisis and to provide some relief for the millions of people who have become overwhelmed by staggering levels of student-loan debt.

First, we recommend that the DOE develop and publicize a student-loan default rate that provides a clearer indication of just how many people have defaulted on their student loans. As we argued earlier in this article, the DOE’s three-year window for measuring defaults fails to capture the number of people who default after the three-year measurement period ends and fails to take into account the number of people who are not making loan payments due to economic hardship deferments or other loan forbearance options. We believe the true student-loan default rate, when measured over the lifetime of students’ loan repayment periods, is at least double the DOE’s most recently reported three-year default rate, which is ten percent. We believe the student-loan default rate for the for-profit college sector is alarmingly high—forty percent or even higher.

In our view, a more transparent student-loan default rate would highlight the fact that the federal student-loan program is in crisis and threatens to undermine the national economy. Moreover, a more accurate student-loan default rate would underscore the fact that millions of people are burdened by unmanageable student-loan debt levels. The current reported rate may be lulling Congress and higher education leaders into believing the student-loan program is basically healthy, which it is not.

Second, we believe Congress and the Executive Branch should take affirmative steps to relieve the suffering of millions of Americans who are struggling with high levels of student-loan debt—debt that many will never be able to repay. This high level of indebtedness not only threatens the economic futures of the indebted former students but also the economic wellbeing of the nation as a whole.

What should be done? First and foremost, we believe the “undue hardship” provision in the Bankruptcy Code should be repealed, which would allow insolvent student-loan debtors to discharge their student loans in bankruptcy like any other non-secured debt. This is by no means a radical

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232. Susan Dynarski & Daniel Kreisman, *Loans for Educational Opportunity: Making Borrowing Work for Today’s Students*, HAMILTON PROJECT, BROOKINGS INSTITUTE (2013), available at [http://www.brookings.edu/~media/research/files/papers/2013/10/21%20student%20loans%20dynarski/thp\\_dynarskidiscpaper\\_final.pdf](http://www.brookings.edu/~media/research/files/papers/2013/10/21%20student%20loans%20dynarski/thp_dynarskidiscpaper_final.pdf).

proposal. The National Bankruptcy Review Commission made this recommendation more than fifteen years ago.<sup>233</sup> No evidence has been presented that indicates that student-loan debtors would abuse the bankruptcy process if the “undue hardship” provision were eliminated. Moreover, bankruptcy courts have the authority to deny discharge if they conclude that a student-loan debtor is using the bankruptcy process for fraudulent purposes.<sup>234</sup>

Third and finally, the DOE should continue its efforts to stamp out fraud and abuse in the for-profit college and university industry, which is plagued by low student-completion rates, high levels of student-loan indebtedness, and high student-loan default rates. As the Harkin Committee report concluded, federal aid to the for-profit sector, which totaled thirty-two billion dollars in 2009–10, is being “squandered” by for-profit institutions that “failed to graduate a majority of their students and poorly prepared them for jobs” and economic security.<sup>235</sup>

To its credit, the DOE passed program integrity regulations intended to cut down on fraud and abuse in the for-profit college and university industry,<sup>236</sup> and the department also passed a gainful employment rule intended to remove institutions from the federal student-loan program whose graduates did not get jobs that paid well enough to allow them reasonably to pay back their student loans.<sup>237</sup> Although federal courts invalidated important parts of those regulations,<sup>238</sup> the DOE issued revised regulations in March of 2014.<sup>239</sup>

The DOE’s continued efforts to regulate the for-profit college and university industry are commendable. Clearly, the federal student-loan program requires major reforms if it is going to continue fulfilling its original purpose of providing Americans with the opportunity to acquire postsecondary education regardless of their economic circumstances. In our view, three major reforms are imperative: a more transparent measurement of student-loan default rates by the DOE, bankruptcy relief for insolvent and

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233. NAT’L BANKRUPTCY REV. COMM’N, *BANKRUPTCY: THE NEXT TWENTY YEARS* (1997). “Section 523(a)(8) should be repealed.” *Id.* See also Huey, *supra* note 100, at 127 (arguing that “Congress should repeal section 523(a)(8) and enable student loans to be dischargeable debts under the Bankruptcy Code”).

234. 11 U.S.C. § 727(a)(4) (2012) (authorizing bankruptcy courts to deny discharge to debtors who make fraudulent misrepresentations or false claims in connection with a bankruptcy proceeding).

235. Stratford, *supra* note 137.

236. Program Integrity Issues, 75 Fed. Reg. 66932–66975 (Dep’t of Educ. Oct. 29, 2010) (final rule).

237. 75 Fed. Reg. 66665 (Oct. 29, 2010) (promulgating 34 C.F.R. § 668.7 (2012)).

238. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012) (invalidating portions of program integrity rules); Ass’n of Private Sector Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133 (D.D.C. 2012).

239. Chris Kirkham, *For-Profit Colleges That Bury Students in Debt Face Second Obama Crackdown*, HUFFINGTON POST (March 13, 2014), [http://www.huffingtonpost.com/2014/03/13/for-profit-colleges-obama\\_n\\_4961163.html](http://www.huffingtonpost.com/2014/03/13/for-profit-colleges-obama_n_4961163.html).

overburdened student-loan debtors, and better regulation of the for-profit college and university industry.

# NO MORE “BUSINESS AS USUAL” IN HIGHER EDUCATION: IMPLICATIONS FOR U.S. AND U.K. FACULTY

BARBARA A. LEE & MARK R. DAVIES\*

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## INTRODUCTION

Higher education in both the United Kingdom and the United States has undergone substantial change in the past several years.<sup>1</sup> The rapid spread of technology has supported a “viral” emergence of online courses, including massive open online courses, also known as “MOOCs.”<sup>2</sup> Funding of higher education in both countries has undergone shifts as public support has declined, a fee structure has been implemented in the United Kingdom, and for-profit institutions have increased in number and reach in both nations.<sup>3</sup> Employment patterns of college faculty have shifted in both countries as well, to the dismay of many “traditional” academics.<sup>4</sup> A chorus of critics is questioning the value of a college degree as the global recession continues, stubbornly unabated.<sup>5</sup> What do these changes mean for higher education, and for the faculty who serve these institutions?

An article in the *Chronicle of Higher Education* quoted the following statement from a representative from a conservative think-tank: “students and parents can no longer afford business as usual from our state’s higher-education institutions.”<sup>6</sup> Although the statement referred to public colleges and universities in Texas, similar sentiments and statements have also been directed at public and private higher education throughout the U.S. and the U.K. The higher education communities of both nations are facing challenges to “business as usual” that were unimaginable a decade or more ago. In the U.S., influential scholars are claiming that college students graduate knowing no more, or little more, than they did when they entered.<sup>7</sup> Pundits claim that postsecondary education costs too much and that students do not

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1. See, e.g., Eliza Anyangwe, *The Biggest Challenges in Higher Education: What You Said*, GUARDIAN (Feb. 9, 2012), <http://www.theguardian.com/higher-education-network/blog/2012/feb/09/challenges-for-higher-education>.

2. For a discussion addressing the efficacy of massive open online courses (MOOCs), see Dan Berrett, *Debate Over MOOCs Reaches Harvard*, CHRON. HIGHER EDUC. (May 10, 2013), <http://chronicle.com/article/Debate-Over-MOOCs-Reaches/139179/>. It is also worth noting that the current debate regarding MOOCs represents the latest in an ongoing discussion about the potential impact of the Internet on higher education. See, e.g., D.J. Farrington, *Borderless Higher Education: Challenges to Regulation, Accreditation and Intellectual Property Rights*, 39 MINERVA 63 (2001).

3. For a discussion of shifts in funding of public higher education, see *infra* Part I.A.

4. For a discussion of changes in faculty employment patterns in both countries, see *infra* Part III.A.

5. This trend is discussed in the next paragraph of this article.

6. Katherine Mangan, *U. of Texas Adopts Plan to Publish Performance Data on Professors and Campuses*, CHRON. HIGHER EDUC. (Aug. 25, 2011), <http://chronicle.com/article/U-of-Texas-Adopts-Plan-to/128800/>.

7. RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (1st ed. 2010).

obtain value for the dollars they spend.<sup>8</sup> Violence on U.S. campuses has led to additional federal regulation of institutions<sup>9</sup> and has spawned hundreds of lawsuits by victims and their families.<sup>10</sup> Finally, funding for public higher education is in a downward spiral.<sup>11</sup>

Similar trends can be observed in the U.K.<sup>12</sup> Although the U.S. and the U.K. approach certain matters—such as funding for postsecondary education and faculty employment issues—differently, the social and cultural trends affecting postsecondary education in both nations are strikingly similar.<sup>13</sup> What are the implications of these trends for the working conditions and employment rights of the faculty and staff in both nations? How are faculty members responding to the market forces and increased consumerism that are forcing change on their institutions? Is a career as a faculty member even an appealing option, or should bright young college and university graduates focus on nonacademic careers?

This article traces briefly some of the numerous changes and pressures facing higher education today in both the U.S. and the U.K., and then turns to recent legal developments that affect faculty work and rights. After re-

8. Amy Phillips, *Is College Worth the Money?*, WASH. TIMES (Dec. 14, 2011), <http://communities.washingtontimes.com/neighborhood/60-second-attention-span/2011/dec/14/college-worth-money/>.

9. See generally, Ashley R. Wood & Steven M. Janosik, *The Clery Act: Crime Reporting Concerns*, 2012 U. RISK MGMT. & INSURANCE ASS'N J. 9-20 (ANNUAL ISSUE), available at <http://www.soe.vt.edu/highered/faculty/janosik/CleryCrimeReporting2012.pdf>. In the UK context, crime statistics tend to be collected by locality and do not differentiate between crimes committed against students and those against the population as a whole. In recent years, along with a general proliferation of league tables, information has appeared which demonstrates the relative crime risks at different institutional locations. The picture in general is that UK universities are not particularly vulnerable to violent or other crime, but that relative levels depend very much upon location. So, as might be expected, lower crime rates are usually associated with institutions located in rural settings or smaller towns. See, e.g., Oliver Mower, *Best and Worst University Locations for Crime*, WHICH? U. (July 22, 2013), <http://university.which.co.uk/advice/best-and-worst-universities-for-crime-and-safety>; *Crime in University Cities*, COMPLETE U. GUIDE, <http://www.thecompleteuniversityguide.co.uk/crime-in-university-cities/> (last visited Aug. 27, 2014).

10. For an example of one such lawsuit, see Sara Lipka, *Jury Holds Virginia Tech Responsible for Students' Deaths, Raising Expectations of Colleges*, CHRON. HIGHER EDUC. (Mar. 14, 2012), <http://chronicle.com/article/Verdict-Against-Virginia-Tech/131176/>. The Virginia Supreme Court reversed the jury verdict. *Commonwealth v. Peterson*, 749 S.E.2d 307 (Va. 2013).

11. See *infra* Part I.A.

12. Peta Lee, *European Higher Education Faces a Widening Budget Gap Between Regions*, CHRON. HIGHER EDUC. (June 19, 2013), <http://chronicle.com/article/article-content/139907/>.

13. See, e.g., John H. Bishop, *Which Secondary Education Systems Work Best? The United States or Northern Europe*, CORNELL U. ILR COLLECTION (Jan. 1, 2011), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1104&context=workingpapers>.

viewing numerous structural changes that have altered the ways that many institutions operate, and examining several legal trends that are bringing changes to faculty work, the article concludes with observations about how faculty in both nations—both individually and collectively—may wish to respond to the changes swirling around them.

## I. STRUCTURAL CHANGES

### A. Funding

Although both public and private U.S. colleges and universities have been negatively affected by the various recessions since the 1970s, the recession that began in 2008 hit the public sector more harshly. Between 1990 and 2010, public funding for higher education, adjusted for inflation, declined by 26.1 percent.<sup>14</sup> During that time period, tuition and fees at public four-year colleges and universities increased by 112.5 percent.<sup>15</sup> The proportion of their revenues that public colleges and universities received from state appropriations dropped from 38.3 percent in 1991–1992 to 24.4 percent in 2008–2009.<sup>16</sup> In fiscal year 2011–12, average state support declined by 7.6 percent, although in some states the declines were between 10 and 41 percent,<sup>17</sup> and in 2012, state support declined by an average of another 8.9 percent.<sup>18</sup> At the same time, income from tuition and fees constitutes an ever-larger proportion of public college and university revenues.<sup>19</sup>

In England, university fees increased substantially in 2012 as a result of major policy changes whereby the government shifted the cost of tuition from the state to individual students.<sup>20</sup> This increase reflects a funding model in which colleges and universities will be permitted to charge students between £6,000 and £9,000 per annum for undergraduate courses, in-

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14. JOHN QUINTERNO, DĒMOS, *THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE MIDDLE CLASS 2* (2012), available at <http://www.demos.org/sites/default/files/publications/thegreatcostshift.pdf>.

15. *Id.*

16. *Id.* at 17.

17. Eric Kelderman, *State Support Falls by 7.6 % in 2012 Fiscal Year*, CHRON. HIGHER EDUC. (Jan. 23, 2012), <http://chronicle.com/article/State-Support-for-Higher/130414/>. Nineteen states saw declines in higher education funding of 10 percent or more in FY 2012. *Id.*

18. STATE HIGHER EDUCATION EXECUTIVE OFFICERS (SHEEO), *PUBLIC HIGHER EDUCATION FINANCE FY 2012* (2013), available at <http://www.sheeo.org/sites/default/files/publications/SHEF%20FY%2012-20130322rev.pdf>.

19. Eric Kelderman, *Students and States Near a 50-50 Split on the Cost of Public Higher Education*, CHRON. HIGHER EDUC. (Mar. 6, 2013) <http://chronicle.com/article/StudentsStates-Near-a/137709/>.

20. See Haroon Chowdry et al., *Fees and Student Support Under the New Education Funding Regime: What are Different Universities Doing?* (Institute for Fiscal Studies, Briefing Note BN134, 2012), available at <http://www.ifs.org.uk/bns/bn134.pdf> (discussing the higher education finance regime introduced in 2012).

stead of a previous blanket fee contribution of around £3,000.<sup>21</sup> Most universities are charging at or towards the top of the new fee range, making the average fee increase well over 200 percent.<sup>22</sup>

In the U.S., changes in funding patterns and tuition increases have reduced out-of-state enrollment at many public colleges and universities, persuaded some students to select public rather than private colleges or universities,<sup>23</sup> swelled enrollments at public community colleges just as their state or local funding was declining,<sup>24</sup> and induced private colleges and universities to return a larger proportion of their tuition revenue to students in the form of additional financial aid.<sup>25</sup>

### B. Productivity and Accountability

At the same time that state legislatures in the U.S. are cutting funding to higher education, they are demanding greater “productivity” from faculty at public institutions. For example, the Board of Regents of the University of Texas approved a plan to report “faculty productivity” metrics such as research productivity and “efficiency,”<sup>26</sup> while the governor of Florida has expressed interest in a similar accountability mechanism for that state’s public colleges and universities.<sup>27</sup> Ohio’s legislature enacted a law requiring a 10 percent increase in statewide undergraduate teaching activity.<sup>28</sup>

Several states, or state higher education systems, require post-tenure review in their public colleges and universities. In some states, post-tenure

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21. *Id.*

22. See Jack Grove, *Nine Out of 10 Universities Opt to Charge Maximum Fee*, TIMES HIGHER EDUC. (July 1, 2013), <http://www.timeshighereducation.co.uk/news/nine-out-of-10-universities-opt-to-charge-maximum-fee/2005624.article> (“Only 10 institutions out of 120 charging undergraduates more than £6,000 will impose the maximum annual tuition cost of £9,000, according to Office for Fair Access data published on 11 July.”).

23. Austin Wright, *Public Colleges Brace for Expected Drop in Out-of-State Students and the Revenue They Provide*, CHRON. HIGHER EDUC. (Aug. 10, 2009), <http://chronicle.com/article/Where-Have-All-the/47967/>.

24. Lacey Johnson, *Community College Enrollments Slow After Years of Growth*, CHRON. HIGHER EDUC. (Oct. 18, 2011), <http://chronicle.com/article/Community-College-Enrollments/129462/>.

25. Goldie Blumenstyk, *Private Colleges Increased Aid as Economy Sank, Tuition-Discounting Survey Finds*, CHRON. HIGHER EDUC. (May 19, 2011), <http://chronicle.com/article/Private-Colleges-Increased-Aid/127599/>.

26. See Mangan, *supra* note 6.

27. In late 2013, a judge upheld new rules enacted by the Florida Department of Education that ties the receipt of “continuing contracts” (that state’s version of tenure) to demonstrated student success in learning gains, course completion rates, graduation rates, and job placement. Colleen Flaherty & Scott Jaschik, *Raising the Bar on Faculty*, INSIDE HIGHER EDUC. (Jan. 2, 2014), <http://www.insidehighered.com/news/2014/01/02/judge-upholds-new-florida-rules-tenure-and-student-success>.

28. Ohio Rev. Code Ann. § 3345.45.

review programs are mandated by statute or administrative regulation;<sup>29</sup> in others, by regulations or policies approved by state systems of higher education.<sup>30</sup> By 2000, thirty-seven states had some form of post-tenure review, either by statute or statewide policy.<sup>31</sup> Additionally, many institutions have adopted post-tenure review policies voluntarily.<sup>32</sup> Legal challenges to the outcomes of post-tenure review have generally been unsuccessful.<sup>33</sup>

Academic tenure in England was eliminated over two decades ago under the Education Reform Act of 1988.<sup>34</sup> When it did exist, the idea of tenure was best understood as protection from dismissal in the absence of good cause—typically gross incompetence or gross moral turpitude—and has been described by some commentators as generally taking hard form, compared with a softer form in the U.S.<sup>35</sup> Contrary to the prediction that the weakening of tenure would lead to insecurity amongst older, established

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29. See, e.g., Ark. Code Ann. § 6-63-104(a) (2001) (explicitly including post-tenure review in statutory language regarding review of faculty performance generally); S.C. Code Ann. § 59-103-30 (2001) (same).

30. Donna R. Euben, *Post-Tenure Review: Some Case Law*, AMER. ASS'N OF U. PROFESSORS (2005), <http://www.aaup.org/issues/post-tenure-review/some-case-law> (noting that post-tenure review programs have been required by the state systems of higher education in Arizona, Oregon, Florida and Wisconsin).

31. CHRISTINE M. LICATA & JOSEPH C. MORREALE, *POST-TENURE FACULTY REVIEW AND RENEWAL: EXPERIENCED VOICES* (2002).

32. Euben, *supra* note 30.

33. *Id.*

34. Stephen Court, *Memories of Jobs for Life*, TIMES HIGHER EDUC. (Dec. 8, 1997), <http://www.timeshighereducation.co.uk/104896.article>.

35. The 'soft' description arises from the capacity in the U.S. to close down whole departments and thereby dismiss academics, a power denied English universities when tenure prevailed. See, e.g., Antony W. Dnes & Jonathan S. Seaton, *The Reform of Academic Tenure in the United Kingdom*, 18 INT'L REV. L. & ECON. 491 (1998) (noting that specific detail regarding tenure differed between universities, dependent upon the content of their charter and statutes). Prior to the 1988 Act, thirty-one universities were identified as having "hard" tenure and sixteen as having "soft" tenure. These numbers reflect a period prior to the significant expansion in U.K. university numbers with the renaming of polytechnics and some other higher education institutions starting in 1992. Dnes and Seaton also highlight the slowness of the process if a tenure dispute arose, with case examples such as *Hines v. Birkbeck College*, a case which took almost eight years to reach a conclusion. In such an environment academics were protected by both the premise of tenure and likely institutional reluctance to become embroiled in lengthy and expensive litigation even if grounds for dismissal were considered to exist. Although, by way of counterbalance, in *Thomas v. University of Bradford* (No.2) application by the university council of a subjective interpretation of good cause for dismissal was permitted. (1992) 1 All ER 964. Prior to the 1988 changes, dismissal of a tenured academic would have required the buying out by the university at a cost equivalent to "the expected difference between their academic remuneration and their earnings in their next best occupation." Dnes, *supra*, at 497). Post the 1988 Act, more usual principles for redundancy apply, typically making dismissal on grounds of redundancy cheaper for universities. For further discussion of the nature and varieties of tenure in U.K. universities and the position since the removal of tenure, see Dennis Farrington & David Palfreyman, *THE LAW OF HIGHER EDUCATION* (2d ed. 2012).

academics and discourage promotion of the most able junior colleagues who might then pose a threat,<sup>36</sup> statistical evidence collected by Antony W. Dnes and Jonathan S. Seaton suggests that this has not been the case; rather, younger academics prospered following the 1988 reforms.<sup>37</sup> It is suggested that this result may have resulted from governmental changes in the 1980s, which linked research funding with measured outputs: younger academics that produced potentially high value outputs were able to gain promotion to fulltime professorial positions.<sup>38</sup> Nevertheless, the effect of the removal of tenure has been felt in recent years with the economic downturn in the economy and the decision by some universities to seek to reduce faculty numbers or to reconfigure the structure of their faculty.<sup>39</sup>

### C. Challenges to Faculty Unionization

In the U.S., faculty members are unionized at approximately one-third of all four-year public colleges and universities; the numbers are lower at private colleges and universities.<sup>40</sup> A study found that “unionization greatly increases faculty influence over decision-making in areas such as setting faculty salary scales, individual faculty salaries, appointing department chairs, and appointments to institution-wide committees.”<sup>41</sup> Perhaps as a result of this apparent success, conservative politicians in at least two states—Ohio and Wisconsin—have attempted to sharply limit or eliminate public faculty’s ability to engage in collective bargaining.<sup>42</sup> In Ohio, the legislature passed a law that would have disqualified faculty at public institutions from bargaining collectively, but voters rejected the law in November of 2011.<sup>43</sup> A similar law was passed in Wisconsin in 2011 and upheld by the state supreme court against a challenge by public sector unions.<sup>44</sup> Ever since the U.S. Supreme Court’s decision in *NLRB v. Yeshiva University*,<sup>45</sup> it has been difficult for faculty at many private colleges and universi-

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36. H. Lorne Carmichael, *Incentives in Academics: Why Is There Tenure?*, 96 J. POL. ECON. 453 (1998).

37. See, e.g., Dnes & Seaton, *supra* note 35.

38. *Id.*

39. See, e.g., Paul Jump, *Near-Unanimity on Strike Ballot*, TIMES HIGHER EDUC. (July 7, 2012), <http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=420196&c=1>.

40. Stephen R. Porter & Clinton M. Stephens, *The Causal Effect of Faculty Unions on Institutional Decision-Making* (Dept. Educ. Leadership & Policy Studies, Iowa State Univ., Working Paper No. 1705713), available at <http://ssrn.com/abstract=1705713>.

41. *Id.*

42. Collin Eaton, *Ohio Voters Reject Law to Curtail Public-College Faculty Bargaining Rights*, CHRON. HIGHER EDUC. (Nov. 9, 2011), <http://chronicle.com/article/Ohio-Voters-Reject-Law-to/129693/>.

43. *Id.*

44. *Ozanne v. Fitzgerald*, 822 N.W.2d 67 (Wis. 2012).

45. 444 U.S. 672 (1980).

ties to unionize unless they have very little governance power.<sup>46</sup> Therefore, it appears that one mechanism for faculty influence over their working conditions and employment rights may be weakening or, in some states, disappearing altogether.

#### D. Rise of the For-Profit Sector

In the last decade, the for-profit postsecondary education sector in the U.S. has expanded substantially, in large part a result of virtually universal access to the Internet and the expansion of the federal student aid program. Although the traditional image of a proprietary college or university in the past was that of a locally-owned, small school offering primarily vocational programs, the for-profit higher education sector now includes large—sometimes publicly-traded—corporations that offer degree programs to students throughout the U.S. and around the world, including certificates, undergraduate degrees, and master's and doctoral degrees.<sup>47</sup> The courses and programs offered by these for-profit colleges and universities have become more diverse and expansive: many offer career preparation, but an increasing number are offering baccalaureate and even graduate degrees.<sup>48</sup> Typically, faculty at these colleges and universities lack tenure and many are part-time. As for the student populations that they serve, a study found that in 2008, low-income and minority students were overrepresented in for-profit institutions relative to their enrollment in nonprofit institutions.<sup>49</sup>

The for-profit sector has been criticized for not meeting the educational or employment needs of the many low-income and minority students that they enroll. Students who attend for-profit colleges and universities are eligible for federal student aid, but their students' default rates on federally-subsidized student loans are substantially higher than the default rates of students who attended public or nonprofit private institutions.<sup>50</sup> According to the U.S. Department of Education, "students at for-profit institutions represent 12 percent of all higher education students, 26 percent of all student

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46. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 568–574 (5th ed. 2013).

47. Robin Wilson, *For-Profit Colleges Change Higher Education's Landscape*, CHRON. HIGHER EDUC. (Feb. 7, 2010), <http://chronicle.com/article/For-Profit-Colleges-Change/64012/>.

48. Suevon Lee, *The For-Profit Higher Education Industry, By the Numbers*, PROPUBLICA (Aug. 9, 2012), <http://www.propublica.org/article/the-for-profit-higher-education-industry-by-the-numbers>.

49. INST. FOR HIGHER EDUC. POLICY, *INITIAL COLLEGE ATTENDANCE OF LOW-INCOME YOUNG ADULTS* (2011), available at [http://www.ihep.org/assets/files/publications/m-r/Portraits-LowIncome\\_Young\\_Adults\\_Attendance\\_Brief\\_FINAL\\_June\\_2011.pdf](http://www.ihep.org/assets/files/publications/m-r/Portraits-LowIncome_Young_Adults_Attendance_Brief_FINAL_June_2011.pdf).

50. Goldie Blumenstyk, *Loan-Default Rate at For-Profit Colleges Would Double Under New Formula*, CHRON. HIGHER EDUC. (Feb. 4, 2011), <http://chronicle.com/article/Loan-Default-Rate-at/126250/>.

loans and 46 percent of all student loan dollars in default.”<sup>51</sup> A 2011 report by the U.S. Government Accounting Office shows that nearly \$32 billion in federal grants and loans were awarded to students attending for-profit colleges and universities during the 2009–10 academic year.<sup>52</sup> The U.S. Department of Education further reported that in 2009–10, 92 percent of students enrolled in these institutions received some form of federal student aid—in most cases, federally-subsidized student loans.<sup>53</sup>

U.S. government’s attempts to rein in deceptive recruitment and enrollment practices at for-profit institutions have saddled the entire higher education system, including public and nonprofit private institutions, with expensive reporting and accountability requirements. Measures requiring certification that students are prepared for “gainful employment”<sup>54</sup> and prior state approval of online course offerings<sup>55</sup> add to the “administrative bloat” that has received much criticism as the proportion of administrators on campuses increases compared to the proportion of faculty.<sup>56</sup>

In comparison with the U.S., moves in the U.K. towards for-profit institutions of higher education are relatively new. In 2007, Brierly Price Prior (“BPP”) became the first publicly owned private company to obtain degree-awarding powers in the U.K.<sup>57</sup> It became a university college in 2010 and, subsequently, in 2013, achieved full university status.<sup>58</sup> In 2012, the

51. Press Release, U.S. Dept. Educ., Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs (June 2, 2011), available at <http://www.ed.gov/news/press-releases/gainful-employment-regulations>.

52. NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2012 100 (2012), available at [http://nces.ed.gov/pubs2012/2012045\\_5.pdf](http://nces.ed.gov/pubs2012/2012045_5.pdf).

53. *Id.*

54. 34 C.F.R. § 668 (2011). Most of the gainful employment regulation was declared void because it had been improperly promulgated; it is likely that the U.S. Department of Education will re-enact similar regulation in the near future. See *Ass’n of Private Coll. & Univ. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012). The disclosure portion of the regulation, however, was upheld by the court. *Id.* at 155–56.

55. W. INTERSTATE CMM’N FOR HIGHER EDUC., STATE APPROVAL REGULATIONS FOR DISTANCE EDUCATION: A “STARTER” LIST WITH ADDENDUM (2011), available at <http://www.wiche.edu/pub/14831>.

56. BENJAMIN GINSBERG, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS (2011). Ginsberg, using data compiled by the U.S. Department of Education, states that between 1975 and 2005, the number of full time faculty in the U.S. increased by 51 percent, while the number of administrators increased by 85 percent and the number of professional staff increased by 240 percent. *Id.* at 25.

57. See *University Governance*, BPP.COM, <http://www.bpp.com/about-bpp/aboutBPP/governance> (last visited Aug. 27, 2014).

58. BPP was founded in 1976, initially to provide accountancy training, but has been part of the international educational investment company, Apollo Global, since 2009. *Our History*, BPP.COM, <http://www.bpp.com/about-bpp/about-BPP/history> (last visited Aug. 27, 2014). The University College is made up of the BPP Law School, the BPP Business School, the BPP School of Health and the School of Foundation and English Language Studies. *Id.* In August 2013, *Times Higher Education* reported that the U.K. Department for Business, Innovation and Skills had delayed approval of the



private but charitable College of Law became a for-profit private provider of higher education after being sold to Montagu Private Equity.<sup>59</sup> The College of Law was awarded university status in 2012 and became the University of Law.<sup>60</sup> These events set the stage for the expansion of proprietary education in the U.K.

#### E. Changes in Student Preparation and Attitudes

A survey of U.S. college and university faculty conducted in 2008 found that nearly half of the faculty believed that students were significantly less prepared for college-level work than students were ten years earlier.<sup>61</sup> The importance of prior academic preparation was demonstrated by a recent study on student performance on the College Learning Assessment (CLA), which revealed that poor and minority students performed as well as higher-income students on the examination when their performance was controlled for level of pre-college academic preparation.<sup>62</sup> Unfortunately,

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award of full university status whilst it investigated the record of the Apollo parent group. John Morgan, *Coalition Confers University Title on Second For-Profit*, TIMES HIGHER EDUC. (Aug. 8, 2013), <http://www.timeshighereducation.co.uk/news/coalition-confers-university-title-on-second-for-profit/2006342.article>.

59. See UNIVERSITY OF LAW, <http://www.law.ac.uk/home/> (last visited Apr. 20, 2014).

60. The College of Law, now the University of Law, historically provided post-graduate professional training for those intending to practice law as solicitors and later as barristers and as such only competed with a relatively small number of college and university law schools who were also engaged in this market. The recent grant of degree awarding powers to the newly rebadged University of Law will enable it to compete directly with the majority of college and university law schools, whose core provision is the academic undergraduate law degree. Whilst more expensive than public sector college and university law degrees, the University of Law is promoting its undergraduate degree on employability, with marketing literature claiming it as the ‘first truly professional undergraduate law course’ with emphasis on ‘the law in a practical, professional context’. See UNIVERSITY OF LAW, <http://www.law.ac.uk/undergraduate/llb-hons-law-degree-3-year/> (last visited Aug. 27, 2014). In addition to offering a three-year program, the University of Law offers an accelerated two year program. See *LLB (Hons) Law Degree—Accelerated*, UNIVERSITY OF LAW, <http://www.law.ac.uk/undergraduate/llb-hons-law-degree-2-year/> (last visited Aug. 27, 2014). Concentrated study over two, rather than the usual three, years will, the University asserts, save students money in the longer run – higher fees being offset by one year less of study and its associated living costs and the potential to earn being brought forwards by a year. *Id.*

61. *How Well are Students Prepared for College?*, MAGUIRE ASSOCIATES (Jan. 5, 2008), available at [http://www.maguireassoc.com/resource/maguire\\_network\\_february2008/College\\_Preparation\\_Linda\\_Maguire\\_CIC2008.pdf](http://www.maguireassoc.com/resource/maguire_network_february2008/College_Preparation_Linda_Maguire_CIC2008.pdf). Anecdotal evidence from the U.K. suggests that similar concerns are held by some academics in universities there. See, e.g., Martin Paul Eve, *Secondary Schools Are Not Adequately Preparing Students for Higher Education*, GUARDIAN (Dec. 22, 2011), <http://www.theguardian.com/higher-education-network/blog/2011/dec/22/humanities-in-secondary-schools>.

62. Josipa Roksa, *An Analysis of Learning Outcomes of Underrepresented Students at Urban Institutions*, COUNCIL INDEP. C. (2012), available at <http://www.cic.edu/News-and-Publications/CIC-Books-and-Reports/Documents/>

many of these students may not be learning as much as their prospective employers expect them to learn. A survey of corporate executives in 2012 concluded that less than half of the college and university graduates they hire are prepared for entry-level positions, and less than one quarter have the knowledge and skills to advance beyond entry-level positions.<sup>63</sup>

Much has been made of the "student consumer" movement in the U.S. and the issue is not new.<sup>64</sup> Ranking systems, such as those published by the *U.S. News and World Report*, have led to attempts to "game the system" and have even resulted in false reporting of student test scores or post-college employment rates and earnings.<sup>65</sup> In some cases, concerns over rankings have triggered a shift in resource allocation, causing scarce resources to be diverted toward particular programs in the hope of attaining higher program or institutional rankings.<sup>66</sup> The rise of the student consumer can also be seen through increasing demands by students and policy makers that institutions devote more resources to teaching and fewer to research. Additionally, student course evaluation results have begun to weigh more heavily at many institutions on the outcome of promotion and tenure decisions, a move that some believe elevates the influence of the student consumer to the detriment of academic freedom.<sup>67</sup> Some researchers also believe that the use of student course evaluation scores in academic personnel decisions is responsible for both grade inflation and lowered expectations for student achievement.<sup>68</sup>

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CLA2012\_report.pdf.

63. John Minners, *Survey Says College Grads Not Prepared for Workforce*, LEXISNEXIS LEGAL NEWSROOM (Feb. 1, 2012, 9:23 AM), <http://www.lexisnexis.com/legalnewsroom/lexis-hub/b/career-news-and-trends/archive/2012/02/01/survey-says-college-graduates-not-prepared-for-the-workforce.aspx>. In the U.K. many graduates have themselves raised concerns about the extent to which higher education has prepared them for the world of work. See Graham Snowdon, *Almost Half of Graduates 'Ill-equipped for World of Work'*, GUARDIAN (Jan. 28, 2011), <http://www.theguardian.com/money/2011/jan/28/half-graduates-ill-equipped-for-work>.

64. See, e.g., Joan S. Stark, *The Emerging Student Consumer Movement in Education*, 13 NEW DIRECTIONS FOR HIGHER EDUC. 1 (1976).

65. Eric Hoover, *Claremont McKenna Official Resigns After Falsely Reporting SAT Scores*, CHRON. HIGHER EDUC. (Jan. 31, 2012), <http://chronicle.com/blogs/headcount/claremont-mckenna-official-resigns-after-falsely-reporting-sat-scores/29556>; Katherine Mangan, *Law Schools Would Face Stricter Reporting Requirements Under New Proposal*, CHRON. HIGHER EDUC. (Jan. 20, 2011), <http://chronicle.com/article/Law-Schools-Would-Face/130401/>.

66. For further discussion of the impact of rankings systems on higher education in the U.S., see MARGUERITE CLARKE, INST. FOR HIGHER EDUC. POL'Y, *THE IMPACT OF HIGHER EDUCATION RANKINGS ON STUDENT ACCESS, CHOICE AND OPPORTUNITY, COLLEGE AND UNIVERSITY RANKING SYSTEMS: GLOBAL PERSPECTIVES AND AMERICAN CHALLENGES* 35-47 (2007), available at <http://www.ihep.org/%5Cassets%5Cfiles%5Cpublications/A-F/CollegeRankingSystems.pdf>.

67. See, e.g., Jordan J. Titus, *Pedagogy on Trial: When Academic Freedom and Education Consumerism Collide*, 38 J.C. & U.L. 107 (2011).

68. See Charles F. Eiszler, *College Students' Evaluations of Teaching and Grade*

Challenges by students to once nearly impregnable academic judgments are increasing in the U.S. Notably, religiously conservative students have challenged course assignments or clinical practice requirements as being contrary to their religious beliefs and thus a violation of their religious freedom. For example, a student who was dismissed from a theater program for refusing to use profanity while participating in a dramatic production, brought suit against her university claiming that her Mormon faith did not permit her to use such words.<sup>69</sup> In two other cases, federal courts addressed similar claims by students at Augusta State University<sup>70</sup> and Eastern Michigan University<sup>71</sup> that the curricular requirements of the institutions' master's programs in counseling, which required students to counsel gay clients, violated the students' rights to freedom of speech and religious freedom under the First Amendment. In both cases, all students enrolled in the institutions' master's programs in counseling were required to adhere to the code of ethics of the American Counseling Association, a professional body that accredits graduate programs in counseling. The code of ethics, according to the faculty, required counselors to set aside their personal values or beliefs and work constructively with the client. In the case involving Augusta State, *Keeton v. Anderson-Wiley*, the student plaintiff had announced that she would attempt to "cure" her gay clients of their homosexuality through conversion therapy.<sup>72</sup> Both the trial<sup>73</sup> and appellate<sup>74</sup> courts ruled that the requirement that students follow the code of ethics was a neutral pedagogical requirement and not a suppression of speech or religious freedom. In the case against Eastern Michigan, the student plaintiff refused to counsel clients who she believed or knew were homosexual.<sup>75</sup> There, although the trial court had awarded summary judgment to the university, the appellate court reversed, noting that material facts relating to the motivation of the faculty who dismissed the plaintiff from the program were at issue.<sup>76</sup>

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*Inflation*, 43 RES. HIGHER EDUC. 483 (2002).

69. *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). The case was later settled; the university implemented a religious accommodation policy, refunded a year of tuition and fees, paid the student's attorney fees, and readmitted her to the university. Angie Welling, *U., Axson-Flynn Settle Civil Rights Suit*, *Deseret News* (July 15, 2004, 6:35 AM ), [http://www.deseretnews.com/article/59507\\_7344/U-Axson-Flynn-settle-civil-rights-suit.html?pg=all](http://www.deseretnews.com/article/59507_7344/U-Axson-Flynn-settle-civil-rights-suit.html?pg=all).

70. *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368 (S.D. Ga. 2010), *aff'd*, 664 F.3d 865(11th Cir. 2011).

71. *Ward v. Wilbanks*, 2010 U.S. Dist. LEXIS 127038 (E.D. Mich. July 26, 2010), *rev'd and remanded sub nom*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

72. *Keeton*, 733 F. Supp. 2d at 1372.

73. *Id.* at 1379.

74. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 876 (11th Cir. 2011).

75. *Ward v. Wilbanks*, 2010 U.S. Dist. LEXIS 127038 (E.D. Mich. July 26, 2010), *rev'd and remanded sub nom*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

76. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). The university and student subsequently settled the litigation for \$75,000 and a notation stating that she had left the

Conflicts between students and faculty, as well as the alleged “liberal bias” of faculty at U.S. colleges and universities, led to attempts by conservative politicians and activists to impose an “Academic Bill of Rights” upon public colleges and universities.<sup>77</sup> Although such legislation was introduced into the U.S. House of Representatives and the legislatures of twenty-eight states, no such legislation has been enacted.<sup>78</sup> However, these initiatives, coupled with the courts’ increasing willingness to entertain student claims of unfair academic evaluation, may lead to reluctance among faculty members to challenge students’ beliefs or assertions out of fear of the unpleasant consequences, such as grievances, negative publicity, and possibly even litigation that may follow.<sup>79</sup> One scholar states unequivocally:

The traditional role of the professoriate in guarding academic integrity is increasingly being challenged, as what students think of their professors and of their teaching gains greater importance to college and university administrators. Students exercise their influence constantly by their responsiveness or boredom in the classroom, and then by attributing a level of tedium or their inattentiveness to failure on the part of the professor to hold their interest. Today’s student culture is often described as one of disengagement and entitlement, so it should come as no surprise if students who enter colleges and universities with a consumer mentality are not comfortable accepting a professor’s pedagogical authority and choose to file legal complaints in order to have their demands satisfied.

The imposition of a market logic into higher education has been facilitated by the power of a marketing discourse to frame the public conversation, by substituting the vocabulary of a market transaction (such as the student as consumer metaphor) for a pedagogical relationship. Institutionalization of the student consumer metaphor has been accompanied by a shift in the ways in which people think about education, transformed from a process of becoming (more learned) to a product for purchase (a grade, or a degree). The public has expressed concern about the value of postsecondary education as a personal investment, and higher education institutions have responded with structures designed “to engage citizens in determining how public higher education can

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graduate program voluntarily. Neal Hutchins, *Student and University Settle Over Her Dismissal From Counselor Education Program*, HIGHER EDUC. L. (Dec. 13, 2012), <http://www.highereducationlaw.org/url/2012/12/13/student-and-university-settle-over-her-dismissal-from-counsel.html>.

77. Cheryl A. Cameron, Laura E. Myers, & Steven G. Olswang, *Academic Bill of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

78. Titus, *supra* note 67, at 156.

79. BRUCE L.R. SMITH ET AL., *CLOSED MINDS? POLITICS AND IDEOLOGY IN AMERICAN UNIVERSITIES* (2008).

serve them” with the aim of “providing world-class service and value to students.”<sup>80</sup>

In the U.K., the courts have generally maintained their unwillingness to interfere with academic decisions, but other developments may still threaten academic autonomy.<sup>81</sup> Notable amongst these is the creation of the Office of the Independent Adjudicator (“OIA”).<sup>82</sup> Section 13 of the Higher Education Act of 2004 empowered the relevant Secretary of State to create an entity to address student complaints—a so-called “designated operator.”<sup>83</sup> The OIA was so designated and displaced the existing complaints jurisdictions, notably visitors appointed to individual universities or other mechanisms for determining disputes.<sup>84</sup>

Since 2005, the number of complaints received by the OIA has increased by 200 percent, suggesting at least some shift toward the mentality of the “student consumer” amongst the student population.<sup>85</sup> In absolute terms, numbers of complaints remain small—1,605 in 2011 and 2,012 in 2012—and the proportions upheld significantly less than 50 percent in each year since 2005.<sup>86</sup> At the moment, therefore, there is little evidence to suggest that the work of the OIA is interfering significantly with academic autonomy, although the figures cited represent only those complaints that reach the OIA. As the OIA expressly requires prospective complainants to have exhausted their university’s internal complaints handling procedures first, it seems reasonable to speculate that far more complaints are resolved internally, with the threat of subsequent OIA involvement providing some incentive to settle or reach a compromise. Also, as a relatively new complaint-handling body, there is ample room for the number of complaints to continue to increase in future. The OIA is already predicting increases in number of complaints as students’ expectations rise with higher fee levels, having already seen an increase in the number of complaints regarding issues at the core of academic decision making.<sup>87</sup>

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80. Titus, *supra* note 67, at 162.

81. *See, e.g.*, Higher Education Act, 2004.

82. *Id.* at § 13.

83. *Id.*

84. For an overview discussion of previous approaches, see David Palfreyman, *Proper Governance in the English Chartered University*, (Oxford Ctr. for Higher Educ. Policy Studies, Working Paper No. 2, 2002), available at [http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS\\_OP2r%20doc.pdf](http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS_OP2r%20doc.pdf).

85. *See* OFF. OF THE INDEP. ADJUDICATOR, OIA ANNUAL REPORT 2012 (2012), available at <http://www.oiahe.org.uk/media/88650/oia-annual-report-2012.pdf> [hereinafter OIA, 2012 ANNUAL REPORT]; OFF. OF THE INDEP. ADJUDICATOR, OIA ANNUAL REPORT 2011 (2011), available at [http://www.oiahe.org.uk/media/57882/oia\\_annual\\_report\\_2011.pdf](http://www.oiahe.org.uk/media/57882/oia_annual_report_2011.pdf) [hereinafter OIA, 2011 ANNUAL REPORT].

86. *See* OIA, 2012 ANNUAL REPORT, *supra* note 85; OIA, 2011 ANNUAL REPORT, *supra* note 85.

87. For example, in its 2011 Annual Report, the OIA noted a significant increase

Perhaps most telling is the contrast between the current student complaints environment and the picture in the past. As William P. Hoye and David Palfreyman observe,

Historically, the very idea that a mere student would have the temerity to pursue a legal claim against one of his instructors, his college or his university would have been unthinkable. After all, students were the minions of their academic institutions: they were the Junior Members in the *studium generale*.

...

Higher education was viewed as a privilege, not a right, by the courts, and the relationship between students and their colleges was perceived as a paternalistic, if not a dictatorial, one. Suffice it to say, student legal claims were not a major problem for colleges and universities during the first 700 years or so of formal higher education.<sup>88</sup>

Even the weakening of stricter forms of hierarchy in the latter part of the twentieth century did not see a major shift in the core elements of academic authority and control.<sup>89</sup> In this context, the twenty-first century move towards student as consumer presents as a fascinating, if risky, experiment.

Other legal developments in the U.K. may potentially interfere with traditional understanding of academic autonomy. For example, efforts by colleges and universities to comply with disability discrimination legislation may err on the side of caution, notwithstanding concerns on the part of some faculty that such measures may be at the expense of academic standards.<sup>90</sup> Even recent developments in immigration policy in the U.K. have given rise to concerns that academics are being required to act as informal immigration officers with, for example, supervisory meetings with research students being recorded not merely for traditional purposes of educational development, but also to provide a record that a student is complying with their immigration status criteria.<sup>91</sup>

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in claims associated with allegations of academic misconduct, such as plagiarism, leading to loss of marks or even expulsion from a course. OIA, 2011 ANNUAL REPORT, *supra* note 85.

88. William P. Hoye & David Palfreyman, *Plato vs. Socrates: The Devolving Relationship Between Higher Education Institutions and Their Students* 1–2 (Oxford Ctr. for Higher Educ. Policy Studies, Working Paper No. 17), available at [http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS\\_OP17.pdf](http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS_OP17.pdf) (last visited Apr. 21, 2014).

89. *See id.*

90. *See, e.g., Education: Disability and Discrimination in Schools (England and Wales)*, NAT'L AUTISTIC SOC'Y, <http://www.autism.org.uk/living-with-autism/education-and-transition/primary-and-secondary-school/education-legislation/education-disability-discrimination-england-and-wales.aspx> (last updated May 14, 2013).

91. Failure to comply on the part of a college or university can have serious implications for its future capacity to recruit international students. *See, e.g., David Matthews, Teesside Licence Suspended as UKBA Cracks Whip*, TIMES HIGHER EDUC.

Clearly, the escalation of the “student consumer movement” has substantial implications for the quality of faculty work-life, as well as faculty members’ employment rights. Those implications will be explored in the next section of this article.

## II. THE STUDENT-AS-CONSUMER TREND IN THE U.K.

Arguably, a significantly distorting influence on the work and professional autonomy of academics in the U.K. has been the introduction of the National Student Survey (“NSS”). The traditional model sees universities not merely as providers of services but as standard setters and regulators of quality.<sup>92</sup> If consumer power finds academics being drawn into what Michael Bayles describes as the agency model of professionalism,<sup>93</sup> academics become “hired guns” undertaking the wishes of the student client.<sup>94</sup> Introduced in 2005, the NSS surveys final-year undergraduate students regarding their perceptions of the quality of their academic programs.<sup>95</sup> The survey was intended to follow a proposal in the 2003 White Paper, *The Future of Higher Education*, to “explicitly cover teaching quality” and ensure that students were treated as “intelligent customers.”<sup>96</sup> Government support for the survey has continued with, for example, the expressed view that student expectations should continue to play an important role in shaping

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(Mar. 22, 2012), <http://www.timeshighereducation.co.uk/419401.article>. For an overview discussion, see Geoffrey Alderman, *Educational Oversight? The IncurSION of the UK Border Agency into the Quality Assurance of Higher-Education Programmes* (Oxford Ctr. for Higher Educ. Policy Studies, Working Paper No. 43), available at [http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/Ox\\_CHEPS\\_OP43.pdf](http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/Ox_CHEPS_OP43.pdf) (last visited Apr. 21, 2014). In August 2012, the U.K. Border Agency revoked the sponsor license of London Metropolitan University; the license was reinstated in April of 2013, but subject to a period of probation and a limit upon the number of international students who could be admitted. See Hannah Richardson, *London Met Wins Back Foreign Student License*, BBC.COM (Apr. 9, 2013), <http://www.bbc.com/news/education-22080301>.

92. MICHAEL BAYLES, PROFESSIONAL ETHICS (1981).

93. *Id.*

94. See G. Sharrock, *Why Students are not (Just) Customers (and other reflections on Life after George)*, 22 J. HIGHER EDUC. POL. & MGMT. 149 (2000); Ken Mackinnon, *The Academic as Fiduciary: More than a Metaphor?*, 1 CANADIAN LEGAL EDUC. ANN. REV. 115, 121 (2007).

95. The survey contains 23 core items, addressing experiences of teaching, assessment, academic support, course organisation, learning resources, personal development and overall course satisfaction and two open response questions. See generally NAT. STUD. SURVEY 2014, <http://www.thestudentsurvey.com/> (last visited Aug. 27, 2014). There are also a number of optional question banks allowing institutions to further tailor the survey to their needs. See *id.*

96. DEP’T FOR EDUC. AND SKILLS, THE FUTURE OF HIGHER EDUCATION 47 (2003), available at <http://www.architecture.com/Files/RIBAHoldings/PolicyAndInternationalRelations/Policy/PublicAffairs/HigerEducationWhitePaper.pdf> [hereinafter THE FUTURE OF HIGHER EDUCATION].

university provision.<sup>97</sup>

Criticisms of the survey focus not only upon its increasingly time consuming nature,<sup>98</sup> as colleges and universities compete for higher position in the league table created from the results,<sup>99</sup> but also, and more fundamentally, on its questionable methodology<sup>100</sup> and the damaging effect it can have on key aspects of a higher education.<sup>101</sup> One vocal critic has described the survey as “a canker that is eating away at the academic profession,” with “its target the modification of everyday academic life.” Distinct from other audit mechanisms, critics argue that the survey goes beyond the mere seeking of accountability, “but directly challenges the identity of a scholar” and “encourages the subordination of education” and scholarship to the arbitrary imperative of student satisfaction.<sup>102</sup> Risk aversion and defensiveness become the hallmarks of academic practice such that the damage to academic identity is not outweighed by the benefits to students but rather risks “infantilizing” them by focusing not on what they need, but what they

97. DEP’T FOR BUS. INNOVATION & SKILLS, HIGHER AMBITIONS: THE FUTURE OF UNIVERSITIES IN A KNOWLEDGE ECONOMY (2009), available at <http://bis.gov.uk/assets/biscore/corporate/docs/h/09-1447-higher-ambitions.pdf>.

98. This issue is compounded by the observation that the variation between institutions, even those towards the top and bottom ends of the ranking, is so low as to make the findings highly questionable as a means to distinguish one institution from another. CTR. FOR HIGHER EDUC. STUDIES, ENHANCING AND DEVELOPING THE NATIONAL STUDENT SURVEY (2010) [hereinafter C.H.E.S., ENHANCING AND DEVELOPING THE NATIONAL STUDENT SURVEY], available at [http://www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12\\_10a.pdf](http://www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12_10a.pdf).

99. *But see* C.H.E.S., *supra* note 98, at 39, 47 (casting doubt on propriety of using NSS results to create league tables). Other inappropriate uses include: comparing subject areas without appropriate adjustments and comparing institutions without factoring in variations, such as characteristics and mix of students. *Id.* at 48.

100. Harriet Swain, *A Hotchpotch of Subjectivity*, GUARDIAN (May 18, 2009), <http://www.guardian.co.uk/education/2009/may/19/national-student-survey-university-guide>. Similar criticisms levelled at the Australian Course Experience Questionnaire (CEQ), the survey on which the NSS is modelled, might also be made here: that it is inadequate to detect important nuances of higher education. *See* Kerri-Lee Harris & Richard James, *The Course Experience Questionnaire, Graduate Destinations Survey and Learning and Teaching Performance Fund in Australian higher education*, PUBLIC POLICY FOR ACADEMIC QUALITY (2006) (cited by C.H.E.S., *supra* note 98, at 8, 14, 18, 21, 26, 36), available at [http://www.unc.edu/ppaq/CEQ\\_final.html](http://www.unc.edu/ppaq/CEQ_final.html).

101. In contrast, a 2010 report to the HEFCE asserts the NSS proved itself to be a successful component of the Quality Assurance Framework (QAF) for higher education, a performance indicator of teaching quality. C.H.E.S., *supra* note 98, at 7. This report also highlights general senior management approval of the NSS, suggesting that, in crude business terms, some senior managers may favour giving students what they *want*, as a means to improve league table rankings, subsequent student recruitment and so the financial health of the institution. *Id.* In contrast, individual academics, as guardians of the academic integrity of their discipline, may be much more attuned to identifying what they think students *need*. *See id.* at 21.

102. *See* John Gill, *Leader: Exit the Comfort Zone*, TIMES HIGHER EDUC. (Mar. 8, 2012), <http://www.timeshighereducation.co.uk/comment/leader/leader-exit-the-comfort-zone/419271.article>.



want.<sup>103</sup> Some (perhaps many) students are buying into the assumption that the education they receive can be measured as easily as the functionality of a new laptop or iPad. For instance, a student engagement coordinator at a leading English university's student union said, "[students] are the people who know how they can best be taught, and it's institutions' job to give them the knowledge and experience they have come to university for."<sup>104</sup> This reflects government thinking, as does a 2011 white paper, *Students at the Heart of the System*, in which the Department for Education & Skills talks about "putting students in the driving seat."<sup>105</sup> But, as some observers have commented, this thinking may permit students to "drive" before they have a license.<sup>106</sup> Experienced academics, all themselves students once-upon-a-time, may recognize over-simplicity in this type of thinking. Experience allows for re-evaluation. Teachers who are entertaining and cater more to students' wishes may be favored at the time of assessment, but what they teach their students may become outdated. Furthermore, their teaching styles may have necessitated little self-managed engagement with the subject. In contrast, the lecturer who gave less and demanded more may have been less popular at the time, but now is recalled more fondly as the genuine "teacher" who facilitated in his or her students lifelong skills of learning how to learn. As Jacquelin Mackinnon observes:

[A]t least in some areas of knowledge and skills, the student cannot know in advance what it is that they need to learn in order to understand a particular topic. If education is transformative, the student has the knowledge to evaluate the teaching process only after it has occurred. Until then he or she may have to take on trust that the methodology and content of the teaching are beneficial."<sup>107</sup>

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103. Frank Furedi, *Satisfaction and its Discontents*, TIMES HIGHER EDUC. (Mar. 8, 2012), <http://www.timeshighereducation.co.uk/419238.article>. See also Duna Sabri, *Absence of the Academic From Higher Education Policy*, 25 J. EDUC. POL'Y 191 (2010); Gill, *supra* note 102. Furedi also observes that different constituencies of student tend to view their experience differently—for example female and mature students tend to be more positive about their experience and different results are obtained from different ethnic groups.

104. Harriet Swain, *Should Students be Given the Power to Decide How Universities are Run?*, GUARDIAN (June 11, 2012), <http://www.theguardian.com/education/2012/jun/11/universities-giving-students-more-power>.

105. DEP'T FOR BUS. INNOVATION & SKILLS, *STUDENTS AT THE HEART OF THE SYSTEM* (2011), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32409/11-944-higher-education-students-at-heart-of-system.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32409/11-944-higher-education-students-at-heart-of-system.pdf).

106. See, e.g., *Students at the heart of the system? White Papers and Taking Control*, UNIV. BLOG, <http://theuniversityblog.co.uk/2011/06/28/students-heart-of-the-system-white-paper/> (last visited Aug. 27, 2014).

107. Jacquelin Mackinnon, *Academic Supervision: Seeking Metaphors and Models for Quality*, 28 J. FURTHER & HIGHER EDUC. 395 (2004). An interesting observation in this regard comes from Michael Moritz, a graduate of Christ Church, Oxford and "billionaire financier" who in July 2012 announced plans to donate £75 million to Oxford

For today’s students, the demanding, perhaps idiosyncratic, but ultimately effective tutor may be a dying breed—pushed to the brink of extinction by students who “know how they can best be taught” and who are encouraged frequently to express this.<sup>108</sup>

The U.K. government’s goal of measuring teacher quality<sup>109</sup> has missed its target, instead risking the move towards a consumer generated “junk food” version of higher education. However, while the government is well aware that market drivers for food have resulted in unhealthy eating and rising levels of obesity—trends which then have to be countered by government spending on initiatives seeking to persuade the public to adopt healthier alternatives—similar considerations are absent with regard to government plans with respect to the “consumption” of higher education. At no stage prior to entering an institution of higher education is a typical U.K. student likely to have been introduced to core ideas about what such an education might or should entail. Thus, just as an unbridled free market for food places customer choice ahead of decades of scientific research regarding the effects of unhealthy food on the human body, the NSS prioritizes the views of young men and women (who have yet to experience the long term benefits of their educations and have no bases for comparison) ahead of centuries of experience, trial and error within the academy itself. Intellectual pressure, whether or not this gives rise immediately to a happy experience, is necessary for academic benefit, something which traditional U.K. higher education has long understood.<sup>110</sup> In contrast, the NSS risks

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University to fund scholarships for financially disadvantaged students. Margarette Driscoll, *Putting Poor Kids on the Path to Billions*, SUNDAY TIMES (July 15, 2012), <http://www.thesundaytimes.co.uk/sto/newsreview/features/article1080953.ece>. In an interview given to the Sunday Times, Moritz said

My experience at Oxford has proved surprisingly useful in dealing with the unconventional . . . . If you ask what I learnt it was the approach to a topic rather than the topic itself . . . . How it helped with what I did subsequently was in being given a topic I knew little about and being able to develop opinions and come up with conclusions based on imperfect information. That proved to be a wonderful skill.

*Id.* at 5. This sentiment is likely to resonate with most academics and most successful students of higher education. What can be most valuable is not what one learns, but the learning how to learn, evidenced by Moritz’s reading history at Oxford and subsequently achieving great financial success in spotting promising entrepreneurs and financing new internet businesses. What is particular telling are the use of “surprisingly” and “proved” (“to be a wonderful skill”). *Id.* These words, it would seem, support the argument that, at the time they are immersed in the learning process, students are often not in the best position to evaluate its deeper qualities or potential future value.

108. Admittedly, this argument has subtle layers. The most entertaining and engaging faculty may inspire lifelong interest in a subject, whilst some less engaging faculty are simply not very good teachers. However, between these extremes is ample scope for variety, which, without the benefit of hindsight, can be very difficult to assess and rank.

109. See THE FUTURE OF HIGHER EDUCATION, *supra* note 96.

110. See, e.g., STEFAN COLLINI, WHAT ARE UNIVERSITIES FOR? (2012).

responses, whether from individual academics or institutions as a whole, which seek to make less challenging key aspects of higher education from the teaching itself to the assessment processes.<sup>111</sup>

The damaging effect of this trend is likely only to be experienced in the medium-to-long term. Unlike generations of graduates before them, who have been able to draw upon challenges faced in the “safe” environment of the college or university to enhance their capacity to address challenges in the world of work, tomorrow’s graduates may be deprived of this. A simple example is the law student refining drafting skills via the traditional experience of writing an essay without direct help from tutors, learning what is good and bad about the writing from feedback and then seeking to utilize these lessons in the next drafts. If law schools succumb to student demands for help during the drafting process, for instance, by seeking comments on drafts, the final mark achieved may be higher and the student may be happier, but the learning experience is severely diminished. As Furedi puts it, “[t]he model of teaching that is slowly creeping into university life is one in which undergraduates are perceived as biologically mature [school] pupils who require constant direction and guidance.”<sup>112</sup>

Another subtle example, discussed later in a different context, is the recording and uploading of lectures to web based learning platforms. Historically, a lecture has been a one-off event that not only conveys information but typically can also facilitate the refinement of listening and note-taking skills. A recorded lecture available “on demand” changes this nature. Faced with the ready availability of technology for recording, as well as student-demand that the additional “service” be provided, university managers have little reason to resist. Only time will tell whether, for instance, future lawyers are missing an important skill set as a result of this move.<sup>113</sup> Just as sugary treats are popular because of the instant satisfaction they provide, so might intellectually innutritious courses or course delivery be favored by some students who crave the high grades and an easier academic life.

It has been suggested that student surveys can be designed to avoid the detrimental effects that have resulted from the NSS in the U.K. For example, other jurisdictions that make use of such surveys include questions relating to matters such as number and length of essays and how hard the

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111. Furedi, *supra* note 103.

112. *Id.*

113. Many lawyers in the U.K. will still likely encounter situations where the ability to take an accurate contemporaneous note is an important skill. Most lawyers currently in practice will have encountered, depending upon individual attendance rates, 500 hours or more of live lectures, typically spread over a four year period, as part of their academic and professional study. This can provide an important skill resource, although one which may easily have been overlooked given the extent to which it was imbedded into traditional university teaching. As with the impact of the ready availability of electronic calculators upon basic numerical skills, only time will tell whether the downgrading of traditional teaching models has an equivalent effect on other skills sets.

student has worked to meet tutors’ expectations—questions that reinforce rather than undermine values towards which higher education should be directed.<sup>114</sup>

It has been argued that the National Survey of Student Engagement (NSSE) used in North America is better methodologically than the NSS because it focuses upon learning rather than satisfaction.<sup>115</sup> Its theoretical underpinning is based upon the idea of reciprocal transactions. For instance, students are asked about their input into the learning process—how hard they have worked, the nature of outputs they have produced, and their levels of engagement with staff.<sup>116</sup>

In addition to the NSS, many U.K. colleges and universities have moved or are moving towards centralized internal student feedback questionnaires. Instead of student feedback being an aspect of the close intellectual relationship between students and academics, being restricted to individual or departmental level and serving to inform the professional development of courses, they become tools of central oversight with the potential to be used bluntly and with undue regard for the subtleties of the process needed to aid students in their development to become autonomous learners. The potential for a form of bullying to emerge from centralized student questionnaires also appears to have been largely ignored within colleges and universities.<sup>117</sup> Some student responses in free text aspects of questionnaires can be blunt, even brutal, in their criticism. The anonymity of feedback can further reduce inhibitions on the part of the writers, who vent their spleen, free from self-censorship. While a certain fortitude might reasonably be expected from academics, an employment environment that regularly invites potential criticism of employees may wear on even the hardest professors.<sup>118</sup>

### III. INSTITUTIONAL RESPONSES AND IMPLICATIONS FOR FACULTY

Particularly at public colleges and universities in the U.S., the trends discussed above have altered the work environment and employment rights of faculty. Departing tenure-track faculty are quite likely to be replaced (if

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114. Gill, *supra* note 102.

115. See, e.g., HIGHER EDUC. ACAD., COMPARATIVE REVIEW OF BRITISH, AMERICAN AND AUSTRALIAN NATIONAL SURVEYS OF UNDERGRADUATE STUDENTS (2007).

116. *Id.* See also C.H.E.S., *supra* note 98.

117. At present, Anglo-Welsh case law on work-related psychiatric illness and the potential defamatory impact of negative review comments has not extended specifically into the academic field. For examples of the existing state of case law, see Walker v Northumberland [1995] I.C.R. 702; Sutherland v Hatton [2002] I.C.R. 613; Barber v Somerset CC [2004] UKHL 13, [2004] 1 W.L.R. 1089; Daw v Intel Corp (UK) Ltd [2007] EWCA Civ 70, [2007] I.R.L.R. 355. See also Jon Swaine, *Man Sued for Libel over Comments on eBay*, TELEGRAPH (Oct. 23, 2008), <http://www.telegraph.co.uk/news/uknews/3247683/Man-sued-for-libel-over-comments-on-eBay.html>.

118. *Id.*

they are replaced at all) with non-tenure-track faculty, working either part-time or full time, but with no prospect for tenure.<sup>119</sup> This trend reduces the number of tenure-track faculty available for governance responsibilities, advising, and other non-teaching work that is expected of faculty members. Also, an important decision by the U.S. Supreme Court appears to have limited the ability of faculty members at public institutions to enjoy the free speech protections of the First Amendment if they speak on matters related to their work.<sup>120</sup> And courts are showing less deference to the pedagogical judgments of faculty with respect to student claims of alleged discrimination or contractual breaches.<sup>121</sup> Each of these trends has elicited responses from institutions that raise questions about the scope of academic freedom and the quality of a faculty member's work-life.

#### A. Increase in Non-Tenure-Track Faculty

Declining financial support and multiple demands on institutional resources have persuaded many colleges and universities to rely more heavily on non-tenure-track faculty, whether part-time adjuncts or full-time employees. According to a survey conducted by the American Federation of Teachers, part-time and adjunct faculty teach "the majority of undergraduate courses" in U.S. colleges and universities.<sup>122</sup> The use of part-time and adjunct faculty differs, however, by type and control of institutions. In 2009, 32 percent of faculty at four-year colleges and universities were part-time; in the same year, 53 percent of the faculty at public two-year colleges and universities were employed part-time.<sup>123</sup> Between 1999 and 2009, the number of part-time faculty overall increased by 63 percent.<sup>124</sup> Also, according to the American Association of University Professors, which used U.S. Department of Education data, the proportion of full-time tenured and tenure-track faculty in U.S. colleges and universities overall declined from 45.1 percent in 1975 to 24.4 percent in 2009, while the proportion of full and part-time non-tenure-track faculty at U.S. institutions increased from 34.3 percent in 1975 to 56.2 percent in 2009.<sup>125</sup>

The decline in hiring of tenure-track faculty has depressed the labor market for recent PhD graduates, and the propensity for older faculty to de-

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119. *Id.*

120. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

121. *See, e.g., Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

122. AM. FED'N TEACHERS, AMERICAN ACADEMIC: A NATIONAL SURVEY OF PART-TIME/ADJUNCT FACULTY (2010), available at [http://www.aft.org/pdfs/highered/aa\\_partimefaculty0310.pdf](http://www.aft.org/pdfs/highered/aa_partimefaculty0310.pdf).

123. U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 374, tbl.255 (2010), available at [http://nces.ed.gov/pubs2011/2011015\\_3a.pdf](http://nces.ed.gov/pubs2011/2011015_3a.pdf).

124. *Id.*

125. AMER. ASS'N UNIV. PROFESSORS, TRENDS IN INSTRUCTIONAL STAFF EMPLOYMENT STATUS, 1975-2009 (2009), available at <http://www.aaup.org/NR/rdonlyres/7C3039DD-EF79-4E75-A20D-6F75BA01BE84/0/Trends.pdf>.

lay retirement, in part due to the lingering effects of the recession that began in 2008,<sup>126</sup> has exacerbated this problem. These trends have created two tiers of faculty and have motivated non-tenure-track faculty at many institutions to seek the right to bargain collectively over pay, job security, and other employment matters. Nearly one-fifth of all non-tenure track faculty are represented by unions—a figure not much lower than that for full-time tenure-track faculty.<sup>127</sup> Although tenure-track and non-tenure-track faculty are in the same bargaining unit at a very small number of institutions, they are usually in separate bargaining units, thus widening the gap between tenure-track faculty and their less fortunate colleagues.

Although tenure-track faculty have far superior working conditions, job security, and pay than their non-tenure-track colleagues, the sharp increase in the use of non-tenure-track faculty will likely change the way that tenure-track faculty work. For example, tenure-track faculty may have less time to conduct research because they must devote more time to governance-related matters, advising, and other nonteaching activities. Additionally, new accountability requirements handed down by accrediting associations may require review and revision of curricula or program content. Institutions facing financial difficulties may limit or eliminate once unquestioned perks, such as sabbaticals or lighter teaching loads for faculty with heavy research loads or those holding positions with additional responsibilities. Class sizes and teaching loads may increase as institutions seek ways to minimize the need to hire additional faculty. All of these developments have made academic work quite different from even a decade ago on many campuses.

The last half-century has witnessed a move in U.K. higher education, from an elite system to a mass system<sup>128</sup> as result of a tenfold increase in student numbers and a rise in the total number of colleges and universities.<sup>129</sup> There are approximately 180,000 academic staff,<sup>130</sup> 10 percent of

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126. Audrey Williams June, *Aging Professors Create a Faculty Bottleneck*, CHRON. HIGHER EDUC. (March 18, 2012), <http://chronicle.com/article/Professors-Are-Graying-and/131226/>.

127. Peter Schmidt, *Part-Time Faculty Are Catching Up to Full-Timers in Union Representation*, CHRON. HIGHER EDUC. (Nov. 18, 2011), <http://chronicle.com/article/Part-Time-Faculty-Are-Catching/129819/>.

128. Ideas regarding “McDonaldization” have even been used by some commentators. See D. Hartley, *McDonaldization of Higher Education: Food for Thought*, 21 OXFORD REV. EDUC. 409 (1995); M. Parker & D. Jary, *The McUniversity—Organization, Management and Academic Subjectivity*, 2 ORGANIZATION 319 (1995); C. Prichard & H. Willmott, *Just How Managed is the McUniversity?*, 18 ORGANISATION STUD. 287 (1997).

129. In 2012, the Guardian newspaper ranked 120 institutions in its “Good University Guide,” with some of these institutions being university colleges rather than fully fledged universities. See *University Guide 2012*, GUARDIAN (May 16, 2011), <http://www.theguardian.com/education/table/2011/may/17/university-league-table-2012>. Combining this total with other providers of higher education brings the total number of institutions to over 150.

whom are full professors.<sup>131</sup> At least one-third of academic employees are on fixed term contracts, although some commentators suggest that the real figure is much higher.<sup>132</sup> Workforce casualization (or, in the words of some commentators, the creation of an “underclass”) allows for greater management flexibility but at the expense of traditional ideas of collegiality.<sup>133</sup> Such developments may also eat into the precious research time of experienced, full-time permanent academics who find themselves having to devote more of their energies to training, supporting and monitoring temporary, possibly transient, junior colleagues.<sup>134</sup> This phenomenon compares unfavorably with earlier academic employment models whereby a stable and predominantly permanent workforce would have worked largely autonomously, at least in the humanities and social sciences. However, increased casualization may provide some benefits to established academics—the provision of a buffer against the effects of the move to a mass education model<sup>135</sup> and, in a post-tenure environment, some protection against redundancy for staff on permanent contracts. Increased casualization has also been accompanied by an increasing delegation of tasks previously undertaken by academics to non-academic staff.<sup>136</sup> Recent examples

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130. *Free Online Statistics—Staff*, HIGHER EDUC. STAT. AGENCY, [http://www.hesa.ac.uk/index.php?option=com\\_content&task=view&id=1898](http://www.hesa.ac.uk/index.php?option=com_content&task=view&id=1898) (last visited Aug. 22, 2014) (listing total academic staff for 2010-2011 at 181,185).

131. In the U.K. context, the title “professor” is generally restricted to those who have reached the top echelons of the academic hierarchy. Most academics in the U.K. are either “lecturers,” “senior lecturers,” or “principal lecturers” (in former polytechnics, which were granted university status from 1992). Some are called “readers.”

132. Earlier research has estimated that around half of academic staff in U.K. higher education institutions are paid hourly, are otherwise not salaried full-time, or are fractional part-time. See Colin Bryson et al, *HESA 2005-6 Part-Time Teaching Staff Statistics: An Analysis and Commentary*, (2007), available at [http://www.new1.heacademy.ac.uk/assets/bmaf/documents/projects/HES\\_final\\_report.pdf](http://www.new1.heacademy.ac.uk/assets/bmaf/documents/projects/HES_final_report.pdf). Changes in U.K. employment legislation may explain the changed description and statistical breakdown in more recent years, although the authors of the latter report do question the accuracy of some HESA data.

133. See Hugh Willmott, *Managing the Academics—Commodification and Control in the Development of University Education in the UK*, 48 HUM. REL. 993 (1995); Clyde W. Barrow, *Beyond the Multiversity: Fiscal Crisis and the Changing Structure of Academic Labour*, in ACADEMIC WORK: THE CHANGING LABOUR PROCESSES IN HIGHER EDUCATION 159 (John Smyth ed., 1995) (cited by Colin Bryson, *What About the Workers? The Expansion of Higher Education and the Transformation of Academic Work*, 35 INDUS. REL. J. 38, 41 (2004)).

134. This comes on top of observations that self-directed academic activities, such as research, have already been squeezed to the edges, such that much of it can only be undertaken in an academic’s own time outside of formal working hours. Bernard Casey, *Academic Staff in Higher Education: Their Experiences and Expectations*, NAT’L COMMITTEE INQUIRY INTO HIGHER EDUC. (1997), <http://www.leeds.ac.uk/educol/ncihe/> (follow “Reports 1-14” hyperlink; then follow “Report 3” hyperlink) (cited by Bryson, *supra* note 133, at 46).

135. Willmott, *supra* note 133.

136. See, e.g., Tom Wilson, *The Proletarianisation of Academic Labour*, 22 INDUS.

have included the creation in some universities of student advisor roles to take charge of advice relating to mitigating evidence for assessments and the provision of reasonable adjustments to meet disability discrimination requirements. On the one hand, such moves may be seen as positive because they concentrate expertise around an increasingly complex legal and regulatory framework, relieving academics of the need to maintain their own expertise in these areas and better ensuring that students receive accurate and up to date advice from specialists. On the other hand there may be displacement and a less desirable disaggregation of activities, especially if such sources of advice are centralized and so removed from the frontline academic activity to which they relate.<sup>137</sup>

Funding in the U.K. has not kept pace with student numbers and, as a result, staff-to-student ratios have worsened and academic pay has lagged behind that of comparable professions and occupations. For example, between 1980 and 1998, the average real terms increase across all employment sectors was 44 percent compared to only 5 percent for academics.<sup>138</sup> A more recent comparative survey found that average academic salaries in the U.K. were the seventh highest<sup>139</sup> amongst twenty-eight countries considered, but that once salaries were compared with other professions they fared relatively poorly.<sup>140</sup> In recent years, the requirement to teach more students for less money has been accompanied by greater external oversight through both the NSS and, most recently, the removal of most state subsidies, which had led to an increase in undergraduate fees and exposed universities to greater market forces.

The impact of the new fee regime, following its imposition on 2012–13 entry students, is still emerging. One indication of the effects of the regime is the number of first-year undergraduate applicants and attendees. For example, from the 2002–03 school year to the 2011–12 school year, the number of first-year undergraduate students at English colleges and universities increased from 344,235<sup>141</sup> to over 480,000.<sup>142</sup> After the introduction of

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REL. J. 250 (1991).

137. A simple example would be student advisors in disciplinary departments and schools who can work closely with academics, sit on exam boards where decisions are implemented, etc., as compared to advisors who are centralized and removed from the core of academic activity and decision making.

138. See MICHAEL BETT, INDEPENDENT REVIEW OF HIGHER EDUCATION PAY AND CONDITIONS (1999) (cited by Bryson, *supra* note 133, at 46–47); Dnes & Seaton, *supra* note 35.

139. The U.K. placed only behind Canada, Italy, South Africa, India, the U.S., and Saudi Arabia.

140. *International Comparison of Academic Salaries in 28 Countries*, ACAREM.HSE.RU, <http://acarem.hse.ru/> (last visited Aug. 27, 2014). See also Jack Grove, *Academic Salaries No Longer Attract Top Talent, Survey Finds*, TIMES HIGHER EDUC. (Mar. 22, 2012), <http://www.timeshighereducation.co.uk/419399.article>.

141. *Students in Higher Education Institutions 2003/4, Table 1b*, HIGHER EDUC. STAT. AGENCY, <https://www.hesa.ac.uk/content/view/1554/251/> (last visited Aug. 27,



higher fees, total enrollment of undergraduate students fell by 17 percent between the 2011-12 and 2012-13 school years.<sup>143</sup> The picture for 2013-14 initially continued to show hesitancy amongst prospective students to commit themselves to college or university study after the imposition of higher fees, but new data indicates that undergraduate enrollment has gradually begun to bounce back.<sup>144</sup> By June 2013, the number of applicants from England was 3 percent greater than at the same time in 2012, suggesting that the initial negativity surrounding higher fees is subsiding.<sup>145</sup>

Another useful indicator is the number of international student applicants. According to a statistical release compiled by UCAS summarizing the number of applicants in the 2012 cycle at the June deadline, applications from other EU countries fell by 12.9 percent between 2011 and 2012.<sup>146</sup> The change from 2012-13 shows a reversal of this trend; according to UCAS, applications from other EU countries increased by 4.3 percent.<sup>147</sup>

Finally, in the wake of the fee regime change, some leading colleges and universities are taking advantage of the opportunity to recruit uncapped numbers of students with at least grades ABB at "A" Level.<sup>148</sup> This use of the August clearing system represents a new pattern of behavior. Historically, clearing was dominated by lower status institutions seeking to recruit students who were rejected by their initial choice of institution because of poorer than predicted grades. The use by some of the more prestigious colleges and universities of the clearing process to tempt applicants who had performed better than expected away from their initial lower status choice is a new tactic, and it presents a further risk to the future viability of some lower-status institutions. This is an unfolding picture in what are still early days of a novel environment for post-1945 English higher education.

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2014).

142. *Students, Qualifiers, and Staff data tables 2011/12, Table 17*, HIGHER EDUC. STAT. AGENCY, <https://www.hesa.ac.uk/content/view/1973/239/> (last visited Aug. 27, 2014).

143. *General Student Numbers, Table 2*, HIGHER EDUC. STAT. AGENCY, <https://www.hesa.ac.uk/stats> (last visited Aug. 27, 2014).

144. Jack Grove, *Student Recruitment Hits Record Numbers*, TIMES HIGHER EDUC. (Dec. 19, 2013), <http://www.timeshighereducation.co.uk/news/student-recruitment-hits-record-levels/2010000.article>.

145. UNIV. & C. ADMISS'N SERV., 2013 CYCLE APPLICANT FIGURES – JUNE DEADLINE POSTED (2013), available at [http://www.ucas.com/system/files/2013-applicant-figures-june-deadline\\_2.pdf](http://www.ucas.com/system/files/2013-applicant-figures-june-deadline_2.pdf).

146. *Id.*

147. *Id.*

148. See, e.g., *Universities U.K.—Clearing 2013*, UNIVERSITIES U.K., <http://www.universitiesuk.ac.uk/aboutus/whatwedo/PolicyAnalysis/Team/Pages/Clearing2013.aspx> (last visited Aug. 27, 2014). See also Jack Grove, *In fight to fill places, all bets are off*, TIMES HIGHER EDUC. (Aug. 8, 2013), <http://www.timeshighereducation.co.uk/news/in-fight-to-fill-places-all-bets-are-off/2006345.article>.

While applicant numbers appear to be holding up better than some commentators predicted, application patterns are still in a state of flux. A so-called “flight to quality” towards high status colleges and universities and towards career-orientated courses continues to put some lower status institutions at risk.<sup>149</sup> In terms of course choice, certain subjects—such as economics, chemistry and physics—were reported to have attracted higher numbers of applicants, while applications for other subjects—such as media studies, performing arts, and communication studies—were significantly decreased.<sup>150</sup>

Academics in the U.K. complain about deteriorating autonomy, declining collegiality and the rise of managerialism. The latter has tended to seek to standardize academic work practices and to measure compliance by the centralized student feedback systems discussed above. Managerialism may also favor academic subjects for which there is a buoyant market, rather than traditional models of colleges and universities as repositories of knowledge, ideas and research—whether mainstream and in current demand or relatively obscure.<sup>151</sup> These developments have undermined traditional ideas that poorer working conditions could be traded for autonomous and intrinsically rewarding academic activity.<sup>152</sup> A “commodification” of the labor process is not unique to academia; other professions and highly skilled occupations have experienced similar developments.<sup>153</sup> Practicing lawyers in England and Wales, for example, have in recent years seen aspects of their work become subject to similar developments.<sup>154</sup> However, a key difference is that legal practitioners work in a genuine market environment where creative business practices can produce surplus value. Historically, U.K. colleges and universities have been non-profit driven organizations with charitable aims, and academic work thus does not generate surplus value in the same manner. Managerial pressure may push academics into acting as though it did.<sup>155</sup>

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149. See Martin Freedman, *University Applications: Have Your Numbers Plummeted?*, GUARDIAN (Feb. 8, 2012), <http://www.theguardian.com/higher-education-network/blog/2012/feb/08/university-applications-in-the-uk>.

150. See *University Applications: Where did People Apply and for What Subjects?*, Data Blog, GUARDIAN, <http://www.theguardian.com/news/datablog/2012/jan/30/university-applications-subjects-age-poverty#subject> (last visited Aug. 27, 2014).

151. See Bryson, *supra* note 133, at 40; Parker & Jary, *supra* note 128; Willmott, *supra* note 133.

152. See Craig McInnis, *Towards New Balance or New Divides? The Changing Work Roles of Academics in Australia*, in *ACADEMIC WORK AND LIFE* 117 (Malcolm Tight ed., 2000).

153. See, e.g., Hugh Levinson, *Call Centre Justice Criticised*, BBC (Oct. 9, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/7035533.stm](http://news.bbc.co.uk/2/hi/uk_news/7035533.stm).

154. *Id.*

155. Willmott, *supra* note 133. See also by Bryson, *supra* note 133, at 41. There is a legitimate argument to be made that to remain viable, especially in uncertain economic times, colleges and universities must work to a suitable balance sheet surplus. How-

## B. The U.S. Supreme Court and Academic Freedom

In 2006, the U.S. Supreme Court issued an opinion in *Garcetti v. Ceballos*<sup>156</sup> that has the potential to sharply limit the free speech protections for faculty at public colleges and universities. In a case involving a non-academic workplace, the Court ruled 5–4 that employee speech made as part of the employee’s job duties is not protected by the First Amendment.<sup>157</sup> An employee may accordingly be disciplined or dismissed as a result of that speech.<sup>158</sup> Although the dissenters, led by Justice Souter, expressed dismay that such a bright line rule might “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties,’”<sup>159</sup> the majority dismissed such concerns. Justice Kennedy, writing for the court, admitted that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”<sup>160</sup> But, he added, “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”<sup>161</sup>

The Court’s disinclination to either apply *Garcetti* wholesale to academia or to carve out an exception for faculty, has led to predictable inconsistency in the lower federal courts. Federal courts in the Ninth,<sup>162</sup> Seventh,<sup>163</sup> Sixth,<sup>164</sup> Second,<sup>165</sup> and Third<sup>166</sup> Circuits have applied *Garcetti* to uphold discipline or dismissal of faculty who claim that these actions were a result of otherwise protected speech. On the other hand, the Idaho Supreme Court<sup>167</sup> and the Fourth Circuit<sup>168</sup> concluded that “letters to the edi-

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ever, the risk remains present that institutions lose sight of this charitable aim and that the profit motive creeps into everyday managerial thinking.

156. 547 U.S. 410 (2006).

157. *Id.*

158. *Id.*

159. *Id.* at 438.

160. Bryson, *supra* note 133, at 46. *See also Garcetti*, 547 U.S. at 425 (2006).

161. *Id.*

162. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d on other grounds*, 403 F. App’x 236 (9th Cir. 2007).

163. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

164. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010).

165. *Ezuma v. CUNY*, 367 F. App’x 178 (2d Cir. 2010); *see also Alberti v. Univ. of P.R.*, 818 F. Supp. 2d 452 (D.P.R. 2011).

166. *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

167. *Sadid v. Idaho State Univ.*, 265 P.3d 1144 (Idaho 2011) (finding that although speech was protected by First Amendment, plaintiff was not retaliated against; affirming summary judgment for university).

168. *Adams v. Trustees of Univ. of N.C.—Wilmington*, 640 F.3d 550 (4th Cir. 2011). *See also VanHeerden v. La. State Univ.*, 2011 U.S. Dist. LEXIS 121414 (M.D.

tor” and other communications directed to the public by university faculty were not made “pursuant to official duties” and thus *Garcetti* did not apply. A federal district court rejected a college’s motion to dismiss an adjunct professor’s constitutional claims that she was impermissibly dismissed because of statements she made in a biology course that she taught.<sup>169</sup> That court called the college defendant’s reliance on *Garcetti* “misplaced” because *Garcetti* “expressly reserved the question of whether its holding extends to scholarship or teaching-related speech,” and thus the court applied “existing circuit law” and rejected the *Garcetti* claim.<sup>170</sup>

The disarray that has occurred in the wake of *Garcetti* is troubling for several reasons. First, institutional defendants are attempting to take advantage of *Garcetti* to insulate negative actions against faculty members that may very well be justified by the facts—and by pre-*Garcetti* First Amendment jurisprudence. Using *Garcetti* as a convenient defense to nearly any negative employment action in which a plaintiff alleges a First Amendment or academic freedom violation chips away at vital protections for both the institution and its faculty. Second, plaintiffs are claiming academic freedom or First Amendment protections for some behavior that could be characterized as misconduct or insubordination—particularly speech related to non-teaching or non-research duties. Prior to *Garcetti*, courts did not hesitate to reject such claims on their merits, rather than labeling them “work-related” and thus undeserving of free speech or academic freedom protection.<sup>171</sup> Third, lower courts have not yet developed a thoughtful analysis of the interplay between faculty academic freedom and the institutions’ need to operate effectively. It is unlikely that the parties in any of these cases gave these courts much help in this regard. It appears that some of these faculty plaintiffs misused the doctrines of academic freedom and free speech to attempt to reverse legitimate disciplinary actions for unprofessional conduct or refusal to comply with a reasonable administrative request. The post-*Garcetti* cases involved either poor performance (*Hong*),<sup>172</sup> outright violation of institutional regulations (*Gorum*),<sup>173</sup> or a choice between complying with an administrative request

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La. Oct. 20, 2011) (denying summary judgment on breach of contract claim brought by untenured faculty member who criticized Army Corps of Engineers and others after levees failed as a result of Hurricane Katrina, and ruling that his statements were made as a private citizen and were not part of his official duties).

169. *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov. 25, 2009).

170. *Id.* at \*10.

171. *See, e.g., de Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002) (upholding dismissal of a tenured faculty member on grounds of unprofessional conduct and insubordination).

172. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d on other grounds*, 403 F. App’x 236 (9th Cir. 2007).

173. *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

or losing a grant (*Renken*).<sup>174</sup> On the other hand, it appears that the institutions defending against these claims focused on *Garcetti* as their primary defense rather than emphasizing that the negative actions—at least in some of these cases—were ratifying faculty recommendations or were legitimate requirements with which the faculty member at issue refused to comply. No party in any of these cases spoke up for the integrity of the original definition of academic freedom—which balances rights with responsibilities and demands that faculty behave in a temperate and restrained manner. Further, *Garcetti*'s potential to eviscerate the faculty role in governance, analyzed so ably by Professor Judith Areen,<sup>175</sup> has been virtually ignored by the courts.

### C. Increasing Governance Disputes in the U.S.

Over the past decade, there have been a number of reported disputes on several campuses over the role of faculty in institutional governance. For example, in 2007, the governing board of the Rensselaer Polytechnic Institute suspended the faculty senate after a dispute about voting rights for non-tenure track faculty, although a new senate was created four years later.<sup>176</sup> Faculty senates have been disbanded at other institutions over the past decade as well—in some cases by the administration, in others by institution-level or state-level boards of trustees.<sup>177</sup> At Idaho State University, the State Board of Education suspended the faculty senate after conflict arose between the administration and the faculty regarding planned reorganization of the university.<sup>178</sup> In some cases, faculty senates have been disbanded or threatened with suspension after votes of no-confidence in presidents or provosts.<sup>179</sup> Many of these disputes appear to be closely related to layoff plans, restructuring of programs or departments, or other responses to financial problems faced by these institutions.

The respective roles of trustees and faculty in governing the institution is

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174. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

175. Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009). See also, Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75 (2008).

176. Andrew Mytelka, *4 Years After Suspension, Faculty Senate Will Return to Rensselaer Polytechnic*, CHRON. HIGHER EDUC. (Dec. 19, 2011), <http://chronicle.com/blogs/ticker/4-years-after-suspension-faculty-senate-will-return-to-rensselaer-polytechnic/39260>.

177. Gary A. Olson, *When to Dissolve a Faculty Senate*, CHRON. HIGHER EDUC. (Mar. 22, 2011), <http://chronicle.com/article/article-content/126827/>.

178. Peter Schmidt, *AAUP Report Denounces Suspension of Idaho State U. Faculty Senate*, CHRON. HIGHER EDUC. (May 26, 2011), <http://chronicle.com/article/AAUP-Report-Denounces/127642/>.

179. See, e.g., Peter Schmidt, *At Fort Valley State U., Faculty Senate is Besieged After Clashing with President*, CHRON. HIGHER EDUC. (Apr. 30, 2012), <http://chronicle.com/article/Faculty-Senate-Is-Besieged/131745/>.

an issue at many colleges and universities. One dramatic example is the sudden dismissal in June 2012 of the president of the University of Virginia, who had served for just two years, and who was popular with the faculty.<sup>180</sup> According to media accounts, the board wanted rapid change, including the elimination of departments and majors, while the president, Teresa Sullivan, preferred working through faculty governance channels to achieve financial savings and to improve quality.<sup>181</sup> The dispute between Sullivan and the board, according to a statement that she released, was “not whether change in and of itself was necessary, but rather at what pace and to what degree.”<sup>182</sup> Faculty members were not consulted about Sullivan’s performance, and the trustees’ decision was widely unpopular with them.<sup>183</sup> The trustees apparently favored speedy decisions over shared governance.

Conflict has also occurred between faculty and administrators over personnel decisions—particularly those involving faculty who have made controversial statements or whose publications have attracted unfavorable attention from the community, alumni, donors, or state policymakers. For example, the uproar over the University of Colorado’s decision to dismiss Ward Churchill led to criticism by the American Association of University Professors (“AAUP”) and a lawsuit by Professor Churchill, in which he was awarded \$1 in nominal damages but not reinstated to his tenured faculty position.<sup>184</sup> Another example is the dismissal of an adjunct faculty member for using controversial language in a communications course; the instructor prevailed on his free speech claim, but did not get his job back.<sup>185</sup>

#### D. Challenges to Academic Judgments in the U.S.

As noted earlier in this article, student claims challenging academic judgments by faculty have increased and some scholars argue that judicial deference to academic judgments is weakening or disappearing.<sup>186</sup> Although not all scholars agree, it does appear that, at least in selected cases, courts are more willing to scrutinize the rationale for academic judgments

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180. Jack Stripling, *Departing President Defends Her ‘Incremental’ Approach to Change at U. of Virginia*, CHRON. HIGHER EDUC. (June 18, 2012), <http://chronicle.com/article/Sullivan-Defends-Her/132379/>.

181. *Id.*

182. *Id.*

183. After the faculty, alumni, the governor, and others came to her defense, the Board of Visitors voted to reinstate Sullivan as president. Sara Hebel et al, *U. of Virginia Board Votes to Reinstate Sullivan*, CHRON. HIGHER EDUC. (June 26, 2012), <http://chronicle.com/article/U-of-Virginia-Board-Votes-to/132603/>.

184. *Churchill v. Univ. of Colo.*, 293 P.3d 16, (Colo. Ct. App. 2010), *aff’d*, 285 P.3d 986 (Colo. 2012).

185. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001).

186. *See, e.g.*, AMY GADJA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (2009).

than they were in the past.<sup>187</sup> For example, although student claims of educational malpractice continue to be unavailing, student breach of contract claims, particularly those brought by graduate students unhappy with the outcome of dissertation committee deliberations, have made some headway.<sup>188</sup> In *Johnson v. Schmitz*, a graduate student sued Yale University and his faculty advisors for breach of contract when the student claimed that his professors had appropriated his ideas and used them in publications without his consent and without acknowledgement.<sup>189</sup> Explaining that Johnson's claims did not allege that he was provided a poor-quality education, but that the university breached express and implied contractual duties that it had assumed, the court stated that its review would be limited to "whether or not Yale had a contractual duty to safeguard its students from faculty misconduct, and, if so, whether that duty was breached in Johnson's case."<sup>190</sup> Students have had mixed success attempting to sue their graduate advisors or other faculty for breach of fiduciary duty; one court was willing to entertain the theory,<sup>191</sup> while a second court rejected the rationale, saying that faculty have an independent duty to the institution to represent its interests in making judgments about the quality of student work.<sup>192</sup>

In another recent U.S. case, *Emeldi v. University of Oregon*,<sup>193</sup> a student sued her university and her dissertation chair after he resigned from her dissertation committee. In that case, Emeldi, a graduate student, had complained to university officials about alleged inequitable treatment of female students, including her, by her dissertation committee chair.<sup>194</sup> The committee chair resigned as chair, and Emeldi could not find another faculty member to chair her dissertation committee.<sup>195</sup> She filed a Title IX claim, asserting that the chair's resignation was in retaliation for her complaints about his behavior.<sup>196</sup> The appellate court reversed a summary judgment award for the university, noting that, although the university claimed that the chair resigned because the plaintiff would not listen to, or take, his suggestions for improving her research, the close time proximity between the student's complaints and the professor's resignation suggested that the resignation was in retaliation for her complaints, and thus the case must be tried.<sup>197</sup>

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187. Robert M. O'Neill, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

188. *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986).

189. 119 F. Supp. 2d 90 (D. Conn. 2000).

190. *Id.* at 96.

191. *Id.*

192. *See Swenson v. Bender*, 764 N.W.2d 596 (Minn. Ct. App. 2009).

193. 673 F.3d 1218 (9th Cir. 2012).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* After two days of trial, a federal judge dismissed the lawsuit, stating that

The increasing propensity for students to file legal challenges to a faculty member’s academic judgments concerning the quality of the student’s work suggests that faculty members may have less discretion to refuse to work with certain students, particularly if those students have filed complaints about the faculty member that could be linked to discrimination or whistleblower laws. Given the substantial investment of time that many faculty members make in mentoring graduate students, particularly at the dissertation stage, these cases have the potential to alter the way that faculty work with students.<sup>198</sup>

Students are increasingly suing faculty, claiming rights to intellectual property that allegedly accrued while the student worked with the faculty member. While most of these lawsuits have been unsuccessful,<sup>199</sup> some students have won the right to have their cases heard. For example, in *Chou v. University of Chicago*, a former graduate student and subsequent post-doctoral researcher claimed that her faculty supervisor had fraudulently concealed from her the patentability of a formula on which she had done considerable research, and that she should share the patent with him.<sup>200</sup> The court allowed her claim to proceed and also ruled that the plaintiff had stated a claim for breach of fiduciary duty against the professor and the university.<sup>201</sup> Faculty members may themselves be plaintiffs, particularly when their employing institution either changes its intellectual property policy to retain more of the royalties for the institution, or claims ownership of faculty discoveries.<sup>202</sup>

In the U.K., the application of fiduciary obligations to the academic–student relationship remains undeveloped. As with other professional fiduciary relationships (such as those between lawyer and client) academics possess special skills and knowledge and are able to exercise significant power, which they can wield with high levels of autonomy.<sup>203</sup> Students

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the plaintiff, Emeldi, had not provided sufficient evidence to support her claims of discrimination and retaliation. Stacy Patton, *Former Graduate Student’s Discrimination Case is Dismissed*, CHRON. HIGHER EDUC. (Dec. 6, 2013), <http://chronicle.com/article/Former-Graduate-Students/143463/>.

198. For another case involving a claim of retaliation by a former doctoral student against her dissertation committee chair, see *Kovacevich v. Vanderbilt Univ.*, No. 3:09–0068, 2010 WL 1492581 (M.D. Tenn. Apr. 12, 2010). For a review of litigation brought by students challenging academic judgments of faculty members, see Barbara A. Lee, *Student-Faculty Academic Conflicts: Emerging Legal Theories and Judicial Review*, 83 MISS. L.J. 837 (2014).

199. See, e.g., *Stern v. Columbia Univ.*, 434 F.3d 1375 (Fed. Cir. 2006).

200. 254 F.3d 1347 (Fed. Cir. 2001).

201. *Id.* at 1363.

202. See, e.g., *Rutgers Council of AAUP Chaps. v. Rutgers*, 884 A.2d 821 (N.J. Super. Ct. App. Div. 2005).

203. Relevant forms of academic power include “reward power”—awarding high grades, writing good references, etc.—and “coercive power”—withholding the latter. See Alan Stone, *Legal Education on the Couch*, 85 HARV L. REV. 392, 411–12 (1971). It is suggested that these and other forms of academic power present “enormous poten-



have to trust academics to use this power fairly and responsibly and certain fiduciary obligations could offer a useful means to underpin this trust.<sup>204</sup> Ken Mackinnon acknowledges that defining the academic-student relationship as fiduciary in more than a metaphorical sense is problematic, given the lack of a universally agreed-upon definition.<sup>205</sup> Jacquelin Mackinnon views the fiduciary metaphor as one that focuses on an ethical relationship that promotes the welfare of the client, a type of professional altruism depending on trust, in which variations of knowledge and power are not exploited.<sup>206</sup> The academic, possessing the greater knowledge and power, has the greater obligations. The dominant linguistic model is that of “mutual responsibilities and obligations rather than rights.”<sup>207</sup> The nature of the academic-student relationship is such that the power balance shifts as the student develops academically, but this should not undermine arguments for fiduciary obligations, any more than lawyers’ fiduciary obligations are diminished when certain clients, for example corporate clients, are more knowledgeable than others.<sup>208</sup>

Persuading English courts to apply fiduciary principles to academic-student relationships is unlikely to be easy given their resistance to take this approach to other professional relationships that involve a high degree of trust, notably those between doctor and patient.<sup>209</sup>

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tial” for the infliction of harm on the student. *See* Mackinnon, *supra* note 94, at 129.

204. *See* Mackinnon, *supra* note 94, at 118–29.

205. The definitions which most closely map onto the academic-student relationship are the broader ones, such as those which focus upon the situation where “some-one . . . has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.” JOHN MCGHEE, *SNELL’S EQUITY* (2006); *London and Sinclair Investment Holdings SA v. Versailles Trade Finance Limited* (2005) EWCA Civ 722 (Eng.). Ken Mackinnon draws upon Burrow’s definition. *See* A. Burrows, *We Do This At Common Law But That In Equity* 22 OXFORD J. LEGAL STUDS. 1, 8 (2002) (defining as a duty to look after another’s interests). A Canadian definition has particular resonance with academic decision-making roles. *See* *Guerin v. R* (1984) 2 S.C.R.SCR 335 (Can.) (“[A] hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.”). Mackinnon, *supra* note 94, at 131. Potential academic fiduciary duties identified by Ken Mackinnon include: a duty not to use students’ research as one’s own or to inappropriately claim joint authorship; a duty not to improperly profit from the relationship (for example, by recommending own texts when not the most appropriate); a duty to treat students equally (for example, by not providing extra tuition to some only); writing references fairly and honestly. Mackinnon, *supra* note 94.

206. Jacquelin Mackinnon, *Academic Supervision: Seeking Metaphors and Models for Quality*, 28 J. FURTHER & HIGHER EDUC. 395 (2004).

207. *Id.* Drawing from the Canadian case *Canson Enter. v. Boughton & Co.*, 3 S.C.R. 534, 85 (1991), Ken Mackinnon observes that this differentiates fiduciary obligations from those in contract and tort, where the parties are generally presumed to be on an equal footing. *See* Mackinnon, *supra* note 94, at 143.

208. Mackinnon, *supra* note 94, at 129.

209. *Id.* at 132. In *Sidaway v. Governors of Bethlem Royal Hospital*, Lord Scarman rejected the applicability of a fiduciary relationship to the medical profession. [1985] UKHL 1 (Eng.), 871, at 886. Jackson & Powell consider the relationship of doc-

## IV. QUALITY AUDIT–STUDENT ENGAGEMENT

Recent developments by the U.K. Quality Assurance Agency for Higher Education (“QAA”)<sup>210</sup> have seen the publication of a Quality Code for Higher Education (“Quality Code”).<sup>211</sup> Part B5 of the Quality Code is of particular relevance to this article as it sets out provisions for ‘student engagement’ in the quality assurance process.<sup>212</sup> This was a new provision introduced in June 2012 and became a reference point for the purposes of institutional reviews carried out by QAA from June 2013.<sup>213</sup> The provision expressly states that student input can offer insight into numerous aspects of the educational experience, including:

- induction and transition into higher education
- programme and curriculum design, delivery and organisation
- curriculum content
- teaching delivery
- learning opportunities
- learning resources
- student support and guidance
- assessment.<sup>214</sup>

Beginning with a devil’s advocate argument, student input into arrangements for transition into higher education, learning opportunities and certain aspects of learning resources is potentially very different from student input into curriculum content or assessment. In the context of the latter two, and sticking with the driving analogy adopted earlier in this article, those without a driving license risk not only being permitted to drive the car, but also to be invited into the factory to influence how it should be designed,

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tor and patient to be capable of being categorized as fiduciary in situations of undue influence relating to dispositions of property or finance in favor of a doctor (citing Lord Browne-Wilkinson in *Barclays Bank Plc v O’Brien* [1994] 1 A.C. 180 at 189G) but acknowledge, in light of *Sidaway*, that fiduciary obligations on the part of doctors will not be extended beyond this. JACKSON & POWELL ON PROFESSIONAL LIABILITY (John Powell et al., 7th ed. 2012).

210. The stated mission of the QAA is to safeguard standards and improve the quality of UK higher education by publishing “reference points and guidance” and conducting reviews of institutions, including the publishing of reports detailing the findings. For further discussion of the nature and role of the QAA, see DENNIS FARRINGTON & DAVID PALFREYMAN, *THE LAW OF HIGHER EDUCATION* (2d Ed, 2012).

211. See QUALITY ASSURANCE AGENCY FOR HIGHER EDUC., <http://www.qaa.ac.uk/Pages/default.aspx> (last visited Aug. 23, 2014), for what has been described by some as a definitive reference point for all U.K. higher education providers.

212. QUALITY ASSURANCE AGENCY FOR HIGHER EDUC., U.K. QUALITY CODE FOR HIGHER EDUCATION—CHAPTER B5: STUDENT ENGAGEMENT (2012), available at <http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/B5.pdf>.

213. *Id.*

214. *Id.* at 2–3.

engineered and built.

Some aspects of the Quality Code appear to give higher education providers flexibility in the extent to which students might influence the factors listed, but these have to be contrasted with other aspects that appear to be more prescriptive. For example, the Quality Code talks about higher education providers working with the student body “to develop solutions that address issues arising from that feedback. Subsequently students are informed of the actions that have taken place to encourage further future engagement.”<sup>215</sup> This terminology appears to leave little room for responses to the effect that particular feedback suggestions are inappropriate and the appropriate “solution” is inaction.<sup>216</sup> This observation is reinforced when the Quality Code discusses closing the feedback loop, stating that “where change is not possible” students should be informed of the reasons why.<sup>217</sup> “Possible” is an interesting choice of word; arguably, a more neutral phrase, such as “where change is not to be implemented,” would have more clearly respected the experience and professional expertise that academics bring to their role. In essence, many changes are “possible” but equally many of these are undesirable when viewed from the perspective of academic expertise. Similarly, the wording, “[s]tudents appreciate engagement opportunities timed so that they experience a direct benefit as a result of their input,”<sup>218</sup> risks kneejerk reactivity by colleges and universities rather than appropriate reflection regarding what is best in the medium to long term. There is little evidence to suggest that a longstanding, generally very high quality higher education system—which has developed in the U.K. over decades, or centuries in the case of some institutions, and at a pace which has allowed for reflection in the interests of rigor and quality—will benefit from being pushed in the direction of rapid kneejerk responsiveness to different cohorts of relatively short term student participants in the system.

Part 5B of the Quality Code recognizes the transformative aspect of higher education when it states: “Higher education is not a passive process - it is transformational for the individual as well as having transactional elements. Higher education providers promote active involvement by students in all aspects of their learning and provide opportunities for students to influence their individual and collective learning journey.”<sup>219</sup> However, the latter part of this statement risks falling into the trap identified by Jacquelin Mackinnon, discussed earlier.<sup>220</sup> The student undergoing the process of transformation, undertaking the “learning journey,” is an active par-

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215. *Id.* at 6.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 4.

220. Mackinnon, *supra* note 107.

ticipant in that journey but, continuing the transport metaphors, is a map reader not yet a cartographer.

It is instructive to contrast the above provisions with the approach of private business operating in a free market. Successful businesses generally seek all the information they can get from customers and prospective customers to maximize their competitive edge. Information gained is considered and acted upon or rejected, as the business deems appropriate. Few, if any, examples exist of private businesses inviting customers into the factory or boardroom to interfere directly in the running of the enterprise. The latter would likely inhibit free and open discussion, shift actual decision-making to other fora in order to sidestep this, and compel businesses to spend significant time fending off well meaning, but poorly informed, input from those not sufficiently expert to contribute. As discussed elsewhere in this article, there are various objections to the marketization of higher education. The observations in this section point out that even within the parameters of a market driven model, institutions of higher education are being pushed in directions and being subjected to levels of interference that private businesses would not willingly tolerate.

The Quality Code also notes that "[i]n fostering effective partnership working, higher education providers encourage frequent and meaningful professional conversations between students and staff."<sup>221</sup> However, the Quality Code leaves open important questions, such as: (a) the degree of equality that the QAA expects in the "partnership," and (b) the extent to which highly experienced academics may find themselves being required to defer to student views, often drawn from little or no experience. Use of the term "partnership" is equally curious and arguably inappropriate when the academic partners are paid a significant proportion of their salary from the fees of the student partners. A professional-client model would be a more accurate descriptor, a model in which ideas of partnership are rarely found.

As alluded to above, the Quality Code is carefully crafted to offer interpretive flexibility regarding its practical application. Accordingly, much will depend upon the interpretation of individual education providers and the steer, if any, given by the QAA at audit visits. If a reasonable balance is encouraged by the QAA then there is the prospect that greater student engagement will be constructive rather than destructive to long-term developments in U.K. higher education. But the risks are significant if such a balance is not achieved.

#### V. IMPLICATIONS FOR FACULTY WORK-LIFE AND RIGHTS

The structural, political, and legal trends traced in this article demonstrate that, on all but perhaps the most elite and financially secure campuses, faculty work is changing, and faculty "rights," whether contractual or

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221. QUALITY ASSURANCE AGENCY FOR HIGHER EDUC., *supra* note 212, at 6.

based on academic custom and usage, are diminishing, particularly in public institutions. What do these changes mean for the way that faculty go about their work? What do they mean for long-enjoyed “rights” such as academic freedom and tenure?

To begin with, at most U.S. institutions, there are pressures on faculty to be more “productive,” but there are various ways to define or measure productivity. In some departments, the faculty is evaluated on the number of publications in “top” journals or books published by “top” academic presses. In others, faculty are expected to teach larger classes, to adopt new technology to supplement traditional teaching methods, and, often, to move their courses to an online format. Calls from accrediting associations and others for enhanced accountability for student learning have pressured faculty to be more specific about learning goals and to achieve consensus about how higher level courses build upon basic principles from lower level courses. All of these pressures suggest a diminution of individual control—over one’s time, over one’s method of teaching, and even over one’s choice of subjects about which to conduct research. Many would welcome this result—particularly those paying the bills for higher education.

Similar pressures can be observed in the U.K. For instance, colleges and universities are moving in the direction of digitally recorded lectures, often in response to students’ demands to “enhance” the learning experience.<sup>222</sup> Some academics have argued that this may undermine the intimate experience of the traditional higher learning process, especially if it reduces student attendance at live lectures, and it may turn courses not designed for distance learning into distance courses by default, thereby harming the education which the initiative was intended to advance.<sup>223</sup> Academic trades unions in the U.K. have also largely been silent about these developments and the implications for the future employability of their members. For subjects in which lecture content changes little from year-to-year, colleges and universities may be acquiring, with little or no opposition from staff or their unions, intellectual property which could dispense with the need to employ those staff to deliver the same lecture live in the future. Just as the rise of movies at the expense of live performance spurred actors, and their unions and agents, to negotiate arrangements for the payment of repeat fees, academic unions should foresee a move from live lectures to digital lectures, giving rise to the need to put into place such protective arrangements for their members.<sup>224</sup>

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222. See, e.g., Tara Brabazon, *Socrates in Earpods?: The iPodification of Education*, FAST CAPITALISM (Feb. 1, 2006), [http://www.uta.edu/huma/agger/fastcapitalism/2\\_1/brabazon.htm](http://www.uta.edu/huma/agger/fastcapitalism/2_1/brabazon.htm).

223. For a detailed critique of the lecture-recording trend, see *id.*

224. Determining intellectual property rights with respect to recordings of faculty lectures in UK institutions is potentially complex. For a helpful account, see JCIS LEGAL INFO., RECORDING LECTURES: LEGAL CONSIDERATIONS (2010), available at <http://www.jisclegal.ac.uk/Portals/12/Documents/PDFs/Recording%20Lectures.pdf>.

Workloads for some U.K. academics, generated by bureaucratic processes such as Research and Teaching Quality Assessments, have become disproportionate to the financial rewards associated with such assessments.<sup>225</sup> Colin Bryson cites the head of a social sciences department who made this observation in relation to his or her own workload.<sup>226</sup> However, it may be argued that the same symptoms are also prevalent amongst academics not holding such managerial responsibility, but who still find both their teaching and research activity overshadowed by these external, distorting influences. As another respondent to Bryson’s study, a senior lecturer in the social sciences, stated: “With the pressures on university staff my job has doubled during the time that I have been here. It has become impossible to teach and research to what I consider a satisfactory level. . . . The increased work load has turned an essentially satisfying job into a nightmare.”<sup>227</sup>

Bryson summarizes the position as follows: “Scholarship and research, beloved of so many academic staff have been distorted by subversion into research outputs suitable for assessment mechanisms, and this has contributed to disillusionment.”<sup>228</sup> Work intensification and associated loss of autonomy have reduced the time available for research such that academics perceive it as problematic to maintain levels of quality they perceive to be desirable. In this regard, what constitutes “quality” to external oversight bodies differs from how academics themselves categorize it.<sup>229</sup>

In addition to greater pressure on faculty members, another change that has developed is the blurring of the distinction between institutions of higher learning and other businesses. In the U.S., the *Garcetti* ruling is simply another example of judicial inclination to treat U.S. higher education much like any other business—with faculty as employees who are subject to the directives of their “supervisors”—who may be faculty colleagues or administrators. The culture of many colleges and universities may still be more collegial than hierarchical, but financial pressures and widespread lack of sympathy for the “special” nature of academia continue to pigeon-hole faculty as employees, whether or not they regard themselves that way.

A third development, at least in the U.S., is that colleges and universities

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225. Peter Scott, *Why Research Assessment is Out of Control*, GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/education/2013/nov/04/peter-scott-research-excellence-framework>. Some individual college and university preparations for the 2014 Research Excellence Framework have also set the foundations for considerable division and internal strife within institutions. See, e.g., Paul Jump, *Lancaster Historian Appeals Against His REF Inclusion*, TIMES HIGHER EDUC., (Oct. 31, 2013) <http://www.timeshighereducation.co.uk/news/lancaster-historian-appeals-against-his-inclusion-in-ref/2008570.article>.

226. Bryson, *supra* note 133, at 46.

227. *Id.*

228. *Id.* at 53.

229. *Id.*

in the U.S. are facing increased pressure from both ends of the political spectrum, which in turn has implications for a faculty member's choice of subject matter and methods of teaching. Some advocates decry the lack of "balance" in biology or political science courses, arguing that "creation theory" and conservative political viewpoints should be provided to "balance" other types of curricular material. References to race, sex, or sexuality in social science courses may result in complaints to an administrator and suspension of one's access to students and faculty colleagues.<sup>230</sup> On-campus artistic exhibits and dramatic performances may draw outrage from various community members and demands for their removal or cancellation.<sup>231</sup>

And whither academic freedom? As noted earlier in this article, there is widespread misunderstanding among faculty about the boundaries of academic freedom—in that many faculty members believe that there are no boundaries. Stanley Fish, a frequent (and controversial) commentator on U.S. academic life, has a different view:

When all is said and done, academic freedom is just a fancy name for being allowed to do your job, and it is only because that job has the peculiar feature of not having a pre-stipulated goal that those who do it must be granted a degree of latitude and flexibility not granted to the practitioners of other professions, who must be responsive to the customer or to the bottom line or to the electorate or to the global economy. . . . The problem with the term "academic freedom" is that the emphasis almost always falls on the "freedom" part rather than the "academic" part, with the result that the concept is made to seem much grander than it is. . . . Invoking academic *freedom* carries with it the danger of thinking that we are doing something noble and even vaguely religious, when in fact what we are doing, or should be interested in doing, is no more—or less—than our academic jobs.<sup>232</sup>

Put succinctly, faculty at most institutions in the U.S. will see, if they have not seen already, the following:

- Increases in teaching loads—either larger class sizes or more class

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230. Peter Schmidt, *Provost Upholds U. of Denver's Handling of Professor Who Discussed Sex in Class*, CHRON. HIGHER EDUC. (Oct. 24, 2011), <http://chronicle.com/article/Provost-Upholds-U-of-Denvers/129524/>. For a more recent example at the University of Colorado, see Charles Huckabee, *U. of Colorado Professor Reportedly is Forced to Retire After Prostitution Skit*, CHRON. HIGHER EDUC. (Dec. 16, 2013), <http://chronicle.com/blogs/ticker/u-of-colorado-professor-reportedly-is-forced-to-retire-after-lecture-on-prostitution/70525>.

231. *Linnemeir v. Indiana Univ. Purdue Univ. Ft. Wayne*, 155 F. Supp. 2d 1034 (N.D. Ind. 2001).

232. Stanley Fish, *Academic Freedom is Not a Divine Right*, CHRON. HIGHER EDUC. (Sept. 5, 2008) (emphasis added), <http://chronicle.com/article/Academic-Freedom-Is-Not-a/10461/>.

sections to teach;

- Additional requirements for specific office hours and heavier student advising loads;
- More focus on merit pay that is tied to research productivity, teaching productivity, student learning and employment outcomes, or all of the above;
- More demands for compliance with conflict of commitment policies, which may reduce faculty members’ time spent on consulting or community activities;
- More demands from administrators for revenue-generating activities, such as noncredit programs, adult education, short-term certificate and credentialing programs;
- For public institutions in particular, more pressure to work with community groups or other external constituencies to provide services (such as programming for at-risk youth, relationships with local employers, etc.) to demonstrate the institution’s “value” to the community, state, or nation;
- Pressures on academic units and their faculty to justify the revenues they receive, for example, by citing employment figures and salaries for recent graduates;
- Diminished influence on important decisions, such as the creation or abolition of programs or departments, the selection of institutional leaders, and the evaluation of administrators.

#### CONCLUSION

A constellation of trends in both the U.K. and the U.S. is changing the way that faculty at many institutions do their jobs, spend their work time, and participate in institutional governance. For public institutions, despite declining funding from public sources, there are greater government-imposed accountability demands. In some cases, these measures are implemented without careful consideration of what is being measured or how it might best be measured. Faculty decisions—even on matters involving the exercise of academic judgment—are being challenged in courts in both nations by both students and faculty colleagues (or former colleagues). Limitations on academic freedom for individual faculty have resulted in more clashes between faculty and institutional representatives, such as chairs and deans.

How should faculty respond to these changes? Clearly, it is not “business as usual”—if it ever was. Faculty decisions are no longer inviolate. Admissions decisions, particularly at the graduate level, need to be made carefully, with attention to whether the student’s educational preparation is sufficient for the level of academic performance expected by the college. Relationships with students need to be considered carefully, and students need to be advised, early and often, whether their work is below the level



of quality expected, particularly for students in graduate or professional programs, as these students tend to be the ones filing lawsuits for breach of contract or discrimination. Faculty need to recognize that, whether they like it or not, higher education is regarded as a business by their students, by the trustees, and, for public colleges, by the taxpayers, and they need to ensure that they spend their time in ways that benefit the institution, not just their own careers. Accountability demands will not disappear; they will increase, and resistance just wastes time and energy. Faculty should certainly attempt to influence *what* is measured and *how* it is measured, but they certainly cannot expect not to be held accountable for the work for which they are compensated, nor should they.

Despite all of these structural, political, and legal trends affecting college faculty, a tenure-track faculty position is still coveted, as well it should be. An academic career, for most faculty, is rewarding and absorbing. While the “gap” between the quality of faculty work-life in the twentieth century and in the twenty-first century may be widening, the career is still worth pursuing.

Much of the discussion in this article relating to the U.K. appears, at first glance, to be negative. Perhaps the discussion may be viewed as reflecting Luddite attitudes that reject the need for or inevitability of change, whether brought about by new technologies or changes to societal expectations. However, this is not the intended conclusion. Inevitably, technology will change the nature of some teaching delivery and students, as consumers holding the purse strings, will expect a greater say with regard to the services they receive. Academics cannot ignore this and should not seek to. However, identifying problems is the first step in creating solutions. The earlier mention of the shift from live performance to movie making is a relevant analogy. Film and its technological successors revolutionized entertainment and enhanced opportunities for actors. What might have originally been seen as a *threat* became an *opportunity*. Digitized teaching materials coupled with modern communications offer similar opportunities, but also pose a threat to academics until they successfully negotiate a new employment paradigm that protects their interests.

Similarly, increased emphasis on listening to students as paying customers is not, in itself, undesirable. However, the key is balance. A race to the bottom amongst universities striving to only please their students is only likely to damage higher education in the long run. In this respect, higher education is not like the provision of many other goods and services—the customer is not always right. It is unfair and patronizing to label all students as valuing easy courses with low-stress assessment, but anecdotally at least it seems that moves in this direction can be triggered even by a minority if their views are expressed frequently or forcefully enough. Safeguarding standards can only work if academics collectively strive to resist pressures to dumb down.

It is in this regard that the time may be ripe for greater professionaliza-

tion within the academic community. Instead of the tendency for many academics to see themselves as lone scholars, plowing the narrow furrow of their individual research and teaching interests and directing what little collective loyalty they may have to their academic subject group, now may be the time when they *need* a professional body encompassing the academic community as a whole, akin to the bodies created long ago by lawyers, medics and other powerful professional groups. Such organizations can undertake numerous functions, including influencing government policy and, perhaps most importantly in the context of this discussion, setting and enforcing standards in the form of codes relating to professional conduct and ethics.<sup>233</sup> If codes can be devised which effectively outlaw practices that may undermine the quality and rigor of higher education, a neutralizing effect should arise to counter temptations to race to the bottom.

What is being proposed in theory here is not easy to achieve in practice. In the century and a half since the creation of key professional bodies for medical practitioners and lawyers in England & Wales, for example, much has been written, both by academics and members of the professions themselves, critiquing both theory and practice of the models adopted.<sup>234</sup> Likewise, the professional bodies for law and medicine have put much thought and effort into reforming, often repeatedly, key aspects of their structure and provision.<sup>235</sup> Nevertheless, few commentators would argue that the creation of professional bodies for lawyers and medics was misplaced. However imperfect they have proven to be, there are strong arguments that the existence of such professional bodies has led to far higher standards in legal and medical practice than would have been the case if these occupations had not adopted more formal professional statuses. Perhaps what was seen as necessary for lawyers and doctors in the mid-nineteenth century has finally become necessary for academics in the early twenty-first century.<sup>236</sup>

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233. Even if codes are initially only repetitive of the general law, they may be worded and presented in a way that is more accessible to the client group. Mackinnon, *supra* note 94, at 143. Over time professional codes can be expanded and developed significantly beyond core legal principles. One possible example is the American Association of University Professors (AAUP), founded in 1915, which has promulgated a variety of statements on academic freedom, institutional governance, and due process in employment matters. *See generally About the AAUP*, AAUP.ORG, <http://www.aaup.org/about-aaup> (last visited Aug. 23, 2014). The AAUP functions as a watchdog for faculty rights; it has been less active as an enforcer of professional conduct and ethics. *See generally id.*

234. *See*, for example, the discussion in MARK DAVIES, *MEDICAL SELF-REGULATION, CRISIS AND CHANGE* (2007).

235. *Id.*

236. So far, attempts in the UK to enhance the status of teaching in higher education and, as part of this, to create a professional style body have had limited success. The Institute of Learning and Teaching in HE ("ILTHE"), created in 2000, proved largely ineffective in this regard and its successor, the Higher Education Academy ("HEA"), founded in 2004, seems to be experiencing similar difficulties. Also, whilst the HEA uses terms such as "professional recognition" it is questionable whether this

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can really be taken to be its core goal in terms of use of the term “profession” by sociological theorists and established professions such as medicine and law. Whilst the HEA Strategic Plan for 2012-2016 has at its core the enhancement of the quality and impact of learning and teaching, its current ambitions do not appear to extend to becoming a fully-fledged professional body for academics. It is also open to question whether a body which engages only with teaching will be sufficient, given that academics also face potential ethical issues in their research and managerial roles. Also, even if the HEA proves itself up to this task, there has been a general lack of enthusiasm amongst academics, especially those in the more powerful research led universities, to enroll, let alone become actively involved, in advancing the aims of the Academy. In this respect, academics themselves may be their own worst enemies in failing to recognize and react to the threats facing them.

# FERPA AND THE PRESS: A RIGHT TO ACCESS INFORMATION?

ERIN ESCOFFERY\*

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## INTRODUCTION

In 1974, Senator James Buckley proposed the Federal Educational Rights and Privacy Act (FERPA)<sup>1</sup> as a measure to prevent schools from hiding individual student files from the students themselves.<sup>2</sup> When he initially offered the educational amendment, he stated that it was important to realize the “dangers of Government data gathering”<sup>3</sup> in the post-Watergate era, and that it was necessary to “protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities.”<sup>4</sup> In the time since the passage of

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1. 20 U.S.C. § 1232g (2010).

2. 120 CONG. REC. 14,580 (1974).

3. *Id.*

4. *Id.* Senator Buckley reasoned:

Some educators seem to feel that they know much more about the welfare and best interests of the child than do the parents, and therefore, once a child comes under their sway, they think they have the right to do what they themselves think is best for the child, without regard for values and beliefs of the parents.

*Id.*

the act, FERPA has provided important protections for students. Yet “[w]hat once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters.”<sup>5</sup> The original goal of FERPA was to protect student files, but the Act has been amended multiple times, and today it is often difficult for colleges and universities to determine exactly what information should and should not be protected.<sup>6</sup> Supporters of the law call for a broad interpretation of protected material. For example, Father Jenkins, President of the University of Notre Dame, stated, “[b]eyond the limitations imposed by FERPA, it is Notre Dame’s long-held belief and policy that our students deserve certain degrees of privacy as part of the educational process, and we have stood by that principle, even in the face of the criticism that might invite.”<sup>7</sup> Colleges and universities often advocate for extensive protections, yet the critics, including various press outlets that want access to information, accuse certain colleges and universities of protecting too much, and of using FERPA to withhold everything from ordinary information such as lunch menus to damaging information such as athletic scandals.<sup>8</sup>

Even for colleges and universities that are protecting student records in good faith, there remains a lot of confusion about what FERPA does and does not protect, as well as how much the press can access. In 2009, for example, *The Columbus Dispatch* conducted an investigation to see whether colleges and universities would release requested athletics-related documents.<sup>9</sup> The results varied greatly from institution to institution.<sup>10</sup> While some colleges and universities released all of the requested information, others released none.<sup>11</sup> Some institutions redacted a few pieces of information, while others blacked out almost every name that appeared on a document.<sup>12</sup> The colleges and universities that withheld information cited

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5. Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. LAW REP. 469, 470 (2001).

6. *Id.*

7. Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1559 n.27 (2012).

8. Jill Riepenhoff & Todd Jones, *Secrecy 101: Athletic Departments use Vague Law to Keep Public Records from Being Seen*, COLUMBUS DISPATCH, May 31, 2009, reprinted in KNOXVILLE NEWS SENTINEL, June 6, 2009, <http://www.knoxnews.com/news/2009/jun/06/secrecy-101-in-college-athletics/?print=1>; see also Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to its Original Design*, 14 N.Y.U.J. LEGIS. & PUB. POL’Y 75, 96 (2011) (“Schools generally provide greater protection to themselves than they reciprocally provide to students in order to avoid unwanted disclosures. In fact, schools routinely rely upon FERPA for defensive purposes, thwarting the very protections that were intended.”).

9. Riepenhoff & Jones, *supra* note 8.

10. *Id.*

11. *Id.*

12. *Id.* The University of Maryland even charged *The Columbus Dispatch* \$35,330 to produce documents pertaining to football team travel records, summer em-

FERPA and student privacy as their reasons.<sup>13</sup> But what does FERPA protect, and what information, if any, does the press have a right to access from colleges and universities?

Part I of this note will discuss the background of FERPA and its original purpose. It will also highlight the evolution of the statute and examine key terms in the statutory language, such as “education records,” and their meanings. Part II will detail how FERPA is used in practice today. Part III will elaborate on certain efforts by the press to access information held by colleges and universities, and will show that specific arguments advanced by the press—namely that they have a First Amendment right to access information and a right to obtain records under certain public records laws—have largely failed when colleges and universities maintained that they were acting in compliance with FERPA. Part IV of this Note will examine recent cases in which records were released and discuss how such decisions turned on the definition of “education records.” Finally, the Conclusion will offer recommendations going forward.

#### I. BACKGROUND OF THE FEDERAL EDUCATIONAL RIGHTS AND PRIVACY ACT

At the time of its passage in 1974, FERPA had two purposes: (1) to assure students and their parents access to the student’s education records, and (2) to protect records from release without the consent of the student.<sup>14</sup> Because the act was initially offered as part of the Education Amendments of 1974,<sup>15</sup> it was not the subject of any committee consideration before it was passed. As a result, it did not have any accompanying legislative history to guide those who would later be charged with its implementation.<sup>16</sup> In fact, after the law was first enacted, lawyers trying to interpret the new provision advised schools not to publicly distribute the weights of football players or the names of the actors in a school play.<sup>17</sup> However, Senators Buckley and Pell, co-authors of the act, did not intend this extreme interpretation.<sup>18</sup> To remedy this confusion, the Senators provided clarification for the act in a joint statement, declaring:

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ployment information of athletes, and NCAA violations. *Id.*

13. *Id.*

14. 120 CONG. REC. 39,862 (1974). *See also* 34 C.F.R. § 99.3 (2014) (for students under the age of 18, the Act gives parents the rights to access and disclose their child’s education records); *see generally* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2010).

15. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484.

16. *Legislative History of Major FERPA Provisions*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html> (last visited Sept. 20, 2014).

17. 120 CONG. REC. 39,863 (1974).

18. *Id.* (“This narrow reading of the law is not what its author intended to achieve, and he so stated during the floor debate . . .”).

The purpose of the Act is two-fold—to assure parents of students, and students themselves if they are over the age of 18 or attending an institution or postsecondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.<sup>19</sup>

Though Senators Buckley and Pell provided some insight into the purpose of the law, “more and more questions have arisen about FERPA’s scope and meaning.”<sup>20</sup> Due to these open questions of interpretation, press outlets have argued that colleges and universities have capitalized on the ambiguities in the law to protect everything from school lunch menus, travel records of athletic teams, and campus parking tickets.<sup>21</sup> Yet, colleges and universities emphasize that they are complying with federal law and are making every effort to be stewards of student privacy.<sup>22</sup> Though the debate continues, one thing is clear: FERPA has greatly changed over time.<sup>23</sup>

Under FERPA as it was originally enacted, the law provided a list of protected information including grades, test scores, and health information.<sup>24</sup> However, in their joint statement, Senators Buckley and Pell removed the original list that enumerated exactly what was protected and instead wrote that the law protected “education records.”<sup>25</sup> The current

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19. 120 CONG. REC. 39,862 (1974).

20. Huefner & Daggett, *supra* note 5, at 470.

21. Riepenhoff & Jones, *supra* note 8 (stating that when members of the press asked Senator Buckley about what FERPA is being used to protect today, he was “stunned” and said, “[t]hat’s not what we intended. The law needs to be revamped. Institutions are putting their own meaning into the law.”); *The Family Educational Rights and Privacy Act (FERPA)*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/ferpa-hipaa-and-dppa/family-educational-rights-and-privacy-act-ferpa> (last visited Sept. 20, 2014).

22. Penrose, *supra* note 7, at 1559, nn. 24–25.

23. Huefner & Daggett, *supra* note 5, at 470.

24. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484.

Any and all official records, files, and data directly related to their children, including all material that is incorporated into each student’s cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.

*Id.*

25. 120 CONG. REC. 39,862 (1974); *see generally* *Legislative History of Major FERPA Provisions*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html> (last visited Sept. 20, 2014) (stating that FERPA has been amended nine times: P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974

statute defines “education records” as “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”<sup>26</sup> Critics have argued that this definition is far too broad,<sup>27</sup> but the statute does provide some additional guidance in Section 1232g(b)(1), where it refers to “education records” as “personally identifiable information.”<sup>28</sup> Alone, the term does not provide much additional guidance, but the Code of Federal Regulations, as amended in 2008, states that “personally identifiable information” includes, but is not limited to, the following:

- (a) The student’s name;
- (b) The name of the student’s parent or other family members;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the

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(Buckley/Pell Amendment); P.L. 96-46, Aug. 6, 1979 (Amendments to Education Amendments of 1978); P.L. 96-88, Oct. 17, 1979 (Establishment of Department of Education); P.L. 101-542, Nov. 8, 1990 (Campus Security Act); P.L. 102-325, July 23, 1992 (Higher Education Amendments of 1992); P.L. 103-382, Oct. 20, 1994 (Improving America’s Schools Act); P.L. 105-244, Oct. 7, 1998 (Higher Education Amendments of 1998); P.L. 106-386, Oct. 28, 2000 (Campus Sex Crime Prevention Act); P.L. 107-56, Oct. 26, 2001 (USA PATRIOT Act of 2001)).

26. 20 U.S.C. § 1232g(a)(4)(A) (2010).

27. Brief of Appellant at 30, *United States v. Miami Univ.*, 294 F.3d 797 (2002) (No. 00-3518).

The plain language of FERPA’s definition of education records is not helpful. If interpreted in a completely literal and simplistic manner as suggested by the district court, FERPA would sweep within its purview an absurd array of information never intended to be kept confidential by Congress. Moreover, if interpreted in this manner, FERPA could be used, as *The Chronicle* [sic] and others fear it is being used by many universities, as a device to shelter campus crime from public scrutiny. Such a result is not what Congress had in mind.

*Id.*

28. 20 U.S.C. § 1232g(b)(1) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .”).



student to whom the education record relates.<sup>29</sup>

Schools are able, and have been since FERPA's inception, to release directory information (including names, addresses, and telephone numbers) separate from "education records" without violating FERPA,<sup>30</sup> but what was originally intended to protect grades and test scores in 1974,<sup>31</sup> has been changed to encompass much more. Now, under 34 C.F.R. § 99.3 (f) and (g), information that is *merely linkable* to a student is protected, as is information relating to a student when a college or university *believes* the requestor knows the identity of the student.<sup>32</sup>

As more information falls under the protection of FERPA, it becomes more difficult for press outlets to access records and exercise a right to information.<sup>33</sup> As written, however, the statute still leaves many questions

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29. 34 C.F.R. § 99.3 (2014).

30. 120 CONG. REC. 39,862 (1974); *see generally Model Notice for Directory Information*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/print/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html> (last visited Sept. 20 2014) (stating that colleges and universities have some leeway in determining how they define directory information, providing a model notice for directory information, and emphasizing that colleges and universities may choose to include all of the information listed or portions of it). *See also UTK FERPA Policy*, UNIV. OF TENN., <http://ferpa.utk.edu/policy.php> (last visited Sept. 20, 2014) (stating that the following is considered directory information at the University of Tennessee: name, local address, permanent address, NetID, university email address, telephone number, classification, most recent previous educational institution attended, graduate or undergraduate level, full-time or part-time status, college, major, dates of attendance, degrees and awards, participation in school activities and sports, weight, and height); *Directory Information*, UNIV. OF SAN DIEGO, <http://www.sandiego.edu/registrar/ferpa/directory.php> (last visited Sept. 20, 2014) (designating directory information at the University of San Diego as name, university email address, major, dates of attendance, participation in officially recognized activities and sports, degrees, honors, awards, and photograph).

31. *See generally* STUDENT PRESS LAW CENTER, FERPA AND ACCESS TO PUBLIC RECORDS, *available at* [http://www.splc.org/pdf/ferpa\\_wp.pdf](http://www.splc.org/pdf/ferpa_wp.pdf) (last visited Sept. 20, 2014) ("FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at (college).") (citing *News & Observer Publ'g Co. v. Baddour*, No. 10CVS1941, Memorandum Ruling of Hon. Howard E. Manning, Jr. at 2 (N.C. Super. Ct. April 19, 2011)).

32. 34 C.F.R. § 99.3(f) & (g) (2009). *See generally* Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) (emphasis added). When the Department of Education undertook the 2008 amendments to the term "personally identifiable information," the Department stated:

We removed the "easily traceable" standard from the definition of *personally identifiable information* because it lacked specificity and clarity. We were also concerned that the "easily traceable" standard suggested that a fairly low standard applied in protecting education records, *i.e.*, that information was considered personally identifiable only if it was easy to identify the student.

*Id.* at 74,831. During the comment phase, some commenters argued that the proposed, and ultimately adopted, definition "would provide school officials too much discretion to conceal information the public deserves to have in order to debate public policy." *Id.* at 74,829.

33. Riepenhoff & Jones, *supra* note 8.

unanswered.<sup>34</sup> What is protected by FERPA? What exactly are “education records”? What should the press have access to, and does the press have any recourse against colleges and universities that refuse to disclose certain information? Finally, can the First Amendment or state open records laws provide any protection for the press?

## II. FERPA IN PRACTICE

FERPA’s statutory language clearly indicates that if a college or university receives federal funding, it cannot release “education records,” but courts have disagreed as to exactly how FERPA protects records.<sup>35</sup> Some have argued that FERPA creates a blanket prohibition on the release of records, and others have claimed that it only *denies funding* to those that do.<sup>36</sup> In *WFTV, Inc. v. School Board of Seminole*, the Fifth District Court of Appeal in Florida held,

FERPA does not prohibit the disclosure of any educational records. FERPA only operates to deprive an educational agency or institution of its eligibility for applicable federal funding based on their policies and practices regarding public access to educational records if they have any policies or practices that run afoul of the rights of access and disclosure privacy protected by FERPA.<sup>37</sup>

However, other courts have held that FERPA does prohibit the disclosure of records because it imposes contractual obligations on colleges and universities: once they have accepted federal funds, they are required to keep pertinent information private.<sup>38</sup> In *Owasso Independent School Dis-*

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34. See generally Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U.L. REV. 59 (2008); Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563 (2004); Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools’ Legitimate Educational Interests: Rethinking FERPA’s Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U.L. REV. 1 (2001).

35. See generally *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998) (discussing whether or not FERPA prohibits the release of “education records”).

36. See *supra* notes 32–34. It is important to note, however, that “[p]rivate and parochial schools at the elementary and secondary levels generally do not receive such funding and are, therefore, not subject to FERPA.” *FERPA General Guidance for Parents*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html> (last visited Sept. 20, 2014).

37. *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 57 (Fla. Dist. Ct. App. 2004) (emphasis omitted). See generally Penrose, *supra* note 7, at 1579 (“[T]he Department of Education, the entity responsible for both interpreting and enforcing FERPA has never ever sought to withdraw any school’s federal funding.”).

38. See *United States v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2001) (holding that “FERPA unambiguously conditions the grant of federal education funds on the educational institutions’ obligation to respect the privacy of students and their parents” and that “the United States may enforce the Universities’ ‘contractual’ obligations

*trict v. Falvo*, for example, the Supreme Court held, “[u]nder FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. One condition specified in the Act is that sensitive information about students may not be released without [the student’s] consent.”<sup>39</sup> However, because of its conditional funding nature, it is not always clear what constitute FERPA’s requirements.

Moreover, although the statutory language spelled out above provides some guidance for what constitutes “education records,” in practice that line has been hard to draw.<sup>40</sup>

The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent [or the consent of the student], but also that parents [and students] have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert a written explanation by the parents regarding the content of the records.<sup>41</sup>

Courts have employed the statutory phrases “directly related to a student” and “maintained by an educational agency” to determine whether records are protected, but there remain inconsistencies in application. For example, the Supreme Court of Ohio held that records that identify a student are “directly related to a student” even if the records do not pertain to academic performance, financial aid, or scholastic performance.<sup>42</sup> The First District Court of Appeal in Florida held that an unredacted e-mail written by a college student about “personal impressions of the classroom educational atmosphere in the context of [the professor’s] teaching and methodology” was not directly related to the student when it contained information about the professor in addition to the student.<sup>43</sup> Similarly, courts

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through the traditional means available at law”).

39. *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002) (citation omitted). Although *Owasso* and *WFTV* are not cases directly concerning colleges or universities, the holdings of these cases are still applicable and relevant to college and university law.

40. See *Penrose*, *supra* note 8, at 95 (arguing that the terms “education records” and “maintained” have been abused by colleges and universities and that “the Privacy Act of 1974 provides the best blueprint for improving FERPA’s ‘education records’ definition”).

41. Brief for the United States as *Amicus Curiae* Supporting Petitioners at 17, *Owasso Independent Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) (No. 00-1073) (citing 20 U.S.C. 1232g(a)(1)(A) & (2)).

42. *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012).

43. *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 858 (Fla. Dist. Ct. App. 2013). For information held not to be “education records,” see *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Ohio 2004) (holding records relating to allegations of corporal punishment by a substitute teacher were not directly related to

have differed regarding the appropriate interpretation of the phrase “maintained by the school.” Using this phrase, some courts have held that peer-graded classroom work and assignments are not “education records,”<sup>44</sup> whereas records received from a psychiatrist about a student and kept in the school’s file are “education records.”<sup>45</sup> E-mails about students that were stored on the computer hard drives of individual teachers are not “education records,”<sup>46</sup> and neither are internal memos and e-mails about a student when the e-mails were not centrally maintained by the college or university.<sup>47</sup> However, when a department retains copies of all e-mails relating to students, the e-mails are considered to be “education records.”<sup>48</sup> These differing interpretations do little to truly define the term “educational record” and leave many unanswered questions—not least of which is what constitutes “educational record.” If the document merely mentions a student, is it an “education record?” If the information is maintained on computer servers generally but not in a single, central file, is it not an “education record?”

Despite these lingering questions, once information is classified as an “education record,” it is generally protected by FERPA from release.

The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office.<sup>49</sup>

Yet, if personally identifying information is redacted from the “education record,” it may be released as long as the college or university does not believe that the requestor would know the student’s identity after the redaction.<sup>50</sup>

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specific students, nor were they “education records,” even though they included student witness statements); *Wallace v. Cranbrook Educ. Cmty.*, No. 05-73446, 2006 WL 2796135 (E.D. Mich. Sept. 27, 2006) (holding that records relating to a school employee’s misconduct were not directly related to specific students, nor “education records,” even though students provided statements); *Baker v. Mitchell-Waters*, 826 N.E.2d 894 (Ohio Ct. App. 2005) (holding that records relating to abuse of students by teachers are not “education records”).

44. *Owasso*, 534 U.S. at 429.

45. *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40 (D.N.H. 1994).

46. *S.A. v. Tulare Cnty. Office of Educ.*, No. CV F 08-1215 LJO GSA, 2009 WL 3296653, at \*1 (E.D. Cal. Oct. 6, 2009) (holding that “education records” must be held in one, single file).

47. *Phoenix Newspapers, Inc. v. Pima Cmty. Coll.*, No. C20111954, In Chambers Under Advisement Ruling Re: Plaintiff’s Application for Order to Show Cause on Special Action at 3 (Ariz. Super. Ct. May 17, 2011).

48. *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012).

49. Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99).

50. *Press-Citizen Co., Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012).

### III. EFFORTS BY THE PRESS TO ACCESS INFORMATION

Amidst all of this confusion regarding what amounts to an “education record” and whether or not colleges and universities are prohibited from releasing such information or just denied funding for doing so, press outlets have tried to gain access to pertinent information held by colleges and universities to cover relevant news stories. Press outlets and news agencies have focused on two main arguments to gain access to information in the possession of colleges and universities: (1) the First Amendment freedom of the press and its related right to access certain information,<sup>51</sup> and (2) the right to access public records under state open records laws.<sup>52</sup> However, neither of these avenues has produced the access to information desired by the media. Colleges and universities have largely denied the press access to records arguing that they are exempt under FERPA’s broad definition of “education records” and “personally identifiable information,” and various state and federal courts have, for the most part, upheld those actions.

#### A. First Amendment “Right of Access”

In order to understand the basis of the First Amendment argument advanced by the press, as well as the related right to access certain information, it is important to understand the evolution of the Supreme Court’s jurisprudence on the issue. Over time, the Court has moved from a grand interpretation of the right to access information to a much narrower one. Whereas the Court originally saw the need for broad access to information to ensure public awareness and the ideals of a participatory democracy, the Court began to limit this view in the 1970s.<sup>53</sup> Though the press retains the First Amendment right to access information related to criminal court proceedings, there is little guarantee of the right to access much else, and as such, the press has largely failed to invoke this First Amendment argument successfully when trying to access information from colleges and universities.

In tackling the issue of whether or not the press has a right to access information, the Supreme Court held in *Martin v. City of Struthers, Ohio*, that “[t]he right of freedom of speech and press has a broad scope . . . . This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.”<sup>54</sup> The Court further emphasized this right in the

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51. See *infra* Part III.A.

52. See *infra* Part III.B.

53. See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004). See generally Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113 (2008); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006).

54. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (quoting *Lovell v.*

1969 case of *Stanley v. Georgia*, holding that “[i]t is now well established that the Constitution protects the right to receive information and ideas.”<sup>55</sup> The Court felt so strongly about this idea, that it stated this right was, in fact, “fundamental to our free society.”<sup>56</sup>

However, in 1972, the Court took a step back and began to narrow the right to gather news. In *Branzburg v. Hayes*, the Court held that “[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>57</sup> Although the Supreme Court has held that there is a First Amendment right of access to criminal trials, proceedings, and records,<sup>58</sup> it has also held that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”<sup>59</sup> To determine whether a qualified First Amendment “right of access” attaches, the Court established a two-part test: (1) whether the information in question has “historically been open to the press and general public,”<sup>60</sup> and (2) whether “public access plays a significant positive role in the functioning of the particular process in question.”<sup>61</sup> If a plaintiff successfully meets the elements of this two-part test, the defendant will only prevail upon a showing of “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>62</sup>

“[R]ecently, the Court has suggested that a general newsgathering right does not apply in cases where it may conflict with laws of general application (such as tort, property, or contract laws).”<sup>63</sup> Thus, the First Amendment freedom of the press and the related right to access information is largely limited to access to criminal proceedings and does not guarantee much beyond that right.<sup>64</sup> Since FERPA does have an exception in place for third parties to access law enforcement information and crime reports, the First Amendment “right of access” argument does not provide much

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Griffin, 303 U.S. 444, 452 (1938)).

55. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

56. *Id.*

57. 408 U.S. 665, 684 (1972).

58. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

59. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978).

60. *Press-Enterprise Co. v. Super. Ct. Cal.*, 478 U.S. 1, 8 (1986).

61. *Id.*

62. *United States v. Miami Univ.*, 294 F.3d 797, 821 (6th Cir. 2001) (citing *Press-Enterprise Co. v. Super. Ct. Cal.*, 464 U.S. 501, 510 (1984)).

63. McDonald, *supra* note 53, at 252. If one follows the school of thought that FERPA is a contractual agreement between the government and a college or university, the idea that the First Amendment does not provide access to information related to a contract would likely be detrimental to the argument that the press should have access to information regarding students.

64. *Id.*

additional protection.<sup>65</sup>

Given existing precedent, it is difficult for press outlets to successfully argue that a news agency has an independent right to access information held by a college or university even if the information at issue is not classified as an “education record.” However, in one case, a federal district court did uphold the right of the press to receive information.<sup>66</sup> In *Student Press Law Center v. Alexander*, student journalists along with the Student Press Law Center challenged a provision of FERPA that allowed colleges and universities to withhold personally identifiable information in the arrest and incident reports of campus police.<sup>67</sup> The D.C. District Court noted, “[t]he right to receive information and ideas ‘is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.’ Therefore, plaintiffs’ claim that the FERPA interferes with their ability to gather information regarding campus crimes implicates the First Amendment.”<sup>68</sup> The court stated that the defendant must provide a reason for withholding the information and could not merely rely on FERPA as the justification.<sup>69</sup> It also held that the information was releasable, noting that its decision was “consistent with the interests of the public in greater access to information, [and] [t]hat interest is at its highest in matters that bear on personal safety and prevention of crime.”<sup>70</sup>

Though the court upheld a First Amendment right to access information in *Student Press Law Center*, the application of the right is a narrow one because it applies only to crime reports—a right that was already guaranteed by the First Amendment.<sup>71</sup> Existing First Amendment jurisprudence allows access to criminal trials, proceedings, and records; thus, in this case, the court did not necessarily break any new ground by allowing the press

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65. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555, 106 Stat. 448. See generally Ethan M. Rosenzweig, *Please Don't Tell: The Question of Confidentiality in Disciplinary Records under FERPA and The Crime Awareness and Security Act*, 51 EMORY L.J. 447, 478–79 (2002) (finding that colleges and universities treat disciplinary records differently from law enforcement records and arguing that disciplinary records should be released in a manner consistent with FERPA in order to increase campus safety while still not compromising privacy).

66. *Stud. Press Law Ctr. v. Alexander*, 778 F. Supp. 1227 (D.D.C. 1991).

67. *Id.*

68. *Stud. Press Law Ctr.*, 778 F. Supp. at 1233 (citations omitted) (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982)).

69. *Id.* at 1234.

70. *Id.*

71. Additionally, it is important to note that student journalists at private colleges and universities may not enjoy the same right of the freedom of the press. Brian J. Steffen, *A First Amendment Focus: Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 139 (2002) (“It has long been established in First Amendment jurisprudence that the federal Constitution protects the press against state action but not private action . . . . Among those private organizations that need not observe First Amendment rights of free expression are private institutions of higher education”).

access to the criminal records at issue. In fact, following the court's ruling in *Student Law Press Center*, Congress amended FERPA to emphasize that law enforcement records are not "education records" and are not protected under the provisions of FERPA.<sup>72</sup>

Furthermore, in *United States v. Miami University*, the Sixth Circuit Court of Appeals distinguished criminal records from disciplinary records and held that the latter were protected under FERPA and not included in the right of the press to access information.<sup>73</sup> The case focused on an action brought by the United States on its own behalf, and on the behalf of the Department of Education, against Miami University and Ohio State University for releasing student disciplinary records.<sup>74</sup> *The Miami Student*, a student newspaper at Miami University, had, under the Ohio Public Records Act, requested records relating to crime trends on campus.<sup>75</sup> The University released records with redacted information; however, the student newspaper wanted records that only redacted the "name, social security number, or student I.D. number of any accused or convicted party," and the University had redacted the "identity, sex, and age of the accuseds [sic], as well as the date, time and location of the incidents giving rise to the disciplinary charges."<sup>76</sup> The student newspaper, unhappy with the records as received, took the issue to the Ohio Supreme Court. The Ohio Supreme Court found that the only potentially applicable exception to the public records act was one that excluded the release of information prohibited by state or federal law.<sup>77</sup> Because the Ohio court found that FERPA did not protect disciplinary records, Miami University was required to produce them.<sup>78</sup>

After the Ohio Supreme Court issued its decision, *The Chronicle of Higher Education* ("*The Chronicle*"), a newspaper that reports on college and university affairs, requested all disciplinary records from 1995 to 1996 from both Miami University and Ohio State University.<sup>79</sup> The Department

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72. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555, 106 Stat. 448 (1992). See also *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991) (holding that a college or university must disclose campus security reports to a student newspaper when requested under state open records law).

73. *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2001). See generally Benjamin F. Sidbury, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress can Eliminate the Loophole*, 26 J.C. & U.L. 755, 780 (2000) (calling for FERPA to "be amended to provide for mandatory disclosure of all student disciplinary records where the student has committed any criminal offense").

74. *Id.* See also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002) (holding that FERPA does not provide for a private right of action in federal court).

75. *Miami Univ.*, 294 F.3d at 803.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 804.



of Education, upon hearing that both universities were going to release the records, filed for an injunction to prevent them from “releasing student disciplinary records that contain personally identifiable information, except as permitted under the FERPA.”<sup>80</sup> The Department subsequently filed a motion for summary judgment, which the district court granted, thereby permanently enjoining both Miami University and Ohio State University from releasing the requested student disciplinary records.<sup>81</sup>

On appeal to the Sixth Circuit, *The Chronicle* argued that “to the extent it prohibits disclosure of student disciplinary records, the FERPA violates the First Amendment and the district court failed to recognize that violation.”<sup>82</sup> The Sixth Circuit disagreed, holding, “[u]nder a plain language interpretation of the FERPA, student disciplinary records are education records [and are protected] because they directly relate to a student and are kept by that student’s university.”<sup>83</sup> Because they were found to be “education records,” the Court held that there was no public right to access disciplinary records that pertain to criminal activities and punishment.<sup>84</sup> Additionally, the court found that student disciplinary hearings have never been open to the public, and thus held that this case failed the first prong of the two-part test as set forth in *Press-Enterprise II*.<sup>85</sup> The court further held that the case failed the second prong of the *Press-Enterprise II* test as well because public access does not play a significant role in disciplinary proceedings.<sup>86</sup> The court also emphasized that public access would not aid in disciplinary proceedings, but would only serve to make them more expensive and less effective as a teaching tool.<sup>87</sup> This holding, which differs from the decision that the court reached in *Student Press Law Center*, appears to have closed the door—at least in the Sixth Circuit—to any future, effective First Amendment claims in FERPA-related access cases.

Though disciplinary records could be compared to criminal records, the “right of access” implicit in the First Amendment’s freedom of the press, as held by the courts, does not attach to disciplinary records or “education

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80. *Id.*

81. *Id.* at 805.

82. *Id.* at 805. See also Brief of Appellant *The Chronicle of Higher Education* at 32–33, *United States v. Miami Univ.*, 294 F.3d 797 (2002) (No. 00-3518) (stating that “there is no evidence that Congress ever intended FERPA to protect student disciplinary records involving criminal conduct”).

83. *Miami Univ.*, 294 F.3d at 812.

84. *Id.* at 822 (“[S]tudent disciplinary proceedings govern the relationship between a student and his or her university, not the relationship between a citizen and ‘The People.’ Only the latter presumptively implicates a qualified First Amendment right of access to the proceedings and the records.”) (internal citations omitted).

85. *Id.* at 823.

86. *Id.*

87. *Id.* at 823–24 (noting that the press does have access to information about crime on college and university campuses including statistics).

records” in general.<sup>88</sup> Even in cases where the records at issue were not found to be protected by FERPA, it is unlikely that a First Amendment “right of access” argument would persuade a court. Because First Amendment jurisprudence limits the scope of access to criminal proceedings, it is not clear that the press would have access to this information even when the information is not an “educational record.”

### B. Open Records Laws

Press outlets have also argued that they should have the right to access information under certain state open records laws. For the most part, state open records laws followed the passage of the Federal Freedom of Information Act passed in 1966, though some states had a pre-existing common law right to public records.<sup>89</sup> While many states have open records laws that mirror the federal act, others diverge from its provisions and sometimes the two separate acts create conflicts regarding what should be protected and not protected.<sup>90</sup>

There may be occasions when records protected by federal law may be otherwise subject to disclosure under a state freedom of information act. Some state statutes specifically address this conflict, resolving the conflict in favor of preserving the confidentiality to the extent necessary to preserve federal funding, services, or information. Other states resolve the potential conflict by incorporating language into their statutes generally stating that the right to inspect records is subject to as otherwise provided by federal law. However, in some cases disclosure of federally protected records has been ordered under state public records laws.<sup>91</sup>

Because open records laws vary from state to state, the jurisprudence on the topic differs as well. Whereas a piece of information may be deemed to be protected in one state, another state may decide that it can be released to the public. Whether through exemptions, federal supremacy of FERPA,<sup>92</sup>

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88. See generally Letter from Kelly E. Campanella, Assistant Attorney General, Georgia Department of Law, to Arthur Leed, Associate Director for Legal Affairs, University of Georgia (Oct. 26, 2012) (on file with the National Association of College and University Attorneys) (“It is now clear that postsecondary student disciplinary records are protected from disclosure by [FERPA] and, therefore, are exempt from Georgia’s Open Records law.”).

89. 5 U.S.C. § 552 (1970).

90. Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 67 (1996) (providing an analysis on the brief history of public records statutes). See generally Nathanael Byerly & J. Chadwick Schnee, *What Every Lawyer Needs to Know about the Right-to-Know Law*, 83 PA. B.A. Q. 116 (2012) (providing an example of one state’s public records statute, summarizing important aspects of Pennsylvania’s Right-to-Know Law, and explaining Penn State’s exclusion from the requirements of the law).

91. Nowadzky, *supra* note 90, at 67–69.

92. See generally Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal*

or a general lack of access to the information, often members of the press are unable to prevail on an open records argument.

For example, in 2009, ESPN claimed access to the Ohio State University (“Ohio State”) records of an NCAA investigation under the Ohio Open Records Act,<sup>93</sup> but the Supreme Court of Ohio ruled that the act provided an exemption for records whose release would violate the provisions of FERPA.<sup>94</sup> The information ESPN had requested from Ohio State related to football players who had been implicated in a scheme to trade Ohio State memorabilia for tattoos.<sup>95</sup> Although the Ohio State football coach had been notified that certain players were involved in the scheme, he failed to notify any of his supervisors at the university about the issue.<sup>96</sup> An NCAA investigation ensued and, in relation to the allegations, ESPN made requests for “[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010.”<sup>97</sup> ESPN also filed follow-up requests relating to a mentor of one of the players.<sup>98</sup> Ohio State initially released over 5,000 pages of information but refused to respond to the follow-up requests and claimed that because the requests were overly broad and related to a pending investigation, they could not be released.<sup>99</sup>

The court held that Ohio State should have given ESPN a second opportunity to submit the records in a more concise manner.<sup>100</sup> Additionally, the court held that the Ohio Open Records Act did not provide an exemption for pending investigations. In spite of this, however, the court did not grant any relief on those claims.<sup>101</sup> Although the court found in favor of ESPN

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*Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. REV. 1045 (2012) (arguing that as a conditional federal funding statute, FERPA is subject to the current unconstitutional conditions doctrine and trumps any contradictory state open records laws).

93. Ohio Rev. Code Ann. § 149.43 (LexisNexis 2012).

94. State ex rel. ESPN v. Ohio State Univ., 970 N.E.2d 939 (Ohio 2012).

95. *Id.* at 942.

96. *Id.*

97. *Id.* at 942–43.

98. *Id.* at 943.

99. *Id.*

100. *Id.*

101. *Id.* The Ohio Revised Code states in pertinent part:

If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney’s fees to the person that instituted the mandamus action, and, if applicable, that includes an order fix-

regarding the broad request and pending investigation, it ultimately held that the information that ESPN sought qualified as “education records” and, therefore, was protected under FERPA.<sup>102</sup> Because the Department of Athletics kept copies of all emails sent or received by anyone in the department and retained documents pertaining to the investigation and organized them by student-athlete involved, they were “education records,” and as “education records” they were not governed by the state’s open records law.<sup>103</sup> The court held that information protected by FERPA could not be released regardless of the open records act on file.<sup>104</sup> The court also noted, however, that once personally identifying information was redacted from the documents, they would no longer be protected by FERPA and should be released.<sup>105</sup>

The Public Records Act serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy. However, even in a society where an open government is considered essential to maintaining a properly functioning democracy, not every iota of information is subject to public scrutiny. Certain safeguards are necessary.<sup>106</sup>

Following this decision, the Kentucky Attorney General issued a notice affirming a decision by the University of Kentucky to withhold records relating to a student athlete.<sup>107</sup> The *Kentucky Kernel*, a student newspaper, requested information under the Kentucky Open Records Act that included “memoranda, paperwork, and any other correspondence in the past two years . . . [as well as] any correspondence with the NCAA about Nerlens Noel.”<sup>108</sup> The university denied the request and cited FERPA as the reason

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ing statutory damages under division (C)(1) of this section.  
Ohio Rev Code Ann. §149.43(C)(1) (LexisNexis 2012).

102. *ESPN*, 970 N.E.2d at 947 (“The records here—insofar as they contain information identifying student-athletes—are directly related to the students.”). It seems that the records, however, may have been tenuously linked to the students in question:

ESPN first claims that the requested records are not education records because records concerning Sarniak, a Pennsylvania businessman who was the mentor to an Ohio State football player implicated in the NCAA investigation concerning trading memorabilia for tattoos, and records relating to compliance by Ohio State coaches and administrators with NCAA regulations do not directly involve Ohio State students or their academic performance, financial aid, or scholastic performance.

*Id.* at 946.

103. *Id.*

104. *Id.* at 949.

105. *Id.* at 947–48.

106. *Id.* at 948 (citing *State ex rel. Wallace v. State Med. Bd. of Ohio*, 732 N.E.2d 960, 967 (Ohio 2000)).

107. Memorandum from the Kentucky Office of the Attorney General (Dec. 4, 2012) (on file with the National Association of College and University Attorneys) [hereinafter *Kentucky Memorandum*].

108. *Id.*

for withholding the records.<sup>109</sup> Not only did the university deny access to the student newspaper, but it also denied access to the Attorney's General office as it reviewed the issue.<sup>110</sup> Notwithstanding the denial however, the Attorney General upheld the actions taken by the university.<sup>111</sup> In fact, the Attorney General deferred to the university's characterization of the records as "education records" without viewing them for himself and stated that under the broad protection provided by both *State ex rel. ESPN, Inc. v. Ohio State University*<sup>112</sup> and *United States v. Miami University*<sup>113</sup>, FERPA clearly supersedes the Kentucky Open Records Act.<sup>114</sup> This situation highlights the level of deference given to "education records" and FERPA's provisions to protect them. With this level of deference to FERPA, it is difficult for press outlets, and even more so for student-run newspapers, to clear the hurdle and gain access to relevant information. In practice, an argument based on access to records through state open records laws does not often beat FERPA.

Along similar lines, in a recent case involving the University of Iowa, the Supreme Court of Iowa held that the court did not have to examine the conflict between state open records laws and FERPA because the Iowa Open Records Act had a built-in FERPA exemption.<sup>115</sup> In *Press Citizen Company v. University of Iowa*, the *Iowa City Press-Citizen* submitted an open records request for information relating to an alleged sexual assault by two University of Iowa football players.<sup>116</sup> A criminal investigation followed the assault; one student pled guilty, and the other was convicted of a simple misdemeanor.<sup>117</sup> In its request for records, the *Press-Citizen* asked for "reports of attempted or actual sexual assaults; correspondence to or from various University officials relating to any such incidents; and e-mail, memos, and other records relating to any such incidents from [two weeks before the attack] to the present."<sup>118</sup> In response to the request, the University submitted minimal information to the *Press-Citizen* and claimed that all other records pertaining to the event were protected by FERPA as "educational records."<sup>119</sup> The *Press-Citizen* subsequently filed suit in state court. The lower court granted some relief by calling for the release of documents that it had determined were not education records and not protected

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109. *Id.*

110. *Id.*

111. *Id.*

112. 970 N.E.2d 939 (Ohio 2012).

113. 294 F.3d 797 (6th Cir. 2001).

114. Kentucky Memorandum, *supra* note 107.

115. *Press-Citizen Co., Inc. v. Univ. of Iowa*, 817 N.W.2d 480 (Iowa 2012).

116. *Id.* at 482.

117. *Id.*

118. *Id.* at 483.

119. *Id.*

by FERPA.<sup>120</sup> On appeal, the *Press-Citizen* again claimed access to the records based on the Iowa Open Records Act which “establishes ‘a presumption of openness and disclosure.’”<sup>121</sup> Although the Iowa Open Records Act lists sixty-four separate exemptions (the first being “[p]ersonal information regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records”),<sup>122</sup> the University of Iowa relied solely on the argument that the documents were protected under FERPA.<sup>123</sup> The Supreme Court of Iowa determined that “[f]or purposes of this appeal, we assume that the appealed [category of] documents are in fact ‘education records’ under FERPA.”<sup>124</sup> The court refused to decide whether FERPA enjoys federal supremacy over the Iowa Open Records Act<sup>125</sup> because it found that a provision of the Iowa Open Records Act lists an exemption for FERPA-related information.<sup>126</sup> Furthermore, the court stated that because the students’ records would be identifiable even if their names were redacted, the university does not have to release redacted copies of the records.<sup>127</sup>

[A]n educational record must be withheld if the recipient would know the student to whom the record refers, even with the redaction of personal information, such as the student’s name . . . . Given the notoriety of the . . . incident, the University contends that no amount of redaction of personal information would prevent the newspaper from knowing the identity of various persons

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120. *Id.*

121. *Id.* at 484 (citing *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996)).

122. Iowa Code Ann. § 22.7.

123. *Press-Citizen*, 817 N.W.2d at 484.

124. *Id.* at 486.

125. *Id.* at 487.

126. Iowa Code Ann. § 22.9. The Iowa Code Annotated states in pertinent part:

If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.

An agency within the meaning of section 17A.2, subsection 1, shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.

*Id.*

127. *Press-Citizen*, 817 N.W.2d at 492. *But see* Bd. of Trs., Cut Bank Pub. Schs. v. Cut Bank Pioneer Press, 160 P.3d 482, 487 (Mont. 2007) (holding that though the newspaper requesting the records knew the students involved, student disciplinary records should still be released with the student names redacted). The *Press-Citizen* declined to follow *Cut Bank* because the case had been decided before the definition of “personally identifiable information” was amended in 2009. *Press-Citizen*, 817 N.W.2d at 492.

referenced in records relating to that incident.<sup>128</sup>

In contrast to this line of reasoning, in *Chicago Tribune Co. v. Board of Trustees of University of Illinois*, the District Court for the Northern District of Illinois held that the University of Illinois could not withhold admission records requests made by the *Chicago Tribune* because those records were not “education records” under FERPA.<sup>129</sup> The *Chicago Tribune* ran a series about the preferential treatment of certain applicants during the admissions process at the University of Illinois and filed a public records request for “the names of the applicants’ parents and the parents’ addresses, and the identity of the individuals who made a request or otherwise became involved in such applicants’ applications.”<sup>130</sup> The university denied the request and claimed that FERPA protected the records from disclosure, but the district court found that the exemptions to the public records law for information prohibited from disclosure by federal or state law should be interpreted narrowly and that FERPA itself did not prohibit disclosure, but rather provided federal funds for those institutions that did not disclose certain materials.<sup>131</sup> On appeal, however, the Seventh Circuit vacated the decision and held that federal courts did not have jurisdiction over the case because the point at issue was whether the state open records law protected the information.<sup>132</sup> The fact that the university was using federal law as a defense did not grant federal jurisdiction.<sup>133</sup> Ultimately, the court refused to decide whether the state open records law or the federal FERPA statute governed the records at issue.<sup>134</sup>

As seen in each of the cases discussed above, claims based on open records arguments tend to fail when matched against FERPA’s provisions. Though open records laws value public access to information and are generally seen as a public good, they are balanced against personal privacy rights. Colleges and universities have used a broad interpretation of “education records” under FERPA in order to claim exemptions for records, and because many open records laws contain exemptions for FERPA-related information, press outlets often lose this argument. Moreover, even when an open record law does not contain a FERPA exemption, the federal supremacy argument may still prevent a valid open records claim.

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128. *Press-Citizen*, 817 N.W.2d at 490.

129. *Chicago Tribune Co. v. Univ. of Illinois Bd. of Trs.*, 781 F. Supp. 2d 672 (N.D. Ill. 2011).

130. *Id.* at 673.

131. *Id.* at 675 (rejecting an argument by the *Chicago Tribune* that its right to access the records was protected under the First Amendment).

132. *Chicago Tribune Co. v. Bd. of Trs. of Univ. of Illinois*, 680 F.3d 1001, 1006 (7th Cir. 2012).

133. *Id.* at 1003.

134. *Id.* at 1006.

## IV. CASES IN WHICH RECORDS WERE RELEASED

In a departure from the jurisprudence discussed above, a few courts have recently held that records sought were not “education records” and, therefore, not protected under FERPA. These cases differ from those above not only in the final judgment of the court, but also in the parties to the case. The following cases either involve a news agency or a college or university as a party, not both. Though this provides for a slightly different perspective, it offers an interesting comparison, as the cases below turn on the definition of “education records,” not on a First Amendment “right of access” claim or an open records law claim.

In *National Collegiate Athletic Association v. The Associated Press*, the First District Court of Appeal of Florida held that documents that the NCAA placed on its own website and allowed member institutions to view did not qualify as “education records.”<sup>135</sup> The case revolved around allegations that a learning specialist and an academic tutor at Florida State University (“Florida State”) provided athletes with improper assistance.<sup>136</sup> The university had self-reported to the NCAA and the NCAA had held its own disciplinary proceedings regarding the misconduct, ultimately issuing penalties against Florida State.<sup>137</sup> Florida State appealed the penalties imposed by the NCAA and requested access to the records relevant to the enforcement proceeding.<sup>138</sup> The NCAA granted the law firm representing the university access to the password-protected transcript of the NCAA hearing.<sup>139</sup> The Associated Press then requested copies of both documents, claiming that they were public records, and filed suit when the NCAA refused to disclose the information.<sup>140</sup> The trial court rendered judgment for the plaintiffs, finding that the records sought were public records “because they were received by an agency of the state government.”<sup>141</sup> The court of appeals affirmed, stating that, although “[r]ecords created and maintained by the NCAA are not generally subject to public disclosure,” since “the documents were received in connection with the transaction of official business by an agency, they are public records.”<sup>142</sup> Furthermore, under FERPA, because the documents were not directly related to students, they were not considered “education records.”<sup>143</sup>

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135. *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1204 (Fla. Dist. Ct. App. 2009).

136. *Id.* at 1204–05.

137. *Id.* at 1205.

138. *Id.*

139. *Id.* The NCAA did not disclose this information to the public.

140. *Id.* at 1205–06.

141. *Id.* at 1206.

142. *Id.* at 1204.

143. *Id.* at 1211 (stating redacted records were related to the University Athletic Department, and only tangentially related to students).



In *Wallace v. Cranbrook Educational Community* (“Cranbrook”), a maintenance person employed by Cranbrook was terminated for allegations, primarily based on anonymous student statements, of “inappropriate sexual behavior towards students.”<sup>144</sup> During discovery in a suit alleging improper termination, Cranbrook released the student statements to the plaintiff with the students’ names and addresses redacted.<sup>145</sup> After a magistrate ordered Cranbrook to produce the students’ identifying information Cranbrook objected, in part, because it asserted that FERPA prohibited the disclosure of the identifying information.<sup>146</sup> In upholding the magistrate’s disclosure order, the district court judge held that employee records were an exception under FERPA and were not considered “education records.”<sup>147</sup>

Education records do not include, “in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose.”<sup>148</sup>

Thus, the court held that the unredacted student statements related to an employee and could be released.<sup>149</sup>

As seen in both *NCAA* and *Wallace*, plaintiffs have had more success fighting the defense of protection under FERPA by arguing that the information at issue is not, in fact, an “education record.” Though claims that the press has a right to access information under the First Amendment or under certain state open records laws have often failed, the argument centering on the definition of “education records” has provided different results.

#### CONCLUSION

Although Senator Buckley originally intended for the Federal Education Rights and Privacy Act to protect information from mishandling by the federal government as well as by colleges, universities, and even primary schools, Congress has amended the statute multiple times and created more ambiguity as to what exactly is protected information. Members of the

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144. *Wallace v. Cranbrook Educ. Cmty.*, No. 05-73446, 2006 WL 2796135, at \*1 (E.D. Mich. Sept. 26, 2006). *See also* *Briggs v. Bd. of Trs. Columbus State Cmty. Coll.*, No. 2:08-CV-644, 2009 WL 2047899 (S.D. Ohio July 8, 2009) (holding that student complaints against a professor are directly related to the professor, not the student, and are not “education records”).

145. *Wallace*, 2006 WL 2796135, at \*1.

146. *Id.*

147. *Id.* at \*5.

148. *Id.* at \*5 (citing 20 U.S.C. § 1232g(a)(4)(B)(iii)).

149. *Id.* at \*6.

press have attempted to access information only to be told it was an “education record” and as such, protected by FERPA. Because of this, press outlets and news agencies have brought cases to seek a right to certain information based on First Amendment rights and open record laws. Yet, in *United States v. Miami University*, the Sixth Circuit held that the press did not have a First Amendment right to access information, and in both *Press-Citizen Co., Inc. v. University of Iowa* and *State ex rel. ESPN v. Ohio State University*, the courts found that certain state open records laws did not provide access to information protected under FERPA.

Recently, however, in *NCAA v. Associated Press* and *Wallace v. Cranbrook Educational Community*, the courts have found exceptions to the statutory definition of “education record” and deemed certain information not an “education record” under the law, and thus accessible to the requester. Though these cases differ from the others examined in this article because they do not involve a press outlet suing a college or university, they do provide helpful insights for press outlets looking to access information and those schools working to keep information confidential. Going forward, press outlets may be more likely to reach outcomes in their favor when the argument is about whether the piece of information sought is an “education record,” rather than when the argument is about whether the press has a right to access the information. Colleges and universities concerned about their own responsibilities under FERPA should consider this evolving debate as well.



REFLECTIONS ON THE MOST IMPORTANT  
CHALLENGES FACING OUR COLLEGES AND  
UNIVERSITIES BY AN EXPERIENCED,  
DISCERNING, AND AFFECTIONATE CRITIC:

A REVIEW OF DEREK BOK'S *HIGHER  
EDUCATION IN AMERICA*

RICHARD L. MCCORMICK\*

About a quarter century ago, American higher education lost the golden glow that had enveloped it during the decades after World War II. No one wanted to repeal the wondrous growth of student enrollment and scientific research that had blossomed during the 1950s, 1960s, and 1970s, but suddenly colleges and universities faced fierce critics and troubling accusations. Several high profile books, starting with Allan Bloom's *The Closing of the American Mind*,<sup>1</sup> took higher education severely to task for what Bloom and others perceived as the soul-impoverishing relativism of the curriculum and the left-leaning "political correctness" of the faculty.<sup>2</sup> The most telling criticisms concerned undergraduate education, an activity that professors allegedly neglected in favor of their often-useless research, with the result that many college and university graduates were ill-prepared for life and work.<sup>3</sup> Adding injury to the insults, state governments everywhere began reducing their funding for higher education, and alas they are reduc-

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1. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS* (1987).

2. DEREK BOK, *HIGHER EDUCATION IN AMERICA* 369 (2013).

3. See BLOOM, *supra* note 2; see also MARTIN ANDERSON, *IMPOSTERS IN THE TEMPLE* (1992); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); ROBERT KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990); PAGE SMITH, *KILLING THE SPIRIT: HIGHER EDUCATION IN AMERICA* (1990).

ing it still.<sup>4</sup> Together, these developments marked a turning point where the tides of popular and political opinion shifted against higher education and hurled it toward the defensive posture it has mostly occupied to the present day.

None of this adversity has prevented America's colleges and universities from continuing to excel in their missions of education, research, and service to society. They are now graduating more and more diverse students than ever before; setting a standard for the world in making discoveries that advance human health and economic productivity; and contributing in myriad ways to the well-being of their communities and the nation.<sup>5</sup> College and university faculty members are utilizing the latest technologies in teaching and research, creating new courses and programs to meet fresh challenges and opportunities, and doing all this with fewer and fewer real dollars from taxpayers.

But the shock of criticism and the withdrawal of support, first administered to colleges and universities a quarter of a century ago, have left their marks. For one thing, a vast literature of articles and books on higher education has appeared, some of it directed toward popular audiences, some of it directed toward scholarly audiences. Many authors have pushed back against the Bloom-era criticisms, but at least as many have deepened and extended the faultfinding.<sup>6</sup> Both the federal and state governments have responded by regulating higher education to a far greater extent than in the past, and in many substantive areas, the courts have gotten into the act as well. Budget cutting by the states has led to significant tuition increases, which, in turn, have discouraged attendance by some students, driven others deeply into debt, and opened up a whole new arena for berating colleges and universities.

At the present time, there is no firm consensus on higher education in America. Its institutions remain both highly popular and highly suspect, and there is little agreement on the problems or the solutions. Recently, in-

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4. Karin Fischer & Jack Stripling, *25 Years of Declining State Support for Public Colleges*, CHRON. HIGHER EDUC. (Mar. 3, 2014), <http://chronicle.com/article/An-Era-of-Neglect/145045/>. *Postsecondary Education Opportunity*, a research newsletter published monthly in Oskaloosa, IA, regularly reports comprehensive longitudinal data on state support for higher education as well as information on many other subjects related to colleges and universities. POSTSECONDARY EDUC. OPPORTUNITY, <http://www.postsecondary.org/> (last visited Apr. 6, 2014).

5. For an authoritative and inspiring account of many of these achievements, see JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY: ITS RISE TO PREEMINENCE, ITS INDISPENSABLE NATIONAL ROLE, WHY IT MUST BE PROTECTED* (2009).

6. See, e.g., CHALLENGES FACING HIGHER EDUCATION AT THE MILLENNIUM (Werner Z. Hirsch & Luc E. Weber eds., 1999) (a volume of insightful essays by higher education luminaries). The footnotes in the book under review here provide a remarkable compilation of the diverse scholarly literature on American higher education today. See BOK, *supra* note 2.

deed, a new generation of criticisms has emerged, with special emphasis upon the costliness and ineffectiveness of undergraduate education.<sup>7</sup> One characteristic of the 1990s and early 2000s was the difficulty that college and university presidents (including the writer of this review) experienced in conveying, publicly and compellingly, the wider purposes of their enterprise. The preceding generation of presidents (one of whom is the author of the book under review) did so with greater success.<sup>8</sup>

At this uncertain juncture, Derek Bok's study, titled *Higher Education in America*, presents in a single, erudite volume a clear-eyed account of virtually all of the vulnerabilities, issues, and problems facing colleges and universities today.<sup>9</sup> Bok sustains some of the criticisms and dismisses others, but what principally characterizes his book is a fair and balanced analysis of every subject he addresses. Drawing to an extent upon decades of personal experience, and drawing even more so upon the evidence unearthed in the hundreds of studies he cites, Bok has written the definitive book on American higher education for our era. Many of the challenges he recounts have been caused, at least in part, by external forces beyond the campus, but Bok focuses relentlessly on what colleges and universities can do for themselves to solve these problems.<sup>10</sup> The audiences he seeks to reach include all the constituencies who have a stake in higher education, but he confesses "a special concern for readers who have chosen to enter that particular vineyard known as 'academic administration.'"<sup>11</sup> Anyone who is even thinking about joining that company should read this book—carefully.

For anyone familiar with American higher education—and certainly any reader of this journal—Derek Bok needs little introduction. The president of Harvard for two tumultuous, triumphant decades spanning from 1971 until 1991, where he had previously served as a professor of law and as the dean of the law school, Bok has gone on to an astonishingly productive, post-presidential career as the author of several influential works on higher education, as well as another quick stint as Harvard's president.<sup>12</sup> Now, he

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7. Two of the best examples are RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGES CAMPUSES* (2011) and JEFFREY J. SELINGO, *COLLEGE (UN)BOUND: THE FUTURE OF HIGHER EDUCATION AND WHAT IT MEANS FOR STUDENTS* (2013).

8. Jeffrey Selingo, *As Colleges Evolve, So Must Their Presidents*, *CHRON. HIGHER EDUC.* (Mar. 4, 2013), <https://chronicle.com/article/As-Colleges-Evolve-So-Must/137635/>.

9. BOK, *supra* note 2.

10. *Id.* at 23. By contrast, JONATHAN R. COLE in *THE GREAT AMERICAN UNIVERSITY* focuses on what external entities, mainly the federal and state governments, should do, or stop doing, to help colleges and universities. See COLE, *supra* note 5. Both perspectives are, of course, entirely valid.

11. BOK, *supra* note 2, at 4.

12. See, e.g., DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003); DEREK BOK, *OUR UNDERACHIEVING COL-*

has written what may or may not be his capstone book, a study that is as capacious as its title, as judicious as was Bok's presidential leadership, and as truly learned as its author. For all that, Bok wears his Harvard identity lightly. *Higher Education in America* has a lot to say about elite, private institutions, but it offers just as much, maybe more, about flagship state universities and comprehensive publics. Bok doesn't completely ignore community colleges or for-profit institutions, but they receive far less attention overall than do the other sectors of higher education. In a couple of well-chosen spots, Bok tells a Harvard story that helps to make a specific point, without arrogance, and at least once he pokes a bit of fun at himself as a former Harvard president. But that's about it; this is not a book about the particular institution that Bok knows best.

Rather, it is a comprehensive account of our colleges and universities, starting with the essential features of the American system of higher education—its strengths and weaknesses, its purposes and goals, and the ways in which the institutions are governed. Bok then turns to the core missions of colleges and universities and devotes most of his book to undergraduate education (his pivotal subject); Ph.D. graduate education; professional education in medicine, law, and business; and research. In each section, Bok concentrates on the problems, the contested areas, the issues that warrant a careful examination—and, in each, he provides exactly that. There are wonderfully lucid mini-essays on practically every subject in which readers will be interested. Just to name a few, they include the following: the value of a college education;<sup>13</sup> how to improve the relationships between states and their public universities;<sup>14</sup> degree completion lengths and attrition rates in PhD programs;<sup>15</sup> changes in the hospital environment that are transforming medical education;<sup>16</sup> the liberal bias of the faculty;<sup>17</sup> and the characteristics of intellectual communities that encourage genuinely creative thought.<sup>18</sup>

Despite its breadth and judiciousness, *Higher Education in America* renders tough judgments and touts strongly held views. There are many things about our colleges and universities that Bok admires. He credits higher education with meeting momentous challenges in the second half of the twentieth century: transitioning from elite to mass education, expanding re-

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LEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE (2006); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

13. See BOK, *supra* note 2, at 82–87.

14. *Id.* at 100–01.

15. *Id.* at 231–38.

16. *Id.* at 264–69.

17. *Id.* at 369–76.

18. *Id.* at 376.

search to address national needs, speeding the translation of laboratory discoveries into useful products, and preparing students for careers in countless emerging fields.<sup>19</sup> Bok deeply admires the core values of higher education, including freedom of thought and expression, disinterested search for truth, respectfulness toward every member of the academic community, and the spirit of invention and experimentation that pervades our colleges and universities—although he laments some fraying of those values today and believes they need conscious protection (most particularly when colleges and universities accept corporate support for research). Bok is generally positive about faculty and students, about college and university leadership (even trustees and presidents), and about the potential of new technologies to improve both teaching and research.

But Bok has equally strong reservations about other features of the higher education system: the vast disparity of resources between the “haves” and “have-nots” among our institutions, the pernicious rankings (he singles out *U.S. News & World Report* again and again) that drive colleges and universities to try to achieve goals that are measurable but ultimately spurious, mission creep and the needless accretion of new programs and activities, big-time intercollegiate athletics, and the relentless engagement in profit-seeking activities by institutions of all kinds. Readers who want an esteemed expert to exonerate colleges and universities of all the charges against them need not bother with Bok.

At the heart of his book is education, and, above all, teaching and learning for undergraduates. Indeed, Bok’s deepest concerns lie in this area, as did the complaints of higher education’s critics a quarter of a century ago. The difference is that Bok’s worries are based on his experience, discernment, and affection for higher education—and have nothing to do with the politics of the professoriate. Two problems concern Bok the most. Put crudely, they are about *quantity* and *quality*—about the sheer number of young people who graduate from colleges and universities and about how much they learn while they are there.<sup>20</sup> “Thirty years ago,” Bok writes, “the United States ranked near the top of all nations in the percentage of young people graduating from college . . . . [Since then], however[,] graduation rates in most advanced countries have surged, while in America they have stood still.”<sup>21</sup> Those left behind are overwhelmingly low- and moderate-income Americans, who, if they go to college at all, are likely to attend inadequately resourced, comprehensive colleges and universities, community colleges, or for-profits, while the children of wealthy Americans occupy most of the seats at the selective institutions, both public and private. These privileged students graduate from college in far greater proportions

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19. *Id.* at 201.

20. *Id.* at 79–80.

21. *Id.* at 87.



than do their less fortunate counterparts, and in so doing they gain access to loftier careers and higher incomes as well as better health and longer lives. American higher education is now perpetuating, and even deepening, the nation's social and economic inequalities—with gloomy consequences for future economic prosperity and for the fulfillment of individual hopes and dreams.<sup>22</sup>

Bok attributes these sobering realities chiefly to rising college and university costs, which, in turn, owe a great deal to the decline of state support for higher education. Characteristically, however, Bok devotes most of his attention not to blaming somebody else but to suggesting constructive steps that institutions themselves can take to elevate the rates of attendance and graduation by economically disadvantaged students. He brings to his discussion almost every conceivable remedy: better coordination between high schools and colleges and universities; targeted outreach to low-income students, especially by selective institutions; reduction of college and university costs; enhancement of need-based financial aid; supportive interventions for struggling students; and the application of new technologies to teaching. Bok's analysis of college and university costs is particularly exemplary; sadly, however, he is not optimistic that they can be greatly reduced. Nor, despite his extreme concern about the need to improve educational attainment, is he cheerful about the likely near-term outcomes: "By any honest calculation," Bok writes, "the chances of success by 2020 are problematic at best."<sup>23</sup> Who, he asks, will educate and graduate more non-affluent students? Maybe no one.<sup>24</sup>

Bok's second principal commitment is to improve student learning and to redress what he calls the "weakened state" of undergraduate education.<sup>25</sup> He questions whether the prevailing curriculum—with its three components of general education, electives, and the major—is well suited for enabling students to achieve either the broad purposes of a liberal education or the narrower aims of vocational preparation. That curriculum, after all, typically reflects "a political accommodation" among different groups of faculty members, "rather than a carefully considered framework for achiev-

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22. *Id.* at 81–144. For a corresponding analysis, with particular reference to minority students, see ANTHONY P. CARNEVALE & JEFF STROHL, *SEPARATE AND UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE* (2013). Suzanne Mettler offers similar observations, but places the blame squarely upon politics and government: "The demise of opportunity through higher education is, fundamentally, a political failure." Suzanne Mettler, *College, the Great Unleveler*, *The Opinion Pages*, N.Y. TIMES (Mar. 1, 2014), [http://opinionator.blogs.nytimes.com/2014/03/01/college-the-great-unleveler/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2014/03/01/college-the-great-unleveler/?_php=true&_type=blogs&_r=0).

23. BOK, *supra* note 2, at 118.

24. *Id.* at 98–165.

25. *Id.* at 182.

ing the lengthy list of generally accepted educational goals.”<sup>26</sup> To judge from research that Bok cites, moreover, most college and university students make only modest progress at gaining proficiency in critical thinking, written communication, or mathematics. This should not be surprising. Over the course of the last several decades, the amount of academic work assigned to undergraduates has declined; they now study much less than they used to—and get higher grades!<sup>27</sup>

The answer, Bok believes, lies in better teaching. By this he means less lecturing and more classroom discussion, higher expectations for students and greater demands upon them, more assignments and experiences that require students’ active engagement, and continuous assessment of what they are really learning. That’s a tall order, to be sure, but here Bok is remarkably hopeful. Many elements essential to the reformation of teaching and learning are in place; others can be mustered over time. Thanks to “a flourishing process of educational research,” there is a “large and growing literature” on effective instruction and an accumulation of evidence “that current teaching methods are not accomplishing the results that professors assume are taking place.”<sup>28</sup> Bok sets forth a hypothetical, but believable, multi-stage process through which faculty, well-supported by college and university administrators, could review and reform the existing curriculum and adopt meaningful changes in methods of instruction. He predicts “that major improvements in teaching will eventually take place”<sup>29</sup> because of the growing evidence on their behalf, the availability of better measures of student learning, and continuing pressures, both on and beyond the campus, for accountability and reform.<sup>30</sup>

When Bok moves beyond undergraduate education to his briefer but still authoritative appraisals of graduate and professional education, he maintains his urgent concern with student learning. America’s top universities, he observes, do very well in training Ph.D. students as researchers, but are far less effective in preparing them to teach. “Few graduate students,” he writes, “learn about the implications of cognitive research for teaching and learning. . . . Even fewer become informed about the ethical obligations of instructors.”<sup>31</sup> Ever the practical reformer, Bok proposes a worthy scenario in which responsibility for such training would be shared by a student’s graduate institution and by the college or university that first appoints that student to an academic position.<sup>32</sup> Each of Bok’s informed, perceptive

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26. *Id.* at 176.

27. *Id.* at 166–86.

28. *Id.* at 202–04.

29. *Id.* at 214.

30. *Id.* at 186–219.

31. *Id.* at 239.

32. *Id.* at 238–46. See also Derek Bok, *We Must Prepare Ph.D. Students for the Complicated Art of Teaching*, CHRON. HIGHER EDUC. (Nov. 11, 2013),

chapters on professional education in medicine, law, and business includes an incisive discussion of what and how to teach.<sup>33</sup> No reader of *Higher Education in America* can escape Bok's most essential point, and no one who aspires to leadership within our colleges and universities should fail to ponder it: the greatest challenge facing higher education today is not securing dollars or gaining reputation or even hiring faculty; it is *improving student learning*.

In exactly that spirit, Bok's discussion of research takes up the question (originally launched as an accusation by critics of Allan Bloom's era) of whether the time-consuming demands of research have led faculty to neglect their teaching. Drawing upon extensive studies of that question, Bok gives an answer that is at once familiar and unexpected. No, he says; voluminous evidence about the relationship between research and teaching provides little support for the view that research undermines the quality of undergraduate education—or that it improves it, either. The main impact of the one upon the other, he observes, is that an emphasis on research affects “the willingness of faculty members to entertain proposals for fundamental changes in curriculum and teaching methods . . . [and leaves them] less open to making substantial reforms in undergraduate education.”<sup>34</sup> Bok does not present this as an argument for doing less research, only as another challenge to be faced if student learning is to receive the attention it needs and deserves.<sup>35</sup>

Even a book as fine and far-reaching as Bok's cannot cover every topic in exhaustive detail, and some of its judgments and interpretations will inevitably fail to satisfy every reader. There are two important subjects about which I wish Bok had written more extensively and one to which I wish he had brought an added vantage point. These subjects are, respectively, adjuncts, athletics, and affirmative action.

Bok mentions part-time adjunct instructors a half-dozen times, and in a couple of footnotes, he cites the literature exploring the effectiveness of adjuncts as teachers and their impact on dropout rates, grade inflation, and the amount of attention students receive from faculty. Elsewhere, he notes that at many institutions adjuncts bear most of the responsibility for teaching the required basic courses in writing, math, and languages, while in another context, Bok observes that the presence of “massive numbers of part-time instructors” proves that institutions have the “flexibility to respond to changing instructional priorities.”<sup>36</sup> Limited, no doubt, by the paucity of research on adjuncts, Bok perhaps felt he carried this topic as far as he

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<http://chronicle.com/article/We-Must-Prepare-PhD-Students/142893/>.

33. BOK, *supra* note 2, at 262–64, 273–82, 291–305.

34. *Id.* at 335.

35. *Id.* at 328–37.

36. *Id.* at 362.

could. But in light of the large and growing share of undergraduate instruction borne by such faculty, and hence the direct relevance of their teaching effectiveness to student learning, greater attention to part-timers might have been in order. The hiring of more and more adjuncts represents, for better or worse, one of the most effective ways in which public colleges and universities have controlled costs, and the growing classroom presence of part-time teachers will inescapably influence the capacity of those institutions to achieve the educational goals Bok has set forth.<sup>37</sup>

Bok also brings up intercollegiate athletics from time to time, and his references whet the appetite for more extensive coverage of the topic. All the devilish features of big-time sports are here: the admissions preference given to academically underqualified athletes, the losses of millions of dollars a year, the exploitation of football and basketball players, the amount of presidential time and attention taken up by athletics, and, through it all, the ceaseless “shabby compromises and petty scandals.”<sup>38</sup> Bok briefly contemplates the option of eliminating intercollegiate athletics as a cost-cutting measure, but he quickly acknowledges that a firestorm of opposition from alumni, trustees, politicians, and students would doom any such proposal and, probably with it, any president who suggested such a thing. Just as in the case of adjuncts, Bok may feel he said everything he has to say about athletics. But given the prominence of big-time sports at so many institutions and in light of the obvious challenges they pose to student learning—both for athletes themselves and for those who watch and cheer for them—this reader hoped for a more sustained treatment of athletics.<sup>39</sup>

Lastly, Bok’s discussion of racial preferences in admissions decisions, commonly termed affirmative action, is missing an important dimension. Readers familiar with his pathbreaking study titled *The Shape of the River* (written with William G. Bowen) will know that Bok supports affirmative action and believes it to be effective.<sup>40</sup> In the present volume, as is his custom, Bok offers a judiciously balanced analysis of the subject. He explains both sides of the debate, acknowledges that “no amount of evidence is likely to resolve the argument over racial preferences,” and concludes with the sly observation that if (or, more likely, *when*) the United States Supreme Court abolishes affirmative action, selective colleges and universities “will find some constitutionally permissible substitute” that allows them to con-

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37. *Id.* at 115, 187, 334, 359, 407. For recent evidence of growing political interest in adjuncts, see DEMOCRATIC STAFF OF THE HOUSE COMM. ON EDUC. & THE WORKFORCE, *THE JUST-IN-TIME PROFESSOR* (2014), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/1.24.14-AdjunctEforumReport.pdf>.

38. BOK, *supra* note 2, at 404–05.

39. *Id.* at 34, 40–41, 59, 113, 128–29, 160, 351.

40. See BOWEN & BOK, *supra* note 12.

tinue to enroll a large number of minority students.<sup>41</sup> All this is sensible and persuasive.

My quarrel is with the exclusively specific and practical grounds on which Bok defends affirmative action—namely, the educational benefits it confers upon students who study alongside people who are different from themselves and the contributions it makes to diversifying “the leadership class” in government and in other major organizations and professions.<sup>42</sup> These are very solid reasons for using racial preferences in college and university admissions decisions, and, so far, the Supreme Court has accepted them. Absent from Bok’s discussion, as well as from recent court decisions, is an argument for affirmative action based on America’s heritage of racial discrimination and on simple social justice—in other words on the very ideals that inspired *Brown v. Board of Education* in 1954.<sup>43</sup> Columbia University president Lee Bollinger, for one, sees in recent court decisions evidence of “a long, slow drift from racial justice” and laments “the failure to renew a conversation about racial justice as the civil-rights era recedes further and further into the past.”<sup>44</sup> He is right. Whatever the courts may say, there are multiple arguments for affirmative action and for racial inclusion more generally, and the most compelling of these is social justice.

Bok’s life and the entire corpus of his writing attest to his deep familiarity with that ideal. And so it is fitting that *Higher Education in America* returns toward the end to its most troubling finding, which is that far too many young Americans are not going to college and, in today’s circumstances, have no realistic prospect of doing so. This fact is deeply concerning to Bok, as it should be to all of us. “Unless our levels of educational attainment,” he writes, “resume the steady increase that occurred in this country over many previous generations, inequality of income is likely to continue rising, the economy will grow more slowly, and many deserving students will be denied opportunities to succeed according to their abilities and aspirations.”<sup>45</sup> Although Bok admirably believes that colleges and universities should solve problems for themselves, *this* problem is different, as he well knows. Solving it will require a renewed partnership on behalf of educational opportunity between colleges and universities and the federal and state governments. Even more, it will depend upon a twenty-first century version of the conviction—held by Americans of the World War II

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41. BOK, *supra* note 2, at 132.

42. *Id.* at 130.

43. 347 U.S. 483 (1954).

44. Lee C. Bollinger, *A Long Slow Drift From Racial Justice*, N.Y. TIMES, June 24, 2013, <http://www.nytimes.com/2013/06/25/opinion/a-long-slow-drift-from-racial-justice.html>; see also Lee C. Bollinger, *To Move Forward We Must Look Back*, CHRON. HIGHER EDUC. (June 27, 2013), <http://chronicle.com/article/To-Move-Forward-We-Must-Look/140053>.

45. BOK, *supra* note 2, at 408.

generation—that our whole society benefits when more people graduate from a college or university and that boosting higher educational attainment is again worthy of the nation’s unwavering commitment and a far greater investment of its taxpayers’ hard-won dollars.



## REVIEW OF CRAIG STEVEN WILDER'S *EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES*

RICHARD PIERCE\*

Historian Ira Berlin wrote that the difference between a "slave society" and a "society with slaves" was that in a slave society the entire community benefitted and suffered from the presence of slaves.<sup>1</sup> In his construction, a slave society's economy, laws, and customs supported the presence of slaves or the slave trade.<sup>2</sup> For too long, in the popular imagination and sometimes in classrooms, northern states during the era before the United States Civil War have occupied a position distinct from southern states as areas increasingly detached from slavery and enlightened in race relations. Craig Steven Wilder's *Ebony and Ivy* disabuses the reader of such notions by enumerating the fact that many academic leaders at northern colleges and universities were slaveholders or slave sympathizers.<sup>3</sup> Further, he specifies that America's first and most revered colleges and universities were complicit in the growth and development of American slavery, noting that "[t]he academy never stood apart from American slavery—in fact, it stood beside church and state as the third pillar of a civilization built on bondage."<sup>4</sup> Over the succeeding centuries, college and university administrators and officials have attempted to sanitize their institution's links to slavery, but Wilder ably proves that the development of the American academy owed much to the donations and benefactions offered by those who profited from the slave trade.<sup>5</sup> Often begun as educational efforts to "civilize" Native Americans, the institutions served as agents of subjugation.

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1. IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* (1998).

2. *Id.*

3. CRAIG STEVEN WILDER, *EBONY AND IVY: RACE SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES* 11 (2003).

4. *Id.*

5. *See, e.g., id.* at 29, 117 (discussing Harvard University); *id.* at 42, 117–18, 136 (discussing the College of William and Mary); *id.* at 113 (discussing Dartmouth College); *id.* at 114, 123 (discussing Rutgers University); *id.* at 118 (discussing Yale University); *id.* at 118–19 (discussing Princeton University); *id.* at 127 (discussing King's College—now, Columbia University).



tion for both Native Americans and Africans.<sup>6</sup> Certainly, other institutions were similarly embedded with slave sympathizers, but American colleges and universities were distinct because of their ability to influence those that became the nation's political, civic, and commercial leaders.<sup>7</sup>

Recent efforts have been made to cast light on the historical realities of physical and financial support from slaveholding interests that modern colleges and universities once enjoyed. Over the past dozen years or so, as part of a movement that was sparked by former president of Brown University, Ruth Simmons, some of America's most revered institutions have undertaken the painful chore of examining their relationship with slavery and the slave economy. The Brown committee, for example, published its findings in the report *Slavery and Justice*, which concluded that enslaved people had helped build the campus, prominent slave traders had helped direct the early history of the university in the colonial period, and that some of the university's first officers were slave owners.<sup>8</sup> Brown's history was not different from that of its peers. Between 1746 and 1769, the number of colleges and universities in Britain's mainland colonies multiplied from three to nine.<sup>9</sup> Not coincidentally, Wilder argues, the African slave trade reached its peak during that period. The great merchant families, like the Livingstons, Browns, and Crugers, filled the boards of new mid-Atlantic and New England colleges and universities, such as the following: Princeton University (originally the College of New Jersey, 1746), the University of Pennsylvania (1751), Columbia University (originally King's College, 1754), Brown University (originally the College of Rhode Island, 1764), Rutgers University (originally Queen's College, 1766), and Dartmouth College (1769).<sup>10</sup> The scions of those families were educated at the very same institutions their forebears directed, sometimes with their own slaves in tow.<sup>11</sup> Wilder links the rise of the American mercantile class with the rise of American institutions of higher learning. He painstakingly demonstrates that college and university officials sought the merchants' benevolence and used the proffered gifts to establish professorships.<sup>12</sup> Such gifts helped develop and sustain those institutions in their infancy and influenced their development.

In the decades before the American Revolution, merchants and planters became not just the benefactors of colonial society but

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6. See, e.g., *id.* at 21–28, 33–44.

7. See *id.* at 82–90.

8. BROWN UNIV. STEERING COMM. ON SLAVERY AND JUSTICE, *SLAVERY AND JUSTICE* (2006).

9. WILDER, *supra* note 3, at 49.

10. *Id.* at 47–50.

11. *Id.* at 75–77.

12. *Id.*

its new masters. Slaveholders became college presidents. The wealth of the traders determined the locations and decided the fates of colonial schools. . . . And the politics of the campus conformed to the presence and demands of slaveholding students.<sup>13</sup>

The enslaved individuals who found themselves on college and university campuses executed chores as far ranging as working in construction, cleaning student rooms, preparing meals, and performing for the students' amusement.<sup>14</sup> At Williams College, the students paid a black man to see him repeatedly smash his head with wooden boards and barrels.<sup>15</sup> In April 1772, at King's College (Columbia University), Beverly Robinson, an upperclassman, attacked one of the servants in the university's chapel.<sup>16</sup> "Robinson spit in the Cook's Face [sic], kicked, & otherwise abused him," reads the record.<sup>17</sup> Despite his temper and his assault, Robinson was allowed to graduate in 1773.<sup>18</sup> He later became a trustee of the university.<sup>19</sup> At Dartmouth, the number of slaves arguably equaled the number of white students at the fledgling college.<sup>20</sup> The sons of elite families were accustomed to the comforts that their servants provided and frequently chose to take a servant with them while they studied in residence.<sup>21</sup>

Given the presence and acceptance of so many slaves on America's campuses, one is left to question to what effect was their presence. Here, Wilder confronts the historical reality of the changed nature of college and university campuses during his research time period. American colleges and universities often had an undeniable link to Christian origins. The first five colleges and universities in the British American colonies—Harvard University (1636), the College of William and Mary (1693), Yale University (1701), Codrington College (1745) in Barbados, and the College of New Jersey (1746)—"were instruments of Christian expansionism and weapons for the conquest of indigenous peoples."<sup>22</sup> Most of the early colleges and universities also established Indian colleges to convert Native Americans to Christianity and to send them out as missionaries. Their efforts included capturing and kidnapping young Native American boys in order to educate them properly in the Christian faith.<sup>23</sup>

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13. *Id.* at 77.

14. *Id.* at 134–43.

15. *Id.* at 142.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 113–14.

21. *See id.* at 77.

22. *Id.* at 17.

23. *Id.* at 44.

But colleges and universities were not static institutions, and over time, science came to challenge theology for hegemony. As science became the *sine qua non* of academic study, race became the area where it established resonance. Academics defended the inferior position of Africans in American society due to an innate “[b]odily and [m]ental [i]nferiority of the Negro.”<sup>24</sup> There was considerable debate within academic circles about the truth of this claim.<sup>25</sup> Benjamin Rush—an opponent of slavery, founder of Dickinson College, a signer of the Declaration of Independence, and intellectual sparring partner with Thomas Jefferson—was one noted critic.<sup>26</sup> Even within the southern state colleges and universities, there was dissent over the peculiar institution of slavery. In 1828, The University of Georgia’s Phi Kappa Literary Society decided that slavery was unjust and eventually reached an abolitionist conclusion.<sup>27</sup> However, students there and elsewhere in the South saw their positions against abolition harden as regional tensions rose. Meanwhile, politicians, editors, and academics in the South began to expand an educational infrastructure that defended slavery more ably in the face of a changed intellectual environment where slavery was more contested.

Here, Wilder is on less sure ground. He concludes that American scholars tried to reconcile the national debate by constructing two paths: “positive defenses of slavery grounded in history, theology, and economics; and scientific attacks upon the humanity of the colored races that denied black people the moral status of person and forced them into the moral sphere of brutes.”<sup>28</sup> However, in constructing such a conclusion, Wilder fails to effectively address the presence of the many academics who reached differing conclusions about the status of Africans. If colleges and universities were under heavy influence by slaveholders, both in support and operation, then how did those very same places sponsor debates on the propriety of slavery? The colleges and universities were part of a broader social, political, and economic environment and were, therefore, subject to the same dialectics that tormented the students and faculty living within their borders. A larger comparative study of the pressures external to college or university borders is largely absent from the monograph, perhaps by design, as his intent is to show how slave sympathizers were well entrenched in the halls of the academy. Nonetheless, a more substantial comparative study of the pressures external to the college or university borders is lacking.

American leaders and intellectuals in the 19<sup>th</sup> century confronted an en-

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24. *Id.* at 227. This phrase is drawn from the title of an undergraduate research paper presented at Columbia by John Francis. *Id.*

25. *See id.* at 231–39.

26. *Id.*

27. *Id.* at 234–35.

28. *Id.* at 239.

vironment rife with racist theories emanating from Europe, an indigenous population that stood at its ever-expanding border, and a swelling, free black population that demanded the full citizenship that the nation's founding documents promised. Wilder focuses upon the academic community as contributors to the ongoing discussion of race in America. Too often academics acted out of fear of an increasing nonwhite population that was seemingly impervious to Christianity's transformative abilities. Academics constructed the argument that there were fixed racial categories with biologically determined fates. In the face of such determinism, the safest course was to remove—or colonize—the nonwhite people to locations outside of the country's borders.<sup>29</sup> The individuals who reached these conclusions had often built their fortunes, if not their legacies, on their families' involvement with a slave past.<sup>30</sup>

Craig Steven Wilder undertook an immense project by attempting to document not merely the presence of Africans on America's early campuses, but also to understand the effect of a mindset that allowed and relied on an enslaved community's subjugation. While one may have wished for a more comparative analysis or a work that incorporated a more statistical basis, one must also recognize the significance of Wilder's accomplishment. *Ebony and Ivy*, in less able hands, would have stopped at detailing the presence of Africans on campuses and let a 21<sup>st</sup> century morality indict slave sympathizers. Rather, Wilder demonstrates how fervently academics and administrators held to racist theories constructed in their labs or those of their colleagues. Their work provided intellectual justification to slaveholders and to those who practiced the racial exclusion and removal campaigns that reigned for over a century. The academy was the "third pillar" because it informed the church and state; a triangular trade of its own.

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29. *Id.* at 265–73.

30. *Id.* at 280–84.

